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April 25, 2022

*Via Electronic Mail*

U.S. Army Corps of Engineers  
Corps Sacramento District  
CESPK-OC  
1325 J Street  
Sacramento, CA 95814-2922  
FOIA-SPK@usace.army.mil

U.S. Army Corps of Engineers  
South Pacific Division  
CECC-SPD  
1445 Market St, Rm 1760  
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**RE: Freedom of Information Act Request and Fee Waiver Request**

Dear FOIA Officers:

This request is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and relevant Department of Defense (“DoD”) and Department of the Army, U.S. Corps of Engineers (“Corps”) FOIA regulations set forth in DoD 5400.7-R (Sep 1998); 32 C.F.R. Part 286 & AR25-55 (1 Nov 1997); and 32 C.F.R. Part 518, respectively. Ecological Rights Foundation ("EcoRights") (via counsel) hereby requests that the Corps Sacramento District and Corps San Francisco Division provide the following records.

**Request 1: The Daguerre Point Dam Technical Memorandum, U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Yuba River.** This request seeks the technical memorandum prepared following the Ninth Circuit Court of Appeals decision in *Friends of the River v. Nat'l Marine Fisheries Service, et al.*, 786 Fed. Appx. 666 (October 3, 2019) which remanded the case to the U.S. District Court for the E.D. California. The Corps referenced this technical memo in status reports to the District Court. *See e.g. Friends of the River v. Nat'l Marine Fisheries Service*, case no. 2:16-cv-00818-JAM-JDP, Dkt. no. 101 (Jan. 24, 2022), (attached in pertinent part).

**Request 2: Fish Ladder Operation and Debris Monitoring and Management Plan for Daguerre Point Dam.** (2021 or 2022).

Please identify and inform us of all responsive or potentially responsive records within the 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions

or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Wash. v. Federal Election Comm'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA’s limited exemptions. *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Pub. L. No. 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Cent. v. U.S. Dep’t of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

EcoRights further requests that the Corps Sacramento District and Corps San Francisco Division provide electronic/digital copies of the above documents in lieu of paper copies (inter alia, to minimize the expense and burden of copying and facilitate their usefulness and dissemination). EcoRights requests that the Corps produce such digital documents either in the original computer file format the documents were created in and are presently stored in or in the form of TIFF files accompanied with load files rendering the documents usable in standard legal profession document processing software. EcoRights notes that FOIA mandates that “an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B).

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

### **Presumption of Openness and “Foreseeable Harm” Standard**

On his first full day in office President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, *available at* [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

This presumption of openness was enshrined in law in the FOIA Improvement Act of 2016, Pub. L. No. 114-185, which added a new section to FOIA that states:

- (8)(A) An agency shall –
  - (i) withhold information under this section only if –
    - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

- (II) disclosure is prohibited by law; and
- (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
- (II) take reasonable steps necessary to segregate and release nonexempt information;

5 U.S.C. § 552(a)(8).

### **Request for Fee Waiver**

FOIA requires that records be furnished without charge or at a reduced charge when requesters are able to demonstrate that (1) disclosure of the requested 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. 5 U.S.C. 552(a)(4)(A)(iii); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

FOIA's fee waiver provision is to be liberally construed in favor of noncommercial requesters. *Judicial Watch* at 1312; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The major purpose of the 1986 FOIA amendments was to remove roadblocks and technicalities that agencies have used to deny fee waivers. *McClellan* at 1284. One of the most favored purposes of FOIA is to facilitate the activities of watchdog organizations such as EcoRights which promote public understanding of the activities of government agencies. *Id* at 1284-86.

A request for fee waiver need only be reasonably specific and nonconclusory. *Judicial Watch* at 1312. Requesters make a prima facie case for a fee waiver when they specify why they want the information, what they intend to do with the information, and to whom they will distribute the information. *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). The burden then shifts to the agency to establish that the denial is warranted. *Id*. In denying a fee waiver request, the agency may not hang "[its] hat on a single factor" but must assess all of the pertinent factors. *Id*. Moreover, a reviewing court owes no particular deference to an agency's restrictive interpretation of FOIA. *See Tax Analysts v. Commissioner*, 117 F.3d 607, 613 (D.C. Cir. 1997). Because EcoRights' request satisfies both of these factors, EcoRights qualifies for a fee waiver.

#### **A. EcoRights' request will contribute significantly to public understanding of the Army Corps of Engineers' operations.**

Pursuant to 32 C.F.R. § 518.19(d), the Corps, like many other federal agencies, employs a four part test to determine whether the requested information is likely "to contribute significantly to public understanding." Case law suggests that the public interest exception should be viewed in an expansive manner. *Judicial Watch* at 1313-15. EcoRights herein addresses each of the factors listed under Section 518.19.

*1. Activities should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of the Army or Department of Defense.*

EcoRights' Response:

EcoRights has requested the Daguerre Point Dam Technical Memorandum and the Fish Ladder Operation and Debris Monitoring Management Plan for Daguerre Point Dam. Providing this information to EcoRights will significantly contribute to the public's understanding of how the Corps complies with its responsibilities under the Endangered Species Act ("ESA") to protect threatened fish species that are impacted by the Corps' operation and maintenance of Daguerre Point Dam and licenses for the Brophy and Cordua diversions.

The legislative history of the fee waiver provision indicates that “A requester is likely to contribute significantly to public understanding if the information is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government “ 132 Cong. Rec. H94646 (Reps. English and Kindness). Courts have cited this legislative intent as a standard for determining that a requester qualifies for a fee waiver. *See McClellen* at 1284-86.

As discussed in greater detail below, EcoRights has a demonstrated ability to disseminate information concerning agency activities pursuant to the ESA to a wider public audience, since it informs its members and the general public through its website. *Judicial Watch* at 1314. EcoRights has also demonstrated its ability to obtain press coverage for its environmental campaigns as well. *Id.* Thus, because the information requested by EcoRights is for the sole purpose of understanding the Corps' compliance with the ESA with respect to Daguerre Point Dam and associated diversions on the Yuba River and the Corps' interpretation of its authority, and the information will be shared with a larger audience, EcoRights meets the requirements of this prong.

*2. Activities should consider the informative value of the information to be disclosed, which requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of the Army or Department of Defense.*

EcoRights' Response:

As discussed above, the information requested by EcoRights is for the purpose of understanding how the Corps has interpreted its authority and complied with the ESA with respect to protecting threatened Yuba River species that are impacted by Daguerre Point Dam and associated diversions. The documents requested should constitute the best evidence available of the Corps' practices and policies used to carry out its duties under the ESA to protect endangered and threatened fish that are impacted by Corps dams and Corps licensed diversions thus providing “meaningful” information for the public on these governmental actions.

*3. Activities should consider whether the contribution to an understanding of the subject by the general public is likely to result from disclosure, rather than simply the individual requester or small segment of interested persons.*

EcoRights' Response:

EcoRights is a non-profit public benefit corporation devoted to protecting and restoring California rivers, influencing public policy, and inspiring citizen action. In *Judicial Watch* the court explained that nothing in FOIA, agency regulations, or case law requires specificity beyond explaining that the requestor plans to disseminate the information. 326 F.3d at 1314. Furthermore, in *Carney v. US DOJ*, 19 F.3d 807 (2nd Cir. 1994), the court indicated that a fee waiver request need not demonstrate that the information will be shared with a large cross-section of the public. As long as the requested information is disseminated “to a reasonably broad audience of persons interested in the subject” the public dissemination test may be satisfied. *Id.* Thus, to meet the third factor, EcoRights need only explain how the information received will be disseminated to persons interested in the Corps' interpretation and exercise of its authority under the ESA to protect endangered and threatened fish that are impacted by Corps dams and Corps licensed diversions, in particular Daguerre Point Dam and associated diversions.

EcoRights' request meets the requirements of the public understanding factor as EcoRights will analyze the information it receives from the Corps and make its conclusions known to its members, other environmental groups, and the public at large. EcoRights' analyses will be disseminated via press releases as well as posted on EcoRights' web site (<http://www.ecorights.org>) and likely the web sites of other environmental groups. EcoRights has a proven track record of obtaining press coverage of the environmental issues it publicizes. Generally, EcoRights obtains press coverage in the local and national media, including newspapers and radio stories. For example, EcoRights received significant press coverage in response to its eight-year legal battle with Pacific Gas and Electric Company (“PG&E”) to halt the discharge of toxic chemicals from PG&E's utility poles into San Francisco and Humboldt Bays. This included stories in general circulation publications like the San Francisco Chronicle,<sup>1</sup> environmentally-focused publications like the Beyond Pesticides Daily News Blog,<sup>2</sup> general circulation legal industry publications like Bloomberg Law,<sup>3</sup> and academic journals like the

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<sup>1</sup> “PG&E agrees in settlement to protect S.F. Bay from chemical runoff from utility poles,” San Francisco Chronicle (Sept. 11, 2018), *available at* <https://www.sfchronicle.com/science/article/PG-E-agrees-to-protect-S-F-Bay-from-chemical-13221486.php#photo-12306742> (last visited Sept. 23, 2019); “Settlement in Lawsuit Over Cancer-Causing Dioxin Runoff from PG&E Utility Poles,” CBS SF Bay Area (Sept. 11, 2018), *available at* <https://sanfrancisco.cbslocal.com/2018/09/11/settlement-in-lawsuit-over-cancer-causing-dioxin-runoff-from-pge-utility-poles/> (last visited Sept. 23, 2019); “PG&E Agrees to Settlement to Reduce Dioxin Runoff into Bays, Waterways,” SFGate (Sept. 11, 2018), *available at* <https://www.sfgate.com/news/bayarea/article/Pg-E-Agrees-To-Settlement-To-Reduce-Dioxin-Runoff-13222439.php> (last visited Sept. 23, 2019).

<sup>2</sup> “Settlement Reached in Lawsuit Over Dioxin Contamination from Poison Poles in Central California,” Beyond Pesticides (Sept. 14, 2018), *available at* <https://beyondpesticides.org/dailynewsblog/2018/09/settlement-reached-in-lawsuit-over-dioxin-contamination-from-poison-poles-in-central-california/> (last visited Sept. 23, 2019).

<sup>3</sup> “PG&E Settles Suit Over Leaching Utility Poles,” Bloomberg Law (Sept. 12, 2018), *available at* <https://news.bloomberglaw.com/product-liability-and-toxics-law/pg-e-settles-suit-over-leaching-utility-poles> (last visited Sept. 23, 2019); “Ninth Circuit Paves Way for Regulation of Stormwater Discharges Under RCRA,” Perkins Coie legal update (Nov. 7, 2017), *available at* <https://www.perkinscoie.com/en/news-insights/ninth-circuit-paves-way-for-regulation-of-stormwater-discharges.html> (last visited Sept. 23, 2019).

Environmental Law Review from Lewis & Clark Law School.<sup>4</sup> As part of this litigation, EcoRights obtained a precedent-setting legal victory in the U.S. Court of Appeals for the Ninth Circuit, which earned its legal team a nomination for the 2019 Public Justice Trial Lawyer of the Year Award.<sup>5</sup>

Given EcoRights' extensive media contacts, its publication of the materials requested by this FOIA request will contribute to EcoRights' members', other environmental groups', and the general public's understanding of how the Corps carries out its responsibilities under the ESA to protect endangered and threatened fish impacted by Corps dams and Corps licensed diversions. Thus, EcoRights meets the public understanding requirement through its concrete plans to disseminate the requested information to a broad audience of persons interested in the protection of endangered and threatened anadromous fish.

*4. Activities must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding, which exists before the disclosure.*

EcoRights' Response:

The requested information will assist EcoRights' understanding of the Corps' policies and practices pertaining to carrying out its ESA duties to protect endangered and threatened fish that are impacted by Corps dams and Corps licensed diversions, in particular Daguerre Point Dam, and the Brophy and Cordua Diversions. The public does not generally know the details of Corps policy and practices and their impacts on endangered and threatened fish. Thus, EcoRights' request and subsequent dissemination will enhance public knowledge.

**B. EcoRights' Request Is Not In the Commercial Interest of the Requester.**

In addition to showing that the requested records will contribute significantly to the public understanding of government operations, EcoRights must show that the request is "not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). To do so, EcoRights must demonstrate: (1) the existence and magnitude of a commercial interest, if there is one; and (2) the primary interest in disclosure, and whether that interest is primarily in the commercial interest of the requester. As explained below, EcoRights has no commercial interest in the information requested, and thus qualifies for a fee waiver.

*1. The existence and magnitude of a commercial interest.*

EcoRights' Response:

EcoRights is a non-profit public benefit corporation organized under the laws of California, with its main office in Garberville, California. EcoRights' purpose is to educate the public about environmental practices which cause harm to human health, the environment and other natural resources, and to seek redress from those harms through litigation or alternative dispute resolution.

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<sup>4</sup> Case Note, *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 874 F.3d 1083 (9th Cir. 2017), *Environmental Law* (2017), available at <https://elawreview.org/case-summaries/ecological-rights-foundation-v-pacific-gas-electric-co-874-f-3d-1083-9th-cir-2017/> (last visited Sept. 23, 2019)

<sup>5</sup> See <https://www.publicjustice.net/trial-lawyer-year-award/> (last visited Sept. 23, 2019).

EcoRights represents citizens in protecting California's waterways from pollution, securing the multitude of benefits that flow from clean, vibrant waters: safe drinking water, abundant and diverse wildlife populations, healthy recreational opportunities, and economic prosperity from commercial fishing, tourism, and other commercial activities that depend on clean water. To further its goals, EcoRights actively seeks federal and state agency implementation of state and federal water environmental laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members.

Accordingly, EcoRights has no commercial interest in the information requested. Rather, EcoRights is seeking the information: (1) to determine whether the Corps is sufficiently protecting endangered and threatened fish species impacted by Daguerre Point Dam and associated diversions; (2) to educate the public regarding Daguerre Point Dam, the Brophy Diversion, and the Cordua Diversion impacts on endangered and threatened fish species; and (3) to assist in EcoRights' efforts to advocate that the Corps and NMFS and the appropriate state, federal, or private entities take needed actions to protect endangered and threatened fish species, particularly those impacted by Daguerre Point Dam and associated diversions.

EcoRights is interested in the protection of endangered and threatened fish species, the enforcement of federal environmental laws to protect those species, and the measures that the Corps is taking to protect endangered and threatened fish species that are impacted by Corps dams and licensees. However, EcoRights has no financial interest in the information sought or any enforcement actions that may result from it. EcoRights' goals in urging enforcement of environmental laws is not for any private financial gain, but serves only to vindicate the larger public interest in compliance with environmental laws designed to protect ecosystems and the species that live therein.

*2. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.*

EcoRights' Response:

EcoRights has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, EcoRights respectfully requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(k) for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

In the event that the Corps denies EcoRights a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of \$25.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and 40 C.F.R. § 2.104. The twenty-day statutory deadline is also applicable to EcoRights' fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).



*Please direct all correspondence and responsive records to:*

Patricia Linn  
115 Oakdale Ave.  
Mill Valley, CA 94941  
(415) 847-7024  
Email: [patricialinn19@gmail.com](mailto:patricialinn19@gmail.com)

Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at the phone or email below.

Sincerely,

Patricia Linn  
115 Oakdale Ave.  
Mill Valley, CA 94941  
(415) 847-7024  
Email: [patricialinn19@gmail.com](mailto:patricialinn19@gmail.com)

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9 **UNITED STATES DISTRICT COURT**  
10 **EASTERN DISTRICT OF CALIFORNIA**

11 FRIENDS OF THE RIVER,

12 Plaintiff,

13 v.

14 NATIONAL MARINE FISHERIES  
15 SERVICE, et al.,

16 Defendants.

17 \_\_\_\_\_  
18 YUBA COUNTY WATER AGENCY,  
19 Defendant-Intervenor.

Case No. 2:16-00818-JAM-EFB

**FIFTH JOINT STATUS REPORT**

1 On October 30, 2020, the Court granted Plaintiff’s motion for an order remanding back to  
2 the National Marine Fisheries Service (“NMFS”) its 2014 Biological Opinion and Letter of  
3 Concurrence (ECF 92) in light of the Ninth Circuit Court of Appeals’ decision in this case, 786  
4 F. App’x 666 (9th Cir. 2019). The Court also granted Plaintiff’s motion for a stay of its  
5 Endangered Species Act (“ESA”) Section 9 claim during the remand but denied Plaintiff’s  
6 motion for a remand schedule. ECF 92. Additionally, the Court ordered the parties “to file  
7 periodic joint status reports” every ninety days “that include specific details regarding the work  
8 completed and actions taken by NMFS as well as best estimates as to when its work will be  
9 completed.” *Id.* at 6. The parties have filed reports as required on January 29, 2021 (ECF 93);  
10 April 29, 2021 (ECF 96); July 28, 2021 (ECF 97); and October 26, 2021 (ECF 98). The parties  
11 now submit their fifth report.

12 A. Federal Defendants’ Report

13 After the parties submitted their first joint status report (ECF 93), the Court issued a  
14 minute order instructing Federal Defendants “to clarify whether they have decided on remand to  
15 (1) provide a more reasoned explanation of the 2014 Biological Opinion and Letter of  
16 Concurrence or (2) reinstate consultation with the Corps and issue a new biological opinion. If  
17 Federal Defendants have not decided which option they will take on remand, they must provide a  
18 specific estimate of when that decision will be made. If Federal Defendants have chosen which  
19 option to take on remand, they must provide a more specific estimate of when the work will be  
20 completed.” ECF 94.

21 In accordance with that Order, Federal Defendants submitted a supplemental status report  
22 on February 11, 2021. ECF 95. Federal Defendants explained therein that they had not yet  
23 decided whether to provide a more reasoned explanation or reinstate consultation on remand.  
24 However, they had been developing a process to ensure that this decision is scientifically-  
25 supported, consistent with the timeline and details provided in prior filings. *See* ECF 82 at 6;  
26 ECF 82-1; ECF 82-2; ECF 88. The U.S. Army Corps of Engineers (“Corps”) employed a  
27 contractor to work with Corps and NMFS technical staff to compile, organize, and analyze post-  
28 2014 data related to the activities at Englebright and Daguerre Point dams that are within the

1 Corps' discretion and control. *See* ECF 98 (citing ECF 98-1 ¶ 6). The purpose of this work was  
2 to assist the Corps and NMFS in determining whether to reinitiate consultation, and,  
3 consequently, how to proceed on remand.

4 The Corps' contractor completed the work necessary to gather, compile, and organize the  
5 extensive post-2014 information and data. *Id.* Among other topics, the contractor used the newly  
6 acquired information to comprehensively update the information and analysis used to inform the  
7 status (life history and abundance, habitat preferences, viability, etc.) of the listed species  
8 (Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern Distinct  
9 Population Segment North American green sturgeon) and designated critical habitat; update the  
10 information and analysis used to describe the effects to listed species and designated critical  
11 habitat of the activities within the Corps' discretion and control at both dams; update the  
12 information and analysis used to characterize the action area (e.g., lower Yuba River); and  
13 update the description of the environmental baseline. *Id.* The Corps' contractor first submitted its  
14 analysis related to Englebright Dam and Daguerre Point Dam to the Corps in April 2021 and July  
15 2021, respectively. *Id.* The contractor submitted revised versions of the analysis related to  
16 Englebright Dam and Daguerre Point Dam to the Corps in early August 2021 and late August  
17 2021, respectively. *Id.* The Corps then transmitted the analysis for Englebright Dam to NMFS in  
18 mid-August 2021 and Daguerre Point Dam in early September 2021. *Id.*

19 As Federal Defendants explained in their December 17, 2021 Notice of Decision  
20 Regarding Englebright Dam, Federal Defendants have determined that reinitiation of ESA  
21 Section 7 consultation on Englebright Dam is not warranted. ECF 100. Federal Defendants will  
22 comply with this Court's (ECF 92) and the Ninth Circuit's (786 F. App'x 666 (9th Cir. 2019))  
23 remand orders by providing further explanation of their decisions regarding the Englebright  
24 Dam, which they intend to do by February 28, 2022. *Id.* Federal Defendants will submit this  
25 explanation to the Court promptly after it is completed. *Id.*

26 As to Daguerre Point Dam, Federal Defendants still expect that they will determine  
27 whether to reinitiate consultation by February 15, 2022, and also will promptly notify the Court  
28 after this decision is made. *See* ECF 98; ECF 100; ECF 100-2 ¶ 5. As Federal Defendants have



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT  
1325 J STREET  
SACRAMENTO CA 95814-2922

May 4, 2022

Office of Counsel

SUBJECT: Freedom of Information Act Request No. FA-22-0097 for the United States Corps of Engineers (USACE) Technical Memorandum on the Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Yuba River and the Debris Monitoring and Management Plan for the Fish Ladder Operation at Daguerre Point Dam

Ms. Patricia Linn, Esquire  
Attorney at Law  
115 Oakdale Avenue  
Mill Valley, California 94941

Dear Ms. Linn:

On April 25, 2022, our office received your Freedom of Information Act (FOIA) request for the United States Corps of Engineers (USACE) Technical Memorandum on the Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Yuba River and the Debris Monitoring and Management Plan for the Fish Ladder Operation at Daguerre Point Dam. We have coordinated this response with the South Pacific Division office and confirmed that our office would be responding to your request.

The draft Daguerre Point Dam Technical Memorandum is withheld in full. This information is exempt from release pursuant to the protection afforded it under 5 U.S.C. § 552 (b)(5), generally known as "Exemption 5" of FOIA. Specifically, the draft Daguerre Point Dam Technical Memorandum is protected from disclosure under the Exemption 5 deliberative process privilege. The purpose of this privilege is to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). The types of information covered by this privilege include "advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Id.* at 150. The draft Daguerre Point Dam Technical Memorandum has not been finalized. The draft Daguerre Point Dam Technical Memorandum was generated for internal use and analysis by the United States Army Corps of Engineers (Corps) and will be used by the planning staff in determining policy as it relates to the subject project and future projects of a similar nature. The draft Daguerre Point Dam Technical Memorandum contains advisory opinions and deliberations on the part of Corps employees. Thus, the draft Daguerre Point Dam Technical Memorandum is exempt from disclosure. See National Wildlife Federation v. United States Forest Service, 861 F.2d 1114 (9th Cir. 1988) (holding that working drafts of a forest plan and draft environmental impact statements were covered

by Exemption 5). Unfortunately, we do not have records for the Fish Ladder Operation and Debris Monitoring and Management Plan for Daguerre Point Dam for 2021 or 2022.

I have determined that your request meets all statutory requirements for a complete fee waiver; therefore, no payment is required for this request.

Additionally, because your request has been denied, you are advised of your right to appeal this determination through this office to the Secretary of the Army (ATTN: General Counsel). Your appeal must be postmarked or electronically transmitted within 90 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U.S. Army Corps of Engineers, Sacramento District, ATTN: CESPCK-OC, 1325 J Street, Room 1440, Sacramento, California 95814.

For any further assistance or to discuss any aspect of your request, you have the right to contact the U.S. Army Corps of Engineers FOIA Public Liaison. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about FOIA mediation services they offer. Contact information is as follows:

U.S. Army Corps of Engineers  
FOIA Public Liaison  
441 G Street, NW  
ATTN: CECC-C (James Whittaker)  
Washington, DC 20314-1000  
Email: foia-liaison@usace.army.mil  
Phone: 202-761-0051

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740-6001  
E-Mail: ogis@nara.gov  
Phone: 202-741-5770 or  
Toll Free: 877-684-6448

If you have any questions regarding the provided information, please contact Ms. Andrea Vaiasicca, FOIA Specialist, at the above letterhead address or by calling (916) 550-9104.

Sincerely,



A. L. Faustino  
District Counsel  
Initial Denial Authority