

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, INC.,

Plaintiffs-Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE and NATIONAL MARINE
FISHERIES SERVICE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California



EXCERPTS OF RECORD

Volume 1 of 1

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District Court Docket Sheet 117

1 IT IS HEREBY STIPULATED, that:

2 1. Production of all documents pursuant to the Court's July 24, 2017 Order Following In
3 Camera Review (ECF 54) shall be stayed pending appeal.

4 2. Plaintiff intends to file a motion to expedite the appeal with the Ninth Circuit, which
5 Defendants will not oppose.

6 3. Defendants agree to file their Appellants' opening brief by October 13, 2017 (a month earlier
7 than the Ninth Circuit's schedule requires).

8 DATED: September 1, 2017

Respectfully submitted,
BRIAN J. STRETCH

9
10 United States Attorney
11 /s/ Wendy M. Garbers
12 WENDY M. GARBERS
13 Assistant United States Attorney

14 Attorneys for Defendants
15 NATIONAL MARINE FISHERIES
16 SERVICE and U.S. FISH AND
17 WILDLIFE SERVICE

18 DATED: September 1, 2017

SUPER LAW GROUP, LLC
19 /s/ Reed W. Super*
20 REED W. SUPER

21 Attorneys for Plaintiff
22 SIERRA CLUB, INC.

23 **In compliance with Civil Local Rule 5-1(i)(3), the filer of this document attests under penalty of perjury
24 that each signatory has concurred in the filing of this document.*

25 **~~[PROPOSED]~~ ORDER**

26 PURSUANT TO STIPULATION, IT IS SO ORDERED.

27 Dated: September 5, 2017

28 
THE HONORABLE ELIZABETH D. LAPORTE

STIPULATION AND [PROPOSED] ORDER RE STAY PENDING APPEAL
NO. 15-CV-0587 EDL

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC.,
Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE, et al.,
Defendants.

Case No. [15-cv-05872-EDL](#)

**ORDER EXTENDING AUGUST 14, 2017
PRODUCTION DEADLINE TO
AUGUST 24, 2017**

Re: Dkt. Nos. 54, 60

On July 28, 2017, Defendants National Marine Fisheries Service and the United States Fish and Wildlife Service filed a motion to stay pending appeal of the August 7, 2017 production deadline set forth in the Court’s July 24, 2017 Order Following In Camera Review. Dkt. 58. On July 31, 2017, the Parties filed a Stipulation and Proposed Order extending the August 7, 2017 production deadline by seven (7) days to August 14, 2017. Dkt. 59. On August 1, 2017, the Court granted the Parties’ stipulation extending the production deadline to August 14, 2017. Dkt. 60.

The Parties have completed briefing on the Defendants’ motion to stay and the Court has set a hearing on the motion for August 22, 2017. Dkt. 66. In light of the August 22, 2017 hearing, the Court hereby extends the August 14, 2017 production deadline to August 24, 2017, subject to possible further delay if the Court determines that a stay is warranted upon consideration of the Parties’ briefs and argument at the August 22, 2017 hearing.

IT IS SO ORDERED.

Dated:

ELIZABETH D. LAPORTE
United States Magistrate Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC.,
Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE, et al.,
Defendants.

Case No. [15-cv-05872-EDL](#)

JUDGMENT

This action came before the Court, Magistrate Judge Elizabeth D. Laporte presiding, and the issues have been duly heard and considered and a decision having been fully rendered, IT IS ORDERED AND ADJUDGED that in accordance with the Court's Order of July 24, 2017, Plaintiff Sierra Club Inc.'s motion for summary judgment is GRANTED in part and DENIED in part, and Defendants National Marine Fisheries Service and United States Fish and Wildlife Service's motion for summary judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

Dated: July 24, 2017


ELIZABETH D. LAPORTE
United States Magistrate Judge

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC.,
Plaintiff,
v.
UNITED STATES FISH AND WILDLIFE
SERVICE, et al.,
Defendants.

Case No. [15-cv-05872-EDL](#)

**ORDER FOLLOWING IN CAMERA
REVIEW**

Before the Court is Plaintiff Sierra Club, Inc.’s (“Plaintiff”) motion for summary judgment and Defendants National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service’s (“FWS”) (collectively, “Defendants”) cross-motion for summary judgment. Plaintiff seeks disclosure of documents pursuant to the Freedom of Information Act (“FOIA”). Following a hearing on June 6, 2017, the Court ordered Defendants to lodge sixteen documents with the Court for *in camera* review.¹ For the reasons discussed below, the Court finds that four are protected by the deliberative process privilege in their entirety; one is partially protected and must be redacted and produced; and eleven are not protected and must be produced in their entirety.

I. FACTUAL BACKGROUND

Industrial cooling water intake structures have the potential to kill or harm fish and other organisms by impinging them on intake screens and entraining eggs and larvae through the plants’ heat exchangers. Final Regulations To Establish Requirements for Cooling Water Intake

¹ These documents were: NMFS 0.7.266.44516.1, FWS 252, FWS 279, FWS 308, FWS 555, NMFS 0.7.266.5427.1, NMFS 0.7.266.5597.1, NMFS 0.7.266.7544.2, NMFS 0.7.266.37667, NMFS 0.7.266.37695, NMFS 0.7.266.61721, NMFS 0.7.266.14973.1, NMFS 0.7.266.7544.3, NMFS 0.7.266.44616.1, NMFS 0.7.266.45263.1, NMFS 0.7.266.45277.2

United States District Court
Northern District of California

1 Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg.
2 48,300, 48,303 (Aug. 15, 2014) (to be codified at 40 C.F.R. pt. 122). Accordingly, Section 316(b)
3 of the Clean Water Act requires the Environmental Protection Agency (“EPA”) to regulate the
4 withdrawal of water from U.S. waters through these structures in order to minimize the structures’
5 adverse environmental impact. 33 U.S.C. § 1326(b).

6 On April 20, 2011, the EPA proposed new Section 316(b) regulations intended to apply to
7 more than one thousand existing power plants and manufacturing facilities. Cooling Water Intake
8 Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Apr. 20, 2011) (to be
9 codified at 40 C.F.R. pt. 122). In order to fulfill its obligations under Section 7 of the Endangered
10 Species Act (“ESA”),² the EPA commenced informal consultation with Defendants in 2012 and
11 formal consultation in 2013. Following several extensions (related in part to the October 2013
12 government shutdown), Defendants and the EPA agreed that Defendants would provide a draft
13 biological opinion to the EPA by December 6, 2013 and the final biological opinion by December
14 20, 2013. Super Decl., Ex. 6 at 3.

15 On December 3, 2013, Defendants informed the EPA that: (i) they still expected to
16 complete the draft biological opinions by December 6, 2013; (ii) the opinions would be “jeopardy
17 opinions”; and (iii) Defendants planned to include the draft biological opinions and related
18 information in their administrative records, which document the agency’s decisionmaking process
19 and basis for the agency’s decision. Super Decl., Ex. 7. NMFS completed its draft biological
20 opinion on December 6, 2013, and FWS completed its draft biological opinion on December 9,
21 2013 (together, the “December 2013 Biological Opinions”). See Dkt. 47 at n.4. However,
22 Defendants did not transmit either biological opinion to the EPA in December 2013. Instead, on

23 _____
24 ² This Section requires federal agencies to consult with Defendants in order to ensure that their
25 actions are “not likely to jeopardize the continued existence” or “result in the destruction or
26 adverse modification of habitat” of threatened or endangered species. 16 U.S.C. § 1536(a)(2).
27 Following formal consultation, Defendants must prepare a written biological opinion containing
28 Defendants’ conclusion of either “jeopardy” (i.e., the finding that the agency action is likely to
jeopardize the continued existence of a protected species or habitat) or “no jeopardy” (i.e., the
finding that the agency action is not likely to jeopardize the continued existence of a protected
species or habitat). If Defendants issue a jeopardy opinion, they must propose reasonable and
prudent alternatives (“RPAs”) that the agency can implement to avoid jeopardizing the species’
continued existence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), (h)(3).

1 December 17, 2013, Defendants emailed the RPAs to the EPA, Super Decl. ¶ 13, Ex. 9, and
2 provided other “portion[s] of the [draft] biological opinion[s]” to the EPA thereafter. Super Decl.
3 ¶¶ 14, 31, Ex. 21.

4 On May 19, 2014, following extensive discussions with the EPA, Defendants issued a joint
5 final biological opinion. Super Decl., Ex. 10. Unlike the December 2013 Biological Opinions,
6 this opinion was a “no jeopardy” opinion that concluded that the EPA’s Section 316(b) regulations
7 were not likely to jeopardize the continued existence of listed species or destroy or adversely
8 modify their designated critical habitat. The EPA issued its final regulations on May 19, 2014 and
9 published them in the Federal Register on August 15, 2014. 79 Fed. Reg. at 48,300.

10 Shortly after the EPA published its final regulations, various environmental groups,
11 including Plaintiff, filed petitions for review in six different circuits pursuant to 33 U.S.C. §
12 1369(b)(1), challenging the EPA’s “no jeopardy” biological opinion. Super Decl. ¶ 17. These
13 petitions for review were eventually consolidated in the Second Circuit as Cooling Water Intake
14 Structure Coalition, et al. v. U.S. EPA, et al., No. 14-4645(L). Super Decl. ¶ 16. On August 11,
15 2014, Plaintiff requested documents relating to the ESA Section 7 consultation from Defendants.
16 Super Decl., Exs. 1, 2. NMFS produced responsive documents over the course of several months,
17 but withheld 2,916 documents in full and 1,536 documents in part on the basis of deliberative
18 process, attorney-client, and work product privilege. Super Decl., Ex. 17. Similarly, FWS
19 produced responsive documents over the course of several months, but withheld 1,075 documents
20 in full and 347 documents in part on the basis of deliberative process, attorney-client, and work
21 product privilege. Super Decl., Ex. 19.

22 **II. PROCEDURAL HISTORY**

23 Plaintiff initiated this action against NMFS on December 21, 2015, alleging that NMFS
24 improperly withheld responsive documents on the basis of the deliberative process privilege.
25 Plaintiff amended its complaint to add FWS as a defendant on March 22, 2016. Plaintiff filed a
26 motion for summary judgment on December 1, 2016, asking the Court to order Defendants to
27 produce twenty-seven documents related to the ESA Section 7 consultation. Defendants filed
28 their opposition and cross-motion on February 13, 2017, arguing that each of the requested

1 documents was protected by the deliberative process privilege. Plaintiff filed its opposition and
2 reply on March 31, 2017, by which point twenty-five documents were in dispute. Defendants
3 filed their reply on May 5, 2017.

4 The hearing took place on June 6, 2017. During the hearing, the Court ordered Defendants
5 to lodge six documents -- the December 2013 Biological Opinions and four independent RPAs --
6 for *in camera* review. It also ordered the Parties to meet and confer and submit a joint statement
7 regarding the documents that remained in dispute. On June 13, 2017, the Parties provided a joint
8 statement listing the ten documents still in dispute and requesting permission to lodge these ten
9 documents for *in camera* review. On June 23, 2017, the Court granted the Parties' request, and
10 Defendants thereafter lodged these documents with the Court.

11 **III. LEGAL STANDARD**

12 FOIA provides the public with the right to access records from federal agencies. Upon
13 receipt of a FOIA request, a federal agency must disclose the requested records unless they fall
14 within one of nine exemptions. 5 U.S.C. § 552(b)(1)-(9). The agency bears the burden of proving
15 that a requested record is exempt from disclosure. *Id.* § 552(a)(4)(B). Federal courts have
16 jurisdiction to order a federal agency to disclose improperly withheld documents or to review
17 documents *in camera* to determine if a claimed FOIA exemption applies. 5 U.S.C. § 552(a)(4)(B);
18 Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 n.2 (9th Cir. 1997).

19 The fifth FOIA exemption, which permits nondisclosure of "inter-agency or intra-agency
20 memorandums or letters that would not be available by law to a party other than an agency in
21 litigation with the agency," 5 U.S.C. § 552(b)(5), encompasses the deliberative process privilege.
22 This privilege protects "documents reflecting advisory opinions, recommendations and
23 deliberations comprising part of a process by which governmental decisions and policies are
24 formulated." Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting
25 Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001)).

26 The deliberative process privilege applies to documents that are both (i) pre-decisional and
27 (ii) deliberative. A document is pre-decisional if it is "prepared in order to assist an agency
28 decisionmaker in arriving at his decision, and . . . reflect[s] the personal opinions of the writer

1 rather than the policy of the agency.” Carter, 307 F.3d at 1089. A record is deliberative if it
2 contains “recommendations, draft documents, proposals, suggestions and other subjective
3 documents that reflect the personal opinions of the writer rather than the policy of the agency.”
4 Nat’l Wildlife Fed’n v. United States Forest Serv., 861 F.2d 1114, 1118-19 (9th Cir.1988). The
5 key question is “whether the disclosure of materials would expose an agency’s decisionmaking
6 process in such a way as to discourage candid discussion within the agency and thereby undermine
7 the agency’s ability to perform its functions.” Assembly of State of Cal. v. U.S. Dep’t of
8 Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

9 “[C]ommunications containing purely factual material are not typically within the purview
10 of Exemption 5.” Julian v. U.S. Dep’t of Justice, 806 F.2d 1411, 1419 (9th Cir. 1986), aff’d 486
11 U.S. 1 (1988). Generally, factual information is not covered by the privilege because the release
12 of such information does not expose the deliberations or opinions of agency personnel. See Mink,
13 410 U.S. at 91 (refusing to extend Exemption 5 to “factual material otherwise available on
14 discovery merely [because] it was placed in a memorandum with matters of law, policy, or
15 opinion”). “The factual/deliberative distinction . . . [is] a useful rule-of-thumb favoring disclosure
16 of factual documents, or the factual portions of deliberative documents where such separation is
17 feasible.” Assembly, 968 F.2d at 921. However, “even if the content of a document is factual, if
18 disclosure of the document would expose the decision-making process itself to public scrutiny by
19 revealing the agency’s evaluation and analysis of the multitudinous facts, the document would
20 nonetheless be exempt from disclosure.” Nat’l Wildlife Fed’n, 861 F.2d at 1119.

21 Several cases have considered whether documents related to ESA Section 7 consultations
22 fall within the deliberative process exemption. See Desert Survivors v. US Dep’t of the Interior,
23 No. 16-CV-01165-JCS, 2017 WL 475281 (N.D. Cal. Feb. 6, 2017); Our Children’s Earth
24 Foundation v. National Marine Fisheries Service, No. 14–4365 SC, 14–1130 SC, 2015 WL
25 4452136 (N.D. Cal. July 20, 2015); Nw. Envtl. Advocates v. U.S. E.P.A., No. CIV 05-1876-HA,
26 2009 WL 349732, at *7 (D. Or. Feb. 11, 2009); Greenpeace v. Nat’l Marine Fisheries Serv., 198
27 F.R.D. 540 (W.D. Wash. 2000). These cases consistently require production of ESA Section 7
28 documents that are “relatively polished drafts.” Nw. Envtl. Advocates, 2009 WL 349732, at *7;

1 see also id. (drafts that “lay out the law applicable to the decisions at hand, discuss the relevant
 2 science, and apply the law to that science” not protected); Desert Survivors, 2017 WL 475281 at
 3 *14 (“preliminary drafts” not protected because disclosure would not have chilling effect on
 4 agencies); Greenpeace, 198 F.R.D. at 543. (“[I]nformation that does not disclose the deliberative
 5 process, communications unrelated to the formulation of law or policy, and routine reports are not
 6 shielded by the privilege.”).

7 However, “documents express[ing] preliminary staff views or tentative opinions” are
 8 protected from disclosure. Nw. Env'tl. Advocates, 2009 WL 349732, at *8; see id. at *7
 9 (documents reflecting “internal discussions” and “back-and-forth/give-and-take” are protected);
 10 Desert Survivors, 2017 WL 475281 at *14 (because disclosure of preliminary staff views or
 11 tentative opinions “might chill speech,” documents expressing them are protected); Our Children’s
 12 Earth Foundation, 2015 WL 4452136 at *5 (drafts that “reflect the *interpretations* of that scientific
 13 information by staff and scientists, thus reflecting their personal opinions on the science” are
 14 protected).

15 **III. DISCUSSION**

16 **A. Documents Lodged on June 13, 2017**

17 As discussed in more detail below, of the six documents that Defendants lodged for *in*
 18 *camera* review on June 13, 2017, the Court finds that one is protected and five are not protected
 19 and must be disclosed.

20 **1. December 6, 2013 Draft Biological Opinion (NMFS 0.7.266.44516.1):** 21 **Not Protected**

22 This document is a 289-page draft jeopardy biological opinion that describes the EPA’s
 23 proposed changes to Section 316(b) of the Clean Water Act, the new requirements for
 24 owner/operators of industrial cooling water intake structures, and the location of affected
 25 structures. It also evaluates the direct and indirect effects that the EPA’s proposed action would
 26 have on ESA-listed species and their habitats. The document is a “relatively polished draft.” Nw.
 27 Env'tl. Advocates, 2009 WL 349732, at *7. It contains only two comments in the margins, neither
 28 of which reveals the decisionmaking process of NMFS personnel. See Assembly of State of Cal.,

1 968 F.2d at 920 (“A predecisional document is a part of the ‘deliberative process,’ if the disclosure
2 of [the] materials would expose an agency’s decisionmaking process.”). Accordingly, it is not
3 exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at
4 543 (“[I]nformation that does not disclose the deliberative process...[is] not shielded by the
5 privilege.”).

6 **2. December 9, 2013 Draft Biological Opinion (FWS 252):**
7 **Not Protected**

8 This document is a 72-page draft jeopardy biological opinion that is similar to the NMFS
9 December 6, 2013 draft Biological Opinion, but it omits several sections. The document is a
10 “relatively polished draft.” Nw. Env’tl Advocates, 2009 WL 349732, at *7. It contains no
11 subjective comments, recommendations, or opinions,. Accordingly, it is not exempt from
12 disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

13 **3. December 17, 2013 RPAs (NMFS 0.7.266.44616.1):**
14 **Protected**

15 This document is a 4-page RPA that describes a course of action by which the EPA could
16 avoid adversely affecting protected species and habitats. It includes multiple comments,
17 modifications, and additions of language by NMFS personnel that reflect their “internal
18 discussions” and “back-and-forth/give-and-take [that is] protected by the deliberative process
19 privilege.” Nw. Env’tl. Advocates, 2009 WL 349732, at *7. Because the comments appear
20 throughout the entirety of this brief document, they are not reasonably segregable. See Nat’l
Wildlife Fed’n, 861 F.2d at 1119. Defendants may withhold this document from production.

21 **4. December 17, 2013 RPAs (FWS 279):**
22 **Not Protected**

23 This document is also 4-page RPA that describes an alternative course of action by which
24 the EPA could avoid adversely affecting protected species and habitats. It contains no subjective
25 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env’tl.
26 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
27 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

28

1 **5. December 18, 2013 FWS RPAs (FWS 308):**
2 **Not Protected**

3 This document is a 3-page RPA that describes an alternative course of action by which the
4 EPA could avoid adversely affecting protected species and habitats. It contains no subjective
5 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Envntl.
6 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
7 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

8 **6. March 6, 2014 FWS RPAs (FWS 555):**
9 **Not Protected**

10 This document is a 2-page RPA that that describes an alternative course of action by which
11 the EPA could avoid adversely affecting protected species and habitats. It contains no subjective
12 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Envntl.
13 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
14 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

15 **B. Documents Lodged on June 27, 2017**

16 As discussed in more detail below, of the ten documents that Defendants lodged for *in*
17 *camera* review on June 27, 2017, three are protected, one is partially protected, and six are not
18 protected and must be disclosed.

19 **1. April 4, 2014 Draft Biological Opinion (NMFS 0.7.266.5427.1):**
20 **Not Protected**

21 This document is a 334-page draft jeopardy biological opinion. Like the December 6,
22 2013 Biological Opinion, it describes the EPA’s proposed changes to Section 316(b) of the Clean
23 Water Act, the new requirements for owner/operators of industrial cooling water intake structures,
24 the location of affected structures, and the direct and indirect effects that the EPA’s proposed
25 action would have on protected species and their habitats. The document is a “relatively polished
26 draft.” Nw. Envntl Advocates, 2009 WL 349732, at *7. It contains no subjective comments,
27 recommendations, or opinions,. Accordingly, it is not exempt from disclosure under the
28 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

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**2. October 21, 2013 Abalone Measures (NMFS 0.7.266.5597.1):
Not Protected**

This 2-page document describes steps that owner/operators must take if abalone, an endangered species, is affected by their cooling water intake structures. It contains no subjective comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

**3. Anadromous Salmonid Measures (NMFS 0.7.266.7544.2):
Not Protected**

This 15-page document is entitled “Anadromous Salmonid Requirements.” It provides criteria and guidelines to be utilized by owner/operators in the development of downstream migrant fish screen facilities for hydroelectric, irrigation, and other water withdrawal projects. The document includes sections on screen design and hydraulics, site conditions, structure placement, screen material, and debris management. It contains no subjective comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

**4. Salmonids, Larval Fish, Sea Turtles, Abalone, and Corals Measures (NMFS 0.7.266.7544.3):
Protected**

This 3-page document lists the steps that owner/operators must follow if salmonids, larval fish, sea turtles, abalone, or corals may be affected by a cooling water intake structure. It is a preliminary draft with notes, comments, and highlighting that reflect “internal discussions” and “back-and-forth/give-and-take [that is] protected by the deliberative process privilege.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Because the comments appear throughout the entirety of this brief document, it is not reasonably segregable. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from production.

**5. Pinniped Measures (NMFS 0.7.266.37695):
Not Protected**

This 2-page document lists the steps that owner/operators must follow if a seal, sea lion, or fur seal, or their designated critical habitat, may be affected by a cooling water intake structure. It

1 contains no subjective comments, recommendations, or opinions, and is a “relatively polished
2 draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from
3 disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

4 **6. Sea Turtle Requirements (NMFS 0.7.266.45263.1):**
5 **Protected**

6 This 2-page document lists the steps that owner/operators must follow if sea turtles are
7 affected by their cooling water intake structures. This document contains comments and additions
8 that reflect “internal discussions” and “back-and-forth/give-and-take [that is] protected by the
9 deliberative process privilege.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Because the
10 comments appear throughout the entirety of this brief document, it is not reasonably segregable.
11 See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from
12 production.

13 **7. Sea Turtle Requirements (NMFS 0.7.266.45277.2):**
14 **Protected**

15 This 2-page document is an exact duplicate of NMFS 0.7.266.45263.1, including all
16 comments, modifications, and additions. For the reasons discussed above, this document is
17 protected and need not be disclosed.

18 **8. Sea Turtle Requirements (NMFS 0.7.266.37667):**
19 **Not Protected**

20 This 3-page document lists the steps that owner/operators must follow if sea turtles are
21 affected by their cooling water intake structures. It contains no subjective comments,
22 recommendations, or opinions, and is a “relatively polished draft.” Nw. Env'tl. Advocates, 2009
23 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process
24 privilege. See Greenpeace, 198 F.R.D. at 543.

25 **9. Table re Affected Species (NMFS 0.7.266.61721):**
26 **Not Protected**

27 This 1-page document contains a statistical chart showing estimated aggregate effects of
28 cooling water intake structure facilities on protected species as a result of impingement and
entrainment. It contains no subjective comments, recommendations, or opinions, and is a
“relatively polished draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not

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1 exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at
2 543.

3 **10. Terms and Conditions (NMFS 0.7.266.14973.1):**
4 **Partially Protected**

5 This 5-page document lists the terms and conditions with which the EPA and an
6 owner/operator must comply in order to be exempt from Section 9 of the ESA. These terms and
7 conditions involve the protocols for dealing with sea turtles near cooling water intake structures.
8 Although Defendant's cross-motion for summary judgment describes the document as "NMFS
9 staff correspondence made in the course of deliberating about and preparing biological opinions,"
10 the document does not contain correspondence. The only notation throughout the document is one
11 sentence highlighted in yellow, which may reveal NMFS's personnel's decisionmaking process,
12 and thus may be redacted. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. The remainder of the
13 document is not protected and should be disclosed.

14 **IV. CONCLUSION**

15 For the reasons set forth above, the cross-motions for summary judgment are GRANTED
16 IN PART and DENIED IN PART. Defendants shall produce the following documents in their
17 entirety: NMFS 0.7.266.44516.1; FWS 252; FWS 279; FWS 308; FWS 555; NMFS
18 0.7.266.5427.1; NMFS 0.7.266.5597.1; NMFS 0.7.266.7544.2; NMFS 0.7.266.37667; NMFS
19 0.7.266.37695; NMFS 0.7.266.61721. Defendants shall redact the protected portions of the
20 following document and produce the remainder: NMFS 0.7.266.14973.1. Defendants may
21 withhold the following documents in their entirety: NMFS 0.7.266.7544.3; NMFS
22 0.7.266.44616.1; NMFS 0.7.266.45263.1; NMFS 0.7.266.45277.2. Defendants shall produce the
23 required documents to Plaintiff within two weeks from the date of this order.

24 **IT IS SO ORDERED.**

25 Dated: July 24, 2017

26 
27 ELIZABETH D. LAPORTE
28 United States Magistrate Judge

1 BRIAN J. STRETCH (CABN 163973)
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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 SIERRA CLUB, INC.,) Case No. 15-cv-05872 EDL
14 Plaintiff,)
15 v.) **JOINT STATEMENT RE DOCUMENTS THAT**
16 NATIONAL MARINE FISHERIES SERVICE) **REMAIN IN DISPUTE**
17 and U.S. FISH & WILDLIFE SERVICE,)
18 Defendants.)
19

20 On June 6, 2017, the Court ordered the defendants to lodge the December 2013 draft Biological
21 Opinions and RPAs for *in camera* review. (ECF 51.) Defendants are concurrently making the requested
22 submission. The Court also ordered the parties to submit a joint statement regarding what other
23 documents remain in dispute. (*Id.*) The parties have met and conferred and provide the following joint
24 statement.

25 In an effort to narrow what is before the Court, plaintiff has agreed to withdraw its request for
26 the following documents:

- 27 • NMFS No. 0.7.266.7196.1;
- 28 • NMFS No. 0.7.266.5143;

JOINT STATEMENT RE DOCUMENTS THAT REMAIN IN DISPUTE
NO. 15-CV-0587 EDL

- 1 • NMFS No. 0.7.266.45161;
- 2 • NMFS No. 0.7.266.45161.1;
- 3 • NMFS No. 0.7.266.45164;
- 4 • NMFS No. 0.7.266.17987.1;
- 5 • NMFS No. 0.7.266.7055;
- 6 • NMFS No. 0.7.266.37253; and
- 7 • NMFS No. 0.7.266.5038.

8 Accordingly, in addition to the documents being submitted for *in camera* review, the following ten
9 documents remain in dispute:

- 10 • NMFS No. 0.7.266.5427.1 (NMFS April 4, 2014 draft BiOp) (334 pages);
- 11 • NMFS No. 0.7.266.5597.1 (2 pages);
- 12 • NMFS No. 0.7.266.7544.2 (15 pages);
- 13 • NMFS No. 0.7.266.7544.3 (3 pages);
- 14 • NMFS No. 0.7.266.37667 (3 pages);
- 15 • NMFS No. 0.7.266.37695 (2 pages);
- 16 • NMFS No. 0.7.266.45263.1 (2 pages);
- 17 • NMFS No. 0.7.266.45277.2 (2 pages);
- 18 • NMFS No. 0.7.266.61721 (1 page); and
- 19 • NMFS No. 0.7.266.14973.1 (5 pages).

20 The parties respectfully propose that these 10 documents also be submitted for *in camera* review. This
21 would enable the Court to make a final order on all documents. Then, each party could evaluate its
22 appeal options and, if appropriate, file a single appeal of the final order.

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1 DATED: June 13, 2017

Respectfully submitted,

2

BRIAN J. STRETCH
United States Attorney

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4

/s/ Wendy M. Garbers
WENDY M. GARBERS
Assistant United States Attorney

5

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Attorneys for Defendants
NATIONAL MARINE FISHERIES
SERVICE and U.S. FISH &
WILDLIFE SERVICE

7

8

9 DATED: June 13, 2017

SUPER LAW GROUP, LLC

10

/s/ Reed W. Super*
REED W. SUPER

11

12

Attorneys for Plaintiff
SIERRA CLUB, INC.

13

14 **In compliance with Civil Local Rule 5-1(i)(3), the filer of this document attests under penalty of perjury that each signatory has concurred in the filing of this document.*

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1 BRIAN J. STRETCH (CABN 163973)
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 SIERRA CLUB, INC.,) Case No. 15-cv-05872 EDL
14 Plaintiff,)
15 v.) **DECLARATION OF SAMUEL D. RAUCH, III**
16) Date: May 23, 2017
17 NATIONAL MARINE FISHERIES SERVICE) Time: 9:00 a.m.
and UNITED STATES FISH AND WILDLIFE) The Honorable Elizabeth D. Laporte
18 SERVICE,)
19 Defendants.)

20
21 I, Samuel D. Rauch, III, do hereby declare the following:

22 1. I am currently the Acting Assistant Administrator for the National Marine Fisheries Service
23 (“NMFS”), a component of the National Oceanic and Atmospheric Administration (“NOAA”), and
24 in 2012 and 2013 I also performed the duties and functions of the Assistant Administrator. Since
25 2006, I have served as the Deputy Assistant Administrator for Regulatory Programs for NMFS. In
26 that capacity I oversee NMFS regulatory actions and programs. This includes consultations
27 under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq, on actions authorized,
28 funded or carried out by Federal agencies, to assist the agencies in meeting their ESA Section

DECLARATION OF SAMUEL D. RAUCH, III
NO. 15-CV-0587 EDL

1 7(a)(2) obligation to insure that their actions are not likely to jeopardize species listed as
2 threatened or endangered under the ESA and not likely to destroy or adversely modify critical
3 habitat designated for those species. I make this declaration based on personal knowledge and
4 information available to me in my capacity as the Acting Assistant Administrator for NMFS and
5 Deputy Assistant Administrator for Regulatory Programs for NMFS.

6 2. Prior to my roles as Acting Assistant Administrator and Deputy Assistant Administrator for
7 Regulatory Programs, I served as the Assistant General Counsel for Fisheries, as head of the office
8 providing legal counsel to NMFS. Previously, I served as a trial attorney and then Assistant Section
9 Chief for the Wildlife and Marine Resources Section of the Environment and Natural Resources
10 Division of the U.S. Department of Justice.

11 3. I hold a J.D. from the Northwestern School of Law of Lewis & Clark College, a M.S. from the
12 University of Georgia, and a B.A. from the University of Virginia.

13 4. As required by Section 7(a)(2) of the ESA, the Environmental Protection Agency (“EPA”)
14 consulted with NMFS and the US Fish and Wildlife Service (“FWS”) (collectively “the Services”) to
15 insure that EPA’s regulation (“Regulation”) for cooling water intakes (“CWIS”), issued pursuant to
16 Section 316(b) of the Clean Water Act, is not likely to jeopardize the continued existence of species
17 listed as endangered or threatened under the ESA or to destroy or adversely modify their critical habitat.
18 ESA Section 7(b)(3) requires that at the end of consultation one or both Services, depending on the
19 species and habitat affected, provide a biological opinion on whether the action complies with the
20 mandate of Section 7(a)(2). If the Services conclude that a proposed action will not comply with the
21 Section 7(a)(2) standard, the Services include a reasonable and prudent alternative (“RPA”) that will
22 allow the action to proceed in compliance. If the Services conclude that the action will meet the Section
23 7(a)(2) standard, no RPA is required or included in the biological opinion. Pursuant to ESA Section
24 7(b)(4), the Services include in a biological opinion an incidental take statement (“ITS”) that specifies
25 the impact to listed species, reasonable and prudent measures (“RPMs”) necessary or appropriate to
26 minimize that impact, and terms and conditions (“T&Cs”) to implement the RPMs.

27 5. The consultation on EPA’s Regulation presented multiple complex and novel issues for all three
28 agencies, NMFS, FWS and EPA. None of the agencies had previously participated in an ESA Section

1 7(a)(2) consultation on earlier EPA regulations implementing Section 316(b). During the almost two
2 years of the consultation process, personnel from all three agencies met routinely, sometimes more than
3 once a week. In addition to these meetings, there were multiple conference calls and many emails
4 involving one, two or all three agencies. During the frank discussions over this lengthy period, multiple
5 options for the Regulation and the biological opinion were considered, reconsidered, with most being
6 rejected. Multiple pre-decisional drafts of the Regulation, the biological opinion, and portions of those
7 documents, as well as briefing and options papers, were circulated intra- and interagency. Multiple
8 comments and suggestions were exchanged, often by several people on the same document, and
9 sometimes those comments and suggestions conflicted. Documents were revised on the author's own
10 initiative or in response to comments and then recirculated. NMFS and FWS generated many drafts of
11 the biological opinion during that internal and interagency discussion. In addition, the Services for
12 much of this time were each writing their own separate opinions, but determined ultimately to issue a
13 joint opinion.

14 6. At the conclusion of that consultation, on May 19, 2014, Donna Wieting, Director of NMFS
15 Office of Protected Resources co-signed, with Paul Souza of FWS, Endangered Species Act Section 7
16 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance
17 and Implementation of the Final Regulations Section 316(b) of the Clean Water Act ("Opinion"). The
18 Services concluded in the Opinion that EPA's issuance of the Regulation was not likely to jeopardize the
19 continued existence of listed species or destroy or adversely modify their designated critical habitat.
20 Although within NMFS the signing of biological opinions issued in NMFS headquarters is delegated to
21 the Director of the Office of Protected Resources, I also participated in many meetings and conference
22 calls, both internal and interagency, and reviewed the Opinion. I am personally familiar with the
23 consultation and the issues that arose.

24 7. On August 11, 2014, Sierra Club filed a Freedom of Information Act ("FOIA") (5 U.S.C. § 552)
25 request with NMFS. The request was extraordinarily broad and sought documents the vast majority of
26 which are protected under the deliberative process privilege, attorney-client communication privilege,
27 attorney work product, and FOIA (b)(5), and not subject to disclosure under FOIA:

28 (1) All NMFS drafts of all or portions of the Endangered Species
Act Section 7 Consultation Programmatic Biological Opinion on the U.S.

DECLARATION OF SAMUEL D. RAUCH, III
NO. 15-CV-0587 EDL

1 Environmental Protection Agency's Issuance and Implementation of the
2 Final Regulations Section 316(b) of the Clean Water Act (the "BiOp"),
Incidental Take Statement and its appendices;

3 (2) All documents exchanged between NMFS staff and within
4 NOAA, and between NOAA/ NMFS and the Environmental Protection
5 Agency (EPA), or any other governmental agency or official, during
interagency review of, and concerning, drafts of the BiOp and/ or
Incidental Take Statement;

6 (3) All documents between NMFS staff and within NOAA, and
7 between NOAA/ NMFS and EPA, or any other governmental agency or
8 official, concerning the ESA section 7 consultation on EPA's most
recently proposed 316(b) rule;

9 (4) All documents serving as the basis for, or which were
10 considered by, NOAA and/ or NMFS in connection with its "no jeopardy"
and/or "no adverse modification" of critical habitat findings on the ESA
11 section 7 consultation for the most recently proposed 316(b) rule;
including but not limited to: a) any and all data, documents,
12 communications and records pertaining to all species of sturgeon, and any
opinions by NMFS staff or others on potential impacts to sturgeon; b) any
13 and all data, documents, communications and records of any type
reflecting any changes to NMFS' opinions or conclusions concerning its
14 jeopardy determinations for sturgeon or any other species; c) any and all
identification by NMFS of any requirements that would have to be met to
15 avoid jeopardy findings for sturgeon or any other species, whether or not
it was included in the final BiOp or Incidental Take Statement; d) any draft
16 or proposed jeopardy opinion that was sent by NMFS to the U.S. Fish and
Wildlife Service, U.S. Environmental Protection Agency, or any other
agency, for the sturgeon or any other species;

17 (5) If not otherwise produced in response to the sections above, all
18 documents or communications of every type between NOAA and/ or
NMFS and the Office of Management and Budget and/ or the Council on
19 Environmental Quality, and any of the agencies' personnel, concerning the
ESA section 7 consultation on the 316(b) rule, including but not limited to
20 any records of telephone conversations, emails or meetings between the
agencies or their personnel on this subject, any draft (full or partial) BiOp
21 or Incidental Take Statements between NMFS, OMB and/ or CEQ on this
subject;

22 (6) If not otherwise produced in response to the sections above, all
23 documents or communications of every type between NOAA and/ or
NMFS and the U.S. Fish and Wildlife Service, and any of the agencies'
24 personnel, concerning the ESA section 7 consultation on the 316(b) Rule,
including but not limited to: a) all communications between NMFS and
25 the FWS with subject lines including the terms 316(b) or Cooling Water
Intake; b) all communications between the Protected Resources Division
26 of NMFS and Drew Crane at FWS

27 (7) All documents between NMFS staff and between NMFS and
EPA, or any other governmental agency or official, concerning any ESA
28 section 7 consultation on EPA's previously proposed 316(b) rule(s),
including for new sources as well as existing sources;

1 (8) All documents exchanged and all documents related to any
2 meetings, telephone conversations, emails, or any other communications
between

3 and/ or NMFS and the utility (i.e., electric generation) industry or
4 manufacturing industry, representatives of the utility or manufacturing
5 industries, trade groups, special interest groups, and/ or other non-
governmental parties relating to the ESA section 7 consultation on the
316(b) rule."

6 8. In response, NMFS staff conducted an extremely broad search. NMFS staff queried 74 people
7 from NOAA and NMFS who had worked in any capacity on the consultation for their responsive
8 records. In addition, NMFS staff searched the electronic files of people who had worked on the project
9 but who were no longer with NMFS. Ultimately, NMFS located 5,724 responsive documents. NMFS
10 released 1,272 documents in full. I asserted the deliberative process privilege and released 1,536
11 documents with redactions of privileged and non-responsive text, and withheld in full 2,916 documents
12 as privileged.

13 9. NMFS provided interim responses to this Sierra Club FOIA on March 3, August 3, September
14 10, November 2, and December 11, 2015, and February 4, February 22, and March 24, 2016. NMFS'
15 final response was sent April 6, 2016. NMFS released in full documents that were not subject to any
16 privilege, redacted privileged portions of documents, and withheld privileged documents in full.

17 10. Of those documents, NMFS filed a privilege log for 1,090 of those documents in a separate
18 litigation regarding this same documents. *Cooling Water Intake Structure Coalition et al. v. EPA et al*,
19 No. 14-4645(L) and consolidated cases 14-4657, 14-4659, 14-4664, 14-4667, and 14-4670 (2nd Circuit).
20 Included among the drafts of the Opinion identified by Plaintiffs is Document 0.7.266.44516.1, a
21 December 6, 2013 NMFS draft opinion, in which NMFS preliminarily concluded that EPA's draft of the
22 Regulation in its then-current-form was likely to jeopardize listed species and destroy or adversely
23 modify designated critical habitat. Originally, NMFS had agreed to share a draft of its opinion with EPA
24 by December 6, 2013 and provide its final opinion by December 20, 2013. However, NMFS never sent
25 this draft to EPA, because NMFS, FWS and EPA agreed that more work needed to be done, as EPA was
26 still considering provisions in the draft Regulation. NMFS never issued its own opinion, and this
27 document was never made final.
28

1 11. Because the Services preliminarily determined that the Regulation as then written may be likely
2 to jeopardize listed species or destroy or adversely modify critical habitat, the Services also wrote a draft
3 RPA. Pursuant to ESA Section 7(b)(3)(A), if the Services conclude that an agency action is likely to
4 jeopardize listed species or destroy or adversely modify critical habitat, the Services must provide a
5 RPA that would allow the action to proceed without that result. Document 0.7.266.44616.1 is one of the
6 drafts of a possible RPA. Ultimately, based on changes to the Regulation, the Services' final conclusion,
7 explained in the joint Opinion, was that the Regulation was not likely to jeopardize the continued
8 existence of listed species or destroy or adversely modify their designated critical habitat. In light of
9 this conclusion, no RPA was required and the Services did not include any in the Opinion.

10 12. When NMFS sends action agencies draft BOs that may be controversial, I occasionally review
11 the draft document prior to its being transmitted. By providing a draft for transmission to another
12 agency, NMFS is not rendering a final decision. The document remains a draft and is subject to change
13 until final signature. The December 6, 2013, NMFS' draft opinion at issue here was clearly not final, as
14 NMFS never issued a separate biological opinion, the final joint Opinion had substantial changes from
15 NMFS' December 6, 2013 draft and reached an entirely different conclusion (i.e., no jeopardy).
16 Moreover, NMFS never sent its December 6, 2013 draft at issue to EPA.

17 13. Central to this internal and deliberative process was the ability of all participants to have the
18 candid and frank discussions that decision-makers must rely on in order to make sure all viewpoints and
19 options are considered. I asserted the deliberative process privilege for these documents in the FOIA
20 response and I continue to assert the privilege here because I do not want these communications to be in
21 anyway discouraged or chilled for fear of disclosure. In addition, as some of these documents reflect
22 positions that NMFS did not adopt, I do not want to create confusion with their release or to use NMFS'
23 resources to defend those rejected positions.

24 14. Plaintiffs have identified twenty-four documents for which they challenge the withholding.
25 Three of the documents – 0.7.266.7026, 0.7.266.7055, 0.7.266.7066 – are parts of an email chain. An
26 identical passage in one of the three documents was unredacted, but redacted in the other two. I have
27 instructed that the redactions of this passage be removed in these two documents. Document
28 0.7.266.7026 has no remaining redactions and will be released to the plaintiffs in full, so is not discussed

1 below. Document 0.7.266.7066 has remaining redactions, but a version without the inconsistent
2 redactions will be provided to the plaintiffs. In addition, in the spirit of cooperation, I have instructed
3 that Document 0.7.266.38030 be released in full. I provide additional detail on the twenty-two
4 remaining documents below.

5 15. I withhold in full Document Number 0.7.266.44516.1 pursuant to the deliberative process
6 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, sent via email by Jennifer
7 Schultz of NMFS to herself on December 6, 2013, is a draft of the biological opinion written by NMFS.
8 This early draft, written more than five months before the Services issued their joint Opinion, reflects a
9 preliminary analysis of a late 2013 draft of EPA's Regulation. Because this draft discusses EPA's 2013
10 draft of the Regulation, the draft reflects EPA's deliberative process as well as that of NMFS. This
11 preliminary analysis was not adopted and this draft was never sent to EPA. Ultimately, NMFS
12 abandoned this draft and did not issue an opinion, instead co-signing the joint Opinion. Between
13 December 6, 2013 and May 2014 EPA and the Services communicated frequently, sometimes daily, to
14 discuss changes to EPA's Regulation. In their final joint Opinion, the Services concluded that EPA's
15 issuance of the Regulation was not likely to jeopardize listed species or destroy or adversely modify
16 designated critical habitat. This conclusion was based on EPA's final Regulation, which differed from
17 EPA's 2013 draft. There are no segregable portions for release in this draft because a biological opinion
18 is not a compilation of data, but rather a detailed sifting and weighing of information to determine
19 whether an action is likely to jeopardize listed species or destroy or adversely modify critical habitat and
20 how to address uncertainty. The discussion of factual material in this document is generally intertwined
21 with the analysis such that it is not possible to reveal the factual material without revealing the agency's
22 preliminary analysis.

23 16. I withhold in full Document Number 0.7.266.44616.1 pursuant to the deliberative process
24 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)): This is a draft of a possible RPA sent via
25 email from Rick Sayers of FWS to Jennifer Schultz of NMFS on December 17, 2013. Pursuant to the
26 ESA Section 7(b)(3) (16 USC § 1536(b)(3)), the Services must provide a RPA, if any, whenever they
27 determine that a federal agency action is likely to jeopardize listed species or destroy or adversely
28 modify critical habitat. The RPA, if implemented, allows the agency action to proceed in compliance

1 with ESA Section 7(a)(2)'s statutory requirement that Federal agencies must insure that actions they
2 authorize, fund or carry out are not likely to jeopardize listed species or to destroy or adversely modify
3 critical habitat. Because NMFS' preliminary analysis of EPA's draft of the Regulation, as it existed in
4 2013, was that it was likely to jeopardize listed species and destroy or adversely modify critical habitat,
5 the Services were considering a draft RPA. This draft was shared between FWS and NMFS and reflects
6 the agencies' deliberations on options for a possible RPA for EPA's 2013 draft of the Regulation. The
7 draft includes various comments, questions, and tracked changes of NMFS agency staff, and the analysis
8 is not complete or final. Because the Services in their final joint Opinion concluded that EPA's action
9 was not likely to jeopardize listed species or to destroy or adversely modify designated critical habitat,
10 no RPA was necessary and the draft RPA was abandoned and never finalized. There are no segregable
11 portions of this document. Because the Services include RPAs in biological opinions recommending
12 actions for the action agency to take, factual material is included to provide the rationale for the
13 recommendations, and it is therefore intertwined with the analysis documenting that the RPA will avoid
14 likely jeopardy. Discussion of factual material, to the extent that it existed, is intertwined with the
15 analysis such that it is not possible to reveal the factual material without revealing the agency's
16 preliminary analysis.

17 17. I withhold in full document number 0.7.266.5427.1 pursuant to the deliberative process
18 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document is a NMFS' April 7, 2014
19 draft of the biological opinion, sent via email on April 7, 2014 from Jennifer Schultz of NMFS to
20 Bridget Crokus, Colette Cairns and Jordan Carduner of NMFS, a draft that was not sent to EPA.
21 Because the Services decided to issue a joint Opinion and because this draft reflected a version of EPA's
22 Regulation that differed prior to the issuance of the final joint Opinion, this draft was abandoned and
23 never finalized. There are no segregable portions for release in this draft because a biological opinion is
24 not a compilation of data, but rather a preliminary narrative analyses based on weighing and sifting
25 information and assigning value, as well as how to deal with uncertainty. Accordingly, the discussion
26 of factual material in this document is intertwined with the analysis such that it is not possible to reveal
27 the factual material without revealing the agency's preliminary analysis. Because this preliminary draft
28 was circulated for internal review and comment, the analysis and factual matters presented are not

1 complete or final and may contain inaccuracies.

2 18. I withhold in full Document Number 0.7.266.5597.1 pursuant to the deliberative process
3 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This is a draft document which describes
4 potential possible methods to minimize risk to abalone, provided as a first draft for comment among
5 NMFS staff and sent via email on November 4, 2013 from Dan Lawson of NMFS to Jennifer Schultz of
6 NMFS. These measures were considered for possible incorporation into the biological opinion, in a
7 RPA, if NMFS were to conclude that the Regulation jeopardized listed species, or as possible T&Cs in
8 an ITS. Ultimately, NMFS did not reach these conclusions in this manner but still included a later-
9 refined version of the measures in the Opinion as Appendix D: Example of Species Specific Control
10 Measures, Monitoring and Reporting. The draft document is a preliminary narrative analysis that
11 reflects the agency's deliberations about what potential species-protective measures should be included
12 in the biological opinion. The selection of topics and supporting information in the draft reflects the
13 agency's decision-making process. The preliminary analysis and material presented are not
14 complete/final and may contain various inaccuracies. There are no segregable portions of this document.
15 The discussion of factual material in this document is generally intertwined with the analysis such that it
16 is not possible to reveal the factual material without revealing the agency's preliminary analysis.
17 Factual material is not merely compiled but is weighed and evaluated to determine what the proper
18 protective methodology, and therefore is intertwined with the analysis such that revealing it will also
19 reveal the agency's preliminary analysis.

20 19. I withhold in its entirety Document Number 0.7.266.7196.1 pursuant to the deliberative process
21 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, sent via email from Shelly
22 Norton of NMFS to Kris Petersen of NMFS on April 24, 2014, is a draft of a recovery plan for
23 Johnson's sea grass, a threatened plant species. The draft recovery plan, not yet final and not itself the
24 subject of this FOIA request, is being developed to replace the existing Johnson's sea grass recovery
25 plan issued in 2002. Ms. Norton provided the draft of the recovery plan to assist Ms. Petersen in writing
26 Appendix C of the Opinion. The draft is a preliminary narrative analysis to be considered prior to a
27 separate agency determination for inclusion in the recovery plan mandated by ESA Section 4(f), 16 USC
28 § 1533(f). There are no segregable portions for release. The selection of topics and supporting

1 information in the draft reflects the agency's decision-making process. The discussion of factual material
2 cannot be revealed without also revealing the agency's preliminary analysis. The preliminary analysis
3 and material presented are not complete/final and may contain various inaccuracies.

4 20. I withhold in its entirety Document Number 0.7.266.7544.2 pursuant to the deliberative process
5 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This document, sent from Jennifer Schultz
6 of NMFS to Audra Livergood and other NMFS staff members on August 9, 2013, is a first draft of
7 potential measures to be included in the biological opinion to minimize risk to salmonids. These
8 measures were considered for possible incorporation into the biological opinion, in a RPA, if NMFS
9 were to conclude that the Regulation jeopardized listed species, or as possible T&Cs in an ITS.
10 Ultimately, NMFS did not reach these conclusions in this manner but still included a later-refined
11 version of the measures in the Opinion as Appendix D: Example of Species Specific Control Measures,
12 Monitoring and Reporting. This first draft was circulated for the purpose of soliciting comments on
13 those measures. The draft is a preliminary narrative analysis to be considered prior to the agency's
14 determination of appropriate measures for inclusion in the biological opinion. There are no segregable
15 portions of this document for release. The selection of topics and supporting information in the draft
16 reflects the agency's decision-making process. The discussion of factual material cannot be revealed
17 without also revealing the agency's preliminary analysis. The preliminary analysis and material
18 presented are not complete/final and may contain various inaccuracies.

19 21. I withhold in its entirety Document Number 0.7.266.7544.3 pursuant to the deliberative process
20 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This document, also sent as an attachment
21 to the same email discussed in the preceding paragraph from Jennifer Schultz of NMFS to Audra
22 Livergood and others of NMFS on August 9, 2013, is a first draft of potential measures to include in the
23 biological opinion to minimize risk to salmonids, larval fish, sea turtles, abalone, and corals. These
24 measures were considered for possible incorporation into the biological opinion, in a RPA, if NMFS
25 were to conclude that the Regulation jeopardized listed species, or as possible T&Cs in an ITS.
26 Ultimately, NMFS did not reach these conclusions in this manner but still included a later-refined
27 version of the measures in the Opinion as Appendix D: Example of Species Specific Control Measures,
28 Monitoring and Reporting. This first draft was circulated for the purpose of soliciting comments from

1 NMFS staff, and was not circulated outside of NMFS. The draft is a preliminary narrative analysis to be
2 considered prior to an agency determination of appropriate measures for inclusion in the biological
3 opinion. The selection of topics and supporting information in the draft reflects the agency's decision-
4 making process. The document also contains various comments and questions of agency staff, which
5 reflect the internal deliberations and discussions during the course of reviewing this draft document.
6 There are no segregable portions of this document for release. The discussion of factual material cannot
7 be revealed without also revealing the agency's preliminary analysis. The preliminary analysis and
8 material presented are not complete/final and may contain various inaccuracies.

9 22. I withhold in its entirety Document Number 0.7.266.37667 pursuant to the deliberative process
10 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This document is an undated draft
11 document written during development of NMFS' draft opinion, describing possible protective measures
12 for consideration in the biological opinion to minimize risk to sea turtles. These measures were
13 considered for possible incorporation into the biological opinion, in a RPA, if NMFS were to conclude
14 that the Regulation jeopardized listed species, or as possible T&Cs in an ITS. Ultimately, NMFS did not
15 reach these conclusions in this manner but still included a later-refined version of the measures in the
16 Opinion as Appendix D: Example of Species Specific Control Measures, Monitoring and Reporting.
17 The draft is a preliminary narrative analysis to be considered prior to an agency determination and
18 consideration in the opinion. The selection of topics and supporting information in the draft reflects the
19 agency's decision-making process. There are no segregable portions for release in this document. The
20 discussion of factual material cannot be revealed without also revealing the agency's preliminary
21 analysis. The preliminary analysis and material presented are not complete/final and may contain
22 various inaccuracies.

23 23. I withhold in its entirety Document Number 0.7.266.37695 pursuant to the deliberative process
24 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document is an undated draft
25 document, written during development of NMFS' draft opinion, describing possible protective measures
26 for inclusion in the biological opinion to minimize risk for pinnipeds. These measures were considered
27 for possible incorporation into the biological opinion, in a RPA, if NMFS were to conclude that the
28 Regulation jeopardized listed species, or as possible T&Cs in an ITS. Ultimately, NMFS did not reach

1 these conclusions in this manner but still included a later-refined version of the measures in the Opinion
2 as Appendix D: Example of Species Specific Control Measures, Monitoring and Reporting. The draft is
3 a preliminary narrative analysis to be considered prior to an agency determination and consideration in
4 the opinion. The selection of topics and supporting information in the draft reflects the agency's
5 decision-making process. The document also contains various comments and questions of agency staff,
6 which reflect the internal deliberations and discussions during the course of reviewing this draft
7 document. There are no segregable portions for release. The discussion of factual material cannot be
8 revealed without also revealing the agency's preliminary analysis. The preliminary analysis and material
9 presented are not complete/final and may contain various inaccuracies.

10 24. I withhold in its entirety Document Number 0.7.266.45263.1 pursuant to the deliberative process
11 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, sent via email from Jennifer
12 Schultz of NMFS to David Nichols and others of NMFS on March 19, 2014, describes draft protective
13 measures for inclusion in the biological opinion to minimize risk to sea turtles. These measures were
14 considered for possible incorporation into the biological opinion, in a RPA, if NMFS were to conclude
15 that the Regulation jeopardized listed species, or as possible T&Cs in an ITS. Ultimately, NMFS did
16 not reach these conclusions in this manner but still included a later-refined version of the measures in
17 the Opinion as Appendix D: Example of Species Specific Control Measures, Monitoring and Reporting.
18 The purpose of sending this draft document is to seek comments from NMFS scientists on the draft
19 protective measures for consideration in the biological opinion. The draft is a preliminary narrative
20 analysis to be considered prior to an agency determination and consideration in the biological opinion.
21 The selection of topics and supporting information in the draft reflects the agency's decision-making
22 process. The document also contains various comments and questions of agency staff, which reflect the
23 internal deliberations and discussions during the course of reviewing this draft document. The
24 document does not contain segregable portions for release. The discussion of factual material cannot be
25 revealed without also revealing the agency's preliminary analysis. The preliminary analysis and material
26 presented are not complete/final and may contain various inaccuracies.

27 25. I withhold in its entirety Document Number 0.7.266.45277.2 pursuant to the deliberative process
28 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, sent from Patrick Opay of

1 NMFS to Jennifer Schultz of NMFS on March 20, 2014 in response to an earlier internal email chain
2 among Jennifer Schultz, David Nichols and Irene Kelly of NMFS, is a draft describing potential
3 protective measures for inclusion in the biological opinion to minimize risk to sea turtles. These
4 measures were considered for possible incorporation into the biological opinion, in a RPA, if NMFS
5 were to conclude that the Regulation jeopardized listed species, or as possible T&Cs in an ITS.
6 Ultimately, NMFS did not reach these conclusions in this manner but still included a later-refined
7 version of the measures in the Opinion as Appendix D: Example of Species Specific Control Measures,
8 Monitoring and Reporting. The draft was circulated to solicit comments from NMFS staff on these
9 potential measures, and contains comments from NMFS staff written in the margins. The draft is a
10 preliminary narrative analysis to be considered prior to an agency determination and consideration for
11 inclusion in the opinion. The selection of topics and supporting information in the draft reflects the
12 agency's decision-making process. The document also contains various comments and questions of
13 agency staff, which reflect the internal deliberations and discussions during the course of reviewing this
14 draft document. There are no segregable portions of this document for release. The discussion of
15 factual material cannot be revealed without also revealing the agency's preliminary analysis. The
16 preliminary analysis and material presented are not complete/final and may contain various inaccuracies.

17 26. I withhold in part document number 0.7.266.5143 pursuant to the deliberative process privilege
18 of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document is an internal email thread from
19 November 11 through November 14, 2013, among Jennifer Schultz of NMFS and Rich Domingue of
20 NMFS and Mark Eames of NOAA's Office of General Counsel, discussing a separate ongoing
21 consultation being done by staff from the Northwest Regional Office. While the information sought was
22 for the purpose of writing the biological opinion that is the subject of this FOIA, the redacted portions of
23 the document contain the agency's deliberations in preparation for developing and writing a separate
24 biological opinion that has yet to be finalized and that is not the subject of this FOIA request. The
25 redacted portions also contain NMFS headquarters and regional staff deliberative evaluation of possible
26 options for implementation of the 2001 Memorandum of Agreement Between the Environmental
27 Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding
28 Enhanced Coordination Under the Clean Water Act and Endangered Species Act (MOA), 36 FR 11202

1 (February 22, 2001). Section IX.A. of the MOA details coordination procedures between EPA and the
2 Services for consideration of ESA concerns in issuance of state or tribal NPDES permits. In the
3 preamble in the Federal Register notice announcing the final Regulation, in the section titled EPA
4 Oversight of State-Issued NPDES Permits To Protect Threatened and Endangered Species, EPA cited to
5 and described these procedures in the MOA and stated that the MOA applies equally to NPDES permits
6 that contain conditions for cooling water intake structures. 79 FR 48299, 48382-3 (August 15, 2014).
7 The Opinion described EPA's oversight role as part of EPA's action. Opinion at 12-13. The discussion
8 in this document contains thoughts and questions from agency staff in preparation for writing an early
9 draft of the NMFS' draft opinion that was never finalized. This document has been segregated and non-
10 deliberative or factual material has been released.

11 27. I withhold in its entirety Document Number 0.7.266.45161 pursuant to the deliberative process
12 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document is a one-paragraph email
13 sent March 10, 2014 from Jennifer Schultz of NMFS to Angela Somma and Ron Dean of NMFS and
14 George Noguchi of FWS discussing implementation of the 2001 MOA, for consideration in developing
15 the biological opinion. This email reflects the agencies' internal deliberations during agency decision-
16 making during development of the Opinion. The content of the email reveals the agency's preliminary
17 analysis of potential agency action and topics/questions to be discussed. No segregation is possible for
18 this document because all factual and non-deliberative material is interwoven with the analysis.

19 28. I withhold in its entirety Document Number 0.7.266.45161.1 pursuant to the deliberative process
20 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, sent as an attachment to the
21 email described in the paragraph above, discusses and evaluates various aspects of the implementation
22 of the 2001 MOA. In addition to reflecting the agencies' deliberations in preparation for the Opinion at
23 issue in this FOIA, the document also reflects the agencies' pre-decisional deliberations on state water
24 quality standards under the Clean Water Act and individual state NPDES permits that are not the subject
25 of this FOIA. This is a document consisting of agency staff's preliminary analysis, thoughts, proposals,
26 and recommendations. This document was attached to be discussed during the course of decision-
27 making by agency staff and was distributed for comments and review antecedent to agency action on the
28 issue. The preliminary analysis and material presented are not complete/final and may contain various

1 inaccuracies. No segregation is possible for this document because all factual and non-deliberative
2 material is interwoven with the analysis.

3 29. I withhold in its entirety Document Number 0.7.266.45164 pursuant to the deliberative process
4 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)) for the reasons described in the two
5 paragraphs above. The document is a March 10, 2014 email response from Angela Somma of NMFS to
6 Documents Number 07.266.45161 and 07.266.45161.1. The content of the email reveals the agency's
7 preliminary analysis of potential agency action and topics/questions to be discussed. No segregation is
8 possible for this document because all factual and non-deliberative material is interwoven with the
9 analysis.

10 30. I withhold in its entirety Document Number 0.7.266.61721 pursuant to the deliberative process
11 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This undated document, written during
12 development of NMFS' draft opinion, is a draft table of possible quantified estimates of effects on listed
13 species, based on the EPA's draft rule as it existed in 2013, a draft table that NMFS after further
14 deliberations among its scientists ultimately determined not to include in the Opinion. This draft
15 represents the agency's preliminary analysis and estimates. This document was generated as part of the
16 agency's decision making regarding a biological opinion. Because the entire document represents draft
17 views, no segregation is possible.

18 31. I withhold in its entirety Document Number 0.7.266.14973.1 pursuant to the deliberative process
19 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document, attached to a March 10,
20 2014 email from Jennifer Schultz of NMFS to Donna Wieting and Cathy Tortorici of NMFS, is an
21 example of T&Cs for consideration in developing an ITS for this Opinion, from a draft biological
22 opinion regarding a separate federal action, not the subject of this FOIA. At the time the draft was
23 shared, the separate biological opinion had not been finalized. This document was created during the
24 process of agency decision-making on the separate federal action, during the development of the
25 biological opinion that is not the subject of this FOIA, and does not reflect the final determination of the
26 agency with respect to that separate biological opinion. This document also contains comments and
27 highlights which reveal the preliminary analysis of agency staff. The document contains no segregable
28 portions for release. The discussion of factual material cannot be revealed without also revealing the

1 agency's preliminary analysis. The preliminary analysis and material presented are not complete/final.

2 32. I withhold in its entirety Document Number 0.7.266.17987.1 pursuant to the deliberative process
3 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This draft document, a duplicate of
4 Document Number 0.7.266.61721, was sent as an attachment to an email from Jennifer Schultz of
5 NMFS to Donna Wieting and Cathy Tortorici of NMFS. I withhold it for the same reasons discussed
6 for Document Number 0.7.266.61721.

7 33. I withhold in part Document Number 0.7.266.7055 pursuant to the deliberative process privilege
8 of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This document is an email among Jennifer Schultz,
9 Steve Thomas and Richard Wantuck of NMFS from March 12 through March 18, 2014 discussing
10 requirements for fish screen monitoring and reporting as well as possible control measures for CWIS.
11 This email chain is internal to NMFS agency staff and reflects the agency's deliberations during the
12 course of drafting and evaluating a possible biological opinion. This discussion is antecedent to official
13 agency action and consists of comments, questions, and thoughts of agency staff during the deliberative
14 process. This document has been segregated and non-deliberative material has been released.

15 34. I withhold in part Document Number 0.7.266.7066 pursuant to the deliberative process privilege
16 of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This document is an email among Jennifer Schultz,
17 Joe Dillon, Steve Thomas and other NMFS staff from March 12 through March 27, 2014, discussing
18 possible requirements for fish screen monitoring and reporting as well as possible control measures for
19 CWIS. Possible options for the biological opinion are also sought. The document also contains an
20 excerpt from EPA's draft Regulation that reflects EPA's deliberative process. This email chain is
21 internal to NMFS agency staff and reflects the agency's deliberations during the course of drafting and
22 evaluating a possible biological opinion as well as including excerpts from an EPA pre-decisional
23 deliberative draft. This discussion is antecedent to official agency action and consists of comments,
24 questions, and thoughts of agency staff during the deliberative process. This document has been
25 segregated and non-deliberative material has been released.

26 35. I withhold in its entirety Document Number 0.7.266.37253 pursuant to the deliberative process
27 privilege of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). This August 7, 2013 email from Bryan
28 Nordlund of NMFS to Rich Domingue of NMFS is a NMFS internal memorandum that discusses the

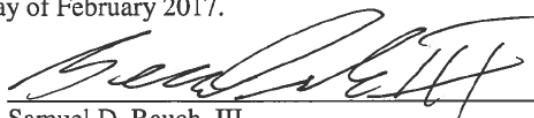
1 intake screens assessment based on evaluation of one facility, for purposes of developing the biological
2 opinion for that facility. That biological opinion, that is not the subject of this FOIA, has not been
3 finalized. This document reflects the agency's internal preliminary analysis, assessments, and
4 recommendations during the course of decision-making for that separate biological opinion. The factual
5 material cannot be revealed without also revealing the agency's preliminary analysis and no segregation
6 is possible.

7 36. I withhold part of Document Number 0.7.266.5038 pursuant to the deliberative process privilege
8 of FOIA exemption (b)(5) (5 U.S.C. § 552(b)(5)). The document is an internal NMFS-only email chain
9 from August 9, 2013, to August 27, 2013, among Jennifer Schultz and Colette Cairns, NMFS
10 headquarters staff with the lead on preparing the biological opinion, and Ryan Hendren, a NMFS
11 biologist in NMFS Southeast Regional Office in St. Petersburg, Florida. This email was generated early
12 in the preparation of the biological opinion and for the purpose of writing and evaluating possible
13 options for the biological opinion. The redacted portions contain the agency's deliberations in
14 discussions and comments on issues related to EPA's delegation of authority to states and possible
15 methods to minimize adverse effects to federally-listed species. This discussion is antecedent to official
16 agency action and consists of comments, questions, and thoughts of agency staff during the deliberative
17 process. This document has been segregated and non-deliberative material has been released.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10 day of February 2017.



Samuel D. Rauch, III
Acting Assistant Administrator, NMFS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB, INC.,)	Case No. 15-cv-05872 EDL
)	
Plaintiff,)	DECLARATION OF GARY FRAZER
)	
v.)	Date: May 23, 2017
NATIONAL MARINE FISHERIES SERVICE)	Time: 9:00 a.m.
and UNITED STATES FISH AND WILDLIFE)	The Honorable Elizabeth D. Laporte
SERVICE,)	
)	
Defendants.)	
)	

DECLARATION OF GARY FRAZER

I, Gary Frazer, hereby declare as follows:

1. I am the Assistant Director for Ecological Services of the U.S. Fish and Wildlife Service (“FWS”), an agency of the U.S. Department of the Interior (“DOI”), located in Washington, D.C. In my capacity as Assistant Director, I am responsible to the Director of the FWS and the Secretary of the Interior for the administration of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. §§ 1531-1544, which includes oversight and management of

national programmatic consultations on Federal agency actions that are conducted by my Ecological Services' program staff at FWS's Headquarters Office.

2. I make this declaration based upon my personal knowledge and information available to me in my capacity as the Assistant Director for Ecological Services of FWS.

3. On May 19, 2014, Paul Souza, Deputy Assistant Director for Ecological Services at the time, signed, in my capacity, the FWS and National Marine Fisheries Service's ("NMFS") joint biological opinion on the U.S. Environmental Protection Agency's ("EPA") issuance and implementation of the final regulations implementing section 316(b) of the Clean Water Act. In the joint biological opinion, the FWS and NMFS (collectively, the "Services") concluded that EPA's promulgation of the regulations is not likely to jeopardize the continued existence of ESA-listed species and is not likely to destroy or adversely modify designated critical habitat. In reaching this conclusion regarding EPA's compliance under section 7(a)(2) of the ESA, the Ecological Services Program staff at FWS Headquarters conducted a programmatic consultation on the 316(b) final rule, focusing primarily on required elements of the regulatory process set forth in the rule and on EPA's commitment to oversee implementation of the rule.

4. Before the joint biological opinion was issued, the Services engaged in an intensive consultation process with EPA involving not only scientific issues regarding the effects of EPA's action, but issues of legal and policy relevance regarding EPA's authority and discretion and the FWS's consideration of such in the consultation. In fact, given the agency action being analyzed was a rulemaking to implement a permitting program carried out by EPA or States approved by EPA under the National Pollutant Discharge Elimination System, this programmatic biological opinion was necessarily laden with significant policy and legal

considerations under both the ESA and the Clean Water Act, even more so than what may be expected in a traditional, site-specific consultation.

5. In the nearly two years leading up to the issuance of the opinion, agency personnel met routinely, both in person and over the phone, and exchanged thousands of emails. The Services, along with EPA, participated in frank discussions over this period, and multiple options for EPA's regulation and the biological opinion were considered and reconsidered, with many rejected. Multiple pre-decisional drafts of the biological opinion, portions of the biological opinion, as well as briefing and options papers were circulated intra- and interagency. Multiple comments and suggestions were exchanged, often by several people on the same document, and sometimes those comments and suggestions conflicted. Documents were revised on the author's own initiative or in response to comments and recirculated.

6. The Services generated many pre-decisional drafts of the biological opinion, most not changing significantly between these versions. Included among the pre-decisional drafts of the biological opinion identified in Exhibit A, attached hereto, are drafts from December 6, 2013 and December 9, 2013, in which the FWS concluded that the EPA's regulation in its then-current-form was likely to jeopardize listed species and adversely modify critical habitat. These pre-decisional draft biological opinions were subject to internal review within FWS and the Department of the Interior and consultation with the EPA. Based upon this internal review and interagency review in December, the FWS concluded that additional consultation was needed to better understand and consider the operation of key elements of EPA's rule, the elements of which were still being deliberated within EPA as well. Therefore, these December 6 and December 9 draft opinions were never signed by me and distributed to EPA as the agency's official preliminary position. In fact, the FWS, NMFS, and the EPA all agreed, that more work

needed to be done and agreed to extend the time frame for the consultation. Because the Services preliminarily believed that the regulation, as then written, may be likely to jeopardize listed species or destroy or adversely modify critical habitat, the Services also wrote draft RPAs as required by ESA Section 7. Ultimately, based on changes to the regulation, the Services' final conclusion was that the regulation was not likely to jeopardize the continued existence of listed species nor likely to destroy or adversely modify critical habitat. Thus, no RPAs were required, and the Services did not include any in the final biological opinion.

7. I am personally familiar with this consultation and the legal and policy issues that were considered by the FWS Headquarters Ecological Services Program staff in rendering its biological opinion. I was involved in the decision-making process at FWS Headquarters, participating in internal discussions with mid-level managers in the Ecological Services Program Office, which included Rick Sayers, Chief of the Division of Environmental Review, and Patrice Ashfield, Chief of the Branch of Consultation and Habitat Conservation Planning, as well as the staff biologist who served as FWS's primary author of the biological opinion, Drew Crane. I also participated in interagency discussions among FWS staff and agency officials at DOI, the DOI's Office of the Solicitor, NMFS, NOAA's General Counsel's Office, EPA, EPA's Office of General Counsel, the Office of Management and Budget, and the United States Department of Justice.

Sierra Club's FOIA Request

8. On August 11, 2014, Sierra Club, Inc. (the "Plaintiff"), submitted a FOIA request to FWS. Specifically this request sought:

"(1) All FWS drafts of all or portions of the Endangered Species Act (ESA) Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act (the "BiOp"), Incidental Take Statement and its appendices;

- (2) All documents exchanged between FWS staff and between FWS and the Environmental Protection Agency (EPA), or any other governmental agency or official, during interagency review of, and concerning, drafts of the BiOp and/or Incidental Take Statement;
- (3) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning the ESA section 7 consultation on EPA's most recent 316(b) rule;
- (4) All documents serving as the basis for, or which were considered by, the FWS in connection with its "no jeopardy" and/or "no adverse modification" of critical habitat findings on the ESA section 7 consultation for the most recently proposed 316(b) rule;
- (5) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning any ESA section 7 consultation on EPA's previously proposed 316(b) rule(s), including for new sources as well as existing sources; and
- (6) All documents exchanged and all documents related to any meetings, telephone conversations, emails, or any other communications between FWS and the utility (i.e., electric generation) industry or manufacturing industry, representatives of the utility or manufacturing industries, trade groups, special interest groups, and/or other non-governmental parties relating to the ESA section 7 consultation and the 316(b) rule,"

9. Accordingly, FWS conducted a broad search in locating the documents that were potentially responsive to the FOIA request. FWS's search for documents responsive to the FOIA request involved extensive queries of FWS staff who worked on the consultation, as well as a search of the electronic files of staff, including those who worked on the project, but were no longer with FWS.

10. Through this extensive search, FWS ultimately located 2,194 documents that were responsive to Sierra Club's FOIA request. FWS provided interim responses to the FOIA request on March 10, March 26, June 22, August 14, October 19, October 30, November 23, December 1, and December 24, 2015; and January 8, 2016. In sum, FWS's complete response to the FOIA request consisted of 624 documents released in full and that were not privileged, 347 documents released with redactions of privileged and non-responsive text, 1,075 documents withheld in full

as privileged, while 148 documents were referred to NOAA and EPA for release determination as those records originated from those agencies.

FWS's Privilege Log

11. In the Second Circuit Court of Appeals, the FWS, along with other defendants, is a party to litigation related to the biological opinion in *Cooling Water Intake Structure Coalition, et. al., v. United States Environmental Protection Agency, et. al.*, Case No. 14-4645(L) (2nd Cir. 2016) (the "Second Circuit Action"). The Plaintiff in this present case before this Court, Sierra Club, is also a plaintiff in the Second Circuit Action.

12. As a part of the Second Circuit Action, on July 13, 2015, FWS filed an administrative record for FWS's biological opinion. This administrative record was created by FWS staff, and the DOI Office of the Solicitor reviewed, again, the documents responsive to Sierra Club's broad FOIA request.

13. On February 24, 2016, the Second Circuit motions panel partially granted a Motion to Compel, ordering FWS (along with other Federal Agencies), to produce a privilege log. In response to the Second Circuit's order, on April 20, 2016, FWS filed a privilege log in the Second Circuit Action, which I reviewed and also signed a supporting declaration

The Assertion of the FOIA's Deliberative Process Privilege

14. FWS and the Plaintiff have used the privilege log in the Second Circuit Action as a basis to identify documents which are the subject of this briefing. FWS provided additional detail on many documents that the Plaintiff identified as potentially responsive. In return, Plaintiff narrowed the list of documents subject to this briefing. Ultimately, following further conversations, the Plaintiffs narrowed the list of documents sought from FWS to five, numbered 243, 252, 279, 308 and 555 in the privilege log in the Second Circuit Action, along with "any

other portions of the draft biological opinion that were delivered to EPA during the consultation process” (collectively the “Narrowed Documents” and each a “Narrowed Document”). The Narrowed Documents are the basis for the FWS’s *Vaughn* Index, attached hereto as Exhibit A.

15. In asserting the deliberative process privilege with respect to the Narrowed Documents, FWS sought to limit its claim of privilege to those documents that are deliberative, the release of which would harm the important government interest in the quality of administrative decision-making on a consultation of nationwide significance. The documents withheld under the deliberative process privilege involve candid discussions among staff at FWS and NMFS, and are reflective or pre-decisional opinions of EPA staff.

16. The documents withheld as subject to the deliberative process privilege are all pre-decisional working drafts of the biological opinion (or sections of drafts) that may also include redlined comments from various biologists and staff members.

17. If the candid views of staff contained in the Narrowed Documents were disclosed, the quality of future internal deliberations on resource issues would suffer. The working drafts of the biological opinion and the rulemaking contain comments from personnel on legal or policy matters related to a complex consultation of national significance. In my view, FWS personnel may hesitate to provide their frank and forthright opinions and recommendations on these draft documents based on fears that candid recommendations would be broadcast outside the executive branch and misunderstood outside of context. I believe that this material, if disclosed, would significantly and adversely impair the integrity and quality of the decision making process for future FWS consultations.

18. These documents are an essential part of the deliberative process in that the authors of the documents make recommendations or express opinions on legal or policy matters related to

the consultation. They include candid internal discussions relating to various options deliberated among the Ecological Services Program's staff and mid-level managers for the consultation. They include recommendations from Program staff members and lower level managers to individuals with decision-making authority. The *Vaughn* Index consists of documents containing legal or policy recommendations and opinions developed by Program staff and mid-level managers with respect to the consultation and implementation of the regulatory processes set forth in the 316(b) rulemaking.

19. In determining which documents were potentially subject to the deliberative process privilege, FWS has applied the following principles: (1) the privilege protects from disclosure only those documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions are made or policies are formulated; (2) withheld material must be opinion, deliberation, advice, recommendation, or evaluation by those responsible for advising on the advantages and disadvantages of proposed agency decision or policy; (3) withheld material must be directed toward formulation of a policy or decision being debated within the agency at the time; and (4) withheld material must be pre-decisional, must contain advice or recommendations, and must not merely comment upon already established policy. To the extent that any factual or non-privileged material is being withheld, I believe that it is so intertwined with privileged information that the factual information cannot be released without releasing privileged information as well. To the best of my knowledge, such factual information generally is available from other documents which were included in the administrative record of the Second Circuit Action or in unredacted portions of documents subject to the FOIA.

20. I have determined that, to the best of my knowledge, the documents identified in the *Vaughn* Index as subject to the deliberative process privilege should be protected from release by this privilege. By this declaration, therefore, I formally claim the deliberative process privilege for all documents so identified in FWS's *Vaughn* Index.

The Narrowed Documents

21. Given the Plaintiffs' reduction in the number of the documents at issue for the purposes of this litigation, I will address each Narrowed Document below, but the reasoning above is incorporated herein by reference.

22. Document 243 is a full draft biological opinion shared between two FWS employees, Drew Crane and Rick Sayers, which incorporates edits made by myself. This revised draft was predecisional and includes edits in track changes throughout the document. It is my opinion that this document is an essential part of the deliberative process in that the authors of the document make recommendations or express opinions on legal or policy matters related to the consultation. It reflects candid internal discussions relating to various options deliberated among the Ecological Services Program's staff and mid-level managers for the consultation. This includes recommendations from Program staff members and lower level managers to individuals with decision-making authority.

23. Document 243 does not contain sections that are segregable. The draft opinion is not a compilation of data, but is a preliminary narrative analysis regarding the subject matter of the opinion that was ultimately issued. Even the parts of the document which do not directly include track changes or notations could be used to shed light on FWS's thinking and discussions at the time the document was drafted. The preliminary conclusions and preliminary inputs discussed in the documents reflect only the preliminary thinking of the FWS at the time of the draft, and

changed significantly by the end of the process. The discussion of factual material in the document is generally intertwined with the analysis such that it is not possible to reveal any factual material without revealing the Services' preliminary analysis and assumptions. Because this is an early draft circulated for internal review and comment, the analysis and factual matters presented are not final and may contain inaccuracies.

24. Document 252 is a full draft biological opinion shared between two FWS employees, Drew Crane and myself, which incorporates previous edits made by the FWS team. This revised draft was predecisional. It is my opinion that this document is an essential part of the deliberative process in that the authors of the document make recommendations or express opinions on legal or policy matters related to the consultation. It reflects candid internal discussions relating to various options deliberated among the Ecological Services Program's staff and mid-level managers for the consultation. This includes recommendations from Program staff members and lower level managers to individuals with decision-making authority.

25. Document 252 does not contain sections that are segregable. The draft opinion is not a compilation of data, but is a preliminary narrative analysis regarding the subject matter of the opinion that was ultimately issued. Even the parts of the document which do not directly reference the RPAs could be used to shed light on FWS's thinking and discussions at the time the document was drafted. The preliminary conclusions and preliminary inputs discussed in the documents reflect only the preliminary thinking of the FWS at the time of the draft, and changed significantly by the end of the process. The discussion of factual material in the document is generally intertwined with the analysis such that it is not possible to reveal any factual material without revealing the Services' preliminary analysis and assumptions. Because this is an early

draft circulated for internal review and comment, the analysis and factual matters presented are not final and may contain inaccuracies.

26. Document 279 is a portion of the biological opinion known as a reasonable and prudent alternative section shared between one FWS employee, Drew Crane, and one employee of NMFS, Jennifer Schultz, which incorporates previous edits made by the FWS team. This revised draft was predecisional. It is my opinion that this document is an essential part of the deliberative process in that the authors of the document make recommendations or express opinions on legal or policy matters related to the consultation. It reflects candid internal discussions relating to various options deliberated among the Ecological Services Program's staff and mid-level managers for the consultation. This includes recommendations from Program staff members and lower level managers to individuals with decision-making authority.

27. Document 279 does not contain sections that are segregable. It is a brief section of the biological opinion which was fully excised from the final and public biological opinion. There is no way to release the document without undermining the deliberative process between members of the FWS internally, as well as between staff of FWS, NMFS, and EPA.

28. Document 308 is a portion of the biological opinion, known as a reasonable and prudent alternative section, that was shared between Rick Sayers, Patrice Ashfield, and Drew Crane of FWS with NMFS, and also incorporates previous edits made by the FWS team. This revised draft was predecisional. It is my opinion that this document is an essential part of the deliberative process in that the authors of the document make recommendations or express opinions on legal or policy matters related to the consultation. It reflects candid internal discussions relating to various options deliberated among the Ecological Services Program's

staff and mid-level managers for the consultation. This includes recommendations from Program staff members and lower level managers to individuals with decision-making authority.

29. Document 308 does not contain sections that are segregable. It is a brief section of the biological opinion which was fully excised from the final and public biological opinion. There is no way to release the document without undermining the deliberative process between members of the FWS internally, as well as between FWS, NFMS, and EPA.

30. Document 555 is a portion of the biological opinion, known as a reasonable and prudent alternative section and shared between FWS and NMFS and also incorporates previous edits made by the FWS team. This revised draft was predecisional. It is my opinion that this document is an essential part of the deliberative process in that the authors of the document make recommendations or express opinions on legal or policy matters related to the consultation. It reflects candid internal discussions relating to various options deliberated among the Ecological Services Program's staff and mid-level managers for the consultation. This includes recommendations from Program staff members and lower-level managers to individuals with decision-making authority.

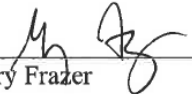
31. Document 555 does not contain sections that are segregable. It is a brief section of the biological opinion which was fully excised from the final and public biological opinion. There is no way to release the document without undermining the deliberative process between members of the FWS internally, as well as between FWS, NMFS, and EPA.

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This declaration is made under the provision of Section 1746 of Title 28 of the United States Civil Code.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 10, 2016 in Washington, D.C.



Gary Frazer

EXHIBIT A

Doc#	# of Pages	Date	Author	Addressee	Document Type	Description	Status	Priv Applied
243	71	12/6/2013	Drew Crane, FWS	Rick Sayers, FWS	Document	Predecisional revised draft biological opinion drafted by FWS staff incorporates edits by the Assistant Director - Ecological Services. The release of this draft would harm future executive decisionmaking because staff would be less inclined to have a candid exchange of ideas on policy matters and would create public confusion from the disclosure of a draft biological opinion that was not adopted nor even submitted to EPA.	Withheld in Full	DP
252	72	12/9/2013	Drew Crane, FWS	Gary Frazer, FWS	Document	Predecisional draft biological opinion prepared by FWS staff and provided to FWS managers for internal agency review only. The release of this draft would harm future executive decisionmaking because staff would be less inclined to have a candid exchange of ideas on policy matters and would create public confusion from the disclosure of a draft biological opinion that was never adopted nor submitted to EPA.	Withheld in Full	DP
279	4	12/17/2013	Jennifer Schultz, NMFS	Rick Sayers, FWS	Document	Predecisional revised portions of the biological opinion drafted by staff from FWS and NMFS. This document is part of a deliberative process between FWS and NMFS. The release of this document would harm future executive decisionmaking because staff would be less inclined to have a candid exchange of ideas on policy matters and would create public confusion from the disclosure of recommendations concerning a complex, nationwide regulatory program that were never adopted.	Withheld in Full	DP
308	3	12/18/2013	NMFS	Rick Sayers, Patrice Ashfield, Drew Crane, FWS	Attachment	Predecisional revised draft portion of the biological opinion drafted by staff from FWS and NMFS. This document is part of a deliberative process between FWS and NMFS. This draft contains revisions provided by NMFS staff for FWS review. The release of this document would create public confusion from the disclosure of recommendations concerning a complex, nationwide regulatory program that were never adopted.	Withheld in Full	DP
555	2	3/6/2014	FWS	NMFS	Document	Draft portions of the biological opinion provided by FWS to NMFS staff to contribute to an ongoing deliberative discussion on the 316(b) consultation. The release of this document would harm future executive decisionmaking because staff would be less inclined to have a candid exchange of ideas on policy and legal matters and would create public confusion from the disclosure of recommendations concerning a complex, nationwide regulatory program that were never adopted.	Withheld in Full	DP

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16 SIERRA CLUB, INC.

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19 SIERRA CLUB, INC.,

20 Plaintiff,

21 v.

22 NATIONAL MARINE FISHERIES SERVICE
23 and UNITED STATES FISH AND WILDLIFE
24 SERVICE,

25 Defendant.

Case No. 15-cv-05872-EDL

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

(Freedom of Information Act,
5 U.S.C. § 552 *et seq.*)

26 SIERRA CLUB, INC. (hereinafter “Sierra Club”), by and through its undersigned counsel,
27 hereby alleges:

28 **I. NATURE OF THE CASE**

1. Plaintiff asserts violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendants National Marine Fisheries Service (“NMFS”), a federal agency situated within the United States Department of Commerce, and Fish and Wildlife Service (“FWS”), a federal agency situated within the Department of the Interior (collectively “Defendants”). Defendants have failed to produce records that Sierra Club sought in two FOIA requests on August 11, 2014.

2. Sierra Club’s FOIA requests concern a formal consultation (hereinafter, the “ESA

1 Consultation”) undertaken by NMFS and FWS under the Endangered Species Act (“ESA”) with
2 respect to regulations promulgated by the U.S. Environmental Protection Agency (“EPA”) under
3 Section 316(b) of the Clean Water Act (hereinafter, the “316(b) Rule”). Section 316(b) requires
4 regulatory standards to minimize the adverse environmental impacts on fish and wildlife caused by
5 cooling water intake structures at existing power plants and other industrial facilities.

6 3. Industrial cooling water systems are, by far, the largest source of water withdrawals in
7 the United States, drawing trillions of gallons per year from America’s rivers, lakes, and oceans. The
8 enormous volume and force of these water withdrawals kills and injures billions of fish and other
9 aquatic organisms each year, including many federally-listed threatened and endangered species, and
10 damages the broader ecosystem.

11 4. More than 16 months after receiving the FOIA request, and long past FOIA’s statutory
12 deadline, NMFS has still not completed its production of responsive documents. NMFS has repeatedly
13 unilaterally extended its estimated date of completion. Further, NMFS’s interim productions have
14 withheld records that Sierra Club contends it is entitled to under FOIA.

15 5. On January 8, 2016, FWS completed its response to Sierra Club’s FOIA request. FWS
16 partially denied Sierra Club’s FOIA request by redacting and withholding responsive documents.
17 Sierra Club timely filed an administrative appeal of the partial denial of its FOIA request. However,
18 FWS missed the statutory deadline for responding to Sierra Club’s appeal.

19 6. As a result of Defendants’ failures, Sierra Club is being deprived of critical information
20 regarding the government’s development of the 316(b) Rule and the measures for protecting threatened
21 and endangered species from intake structures.

22 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

23 7. This Court has jurisdiction “to enjoin the agency from withholding agency records and
24 to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §
25 552(a)(4)(B).

26 8. Venue is proper in this District because Plaintiff’s principal places of business are
27 located in this District. 5 U.S.C. § 552(a)(4)(B).

28 9. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is

1 appropriate because Plaintiff Sierra Club is incorporated in California and resides and maintains its
2 headquarters in San Francisco County.

3 **III. PARTIES**

4 10. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grass-roots
5 environmental organization. The Sierra Club is a national nonprofit organization that is incorporated in
6 California and has its headquarters in San Francisco, California. It has more than one million members
7 and supporters, including thousands of members in California. The Sierra Club is dedicated to the
8 protection and preservation of the natural and human environment, including protecting threatened and
9 endangered species and their habitat. The Sierra Club's purpose is to explore, enjoy and protect the
10 wild places of the earth; to practice and promote the responsible use of the earth's ecosystem and
11 resources; and to educate and enlist humanity to protect and restore the quality of the natural and
12 human environments.

13 11. Defendant National Marine Fisheries Service, also known as "NOAA Fisheries" is a
14 federal agency within the National Oceanic and Atmospheric Administration within the United States
15 Department of Commerce, which is subject to the requirements of FOIA and has possession or control
16 of records that Plaintiff seeks in this action.

17 12. Defendant United States Fish and Wildlife Service is a federal agency within the
18 Department of the Interior, which is subject to the requirements of FOIA and has possession or control
19 of records that plaintiff seeks in this action.

20 **IV. STATUTORY AND REGULATORY BACKGROUND**

21 13. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning
22 of a democratic society, needed to check against corruption and to hold the governors accountable to
23 the governed." *NRLB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In other words, as the
24 Supreme Court has declared, "FOIA is often explained as a means for citizens to know what the
25 Government is up to." *Nat'l Archive & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal
26 quotations and citations omitted).

27 14. In particular, FOIA requires agencies of the federal government to release, upon request,
28 information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. §

1 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of
2 establishing the applicability of each exemption as to each document for which it is claimed.

3 15. Upon receiving a FOIA request, an agency has twenty business days to respond by
4 determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. §
5 552(a)(6)(A).

6 16. FOIA allows an agency to delay an initial response for ten business days – but only ten
7 business days – past the statutory deadline, if the agency can demonstrate that it faces “unusual
8 circumstances” in responding to the request. 5 U.S.C. § 552(a)(6)(B). “Unusual circumstances”
9 include the need to search for and collect requested documents from other offices, the need to
10 appropriately examine a voluminous amount of separate and distinct records, and the need to consult
11 with another agency. 5 U.S.C. § 552(a)(6)(B)(iii)(I-III). Even under “unusual circumstances,”
12 however, an agency must provide notice of the delay and also provide “the date on which a
13 determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i).

14 17. The agency must provide information about the status of the request including “an
15 estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii).
16 This date and other information about the status of the request must be available through a telephonic
17 line or internet service established by the agency. *Id.*

18 18. When an agency denies, in whole or in part, a request for records under FOIA, the
19 agency must make a “reasonable effort to estimate the volume of any requested matter the provision of
20 which is denied, and shall provide any such estimate to the person making the request.” 5 U.S.C. §
21 552(a)(6)(F).

22 19. When an agency denies, in whole or in part, a request for records under FOIA, the
23 agency must inform the requesting party of the right “to appeal to the head of the agency any adverse
24 determination.” 5 U.S.C. § 552(a)(6)(A)(i). The agency must make a determination with respect to
25 any appeal within twenty business days (excluding holidays). 5 U.S.C. § 552(a)(6)(A)(ii).

26 20. FOIA expressly provides that a requester “shall be deemed to have exhausted his
27 administrative remedies . . . if the agency fails to comply with the applicable time limit provisions”
28 governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

1 **V. STATEMENT OF FACTS**

2 **A. Cooling Water Intake Structures Kill Billions of Fish Every Year.**

3 21. Power plants and other industrial facilities use cooling water intake structures to
4 withdraw massive volumes of water for cooling. Collectively, the nation's industrial cooling systems
5 withdraw more water than is used for municipal water supplies and irrigated agriculture combined.

6 22. The largest plants in the country can draw enough water from a river to fill an Olympic
7 swimming pool in less than 30 seconds. It is no wonder, then, that every year, hundreds of billions of
8 juvenile fish, larvae, eggs and other aquatic organisms – including the young of many threatened and
9 endangered species – are trapped and killed by the incredibly powerful pumps at such facilities.

10 23. The withdrawal of cooling from natural water bodies causes multiple types of
11 undesirable adverse environmental impacts, including but not limited to entrainment¹ and
12 impingement;² reductions of threatened, endangered or other protected species; damage to critical
13 aquatic organisms, including important elements of the food chain; diminishment of fish population's
14 compensatory reserve; losses to populations including reductions of indigenous species populations and
15 commercial and recreational fishery stocks; and stresses to overall communities and ecosystems.

16 24. By EPA's highly conservative estimates, industrial cooling water withdrawals annually
17 result in the death of at least 2.2 billion age one-equivalent fish, crabs, and shrimp, and a minimum of
18 528 billion eggs and larvae that serve as the basis of the aquatic food chain. In many cases, the toll on
19 fisheries by power plants rivals or exceeds that of the fishing industry. These withdrawals also destroy
20 individuals from at least 266 federally-listed threatened and endangered species, and adversely impact
21 the designated critical habitat of certain protected species.

22 25. "The environmental impact of these systems is staggering: A single power plant might
23 impinge a million adult fish in just a three-week period, or entrain some 3 to 4 billion smaller fish and

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25 ¹ *Entrainment* refers to the extracting of fish eggs and larvae and other small organisms from a source
26 waterbody into and through a power plant's cooling system, where they are killed or injured by
thermal, physical and chemical shocks.

27 ² *Impingement* refers to the trapping of adult and juvenile fish and other large aquatic organisms,
28 including sea turtles and marine mammals, on the screens of an intake structure, which can kill or
injure those animals through asphyxiation, descaling and other harms.

1 shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem.” *Riverkeeper, Inc.*
2 v. *U.S. EPA*, 358 F.3d 174, 181 (2d Cir. 2004).

3 **B. EPA’s Regulations and the Endangered Species Act Consultation.**

4 26. In the Clean Water Act of 1972, Congress ordered EPA to minimize the devastating
5 environmental impacts that cooling water intake structures have on America’s waters by setting
6 nationally uniform and binding regulations. See CWA Section 316(b); 33 U.S.C. § 1326(b).

7 27. In 2001, 2004 and 2006 EPA promulgated Section 316(b) regulations that were
8 challenged and upheld in part and remanded in part. See *Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174
9 (2d Cir. 2004) (“*Riverkeeper I*”); *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007)
10 (“*Riverkeeper II*”); *ConocoPhillips Co. v. EPA*, 612 F.3d 822 (5th Cir. 2010).

11 28. In 2007, EPA suspended the regulations that were remanded in large part by the Second
12 Circuit in *Riverkeeper II*. 72 Fed. Reg. 37,107, 37,108 (July 9, 2007).

13 29. On remand from the circuit courts, in 2011, EPA proposed new Section 316(b)
14 regulations for existing facilities and revised its regulations for new facilities.

15 30. On June 18, 2013, EPA initiated the formal ESA Consultation with NMFS and the FWS
16 following comments by environmental groups, including Sierra Club, that EPA must undertake such
17 consultation.

18 31. The ESA Consultation concluded approximately eleven months later, on May 19, 2014,
19 with the Services’ release of a programmatic biological opinion on EPA’s issuance and implementation
20 of the 316(b) Rule (“Biological Opinion”).

21 32. On May 19, 2014, the EPA Administrator signed the final 316(b) Rule, entitled *National*
22 *Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling*
23 *Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities* (EPA-
24 HQ-OW-2008-0667).

25 33. EPA published the 316(b) Rule in the Federal Register on August 15, 2014.

26 **C. The FOIA Request.**

27 34. On August 11, 2014, Sierra Club submitted FOIA requests to Defendants asking that
28 they make available for inspection and copying eight categories of records relating to the 316(b) Rule,

1 Biological Opinion and ESA Consultation. *See* Exhibits A & B.

2 **D. NMFS's Response.**

3 35. NMFS's response to Sierra Club's request has been wholly inadequate.

4 36. On August 13, 2014, NMFS mailed an initial response acknowledging receipt of Sierra
5 Club's August 11, 2014, request and assigned that request a tracking number, FOIA# DOC-NOAA-
6 2014-001474. *See* Exhibit C

7 37. On August 27, 2014, counsel for the parties conferred regarding the scope of the
8 request.

9 38. On September 8, 2014, Sierra Club agreed to narrow the scope of the request to exclude
10 records containing routine administrative matters and personally identifiable information. *See* Exhibit
11 D.

12 39. On September 25, 2014, Sierra Club received an email from NMFS estimating that the
13 "earliest [NMFS] can provide a response is November 21[, 2014]." *See* Exhibit E.

14 40. Having received no records from NMFS, on December 3, 2014, Sierra Club requested a
15 status update from NMFS.

16 41. On December 11, 2014, NMFS responded that it was not able to provide an estimated
17 date of completion, but "anticipate[d] being able to provide a date certain for providing our response"
18 by the end of January 2015. *See* Exhibit F.

19 42. After January 2015 passed with no information from NMFS, on February 24, 2015,
20 Sierra Club requested a status update from NMFS, followed by another request for a status update on
21 March 4, 2015.

22 43. On March 3, 2015, more than six months after Sierra Club submitted its FOIA request,
23 NMFS released the first production of responsive records, which was composed of only five documents
24 totaling 51 pages.

25 44. On March 4, 2015, after a telephone conversation between the parties, counsel for
26 NMFS sent Sierra Club an email stating that "review of the documents responsive to the FOIA request
27 will occur in conjunction with the preparation of the administrative record in the pending litigation
28 We anticipate being able to provide a final response approximately one month after the filing of the

1 administrative record [in *Cooling Water Intake Structure v. U.S. Environmental Protection Agency*,
2 U.S. Court of Appeals for the Second Circuit, No. 14-4645 and consolidated cases].” *See* Exhibit G.
3 Sierra Club and NMFS are parties to the referenced *Cooling Water Intake Structure v. EPA* case in the
4 Second Circuit. The administrative record in that case was due on July 13, 2015 (and, indeed, was
5 filed on that date). Thus, the anticipated date of completion in NMFS’s March 4, 2015, email was
6 August 13, 2015.

7 45. In July 2015, NMFS informed Sierra Club that it would not complete its response to the
8 FOIA request by August 13, 2015, and that the new estimated completion date for the FOIA request
9 would be October 30, 2015.

10 46. On or about August 3, 2015, Sierra Club received a second partial production from
11 NMFS consisting of 353 documents. *See* Exhibit H.

12 47. On or about September 10, 2015, Sierra Club received a third partial production from
13 NMFS consisting of 73 documents. *See* Exhibit I.

14 48. On September 29, 2015, NMFS notified Sierra Club that it would be unable to complete
15 its response to the FOIA request by October 30, 2015, and anticipated providing a final release of
16 documents by January 31, 2016. *See* Exhibit J.

17 49. On November 2, 2015, Sierra Club received a fourth partial production consisting of
18 268 emails and attachments. In its November 2nd response, NMFS redacted 75 documents and
19 withheld 688 documents. *See* Exhibit K.

20 50. On or about November 13, 2015, Sierra Club submitted an administrative appeal to
21 NMFS concerning NMFS’s excessive and undue delay in complying with FOIA as well as NMFS’s
22 misuse of the deliberative process privilege to withhold responsive records. *See* Exhibit L.

23 51. The statutory deadline for responding to Sierra Club’s appeal was December 14, 2015,
24 *See* 5 U.S.C. § 552(a)(6)(A)(ii) (20 business days). NMFS did not timely respond to the appeal.

25 52. On or about December 11, 2015, Sierra Club received a fifth partial production
26 consisting of 268 emails and attachments. In its December 11th response, NMFS partially redacted
27 269 documents, fully redacted 212 documents, and withheld 392 documents. *See* Exhibit M.

28 53. More than sixteen months has now passed since NMFS received Sierra Club’s FOIA

1 request, NMFS has repeatedly extended the date by which it would complete production of documents
2 responsive to the request, has not completed its production, and has unlawfully redacted and withheld
3 responsive documents.

4 **E. FWS's Response.**

5 54. FWS's response to Sierra Club's request has been legally inadequate.

6 55. On or about January 8, 2016, after four interim releases of documents, FWS completed
7 its response to the FOIA request. Over the course of these productions, FWS produced some
8 documents, but partially denied Sierra Club's FOIA request by redacting 346 emails and withholding
9 attachments.

10 56. On or about January 8, 2016, FWS informed Sierra Club that it had 30 business days
11 (i.e., until February 19, 2016) to appeal the agency's response. *See* Exhibit N. On February 16, 2016,
12 Sierra Club timely appealed FWS's response to its FOIA request. *See* Exhibit O

13 57. The statutory deadline for responding to Sierra Club's appeal was March 15, 2016. *See*
14 5 U.S.C. § 552(a)(6)(A)(ii) (20 business days). FWS did not timely respond to the appeal.

15 **VI. CLAIMS FOR RELIEF**

16 **FIRST CAUSE OF ACTION**

17 **Failure to properly and timely comply with FOIA requirements**

18 **(Violation of FOIA, 5 U.S.C. §§ 552)**

19 58. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
20 Complaint as if fully set forth herein.

21 59. By failing to properly and timely respond to Sierra Club's August 11, 2014 FOIA
22 request and provide all records responsive thereto, NMFS has violated FOIA's mandate to release
23 agency records to the public. *See* 5 U.S.C. §§ 552(a)(3)(A) and (a)(6).

24 60. By failing to timely make a determination with respect to Sierra Club's February 16,
25 2016 appeal, FWS has violated FOIA's mandate to respond to appeals within 20 business days. *See* 5
26 U.S.C. § 552(a)(6)(A)(ii).

27 61. Defendants have wrongfully withheld the requested records from Sierra Club.

28 62. Sierra Club has exhausted any and all applicable administrative remedies.

1 63. Sierra Club is entitled to obtain the requested records immediately.

2 **SECOND CAUSE OF ACTION**

3 **Improperly withholding responsive records**

4 **(Violation of FOIA, 5 U.S.C. §§ 552)**

5 64. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
6 Complaint as if fully set forth herein.

7 65. Defendants have withheld documents, purportedly on the basis of FOIA exemptions,
8 without meeting their burden of establishing that the exemption applies.

9 66. Defendants have improperly withheld and redacted documents responsive to Sierra
10 Club's FOIA request that are not within the scope of the exemptions asserted by Defendants.

11 67. Defendants have wrongfully withheld requested records from Plaintiff.

12 68. Plaintiff has exhausted any and all applicable administrative remedies.

13 69. Sierra Club is entitled to obtain the requested records immediately.

14 **VII. RELIEF REQUESTED**

15 **WHEREFORE**, Plaintiff requests that this Court enter an order and judgment:

16 a. Declaring that Defendants have violated FOIA by failing to properly respond to
17 Plaintiff's FOIA request and provide all responsive records;

18 b. Declaring that Defendants have failed to comply with FOIA's statutory deadlines.

19 c. Ordering that Defendants immediately produce all requested records to Plaintiff
20 along with a "*Vaughn* index" of any records withheld under claim of exemption;

21 d. Ordering that Defendants produce any documents listed on its *Vaughn* index that the
22 Court determines are not exempt from FOIA;

23 e. Awarding Plaintiff its litigation costs and reasonable attorneys' fees in this action;

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f. Ordering such other and further relief as the Court may deem just and proper.

Dated: March 22, 2015

Respectfully submitted,
SUPER LAW GROUP, LLC.

By: s/ Reed W. Super
Reed W. Super
Attorney for Plaintiff
Sierra Club

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16 SIERRA CLUB, INC.

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19 SIERRA CLUB, INC.,
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21 Plaintiff,
22
23 v.
24 NATIONAL MARINE FISHERIES SERVICE,
25
26 Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Freedom of Information Act,
5 U.S.C. § 552 *et seq.*)

27 SIERRA CLUB, INC. (hereinafter “Sierra Club”), by and through its undersigned counsel,
28 hereby alleges:

I. NATURE OF THE CASE

1. Plaintiff asserts violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant National Marine Fisheries Service (“NMFS”), a federal agency situated within the United States Department of Commerce. NMFS has failed to produce records that Sierra Club requested under FOIA on August 11, 2014.

2. Sierra Club’s FOIA request concerns a formal consultation (hereinafter, the “ESA Consultation”) undertaken by NMFS under the Endangered Species Act (“ESA”) with respect to regulations promulgated by the U.S. Environmental Protection Agency (“EPA”) under Section 316(b)

1 of the Clean Water Act (hereinafter, the “316(b) Rule”). Section 316(b) requires regulatory standards
2 to minimize the adverse environmental impacts on fish and wildlife caused by cooling water intake
3 structures at existing power plants and other industrial facilities.

4 3. Industrial cooling water systems are, by far, the largest source of water withdrawals in
5 the United States, drawing trillions of gallons per year from America’s rivers, lakes, and oceans. The
6 enormous volume and force of these water withdrawals kills and injures billions of fish and other
7 aquatic organisms each year, including many federally-listed threatened and endangered species, and
8 damages the broader ecosystem.

9 4. More than 16 months after receiving the FOIA request, and long past FOIA’s statutory
10 deadline, NMFS has still not completed its production of responsive documents. NMFS has repeatedly
11 unilaterally extended its estimated date of completion. Further, NMFS’s interim productions have
12 withheld records that Sierra Club contends it is entitled to under FOIA.

13 5. As a result of NMFS’s failures, Sierra Club is being deprived of critical information
14 regarding the government’s development of the 316(b) Rule and the measures for protecting threatened
15 and endangered species from intake structures.

16 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

17 6. This Court has jurisdiction “to enjoin the agency from withholding agency records and
18 to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §
19 552(a)(4)(B).

20 7. Venue is proper in this District because Plaintiff’s principal places of business are
21 located in this District. 5 U.S.C. § 552(a)(4)(B).

22 8. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is
23 appropriate because Plaintiff Sierra Club is incorporated in California and resides and maintains its
24 headquarters in San Francisco County.

25 **III. PARTIES**

26 9. Plaintiff Sierra Club was founded in 1892 and is the nation’s oldest grass-roots
27 environmental organization. The Sierra Club is a national nonprofit organization that is incorporated in
28 California and has its headquarters in San Francisco, California. It has more than one million members

1 and supporters, including thousands of members in California. The Sierra Club is dedicated to the
2 protection and preservation of the natural and human environment, including protecting threatened and
3 endangered species and their habitat. The Sierra Club’s purpose is to explore, enjoy and protect the
4 wild places of the earth; to practice and promote the responsible use of the earth’s ecosystem and
5 resources; and to educate and enlist humanity to protect and restore the quality of the natural and
6 human environments.

7 10. Defendant National Marine Fisheries Service, also known as “NOAA Fisheries” is a
8 federal agency within the National Oceanic and Atmospheric Administration within the United States
9 Department of Commerce, which is subject to the requirements of FOIA and has possession or control
10 of records that Plaintiff seeks in this action.

11 **IV. STATUTORY AND REGULATORY BACKGROUND**

12 11. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning
13 of a democratic society, needed to check against corruption and to hold the governors accountable to
14 the governed.” *NRLB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In other words, as the
15 Supreme Court has declared, “FOIA is often explained as a means for citizens to know what the
16 Government is up to.” *Nat’l Archive & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal
17 quotations and citations omitted).

18 12. In particular, FOIA requires agencies of the federal government to release, upon request,
19 information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. §
20 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of
21 establishing the applicability of each exemption as to each document for which it is claimed.

22 13. Upon receiving a FOIA request, an agency has twenty working days to respond by
23 determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. §
24 552(a)(6)(A).

25 14. FOIA allows an agency to delay an initial response for ten working days – but only ten
26 working days – past the statutory deadline, if the agency can demonstrate that it faces “unusual
27 circumstances” in responding to the request. 5 U.S.C. § 552(a)(6)(B). “Unusual circumstances”
28 include the need to search for and collect requested documents from other offices, the need to

1 appropriately examine a voluminous amount of separate and distinct records, and the need to consult
2 with another agency. 5 U.S.C. § 552(a)(6)(B)(iii)(I-III). Even under “unusual circumstances,”
3 however, an agency must provide notice of the delay and also provide “the date on which a
4 determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i).

5 15. The agency must provide information about the status of the request including “an
6 estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii).
7 This date and other information about the status of the request must be available through a telephonic
8 line or internet service established by the agency. *Id.*

9 16. When an agency denies, in whole or in part, a request for records under FOIA, the
10 agency must make a “reasonable effort to estimate the volume of any requested matter the provision of
11 which is denied, and shall provide any such estimate to the person making the request.” 5 U.S.C. §
12 552(a)(6)(F).

13 17. FOIA expressly provides that a requester “shall be deemed to have exhausted his
14 administrative remedies . . . if the agency fails to comply with the applicable time limit provisions”
15 governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

16 **V. STATEMENT OF FACTS**

17 **A. Cooling Water Intake Structures Kill Billions of Fish Every Year.**

18 18. Power plants and other industrial facilities use cooling water intake structures to
19 withdraw massive volumes of water for cooling. Collectively, the nation’s industrial cooling systems
20 withdraw more water than is used for municipal water supplies and irrigated agriculture combined.

21 19. The largest plants in the country can draw enough water from a river to fill an Olympic
22 swimming pool in less than 30 seconds. It is no wonder, then, that every year, hundreds of billions of
23 juvenile fish, larvae, eggs and other aquatic organisms – including the young of many threatened and
24 endangered species – are trapped and killed by the incredibly powerful pumps at such facilities.

25 20. The withdrawal of cooling from natural water bodies causes multiple types of
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1 undesirable adverse environmental impacts, including but not limited to entrainment¹ and
 2 impingement;² reductions of threatened, endangered or other protected species; damage to critical
 3 aquatic organisms, including important elements of the food chain; diminishment of fish population's
 4 compensatory reserve; losses to populations including reductions of indigenous species populations and
 5 commercial and recreational fishery stocks; and stresses to overall communities and ecosystems.

6 21. By EPA's highly conservative estimates, industrial cooling water withdrawals annually
 7 result in the death of at least 2.2 billion age one-equivalent fish, crabs, and shrimp, and a minimum of
 8 528 billion eggs and larvae that serve as the basis of the aquatic food chain. In many cases, the toll on
 9 fisheries by power plants rivals or exceeds that of the fishing industry. These withdrawals also destroy
 10 individuals from at least 266 federally-listed threatened and endangered species, and adversely impact
 11 the designated critical habitat of certain protected species.

12 22. "The environmental impact of these systems is staggering: A single power plant might
 13 impinge a million adult fish in just a three-week period, or entrain some 3 to 4 billion smaller fish and
 14 shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem." *Riverkeeper, Inc.*
 15 *v. U.S. EPA*, 358 F.3d 174, 181 (2d Cir. 2004).

16 **B. EPA's Regulations and the Endangered Species Act Consultation.**

17 23. In the Clean Water Act of 1972, Congress ordered EPA to minimize the devastating
 18 environmental impacts that cooling water intake structures have on America's waters by setting
 19 nationally uniform and binding regulations. *See CWA Section 316(b); 33 U.S.C. § 1326(b).*

20 24. In 2001, 2004 and 2006 EPA promulgated Section 316(b) regulations that were
 21 challenged and upheld in part and remanded in part. *See Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174
 22 (2d Cir. 2004) ("*Riverkeeper I*"); *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007)
 23 ("*Riverkeeper II*"); *ConocoPhillips Co. v. EPA*, 612 F.3d 822 (5th Cir. 2010).

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 25 _____
 26 ¹ *Entrainment* refers to the extracting of fish eggs and larvae and other small organisms from a source
 waterbody into and through a power plant's cooling system, where they are killed or injured by
 thermal, physical and chemical shocks.

27 ² *Impingement* refers to the trapping of adult and juvenile fish and other large aquatic organisms,
 28 including sea turtles and marine mammals, on the screens of an intake structure, which can kill or
 injure those animals through asphyxiation, descaling and other harms.

1 25. In 2007, EPA suspended the regulations that were remanded in large part by the Second
2 Circuit in *Riverkeeper II*. 72 Fed. Reg. 37,107, 37,108 (July 9, 2007).

3 26. On remand from the circuit courts, in 2011, EPA proposed new Section 316(b)
4 regulations for existing facilities and revised its regulations for new facilities.

5 27. On June 18, 2013, EPA initiated the formal ESA Consultation with NMFS and the U.S.
6 Fish and Wildlife Service following comments by environmental groups, including Sierra Club, that
7 EPA must undertake such consultation.

8 28. The ESA Consultation concluded approximately eleven months later, on May 19, 2014,
9 with the Services' release of a programmatic biological opinion on EPA's issuance and implementation
10 of the 316(b) Rule ("Biological Opinion").

11 29. On May 19, 2014, the EPA Administrator signed the final 316(b) Rule, entitled *National*
12 *Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling*
13 *Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities* (EPA-
14 HQ-OW-2008-0667).

15 30. EPA published the 316(b) Rule in the Federal Register on August 15, 2014.

16 **C. The FOIA Request.**

17 31. On August 11, 2014, Sierra Club submitted a FOIA request to NMFS asking that it
18 make available for inspection and copying eight categories of records relating to the 316(b) Rule,
19 Biological Opinion and ESA Consultation. *See* Exhibit A.

20 **D. NMFS's Response.**

21 32. NMFS's response to Sierra Club's request has been wholly inadequate.

22 33. On August 13, 2014, NMFS mailed an initial response acknowledging receipt of Sierra
23 Club's August 11, 2014, request and assigned that request a tracking number, FOIA# DOC-NOAA-
24 2014-001474. *See* Exhibit B.

25 34. On August 27, 2014, counsel for the parties conferred regarding the scope of the
26 request.

27 35. On September 8, 2014, Sierra Club agreed to narrow the scope of the request to exclude
28 records containing routine administrative matters and personally identifiable information. *See* Exhibit

1 C.

2 36. On September 25, 2014, Sierra Club received an email from NMFS estimating that the
3 “earliest [NMFS] can provide a response is November 21[, 2014].” *See* Exhibit D.

4 37. Having received no records from NMFS, on December 3, 2014, Sierra Club requested a
5 status update from NMFS.

6 38. On December 11, 2014, NMFS responded that it was not able to provide an estimated
7 date of completion, but “anticipate[d] being able to provide a date certain for providing our response”
8 by the end of January 2015. *See* Exhibit E.

9 39. After January 2015 passed with no information from NMFS, on February 24, 2015,
10 Sierra Club requested a status update from NMFS, followed by another request for a status update on
11 March 4, 2015.

12 40. On March 3, 2015, more than six months after Sierra Club submitted its FOIA request,
13 NMFS released the first production of responsive records, which was composed of only five documents
14 totaling 51 pages.

15 41. On March 4, 2015, after a telephone conversation between the parties, counsel for
16 NMFS sent Sierra Club an email stating that “review of the documents responsive to the FOIA request
17 will occur in conjunction with the preparation of the administrative record in the pending litigation
18 We anticipate being able to provide a final response approximately one month after the filing of the
19 administrative record [in *Cooling Water Intake Structure v. U.S. Environmental Protection Agency*,
20 U.S. Court of Appeals for the Second Circuit, No. 14-4645 and consolidated cases].” *See* Exhibit F.
21 Sierra Club and NMFS are parties to the referenced *Cooling Water Intake Structure v. EPA* case in the
22 Second Circuit. The administrative record in that case was due on July 13, 2015 (and, indeed, was
23 filed on that date). Thus, the anticipated date of completion in NMFS’s March 4, 2015, email was
24 August 13, 2015.

25 42. In July 2015, NMFS informed Sierra Club that it would not complete its response to the
26 FOIA request by August 13, 2015, and that the new estimated completion date for the FOIA request
27 would be October 30, 2015.

28 43. On or about August 3, 2015, Sierra Club received a second partial production from

1 NMFS consisting of 353 documents. *See* Exhibit G.

2 44. On or about September 10, 2015, Sierra Club received a third partial production from
3 NMFS consisting of 73 documents. *See* Exhibit H.

4 45. On September 29, 2015, NMFS notified Sierra Club that it would be unable to complete
5 its response to the FOIA request by October 30, 2015, and anticipated providing a final release of
6 documents by January 31, 2016. *See* Exhibit I.

7 46. On November 2, 2015, Sierra Club received a fourth partial production consisting of
8 268 emails and attachments. In its November 2nd response, NMFS redacted 75 documents and
9 withheld 688 documents. *See* Exhibit J.

10 47. On or about November 13, 2015, Sierra Club submitted an administrative appeal to
11 NMFS concerning NMFS's excessive and undue delay in complying with FOIA as well as NMFS's
12 misuse of the deliberative process privilege to withhold responsive records. *See* Exhibit K.

13 48. The statutory deadline for responding to Sierra Club's appeal was December 14, 2015,
14 *See* 5 U.S.C. § 552(a)(6)(A)(ii) (agencies must respond to appeals within 20 business days). NMFS did
15 not timely respond to the appeal.

16 49. On or about December 11, 2015, Sierra Club received a fifth partial production
17 consisting of 268 emails and attachments. In its December 11th response, NMFS partially redacted
18 269 documents, fully redacted 212 documents, and withheld 392 documents. *See* Exhibit L.

19 50. More than sixteen months has now passed since NMFS received Sierra Club's FOIA
20 request, NMFS has repeatedly extended the date by which it would complete production of documents
21 responsive to the request, has not completed its production, and has unlawfully redacted and withheld
22 responsive documents.

23 **VI. CLAIMS FOR RELIEF**

24 **FIRST CAUSE OF ACTION**

25 **Failure to properly and timely respond to FOIA request**

26 **(Violation of FOIA, 5 U.S.C. §§ 552)**

27 51. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
28 Complaint as if fully set forth herein.

1 52. By failing to properly and timely respond to Sierra Club's August 11, 2014, FOIA
2 request and provide all records responsive thereto, NMFS has violated FOIA's mandate to release
3 agency records to the public. *See* 5 U.S.C. §§ 552(a)(3)(A) and (a)(6).

4 53. NMFS has wrongfully withheld the requested records from Sierra Club.

5 54. Sierra Club has exhausted any and all applicable administrative remedies.

6 55. Sierra Club is entitled to obtain the requested records immediately.

7 **SECOND CAUSE OF ACTION**

8 **Improperly withholding responsive records**

9 **(Violation of FOIA, 5 U.S.C. §§ 552)**

10 56. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
11 Complaint as if fully set forth herein.

12 57. NMFS has withheld documents, purportedly on the basis of a FOIA exemption, without
13 meeting its burden of establishing that the exemption applies.

14 58. NMFS has improperly withheld and redacted documents responsive to Sierra Club's
15 FOIA request that are not within the scope of the exemption asserted by NMFS.

16 59. NMFS has wrongfully withheld requested records from Plaintiff.

17 60. Plaintiff has exhausted any and all applicable administrative remedies.

18 61. Sierra Club is entitled to obtain the requested records immediately.

19 **VII. RELIEF REQUESTED**

20 **WHEREFORE**, Plaintiff requests that this Court enter an order and judgment:

21 a. Declaring that Defendant NMFS has violated FOIA by failing to properly respond to
22 Plaintiff's FOIA request and provide all responsive records;

23 b. Declaring that Defendant NMFS has failed to comply with FOIA's statutory
24 deadlines.

25 c. Ordering that Defendant NMFS immediately produce all requested records to
26 Plaintiff along with a "*Vaughn* index" of any records withheld under claim of exemption;

27 d. Ordering that Defendant NMFS produce any documents listed on its *Vaughn* index
28 that the Court determines are not exempt from FOIA;

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e. Awarding Plaintiff its litigation costs and reasonable attorneys' fees in this action;

and

f. Ordering such other and further relief as the Court may deem just and proper.

Dated: December 21, 2015

Respectfully submitted,
SUPER LAW GROUP, LLC.

By: s/ Reed W. Super
Reed W. Super
Attorney for Plaintiff
Sierra Club

Exhibit A

August 11, 2014

VIA ELECTRONIC MAIL AND FACSIMILE

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910
Fax: (301) 713-4040
FOIA@noaa.gov

**Re: Freedom of Information Act Request - Endangered Species Act Section 7
Consultation Programmatic Biological Opinion on the U.S.
Environmental Protection Agency's Issuance and Implementation of
Final Regulations Under Section 316(b) of the Clean Water Act**

Dear NMFS FOIA Officer:

On behalf of Sierra Club, I am writing to request that the National Marine Fisheries Service (NMFS) and/or the National Oceanic and Atmospheric Administration (NOAA) provide copies of the records described below pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. If this request should be directed elsewhere, please forward this request as needed.

The Sierra Club is the nation's oldest environmental organization. It has more than two million members, supporters, and donors nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club is committed to solving the pressing environmental and health problems associated with the mining, burning, and disposal of coal and its combustion by-products.

Documents Requested:

- (1) All NMFS drafts of all or portions of the Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act (the "BiOp"), Incidental Take Statement and its appendices;

- (2) All documents¹ exchanged between NMFS staff and within NOAA, and between NOAA/NMFS and the Environmental Protection Agency (EPA), or any other governmental agency or official, during interagency review of, and concerning, drafts of the BiOp and/or Incidental Take Statement;
- (3) All documents between NMFS staff and within NOAA, and between NOAA/NMFS and EPA, or any other governmental agency or official, concerning the ESA section 7 consultation on EPA's most recently proposed 316(b) rule;
- (4) All documents serving as the basis for, or which were considered by, NOAA and/or NMFS in connection with its "no jeopardy" and/or "no adverse modification" of critical habitat findings on the ESA section 7 consultation for the most recently proposed 316(b) rule; including but not limited to:
 - a) any and all data, documents, communications and records pertaining to all species of sturgeon, and any opinions by NMFS staff or others on potential impacts to sturgeon;
 - b) any and all data, documents, communications and records of any type reflecting any changes to NMFS' opinions or conclusions concerning its jeopardy determinations for sturgeon or any other species;
 - c) any and all identification by NMFS of any requirements that would have to be met to avoid jeopardy findings for sturgeon or any other species, whether or not it was included in the final BiOp or Incidental Take Statement;
 - d) any draft or proposed jeopardy opinion that was sent by NMFS to the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, or any other agency, for the sturgeon or any other species;
- (5) If not otherwise produced in response to the sections above, all documents or communications of every type between NOAA and/or NMFS and the Office of Management and Budget and/or the Council on Environmental Quality, and any of the agencies' personnel, concerning the ESA section 7 consultation on the 316(b) rule, including but not limited to any records of telephone conversations, emails or meetings between the agencies or their personnel on this subject, any

¹ The terms "document," "record" or "communication" as used herein encompass any and all that are located at any level of the agency, and include without limitation, any writing, as well as all papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, paper documents, electronic mail, memoranda, notes, including telephonic or in-person meeting notes, records of discussions, guidelines, internal policy documents and inter-agency communications and intra-agency communications without exception.

draft (full or partial) BiOp or Incidental Take Statements between NMFS, OMB and/or CEQ on this subject;

- (6) If not otherwise produced in response to the sections above, all documents or communications of every type between NOAA and/or NMFS and the U.S. Fish and Wildlife Service, and any of the agencies' personnel, concerning the ESA section 7 consultation on the 316(b) rule, including but not limited to:
 - a) all communications between NMFS and the FWS with subject lines including the terms 316(b) or Cooling Water Intake;
 - b) all communications between the Protected Resources Division of NMFS and Drew Crane at FWS
- (7) All documents between NMFS staff and between NMFS and EPA, or any other governmental agency or official, concerning any ESA section 7 consultation on EPA's previously proposed 316(b) rule(s), including for new sources as well as existing sources;
- (8) All documents exchanged and all documents related to any meetings, telephone conversations, emails, or any other communications between NOAA and/or NMFS and the utility (i.e., electric generation) industry or manufacturing industry, representatives of the utility or manufacturing industries, trade groups, special interest groups, and/or other non-governmental parties relating to the ESA section 7 consultation on the 316(b) rule.

* * * * *

In connection with this FOIA request, I also request the following:

- (1) If there are any records responsive to this request that can be emailed to me in electronic form, please do so to Legal Assistant Stephanie Hsiung at the Sierra Club, stephanie.hsiung@sierraclub.org.
- (2) If there are any records that are in electronic form but cannot be emailed, please let me know whether they can be copied onto a CD and sent to me via U.S. Mail.
- (3) If there are any records responsive to this request that cannot be emailed to me or copied onto a CD and sent to me via U.S. Mail, please contact me and let me know how many pages the remaining documents encompass and any charge for those pages.

Exempt Records:

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Sierra Club to appeal the denial, in accordance with *Vaughn v. Rosen*² and related cases. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

Further, if you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them anyway. As you know, on his first full day in office, President Obama declared a “New Era of Open Government” and issued a memorandum to the heads of all agencies directing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”³ Agencies were directed to “adopt a presumption in favor of disclosure” and to apply that presumption “to all decisions involving FOIA.”⁴ Attorney General Holder’s FOIA Guidelines explain that the presumption of openness called for by the President means that information should not be withheld “simply because [an agency] may do so legally.” The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”⁵

Request for Expedited Processing:

FOIA provides that each agency shall provide for expedited processing of records where there is a “compelling need.”⁶ Department of Commerce’s FOIA regulations state that “requests and appeals shall be taken out of order and given expedited treatment whenever it is determined that they involve...[a]n urgency to inform the public about an actual or alleged Federal

² 484 F.2d 820 (D.C. Cir. 1973).

³ President’s FOIA Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009. 74 Fed. Reg. at 4,683 (Jan. 26, 2009).

⁴ *Id.*

⁵ Attorney General’s FOIA Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009. Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

⁶ 5 U.S.C. § 552(a)(6)(E)(i); *see also* 5 U.S.C. § 552(a)(6)(E)(v) (statutory definition of “compelling need”).

Government activity, if made by a person primarily engaged in disseminating information.”⁷ In this case, employees of Requesters are persons primarily engaged in disseminating information to the public, and there is an urgent need to inform the public about the Federal government’s decision-making process and consideration of threatened and endangered species and critical habitat and impacts related to implementation for the final regulations for Section 316(b) of the Clean Water Act.

As the Section 316(b) regulations go into effect, state environmental regulators will be called upon to determine the best technology available (BTA) for minimizing adverse environmental impact at cooling water intake structures at approximately 1,200 in-scope facilities. There is a compelling need for Requesters to have access to the requested records in time for them to inform the public about the benefits of cooling water intake structure regulation so that they can provide information to state agencies (and EPA’s regional offices in non-delegated states) regarding implementation of the Section 316(b) regulations. If NMFS does not expedite the processing of this request and disclose these records promptly to Requesters, it will have prevented Requesters from disseminating information to the public on the implementation of the cooling water intake structure rule in a prompt and useful manner.

Fee Waiver Request:

Sierra Club requests that NMFS waive all fees associated with responding to this request. As noted above, Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Indeed, Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

FOIA dictates that requested records be provided without charge or at a reduced charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”⁸ As explained below, the requested disclosure would meet both of these requirements because Requesters’ request complies with each of the factors agencies and courts consider in making fee waiver determinations.⁹ In addition, Requesters qualify as “representative[s] of the news media” entitled to a reduction of fees under the FOIA.¹⁰

⁷ 15 C.F.R. § 4.6(e)(iv).

⁸ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11(k).

⁹ The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.*, Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *see also* *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11.

A. Disclosure is in the Public Interest.

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.”¹¹ Specifically, as we discuss immediately below in subsections IV.A.1-4, the requested disclosure would satisfy the elements identified in Department of Commerce’s FOIA Regulations¹² and in the U.S. Department of Justice’s Fee Waiver Policy Guidance.

1. The request concerns the operations or activities of the government.

The requested records concern “the operations or activities of the government.”¹³ NMFS is responsible for ensuring that actions that Federal agencies authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. One way in which NMFS accomplishes this goal is to engage in formal consultation with Federal agencies whose actions may jeopardize listed species. Records regarding NMFS’s review of the potential and probable impacts on threatened and endangered species from the Final Regulations under Section 316(b) of the Clean Water Act plainly concern the operations or activities of government.

2. The disclosure is likely to contribute to an understanding of government operations and activities.

The requested records are “likely to contribute” to public understanding of the activities described above.¹⁴ The FOIA Guide makes it clear that, in the Department of Justice’s view, this determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain, as is the case here. The materials Sierra Club requests will contribute meaningfully to public understanding of government activities, specifically NMFS’ findings and consideration of the Final Regulations under Section 316(b) of the Clean Water Act’s impacts on listed species and critical habitat.

Since the BiOp is now complete, the requested records will shed light on a more complete assessment of the impacts by cooling water intake structures on threatened and endangered species and their critical habitat.

¹¹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹² See 15 C.F.R. § 4.11.

¹³ 15 C.F.R. § 4.11(k)(2)(i).

¹⁴ 15 C.F.R. § 4.11(k)(2)(ii).

- 3. The information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester – i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public – is examined.**

Disclosure of these records will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”¹⁵ Sierra Club and its members have a longstanding interest and expertise in the subject of power plants. More importantly, the Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to digest and disseminate such information to the public quickly, through numerous and varied publications, including Sierra Magazine which is nationally distributed, Sierra Club websites and social media, educational programs, media initiatives, and public interest litigation. Sierra Club routinely uses FOIA to obtain information from federal agencies that Sierra Club legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality.

- 4. The information will contribute “significantly” to public understanding of government operations or activities.**

Disclosure of the requested documents is “likely to contribute significantly to public understanding,”¹⁶ because Requesters intend to disseminate any newsworthy information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. As Sierra Club’s long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, Requesters are well prepared to convey to the public any relevant information it obtains through this records request.

None of the materials requested are now widely known (if they have been made public at all), yet they are essential to evaluating EPA’s Section 316(b) rulemaking, the benefits of that rulemaking, the implementation of the final regulations, how endangered and threatened species will be impacted, and the benefits of installing the best technology available for minimizing the adverse environmental impacts of cooling water intake structures at existing facilities. As discussed above, these materials will allow the public and independent experts to critically evaluate the benefits of intake structure regulations and the Requesters to disseminate an informed understanding of the government’s decision-making process and potential impacts of the implementation of the regulations.

Therefore, the public’s understanding of the subject in question, as compared to the level

¹⁵ 15 C.F.R. § 4.11(k)(2)(iii).

¹⁶ 5 U.S.C. § 552(a)(4)(iii); 15 C.F.R. § 4.11(k)(2)(iv).

of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.¹⁷

B. Requesters have no Commercial Interest in this Information.

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Requesters do not have any commercial interest that would be furthered by the requested disclosure.¹⁸ Sierra Club is a not-for-profit organization and, as such, has no commercial interest.¹⁹ “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”²⁰ Requesters’ interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about NMFS’ evaluation of EPA’s Final Regulations under Section 316(b) of the CWA.

For all of the foregoing reasons, a fee waiver is warranted here.

C. Requesters are Media Requesters.

Even if NMFS were to deny a public interest waiver of all costs and fees, Requesters should be considered representatives of the news media entitled to a reduction of fees under FOIA and the Department of Commerce’s FOIA regulations.²¹ Under FOIA, a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”²²

Sierra Club publishes a bi-monthly magazine, SIERRA, which has over 500,000 subscribers; issues electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public.

As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of Requesters’ publications or other suitable media channels.

¹⁷ 15 C.F.R. § 4.11(k)(2)(iv).

¹⁸ 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(k)(3)(i).

¹⁹ 15 C.F.R. § 4.11(k)(3)(i).

²⁰ *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 15 C.F.R. § 4.11(c)(1).

²² 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep’t of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

Record Delivery:

Please provide the records above irrespective of the status and outcome of your evaluation of Requesters' fee category assertion and fee waiver request. In order to prevent delay in NMFS' provision of the requested records, Requesters state that they will, if necessary and under protest, pay fees in accordance with Department of Commerce's FOIA regulations.²³ Please consult with us, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of Requesters' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

* * * * *

I believe this request reasonably describes identifiable records and I am aware of no express provision of law exempting the records from disclosure. In particular, documents exchanged between NMFS and EPA plainly do not fall within the FOIA exclusion for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Under EO 12866, NMFS is obligated by law to release these particular inter-agency memoranda and letters to the public (*see* § 6(b)(4)(D)) and thus the Executive has waived any claim of privilege.

Given the plain requirements of Executive Order 12866 and FOIA § 552(a)(6)(A), we request that you make the referenced documents available, or respond in writing to explain your failure to do so, as soon as possible but in no case later than twenty days from the date of this request.

I hope that you will be able to provide me with the requested materials at the earliest possible date. If there is anything I can do to facilitate this request, do not hesitate to call me at (303) 449-5595 ext. 101.

Thank you for your attention to this matter.

²³ 15 C.F.R. § 4.11.

Sierra Club Environmental Law Program
1650 38th St. Ste. 102W
Boulder, CO 80301
(303) 449-5595 ext. 101
(303) 449-6520 (fax)

cc:

Michael E. Justen, NMFS FOIA Officer
1315 East-West Highway
Silver Spring, MD 20910
phone: (301) 713-1364, x147
fax: (301) 713-1441
e-mail: mike.justen@noaa.gov

Exhibit B

August 11, 2014

VIA ELECTRONIC MAIL AND FACSIMILE

Melissa Allen
FWS FOIA Officer
Division of Information Resources and Technology Management
5275 Leesburg Pike
MS:IRTM
Falls Church, VA 22041
Phone: 703-358-2470
Fax: 703-358-2251
fwhq_foia@fws.gov

Re: **Freedom of Information Act Request - Endangered Species Act
Section 7 Consultation Programmatic Biological Opinion on the U.S.
Environmental Protection Agency's Issuance and Implementation of
Final Regulations Under Section 316(b) of the Clean Water Act**

Dear FWS FOIA Officer Allen:

On behalf of Sierra Club, I am writing to request that the U.S. Fish and Wildlife Service (FWS) provide copies of the records described below pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This request is sent to you because you were identified as the proper person to receive such requests. If this request should be directed to another person, please forward this request to that person.

The Sierra Club is the nation's oldest environmental organization. It has more than two million members, supporters, and donors nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club is committed to solving the pressing environmental and health problems associated with the mining, burning, and disposal of coal and its combustion by-products.

Documents Requested:

- (1) All FWS drafts of all or portions of the Endangered Species Act (ESA) Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act (the "BiOp"), Incidental Take Statement and its appendices;

- (2) All documents¹ exchanged between FWS staff and between FWS and the Environmental Protection Agency (EPA), or any other governmental agency or official, during interagency review of, and concerning, drafts of the BiOp and/or Incidental Take Statement;
- (3) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning the ESA section 7 consultation on EPA's most recent 316(b) rule;
- (4) All documents serving as the basis for, or which were considered by, the FWS in connection with its "no jeopardy" and/or "no adverse modification" of critical habitat findings on the ESA section 7 consultation for the most recently proposed 316(b) rule;
- (5) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning any ESA section 7 consultation on EPA's previously proposed 316(b) rule(s), including for new sources as well as existing sources; and
- (6) All documents exchanged and all documents related to any meetings, telephone conversations, emails, or any other communications between FWS and the utility (i.e., electric generation) industry or manufacturing industry, representatives of the utility or manufacturing industries, trade groups, special interest groups, and/or other non-governmental parties relating to the ESA section 7 consultation on the 316(b) rule;

* * * * *

In connection with this FOIA request, I also request the following:

- (1) If there are any records responsive to this request that can be emailed to me in electronic form, please do so to Legal Assistant Stephanie Hsiung at the Sierra Club, stephanie.hsiung@sierraclub.org.
- (2) If there are any records that are in electronic form but cannot be emailed, please let me know whether they can be copied onto a CD and sent to me via U.S. Mail.

¹ The terms "document," "record" or "communication" as used herein encompass any and all that are located at any level of the agency, and include without limitation, any writing, as well as all papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, paper documents, electronic mail, memoranda, notes, including telephonic or in-person meeting notes, records of discussions, guidelines, internal policy documents and inter-agency communications and intra-agency communications without exception.

- (3) If there are any records responsive to this request that cannot be emailed to me or copied onto a CD and sent to me via U.S. Mail, please contact me and let me know how many pages the remaining documents encompass and any charge for those pages.

Exempt Records:

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Sierra Club to appeal the denial, in accordance with *Vaughn v. Rosen*² and related cases. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

Further, if you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them anyway. As you know, on his first full day in office, President Obama declared a “New Era of Open Government” and issued a memorandum to the heads of all agencies directing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”³ Agencies were directed to “adopt a presumption in favor of disclosure” and to apply that presumption “to all decisions involving FOIA.”⁴ Attorney General Holder’s FOIA Guidelines explain that the presumption of openness called for by the President means that information should not be withheld “simply because [an agency] may do so legally.” The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”⁵

² 484 F.2d 820 (D.C. Cir. 1973).

³ President’s FOIA Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009. 74 Fed. Reg. at 4,683 (Jan. 26, 2009).

⁴ *Id.*

⁵ Attorney General’s FOIA Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009. Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

Request for Expedited Processing:

FOIA provides that each agency shall provide for expedited processing of records where there is a “compelling need.”⁶ Department of Interior’s FOIA regulations state that the “bureau will provide expedited processing upon request if you demonstrate to the satisfaction of the bureau that there is a compelling need for the records” such as “an urgency to inform the public about an actual or alleged Federal government activity and the request is made by a person primarily engaged in disseminating information.”⁷ In this case, employees of Requesters are persons primarily engaged in disseminating information to the public, and there is an urgent need to inform the public about the Federal government’s decision-making process and consideration of threatened and endangered species and critical habitat and impacts related to implementation for the final regulations for Section 316(b) of the Clean Water Act.

As the Section 316(b) regulations go into effect, state environmental regulators will be called upon to determine the best technology available (BTA) for minimizing adverse environmental impact at cooling water intake structures at approximately 1,200 in-scope facilities. There is a compelling need for Requesters to have access to the requested records in time for them to inform the public about the benefits of cooling water intake structure regulation so that they can provide information to state agencies (and EPA’s regional offices in non-delegated states) regarding implementation of the Section 316(b) regulations. If FWS does not expedite the processing of this request and disclose these records promptly to Requesters, it will have prevented Requesters from disseminating information to the public on the implementation of the cooling water intake structure rule in a prompt and useful manner.

Fee Waiver Request:

Sierra Club requests that FWS waive all fees associated with responding to this request. As noted above, Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Indeed, Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

FOIA dictates that requested records be provided without charge or at a reduced charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”⁸ As

⁶ 5 U.S.C. § 552(a)(6)(E)(i).

⁷ 43 C.F.R. § 2.20(a)(2); *see also* 5 U.S.C. § 552(a)(6)(E)(v) (statutory definition of “compelling need”).

⁸ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a).

explained below, the requested disclosure would meet both of these requirements because Requesters' request complies with each of the factors agencies and courts consider in making fee waiver determinations.⁹ In addition, Requesters qualify as "representative[s] of the news media" entitled to a reduction of fees under the FOIA.¹⁰

A. Disclosure is in the Public Interest.

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government."¹¹ Specifically, as we discuss immediately below in subsections IV.A.1-4, the requested disclosure would satisfy the elements identified in Department of Interior's FOIA Regulations¹² and in the U.S. Department of Justice's Fee Waiver Policy Guidance.

1. The request concerns the operations or activities of the government.

The requested records concern "the operations or activities of the government."¹³ FWS is responsible for ensuring that actions that Federal agencies authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. One way in which FWS accomplishes this goal is to engage in formal consultation with Federal agencies whose actions may jeopardize listed species. Records regarding FWS's review of the potential and probable impacts on threatened and endangered species from the Final Regulations under Section 316(b) of the Clean Water Act plainly concern the operations or activities of government.

2. The disclosure is likely to contribute to an understanding of government operations and activities.

The requested records are "likely to contribute" to public understanding of the activities described above.¹⁴ The FOIA Guide makes it clear that, in the Department of Justice's view, this determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain, as is the case

⁹ The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.*, Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *see also* *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.70.

¹¹ 5 U.S.C. § 552(a)(4)(A)(iii).

¹² *See* 43 C.F.R. § 2.45.

¹³ 43 C.F.R. § 2.45(b).

¹⁴ 43 C.F.R. § 2.45(a)(1).

here. The materials Sierra Club requests will contribute meaningfully to public understanding of government activities, specifically FWS's findings and consideration of the Final Regulations under Section 316(b) of the Clean Water Act's impacts on listed species and critical habitat.

Since the BiOp is now complete, the requested records will shed light on a more complete assessment of the impacts by cooling water intake structures on threatened and endangered species and their critical habitat.

- 3. The information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester – i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public – is examined.**

Disclosure of these records will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”¹⁵ Sierra Club and its members have a longstanding interest and expertise in the subject of power plants. More importantly, the Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to digest and disseminate such information to the public quickly, through numerous and varied publications, including Sierra Magazine which is nationally distributed, Sierra Club websites and social media, educational programs, media initiatives, and public interest litigation. Sierra Club routinely uses FOIA to obtain information from federal agencies that Sierra Club legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality.

- 4. The information will contribute “significantly” to public understanding of government operations or activities.**

Disclosure of the requested documents is “likely to contribute significantly to public understanding,”¹⁶ because Requesters intend to disseminate any newsworthy information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. As Sierra Club's long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, Requesters are well prepared to convey to the public any relevant information it obtains through this records request.

¹⁵ 43 C.F.R. § 2.48(a)(2)(iii).

¹⁶ 5 U.S.C. § 552(a)(4)(iii); 43 C.F.R. § 2.45(b).

None of the materials requested are now widely known (if they have been made public at all), yet they are essential to evaluating EPA's Section 316(b) rulemaking, the benefits of that rulemaking, the implementation of the final regulations, how endangered and threatened species will be impacted, and the benefits of installing the best technology available for minimizing the adverse environmental impacts of cooling water intake structures at existing facilities. As discussed above, these materials will allow the public and independent experts to critically evaluate the benefits of intake structure regulations and the Requesters to disseminate an informed understanding of the government's decision-making process and potential impacts of the implementation of the regulations.

Therefore, the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.¹⁷

B. Requesters have no Commercial Interest in this Information.

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Requesters do not have any commercial interest that would be furthered by the requested disclosure.¹⁸ Sierra Club is a not-for-profit organization and, as such, has no commercial interest.¹⁹ "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"²⁰ Requesters' interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about FWS's evaluation of EPA's Final Regulations under Section 316(b) of the CWA.

For all of the foregoing reasons, a fee waiver is warranted here.

C. Requesters are Media Requesters.

Even if FWS were to deny a public interest waiver of all costs and fees, Requesters should be considered representatives of the news media entitled to a reduction of fees under FOIA and the Department of Interior's FOIA regulations.²¹ Under FOIA, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw

¹⁷ 43 C.F.R. § 2.48(a)(4).

¹⁸ 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a)(2).

¹⁹ 43 C.F.R. § 2.45(a)(2).

²⁰ *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); see also *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.48(b)(3)(ii).

materials into a distinct work, and distributes that work to an audience.”²²

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As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of Requesters’ publications or other suitable media channels.

Record Delivery:

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* * * * *

I believe this request reasonably describes identifiable records and I am aware of no express provision of law exempting the records from disclosure. In particular, documents exchanged between FWS and EPA plainly do not fall within the FOIA exclusion for “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Under EO 12866, FWS is obligated by law to release these particular inter-agency memoranda and letters to the public (*see* § 6(b)(4)(D)) and thus the Executive has waived any claim of privilege.

Given the plain requirements of Executive Order 12866 and FOIA § 552(a)(6)(A), we request that you make the referenced documents available, or respond in writing to explain your failure to do so, as soon as possible but in no case later than twenty days from the date of this request.

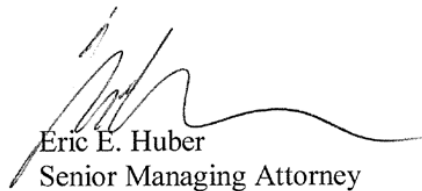
²² 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep’t of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

²³ 43 C.F.R. § 2.56(b).

I hope that you will be able to provide me with the requested materials at the earliest possible date. If there is anything I can do to facilitate this request, do not hesitate to call me at (303) 449-5595 ext. 101.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Eric E. Huber', with a long, sweeping horizontal flourish extending to the right.

Eric E. Huber
Senior Managing Attorney

Sierra Club Environmental Law Program
1650 38th St. Ste. 102W
Boulder, CO 80301
(303) 449-5595 ext. 101
(303) 449-6520 (fax)

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United States Attorney
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Chief, Civil Division
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Attorneys for Defendants
NATIONAL MARINE FISHERIES SERVICE
and U.S. FISH & WILDLIFE SERVICE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB, INC.,)	Case No. 15-cv-05872 EDL
)	
Plaintiff,)	NOTICE OF APPEAL
)	
v.)	
)	
NATIONAL MARINE FISHERIES SERVICE)	
and U.S. FISH & WILDLIFE SERVICE,)	
)	
Defendants.)	

Notice is hereby given that Defendants NATIONAL MARINE FISHERIES SERVICE and U.S. FISH & WILDLIFE SERVICE, in the above-named action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment, entered in this action on July 24, 2017, and the Order Following in Camera Review, entered that same day. Copies of said Judgment and Order Following in Camera Review are attached hereto as Exhibit A.

Defendant's Representation Statement, as required by Ninth Circuit Rule 3-2(b), is attached to this Notice as Exhibit B.

DATED: August 4, 2017

Respectfully submitted,

BRIAN J. STRETCH
United States Attorney

/s/ Wendy M. Garbers
WENDY M. GARBERS
Assistant United States Attorney

Attorneys for Defendants
NATIONAL MARINE FISHERIES
SERVICE and U.S. FISH &
WILDLIFE SERVICE

EXHIBIT A

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC.,
Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE, et al.,
Defendants.

Case No. [15-cv-05872-EDL](#)

JUDGMENT

This action came before the Court, Magistrate Judge Elizabeth D. Laporte presiding, and the issues have been duly heard and considered and a decision having been fully rendered, IT IS ORDERED AND ADJUDGED that in accordance with the Court’s Order of July 24, 2017, Plaintiff Sierra Club Inc.’s motion for summary judgment is GRANTED in part and DENIED in part, and Defendants National Marine Fisheries Service and United States Fish and Wildlife Service’s motion for summary judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

Dated: July 24, 2017


ELIZABETH D. LAPORTE
United States Magistrate Judge

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, INC.,
Plaintiff,
v.
UNITED STATES FISH AND WILDLIFE
SERVICE, et al.,
Defendants.

Case No. [15-cv-05872-EDL](#)

**ORDER FOLLOWING IN CAMERA
REVIEW**

Before the Court is Plaintiff Sierra Club, Inc.’s (“Plaintiff”) motion for summary judgment and Defendants National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service’s (“FWS”) (collectively, “Defendants”) cross-motion for summary judgment. Plaintiff seeks disclosure of documents pursuant to the Freedom of Information Act (“FOIA”). Following a hearing on June 6, 2017, the Court ordered Defendants to lodge sixteen documents with the Court for *in camera* review.¹ For the reasons discussed below, the Court finds that four are protected by the deliberative process privilege in their entirety; one is partially protected and must be redacted and produced; and eleven are not protected and must be produced in their entirety.

I. FACTUAL BACKGROUND

Industrial cooling water intake structures have the potential to kill or harm fish and other organisms by impinging them on intake screens and entraining eggs and larvae through the plants’ heat exchangers. Final Regulations To Establish Requirements for Cooling Water Intake

¹ These documents were: NMFS 0.7.266.44516.1, FWS 252, FWS 279, FWS 308, FWS 555, NMFS 0.7.266.5427.1, NMFS 0.7.266.5597.1, NMFS 0.7.266.7544.2, NMFS 0.7.266.37667, NMFS 0.7.266.37695, NMFS 0.7.266.61721, NMFS 0.7.266.14973.1, NMFS 0.7.266.7544.3, NMFS 0.7.266.44616.1, NMFS 0.7.266.45263.1, NMFS 0.7.266.45277.2

1 Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg.
2 48,300, 48,303 (Aug. 15, 2014) (to be codified at 40 C.F.R. pt. 122). Accordingly, Section 316(b)
3 of the Clean Water Act requires the Environmental Protection Agency (“EPA”) to regulate the
4 withdrawal of water from U.S. waters through these structures in order to minimize the structures’
5 adverse environmental impact. 33 U.S.C. § 1326(b).

6 On April 20, 2011, the EPA proposed new Section 316(b) regulations intended to apply to
7 more than one thousand existing power plants and manufacturing facilities. Cooling Water Intake
8 Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Apr. 20, 2011) (to be
9 codified at 40 C.F.R. pt. 122). In order to fulfill its obligations under Section 7 of the Endangered
10 Species Act (“ESA”),² the EPA commenced informal consultation with Defendants in 2012 and
11 formal consultation in 2013. Following several extensions (related in part to the October 2013
12 government shutdown), Defendants and the EPA agreed that Defendants would provide a draft
13 biological opinion to the EPA by December 6, 2013 and the final biological opinion by December
14 20, 2013. Super Decl., Ex. 6 at 3.

15 On December 3, 2013, Defendants informed the EPA that: (i) they still expected to
16 complete the draft biological opinions by December 6, 2013; (ii) the opinions would be “jeopardy
17 opinions”; and (iii) Defendants planned to include the draft biological opinions and related
18 information in their administrative records, which document the agency’s decisionmaking process
19 and basis for the agency’s decision. Super Decl., Ex. 7. NMFS completed its draft biological
20 opinion on December 6, 2013, and FWS completed its draft biological opinion on December 9,
21 2013 (together, the “December 2013 Biological Opinions”). See Dkt. 47 at n.4. However,
22 Defendants did not transmit either biological opinion to the EPA in December 2013. Instead, on

23
24 ² This Section requires federal agencies to consult with Defendants in order to ensure that their
25 actions are “not likely to jeopardize the continued existence” or “result in the destruction or
26 adverse modification of habitat” of threatened or endangered species. 16 U.S.C. § 1536(a)(2).
27 Following formal consultation, Defendants must prepare a written biological opinion containing
28 Defendants’ conclusion of either “jeopardy” (i.e., the finding that the agency action is likely to
jeopardize the continued existence of a protected species or habitat) or “no jeopardy” (i.e., the
finding that the agency action is not likely to jeopardize the continued existence of a protected
species or habitat). If Defendants issue a jeopardy opinion, they must propose reasonable and
prudent alternatives (“RPAs”) that the agency can implement to avoid jeopardizing the species’
continued existence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), (h)(3).

1 December 17, 2013, Defendants emailed the RPAs to the EPA, Super Decl. ¶ 13, Ex. 9, and
2 provided other “portion[s] of the [draft] biological opinion[s]” to the EPA thereafter. Super Decl.
3 ¶¶ 14, 31, Ex. 21.

4 On May 19, 2014, following extensive discussions with the EPA, Defendants issued a joint
5 final biological opinion. Super Decl., Ex. 10. Unlike the December 2013 Biological Opinions,
6 this opinion was a “no jeopardy” opinion that concluded that the EPA’s Section 316(b) regulations
7 were not likely to jeopardize the continued existence of listed species or destroy or adversely
8 modify their designated critical habitat. The EPA issued its final regulations on May 19, 2014 and
9 published them in the Federal Register on August 15, 2014. 79 Fed. Reg. at 48,300.

10 Shortly after the EPA published its final regulations, various environmental groups,
11 including Plaintiff, filed petitions for review in six different circuits pursuant to 33 U.S.C. §
12 1369(b)(1), challenging the EPA’s “no jeopardy” biological opinion. Super Decl. ¶ 17. These
13 petitions for review were eventually consolidated in the Second Circuit as Cooling Water Intake
14 Structure Coalition, et al. v. U.S. EPA, et al., No. 14-4645(L). Super Decl. ¶ 16. On August 11,
15 2014, Plaintiff requested documents relating to the ESA Section 7 consultation from Defendants.
16 Super Decl., Exs. 1, 2. NMFS produced responsive documents over the course of several months,
17 but withheld 2,916 documents in full and 1,536 documents in part on the basis of deliberative
18 process, attorney-client, and work product privilege. Super Decl., Ex. 17. Similarly, FWS
19 produced responsive documents over the course of several months, but withheld 1,075 documents
20 in full and 347 documents in part on the basis of deliberative process, attorney-client, and work
21 product privilege. Super Decl., Ex. 19.

22 **II. PROCEDURAL HISTORY**

23 Plaintiff initiated this action against NMFS on December 21, 2015, alleging that NMFS
24 improperly withheld responsive documents on the basis of the deliberative process privilege.
25 Plaintiff amended its complaint to add FWS as a defendant on March 22, 2016. Plaintiff filed a
26 motion for summary judgment on December 1, 2016, asking the Court to order Defendants to
27 produce twenty-seven documents related to the ESA Section 7 consultation. Defendants filed
28 their opposition and cross-motion on February 13, 2017, arguing that each of the requested

1 documents was protected by the deliberative process privilege. Plaintiff filed its opposition and
2 reply on March 31, 2017, by which point twenty-five documents were in dispute. Defendants
3 filed their reply on May 5, 2017.

4 The hearing took place on June 6, 2017. During the hearing, the Court ordered Defendants
5 to lodge six documents -- the December 2013 Biological Opinions and four independent RPAs --
6 for *in camera* review. It also ordered the Parties to meet and confer and submit a joint statement
7 regarding the documents that remained in dispute. On June 13, 2017, the Parties provided a joint
8 statement listing the ten documents still in dispute and requesting permission to lodge these ten
9 documents for *in camera* review. On June 23, 2017, the Court granted the Parties' request, and
10 Defendants thereafter lodged these documents with the Court.

11 **III. LEGAL STANDARD**

12 FOIA provides the public with the right to access records from federal agencies. Upon
13 receipt of a FOIA request, a federal agency must disclose the requested records unless they fall
14 within one of nine exemptions. 5 U.S.C. § 552(b)(1)-(9). The agency bears the burden of proving
15 that a requested record is exempt from disclosure. *Id.* § 552(a)(4)(B). Federal courts have
16 jurisdiction to order a federal agency to disclose improperly withheld documents or to review
17 documents *in camera* to determine if a claimed FOIA exemption applies. 5 U.S.C. § 552(a)(4)(B);
18 Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 n.2 (9th Cir. 1997).

19 The fifth FOIA exemption, which permits nondisclosure of “inter-agency or intra-agency
20 memorandums or letters that would not be available by law to a party other than an agency in
21 litigation with the agency,” 5 U.S.C. § 552(b)(5), encompasses the deliberative process privilege.
22 This privilege protects “documents reflecting advisory opinions, recommendations and
23 deliberations comprising part of a process by which governmental decisions and policies are
24 formulated.” Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting
25 Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001)).

26 The deliberative process privilege applies to documents that are both (i) pre-decisional and
27 (ii) deliberative. A document is pre-decisional if it is “prepared in order to assist an agency
28 decisionmaker in arriving at his decision, and . . . reflect[s] the personal opinions of the writer

1 rather than the policy of the agency.” Carter, 307 F.3d at 1089. A record is deliberative if it
2 contains “recommendations, draft documents, proposals, suggestions and other subjective
3 documents that reflect the personal opinions of the writer rather than the policy of the agency.”
4 Nat’l Wildlife Fed’n v. United States Forest Serv., 861 F.2d 1114, 1118-19 (9th Cir.1988). The
5 key question is “whether the disclosure of materials would expose an agency’s decisionmaking
6 process in such a way as to discourage candid discussion within the agency and thereby undermine
7 the agency’s ability to perform its functions.” Assembly of State of Cal. v. U.S. Dep’t of
8 Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

9 “[C]ommunications containing purely factual material are not typically within the purview
10 of Exemption 5.” Julian v. U.S. Dep’t of Justice, 806 F.2d 1411, 1419 (9th Cir. 1986), aff’d 486
11 U.S. 1 (1988). Generally, factual information is not covered by the privilege because the release
12 of such information does not expose the deliberations or opinions of agency personnel. See Mink,
13 410 U.S. at 91 (refusing to extend Exemption 5 to “factual material otherwise available on
14 discovery merely [because] it was placed in a memorandum with matters of law, policy, or
15 opinion”). “The factual/deliberative distinction . . . [is] a useful rule-of-thumb favoring disclosure
16 of factual documents, or the factual portions of deliberative documents where such separation is
17 feasible.” Assembly, 968 F.2d at 921. However, “even if the content of a document is factual, if
18 disclosure of the document would expose the decision-making process itself to public scrutiny by
19 revealing the agency’s evaluation and analysis of the multitudinous facts, the document would
20 nonetheless be exempt from disclosure.” Nat’l Wildlife Fed’n, 861 F.2d at 1119.

21 Several cases have considered whether documents related to ESA Section 7 consultations
22 fall within the deliberative process exemption. See Desert Survivors v. US Dep’t of the Interior,
23 No. 16-CV-01165-JCS, 2017 WL 475281 (N.D. Cal. Feb. 6, 2017); Our Children’s Earth
24 Foundation v. National Marine Fisheries Service, No. 14–4365 SC, 14–1130 SC, 2015 WL
25 4452136 (N.D. Cal. July 20, 2015); Nw. Envtl. Advocates v. U.S. E.P.A., No. CIV 05-1876-HA,
26 2009 WL 349732, at *7 (D. Or. Feb. 11, 2009); Greenpeace v. Nat’l Marine Fisheries Serv., 198
27 F.R.D. 540 (W.D. Wash. 2000). These cases consistently require production of ESA Section 7
28 documents that are “relatively polished drafts.” Nw. Envtl. Advocates, 2009 WL 349732, at *7;

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1 see also *id.* (drafts that “lay out the law applicable to the decisions at hand, discuss the relevant
2 science, and apply the law to that science” not protected); *Desert Survivors*, 2017 WL 475281 at
3 *14 (“preliminary drafts” not protected because disclosure would not have chilling effect on
4 agencies); *Greenpeace*, 198 F.R.D. at 543. (“[I]nformation that does not disclose the deliberative
5 process, communications unrelated to the formulation of law or policy, and routine reports are not
6 shielded by the privilege.”).

7 However, “documents express[ing] preliminary staff views or tentative opinions” are
8 protected from disclosure. *Nw. Env'tl. Advocates*, 2009 WL 349732, at *8; see *id.* at *7
9 (documents reflecting “internal discussions” and “back-and-forth/give-and-take” are protected);
10 *Desert Survivors*, 2017 WL 475281 at *14 (because disclosure of preliminary staff views or
11 tentative opinions “might chill speech,” documents expressing them are protected); *Our Children’s*
12 *Earth Foundation*, 2015 WL 4452136 at *5 (drafts that “reflect the *interpretations* of that scientific
13 information by staff and scientists, thus reflecting their personal opinions on the science” are
14 protected).

15 **III. DISCUSSION**

16 **A. Documents Lodged on June 13, 2017**

17 As discussed in more detail below, of the six documents that Defendants lodged for *in*
18 *camera* review on June 13, 2017, the Court finds that one is protected and five are not protected
19 and must be disclosed.

20 **1. December 6, 2013 Draft Biological Opinion (NMFS 0.7.266.44516.1):**
21 **Not Protected**

22 This document is a 289-page draft jeopardy biological opinion that describes the EPA’s
23 proposed changes to Section 316(b) of the Clean Water Act, the new requirements for
24 owner/operators of industrial cooling water intake structures, and the location of affected
25 structures. It also evaluates the direct and indirect effects that the EPA’s proposed action would
26 have on ESA-listed species and their habitats. The document is a “relatively polished draft.” *Nw.*
27 *Env'tl. Advocates*, 2009 WL 349732, at *7. It contains only two comments in the margins, neither
28 of which reveals the decisionmaking process of NMFS personnel. See *Assembly of State of Cal.*,

1 968 F.2d at 920 (“A predecisional document is a part of the ‘deliberative process,’ if the disclosure
2 of [the] materials would expose an agency’s decisionmaking process.”). Accordingly, it is not
3 exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at
4 543 (“[I]nformation that does not disclose the deliberative process...[is] not shielded by the
5 privilege.”).

6 **2. December 9, 2013 Draft Biological Opinion (FWS 252):**
7 **Not Protected**

8 This document is a 72-page draft jeopardy biological opinion that is similar to the NMFS
9 December 6, 2013 draft Biological Opinion, but it omits several sections. The document is a
10 “relatively polished draft.” Nw. Env’tl Advocates, 2009 WL 349732, at *7. It contains no
11 subjective comments, recommendations, or opinions,. Accordingly, it is not exempt from
12 disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

13 **3. December 17, 2013 RPAs (NMFS 0.7.266.44616.1):**
14 **Protected**

15 This document is a 4-page RPA that describes a course of action by which the EPA could
16 avoid adversely affecting protected species and habitats. It includes multiple comments,
17 modifications, and additions of language by NMFS personnel that reflect their “internal
18 discussions” and “back-and-forth/give-and-take [that is] protected by the deliberative process
19 privilege.” Nw. Env’tl. Advocates, 2009 WL 349732, at *7. Because the comments appear
20 throughout the entirety of this brief document, they are not reasonably segregable. See Nat’l
Wildlife Fed’n, 861 F.2d at 1119. Defendants may withhold this document from production.

21 **4. December 17, 2013 RPAs (FWS 279):**
22 **Not Protected**

23 This document is also 4-page RPA that describes an alternative course of action by which
24 the EPA could avoid adversely affecting protected species and habitats. It contains no subjective
25 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env’tl.
26 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
27 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

28

1 **5. December 18, 2013 FWS RPAs (FWS 308):**
2 **Not Protected**

3 This document is a 3-page RPA that describes an alternative course of action by which the
4 EPA could avoid adversely affecting protected species and habitats. It contains no subjective
5 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Envntl.
6 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
7 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

8 **6. March 6, 2014 FWS RPAs (FWS 555):**
9 **Not Protected**

10 This document is a 2-page RPA that that describes an alternative course of action by which
11 the EPA could avoid adversely affecting protected species and habitats. It contains no subjective
12 comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Envntl.
13 Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the
14 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

15 **B. Documents Lodged on June 27, 2017**

16 As discussed in more detail below, of the ten documents that Defendants lodged for *in*
17 *camera* review on June 27, 2017, three are protected, one is partially protected, and six are not
18 protected and must be disclosed.

19 **1. April 4, 2014 Draft Biological Opinion (NMFS 0.7.266.5427.1):**
20 **Not Protected**

21 This document is a 334-page draft jeopardy biological opinion. Like the December 6,
22 2013 Biological Opinion, it describes the EPA’s proposed changes to Section 316(b) of the Clean
23 Water Act, the new requirements for owner/operators of industrial cooling water intake structures,
24 the location of affected structures, and the direct and indirect effects that the EPA’s proposed
25 action would have on protected species and their habitats. The document is a “relatively polished
26 draft.” Nw. Envntl Advocates, 2009 WL 349732, at *7. It contains no subjective comments,
27 recommendations, or opinions,. Accordingly, it is not exempt from disclosure under the
28 deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

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**2. October 21, 2013 Abalone Measures (NMFS 0.7.266.5597.1):
Not Protected**

This 2-page document describes steps that owner/operators must take if abalone, an endangered species, is affected by their cooling water intake structures. It contains no subjective comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

**3. Anadromous Salmonid Measures (NMFS 0.7.266.7544.2):
Not Protected**

This 15-page document is entitled “Anadromous Salmonid Requirements.” It provides criteria and guidelines to be utilized by owner/operators in the development of downstream migrant fish screen facilities for hydroelectric, irrigation, and other water withdrawal projects. The document includes sections on screen design and hydraulics, site conditions, structure placement, screen material, and debris management. It contains no subjective comments, recommendations, or opinions, and is a “relatively polished draft.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

**4. Salmonids, Larval Fish, Sea Turtles, Abalone, and Corals Measures (NMFS 0.7.266.7544.3):
Protected**

This 3-page document lists the steps that owner/operators must follow if salmonids, larval fish, sea turtles, abalone, or corals may be affected by a cooling water intake structure. It is a preliminary draft with notes, comments, and highlighting that reflect “internal discussions” and “back-and-forth/give-and-take [that is] protected by the deliberative process privilege.” Nw. Env'tl. Advocates, 2009 WL 349732, at *7. Because the comments appear throughout the entirety of this brief document, it is not reasonably segregable. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from production.

**5. Pinniped Measures (NMFS 0.7.266.37695):
Not Protected**

This 2-page document lists the steps that owner/operators must follow if a seal, sea lion, or fur seal, or their designated critical habitat, may be affected by a cooling water intake structure. It

1 contains no subjective comments, recommendations, or opinions, and is a “relatively polished
2 draft.” Nw. Env’tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from
3 disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

4 **6. Sea Turtle Requirements (NMFS 0.7.266.45263.1):**
5 **Protected**

6 This 2-page document lists the steps that owner/operators must follow if sea turtles are
7 affected by their cooling water intake structures. This document contains comments and additions
8 that reflect “internal discussions” and “back-and-forth/give-and-take [that is] protected by the
9 deliberative process privilege.” Nw. Env’tl. Advocates, 2009 WL 349732, at *7. Because the
10 comments appear throughout the entirety of this brief document, it is not reasonably segregable.
11 See Nat’l Wildlife Fed’n, 861 F.2d at 1119. Defendants may withhold this document from
12 production.

13 **7. Sea Turtle Requirements (NMFS 0.7.266.45277.2):**
14 **Protected**

15 This 2-page document is an exact duplicate of NMFS 0.7.266.45263.1, including all
16 comments, modifications, and additions. For the reasons discussed above, this document is
17 protected and need not be disclosed.

18 **8. Sea Turtle Requirements (NMFS 0.7.266.37667):**
19 **Not Protected**

20 This 3-page document lists the steps that owner/operators must follow if sea turtles are
21 affected by their cooling water intake structures. It contains no subjective comments,
22 recommendations, or opinions, and is a “relatively polished draft.” Nw. Env’tl. Advocates, 2009
23 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process
24 privilege. See Greenpeace, 198 F.R.D. at 543.

25 **9. Table re Affected Species (NMFS 0.7.266.61721):**
26 **Not Protected**

27 This 1-page document contains a statistical chart showing estimated aggregate effects of
28 cooling water intake structure facilities on protected species as a result of impingement and
entrainment. It contains no subjective comments, recommendations, or opinions, and is a
“relatively polished draft.” Nw. Env’tl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not

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1 exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at
2 543.

3 **10. Terms and Conditions (NMFS 0.7.266.14973.1):**
4 **Partially Protected**

5 This 5-page document lists the terms and conditions with which the EPA and an
6 owner/operator must comply in order to be exempt from Section 9 of the ESA. These terms and
7 conditions involve the protocols for dealing with sea turtles near cooling water intake structures.
8 Although Defendant’s cross-motion for summary judgment describes the document as “NMFS
9 staff correspondence made in the course of deliberating about and preparing biological opinions,”
10 the document does not contain correspondence. The only notation throughout the document is one
11 sentence highlighted in yellow, which may reveal NMFS’s personnel’s decisionmaking process,
12 and thus may be redacted. See Nat’l Wildlife Fed’n, 861 F.2d at 1119. The remainder of the
13 document is not protected and should be disclosed.

14 **IV. CONCLUSION**

15 For the reasons set forth above, the cross-motions for summary judgment are GRANTED
16 IN PART and DENIED IN PART. Defendants shall produce the following documents in their
17 entirety: NMFS 0.7.266.44516.1; FWS 252; FWS 279; FWS 308; FWS 555; NMFS
18 0.7.266.5427.1; NMFS 0.7.266.5597.1; NMFS 0.7.266.7544.2; NMFS 0.7.266.37667; NMFS
19 0.7.266.37695; NMFS 0.7.266.61721. Defendants shall redact the protected portions of the
20 following document and produce the remainder: NMFS 0.7.266.14973.1. Defendants may
21 withhold the following documents in their entirety: NMFS 0.7.266.7544.3; NMFS
22 0.7.266.44616.1; NMFS 0.7.266.45263.1; NMFS 0.7.266.45277.2. Defendants shall produce the
23 required documents to Plaintiff within two weeks from the date of this order.

24 **IT IS SO ORDERED.**

25 Dated: July 24, 2017

26 
27 ELIZABETH D. LAPORTE
28 United States Magistrate Judge

EXHIBIT B

REPRESENTATION STATEMENT

Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Defendant-Appellants NATIONAL MARINE FISHERIES SERVICE and U.S. FISH & WILDLIFE SERVICE submit this Representation Statement. The following list identifies all parties to the action, and their respective counsel.

<u>PARTY</u>	<u>COUNSEL OF RECORD</u>
Defendant-Appellants NATIONAL MARINE FISHERIES SERVICE and U.S. FISH & WILDLIFE SERVICE	BRIAN J. STRETCH (CABN 163973) United States Attorney SARA WINSLOW (DCBN 457643) Chief, Civil Division WENDY M. GARBERS (CABN 213208) Assistant United States Attorney 450 Golden Gate Avenue, Box 36055 San Francisco, California 94102-3495 Telephone: (415) 436-6475 FAX: (415) 436-7234 wendy.garbers@usdoj.gov Samantha L. Chaifetz U.S. DEPARTMENT OF JUSTICE Civil Division, Appellate Staff 950 Pennsylvania Ave., NW, Room 7248 Phone: 202.514.4821 Fax: 202.514.8151 samantha.chaifetz@usdoj.gov
Plaintiff-Appellee SIERRA CLUB, INC.	REED W. SUPER (State Bar No. 164706) SUPER LAW GROUP, LLC 180 Maiden Lane, Suite 603 New York, New York 10038 Telephone: (212) 242-2355 Facsimile: (855) 242-7956 reed@superlawgroup.com Katie Schaefer (Cal. Bar No. 300913) SIERRA CLUB, INC. 2101 Webster St. Ste. 1300 Oakland, CA 94612 Telephone: (415) 977-5745 katie.schaefer@sierraclub.org



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United States Court of Appeals for the Ninth Circuit
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Molly C. Dwyer
Clerk of Court

August 07, 2017

No.: 17-16560
D.C. No.: 3:15-cv-05872-EDL
Short Title: Sierra Club, Inc. v. United States Fish and Wildlif, et al

Dear Appellants/Counsel

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 07 2017
MOLLY C DWYER, CLERK
U S COURT OF APPEALS

SIERRA CLUB, INC.,

Plaintiff - Appellee,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE; NATIONAL
MARINE FISHERIES SERVICE,

Defendants - Appellants.

No. 17-16560

D.C. No. 3:15-cv-05872-EDL
U.S. District Court for Northern
California, San Francisco

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

- Mon., August 14, 2017** Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.
- Mon., November 13, 2017** Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
- Wed., December 13, 2017** Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

The optional appellants' reply brief shall be filed and served within 21 days of service of the appellee's brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.

Failure of the appellants to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Ruben Talavera
Deputy Clerk
Ninth Circuit Rule 27-7

**U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:15-cv-05872-EDL**

Sierra Club, Inc. v. National Marine Fisheries Service
Assigned to: Magistrate Judge Elizabeth D. Laporte
Case in other court: 17-16560
Cause: 05:552 Freedom of Information Act

Date Filed: 12/21/2015
Date Terminated: 07/24/2017
Jury Demand: None
Nature of Suit: 895 Freedom of
Information Act
Jurisdiction: U.S. Government
Defendant

Plaintiff

Sierra Club, Inc.

represented by **Reed Wayne Super**
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Email: nicholas.jimenez@sierraclub.org
TERMINATED: 08/10/2016

V.

Defendant

Fish and Wildlife Service
TERMINATED: 03/22/2016

Defendant

United States Fish and Wildlife Service

represented by **Wendy M. Garbers**
United States Attorney's Office
Northern District of California
450 Golden Gate Ave., 9th Floor
San Francisco, CA 94102
(415) 436-6475
Email: wendy.garbers@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

National Marine Fisheries Service

represented by **Wendy M. Garbers**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/21/2015	1	COMPLAINT against National Marine Fisheries Service. Filed by Sierra Club, Inc. Receipt No. 0971-10081040, \$400.00. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Civil Cover Sheet)(Super, Reed) (Filed on 12/21/2015) Modified on 12/21/2015 (cjlS, COURT STAFF). (Entered: 12/21/2015)
12/21/2015	2	Case assigned to Magistrate Judge Elizabeth D. Laporte. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening . Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges . Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. by 1/4/2016. (cjlS, COURT STAFF) (Filed on 12/21/2015) (Entered: 12/21/2015)
12/21/2015	3	Proposed Summons. (Super, Reed) (Filed on 12/21/2015) (Entered: 12/21/2015)
12/22/2015	4	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/15/2016. Case Management Conference set for 3/22/2016 10:00 AM. (mclS, COURT STAFF) (Filed on 12/22/2015) (Entered: 12/22/2015)

12/22/2015	5	Summons Issued as to National Marine Fisheries Service. (mclS, COURT STAFF) (Entered: 12/22/2015)
01/04/2016	6	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Sierra Club, Inc... (Super, Reed) (Filed on 1/4/2016) (Entered: 01/04/2016)
01/04/2016	7	SUMMONS RETURNED EXECUTED by Sierra Club, Inc. <i>National Marine Fisheries Service served by certified mail.</i> (Attachments: # 1 Supplement, # 2 Exhibit)(Super, Reed) (Filed on 1/4/2016) Modified on 1/5/2016 (mclS, COURT STAFF). (Entered: 01/04/2016)
01/27/2016	8	ANSWER to 1 Complaint byNational Marine Fisheries Service. (Garbers, Wendy) (Filed on 1/27/2016) Modified on 1/28/2016 (aaaS, COURT STAFF). (Entered: 01/27/2016)
01/27/2016	9	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by National Marine Fisheries Service.. (Garbers, Wendy) (Filed on 1/27/2016) (Entered: 01/27/2016)
02/19/2016	10	NOTICE of Change of Address by Reed Wayne Super (Super, Reed) (Filed on 2/19/2016) (Entered: 02/19/2016)
02/25/2016	11	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Garbers, Wendy) (Filed on 2/25/2016) (Entered: 02/25/2016)
02/29/2016	12	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Super, Reed) (Filed on 2/29/2016) (Entered: 02/29/2016)
03/01/2016	13	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Garbers, Wendy) (Filed on 3/1/2016) (Entered: 03/01/2016)
03/01/2016	14	ADR Clerk's Notice Setting ADR Phone Conference on March 10, 2016 at 2:00 PM Pacific time. Please note that you must be logged into an ECF account of counsel of record in order to view this document. (cmf, COURT STAFF) (Filed on 3/1/2016) (Entered: 03/01/2016)
03/07/2016	15	Consent MOTION to Appear by Telephone filed by Sierra Club, Inc.. (Super, Reed) (Filed on 3/7/2016) (Entered: 03/07/2016)
03/10/2016	16	ORDER Granting Request to Appear Telephonically by Magistrate Judge Elizabeth D. Laporte: granting 15 Motion. (shyS, COURT STAFF) (Filed on 3/10/2016) (Entered: 03/10/2016)
03/10/2016		ADR Remark: ADR Phone Conference held on March 10, 2016 with Tamara Lange. A further ADR Phone Conference is scheduled for May 9, 2016 at 1:00 PM. The call-in information remains the same. (cmf, COURT STAFF) (Filed on 3/10/2016) (Entered: 03/10/2016)
03/15/2016	17	CASE MANAGEMENT STATEMENT (<i>Joint</i>) filed by National Marine Fisheries Service. (Garbers, Wendy) (Filed on 3/15/2016) (Entered: 03/15/2016)
03/22/2016	18	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; against All Defendants. Filed bySierra Club, Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, #

		12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O)(Super, Reed) (Filed on 3/22/2016) Modified on 3/23/2016 (aaaS, COURT STAFF). (Entered: 03/22/2016)
03/22/2016	19	Proposed Summons. (Super, Reed) (Filed on 3/22/2016) (Entered: 03/22/2016)
03/22/2016	20	Minute Entry for case management conference held before Magistrate Judge Elizabeth D. Laporte on 3/22/2016. Plaintiff to file an amended complaint on 3/22/2016. Current defendant to complete FOIA production by 4/8/2016. A further case management conference is set for 6/7/2016 at 10:00 am in Courtroom E, 15th floor, San Francisco. An updated case management statement shall be filed by 5/31/2016. FTR Time 10:23 - 10:27 Plaintiff Attorneys: Nicholas Jimenez and Reed Super (telephonic appearance) Defendant Attorney: Wendy Garbers This is a text only Minute Entry (shyS, COURT STAFF) (Date Filed: 3/22/2016) (Entered: 03/22/2016)
03/22/2016	21	CASE MANAGEMENT ORDER by Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 3/22/2016) (Entered: 03/22/2016)
03/23/2016	22	Summons Issued as to United States Fish and Wildlife Service. (aaaS, COURT STAFF) (Filed on 3/23/2016) (Entered: 03/23/2016)
03/24/2016	23	CERTIFICATE OF SERVICE by Sierra Club, Inc. on <i>U.S. Fish and Wildlife Service</i> (Super, Reed) (Filed on 3/24/2016) (Entered: 03/24/2016)
04/22/2016	24	ANSWER to 18 Amended Complaint by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 4/22/2016) Modified on 4/25/2016 (aaaS, COURT STAFF). (Entered: 04/22/2016)
04/25/2016	25	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by United States Fish and Wildlife Service.. (Garbers, Wendy) (Filed on 4/25/2016) (Entered: 04/25/2016)
05/09/2016		ADR Remark: ADR Phone Conference held on 5/9/2016 with Tamara Lange. A further ADR Phone Conference is scheduled for 8/4/2016 at 10:30 AM. The call-in information remains the same. <i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (cmf, COURT STAFF) (Filed on 5/9/2016) (cmf, COURT STAFF) (Filed on 5/9/2016) (Entered: 05/09/2016)
05/10/2016	26	STIPULATION WITH PROPOSED ORDER re 21 Order filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 5/10/2016) (Entered: 05/10/2016)
05/10/2016	27	STIPULATION AND ORDER Continuing Case Management Conference signed by Magistrate Judge Elizabeth D. Laporte: granting 26 Stipulation. (shyS, COURT STAFF) (Filed on 5/10/2016) (Entered: 05/10/2016)

07/20/2016	28	<i>Stipulation and [Proposed] Order Continuing CMC</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 7/20/2016) (Entered: 07/20/2016)
07/26/2016	29	STIPULATION AND ORDER Continuing CMC signed by Magistrate Judge Elizabeth D. Laporte: granting 28 Stipulation. (shyS, COURT STAFF) (Filed on 7/26/2016) (Entered: 07/26/2016)
07/27/2016	30	MOTION to Appear by Telephone filed by Sierra Club, Inc.. (Super, Reed) (Filed on 7/27/2016) (Entered: 07/27/2016)
07/27/2016	31	ORDER Granting Request to Appear Telephonically by Magistrate Judge Elizabeth D. Laporte: granting 30 Request. (shyS, COURT STAFF) (Filed on 7/27/2016) (Entered: 07/27/2016)
08/04/2016	32	ADR Remark: ADR Phone Conference held on 8/4/2016 with Tamara Lange. (cmf, COURT STAFF) (Filed on 8/4/2016) <i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (Entered: 08/04/2016)
08/10/2016	33	NOTICE of Substitution of Counsel by Katherine Hannah Schaefer (Schaefer, Katherine) (Filed on 8/10/2016) (Entered: 08/10/2016)
08/15/2016	34	CASE MANAGEMENT STATEMENT <i>(Joint)</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 8/15/2016) (Entered: 08/15/2016)
08/23/2016	35	Minute Entry for further case management conference held on 8/23/2016 before Magistrate Judge Elizabeth D. Laporte. On or before 9/16/2016, the defendant shall provide Plaintiff with a supplemental privilege log providing additional detail with respect to the entries identified by plaintiff. Plaintiff to identify the documents at issue for summary judgment by 9/30/2016. Parties to submit a joint proposal to the Court regarding a proposed summary judgment briefing schedule by 10/14/2016. FTR Time: 10:16 - 10:18 Plaintiff Attorneys: Katie Schaefer and Reed Super (telephonic appearance) Defendant Attorney: Wendy Garbers This is a text only Minute Entry (shyS, COURT STAFF) (Date Filed: 8/23/2016) (Entered: 08/23/2016)
10/13/2016	36	JOINT CASE MANAGEMENT STATEMENT <i>Re Summary Judgment</i> filed by United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 10/13/2016) (Entered: 10/13/2016)
10/18/2016	37	ORDER Adopting Joint Proposal Re Summary Judgment Schedule signed by Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 10/18/2016) (Entered: 10/18/2016)
10/22/2016		

		Set/Reset Hearing Motion Hearing set for 5/23/2017 09:00 AM in Courtroom E, 15th Floor, San Francisco before Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 10/22/2016) (Entered: 10/22/2016)
11/15/2016	38	STIPULATION WITH PROPOSED ORDER <i>re page limits for summary judgment motion</i> filed by Sierra Club, Inc.. (Super, Reed) (Filed on 11/15/2016) (Entered: 11/15/2016)
11/16/2016	39	STIPULATION AND ORDER Re Page Limits for Summary Judgment Motion signed by Magistrate Judge Elizabeth D. Laporte: granting 38 Stipulation. (shyS, COURT STAFF) (Filed on 11/16/2016) (Entered: 11/16/2016)
12/01/2016	40	MOTION for Summary Judgment filed by Sierra Club, Inc.. Motion Hearing set for 5/23/2017 09:00 AM in Courtroom E, 15th Floor, San Francisco before Magistrate Judge Elizabeth D. Laporte. Responses due by 2/13/2017. Replies due by 3/17/2017. (Attachments: # 1 Proposed Order)(Super, Reed) (Filed on 12/1/2016) (Entered: 12/01/2016)
12/01/2016	41	Declaration of Reed W. Super in Support of 40 MOTION for Summary Judgment filed by Sierra Club, Inc.. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Exhibit Exhibit 10, # 11 Exhibit Exhibit 11, # 12 Exhibit Exhibit 12, # 13 Exhibit Exhibit 13, # 14 Exhibit Exhibit 14, # 15 Exhibit Exhibit 15, # 16 Exhibit Exhibit 16, # 17 Exhibit Exhibit 17, # 18 Exhibit Exhibit 18, # 19 Exhibit Exhibit 19, # 20 Exhibit Exhibit 20, # 21 Exhibit Exhibit 21, # 22 Exhibit Exhibit 22, # 23 Exhibit Exhibit 23)(Related document (s) 40) (Super, Reed) (Filed on 12/1/2016) (Entered: 12/01/2016)
02/13/2017	42	MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. Motion Hearing set for 5/23/2017 09:00 AM before Magistrate Judge Elizabeth D. Laporte. Responses due by 3/17/2017. Replies due by 4/21/2017. (Garbers, Wendy) (Filed on 2/13/2017) (Entered: 02/13/2017)
02/13/2017	43	Declaration of Gary Frazer in Support of 42 MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities Declaration of Gary Frazer</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Attachments: # 1 Exhibit Exhibit A)(Related document(s) 42) (Garbers, Wendy) (Filed on 2/13/2017) (Entered: 02/13/2017)
02/13/2017	44	Declaration of Samuel D. Rauch, III in Support of 42 MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities Declaration of Samuel D. Rauch, III</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Related document(s) 42) (Garbers, Wendy) (Filed on 2/13/2017) (Entered: 02/13/2017)

03/13/2017	45	STIPULATION WITH PROPOSED ORDER <i>re: Summary Judgment Briefing Schedule</i> filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 3/13/2017) (Entered: 03/13/2017)
03/14/2017	46	STIPULATION AND ORDER Re Summary Judgment Briefing Schedule signed by Magistrate Judge Elizabeth D. Laporte: granting 45 Stipulation. (shyS, COURT STAFF) (Filed on 3/14/2017) (Entered: 03/14/2017)
03/31/2017	47	OPPOSITION/RESPONSE (re 40 MOTION for Summary Judgment , 42 MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities</i>) <i>Opposition to Defendants' Cross Motion for Summary Judgment and Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment</i> filed by Sierra Club, Inc.. (Attachments: # 1 Proposed Order Updated)(Super, Reed) (Filed on 3/31/2017) (Entered: 03/31/2017)
03/31/2017	48	Declaration of Reed W. Super in Support of 47 Opposition/Response to Motion,, filed by Sierra Club, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Related document (s) 47) (Super, Reed) (Filed on 3/31/2017) (Entered: 03/31/2017)
05/05/2017	49	REPLY (re 42 MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities</i>) filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 5/5/2017) (Entered: 05/05/2017)
05/05/2017	50	Proposed Order re 40 MOTION for Summary Judgment , 42 MOTION for Summary Judgment <i>Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion; Memorandum of Points and Authorities</i> by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 5/5/2017) (Entered: 05/05/2017)
06/06/2017	51	Minute Entry for proceedings held on 6/6/2017 before Magistrate Judge Elizabeth D. Laporte regarding the cross motions for summary judgment. By 6/13/2017, Defendants shall lodge in camera the December 2013 Biological Opinions and RPAs, and Parties shall file joint statement with description of lodged documents and summary of which records remain in dispute. FTR Time 9:06 - 9:36 Plaintiff Attorneys: Reed Super and Katie Schaefer Defendant Attorney: Wendy Garbers This is a text-only Minute Entry (shyS, COURT STAFF) (Date Filed: 6/6/2017) Modified on 9/20/2017: Matter transcribed by Tara Bauer (ECHO Reporting). (rjdS, COURT STAFF). (Entered: 06/06/2017)
06/13/2017	52	

		JOINT CASE MANAGEMENT STATEMENT filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 6/13/2017) (Entered: 06/13/2017)
06/23/2017	53	ORDER RE: In Camera Review by Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 6/23/2017) (Entered: 06/23/2017)
07/24/2017	54	ORDER Following In Camera Review by Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 7/24/2017) (Entered: 07/24/2017)
07/24/2017	55	JUDGMENT by Magistrate Judge Elizabeth D. Laporte. (shyS, COURT STAFF) (Filed on 7/24/2017) (Entered: 07/24/2017)
07/25/2017	56	STIPULATION WITH PROPOSED ORDER <i>Extending Deadline for Fee Motion</i> filed by Sierra Club, Inc.. (Super, Reed) (Filed on 7/25/2017) (Entered: 07/25/2017)
07/26/2017	57	STIPULATION AND ORDER Re Extension of Time for Filing Fee Motion signed by Magistrate Judge Elizabeth Laporte: granting 56 Stipulation. (shyS, COURT STAFF) (Filed on 7/26/2017) (Entered: 07/26/2017)
07/28/2017	58	ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order filed by National Marine Fisheries Service, United States Fish and Wildlife Service. Responses due by 8/2/2017. (Garbers, Wendy) (Filed on 7/28/2017) (Entered: 07/28/2017)
07/31/2017	59	STIPULATION WITH PROPOSED ORDER re 58 ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order , 54 Order filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 7/31/2017) (Entered: 07/31/2017)
08/01/2017	60	STIPULATION AND ORDER re One-Week Extension of August 7, 2017 Production Deadline and Plaintiff's Response to Motion to Stay signed by Magistrate Judge Elizabeth D. Laporte: granting 59 Stipulation. (shyS, COURT STAFF) (Filed on 8/1/2017) (Entered: 08/01/2017)
08/02/2017	61	OPPOSITION/RESPONSE (re 58 ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order) filed bySierra Club, Inc.. (Super, Reed) (Filed on 8/2/2017) (Entered: 08/02/2017)
08/03/2017	62	REPLY (re 58 ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order) filed byNational Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 8/3/2017) (Entered: 08/03/2017)
08/03/2017	63	Proposed Order re 58 ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 8/3/2017) (Entered: 08/03/2017)
08/04/2017	64	NOTICE OF APPEAL to the 9th Circuit Court of Appeals re 55 Judgment; filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Appeal fee FEE WAIVED.) (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Garbers, Wendy) (Filed on 8/4/2017) Modified on 8/8/2017 (aaaS, COURT STAFF). (Additional attachment(s) added on 8/9/2017: # 3 USCA NUMBER 17-16560) (aaa, COURT STAFF). (Entered: 08/04/2017)

08/09/2017	65	USCA Case Number 17-16560 for 64 Notice of Appeal, filed by United States Fish and Wildlife Service, National Marine Fisheries Service. (aaa, COURT STAFF) (Filed on 8/9/2017) (Entered: 08/09/2017)
08/10/2017	66	CLERK'S NOTICE: A hearing on the motion for stay 58 is set for 8/22/2017 at 1:45 PM in Courtroom E, 15th Floor, San Francisco before Magistrate Judge Elizabeth D. Laporte. The parties are permitted to appear by phone. <i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (shyS, COURT STAFF) (Filed on 8/10/2017) (Entered: 08/10/2017)
08/10/2017	67	ORDER EXTENDING AUGUST 14, 2017 PRODUCTION DEADLINE TO AUGUST 24, 2017. Signed by Magistrate Judge Elizabeth D. Laporte on 8/10/17. (klhS, COURT STAFF) (Filed on 8/10/2017) (Entered: 08/10/2017)
08/22/2017	68	Minute Entry for proceedings held on 8/22/2017 before Magistrate Judge Elizabeth D. Laporte regarding motion to stay. The production deadline is extended to 9/6/2017. The parties shall file a joint submission by 9/6/2017. The joint submission shall address the parties' respective positions regarding whether the requested stay should apply to the five documents identified by the Court during the hearing. In addition, the joint submission should address the 9th Circuit's standard for expediting appeal. FTR Time 1:50 - 2:06 Plaintiff Attorneys: Katie Schaefer and Reed Super(telephonic appearance) Defendant Attorney: Wendy Garbers This is a text-only Minute Entry (shyS, COURT STAFF) (Date Filed: 8/22/2017) (Entered: 08/23/2017)
09/01/2017	69	STIPULATION WITH PROPOSED ORDER re 58 ADMINISTRATIVE MOTION Stay Pending Appeal re 54 Order , 68 Motion Hearing,, filed by National Marine Fisheries Service, United States Fish and Wildlife Service. (Garbers, Wendy) (Filed on 9/1/2017) (Entered: 09/01/2017)
09/05/2017	70	STIPULATION AND ORDER Re Stay Pending Appeal signed by Magistrate Judge Elizabeth D. Laporte: granting 69 Stipulation. (shyS, COURT STAFF) (Filed on 9/5/2017) (Entered: 09/05/2017)
09/20/2017	71	TRANSCRIPT ORDER for proceedings held on 06-06-2017 before Magistrate Judge Elizabeth D. Laporte by National Marine Fisheries Service, United States Fish and Wildlife Service, for Court Reporter FTR - San Francisco. (Garbers, Wendy) (Filed on 9/20/2017) (Entered: 09/20/2017)
09/26/2017	72	Transcript of Proceedings of the official sound recording held on 06/06/17, before Magistrate Judge Elizabeth D. Laporte. FTR/Transcriber Echo Reporting, Inc., telephone number 8584537590. Tape Number: FTR 9:06 - 9:36. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of

Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re [71](#) Transcript Order,) Redaction Request due 10/17/2017. Redacted Transcript Deadline set for 10/27/2017. Release of Transcript Restriction set for 12/26/2017. (Related documents(s) [71](#)) (tgb, COURT STAFF) (Filed on 9/26/2017) (Entered: 09/26/2017)
