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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**COLUMBIA RIVERKEEPER AND
WILLAMETTE RIVERKEEPER,**
Oregon nonprofit corporations,
Plaintiff,

v.

**FEDERAL ENERGY
REGULATORY COMMISSION,**
an agency of the United States,
Defendant.

No. 08-936-HU

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT.**

Oral argument requested

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INTRODUCTION

This case involves two discrete Freedom of Information Act (“FOIA”) requests from plaintiffs Columbia Riverkeeper and Willamette Riverkeeper (“Riverkeeper”) and two discrete responses from the Federal Energy Regulatory Commission (“FERC”). Riverkeeper challenges both of FERC’s responses, but for distinct reasons.

FOIA request # 1: Riverkeeper requested, among other documents, a) any and all mailing lists that FERC used to send letters in October through December 2007 inviting affected landowners to FERC hearings regarding the proposed Palomar Pipeline, and b) any and all lists compiled at these meeting. Pl.’s Ex. 1, 1. FERC concluded that it had no responsive documents. Pl.’s Ex. 3, 1.

FOIA request # 2: Riverkeeper requested a FERC mailing list dated April 18, 2008 related to the Palomar pipeline route. FERC produced this list pursuant to FOIA, but redacted the names and addresses of individuals. Pl’s Ex. 22.

Riverkeeper’s complaint alleges three claims. The first two claims relate to Riverkeeper’s FOIA request #1. First, FERC violated FOIA and the Administrative Procedures Act (“APA”) by conducting an inadequate search and withholding documents. Second, FERC violated FOIA and the APA by losing or destroying responsive documents. FERC filed a Motion for Summary Judgment in this case, but it does not discuss Riverkeeper’s first two claims for relief. Therefore, Riverkeeper moves for summary judgment on these claims.

FOIA request # 1 relates to the “Notice of Intent to Prepare an Environmental Impact Statement . . . and Notice of Public Meetings” (hereafter “Notice”) that FERC mailed on October 29, 2007 to citizens whose land would be affected by the proposed Palomar Pipeline.¹ Pl.’s Ex. 6, 1. Riverkeeper wished to review the mailing list for the Notice to ensure that FERC

is complying with its statutory duty to provide notice of the National Environmental Policy Act (NEPA) comment period and notice of the public hearings to affected landowners. *See* 18 CFR §380.9. Ensuring that FERC complied with the law is especially important here because a significant number of landowners, whose property is subject to eminent domain, did not receive any notice from FERC about the Palomar Pipeline or the public hearings. Pl.’s Ex. 2 at 1 (Sansone Dec.). Pl.’s Ex. 14 (Dryeden Dec.); Pl.’s Ex. 19.

Plaintiffs are entitled to relief for FOIA request # 1 for two reasons: FERC violated FOIA and the APA by failing to conduct an adequate search and FERC violated FOIA and the APA by withholding responsive documents.

This Court recognized that FERC’s conclusion that there are no responsive documents to FOIA request #1 warrants further investigation. *Columbia Riverkeeper v. FERC*, No. 08-935, Order on Plaintiffs’ Motion to Compel at 3. During the course of this lawsuit, a shocking pattern of incompetence has emerged. For example:

1. The only place that FERC Administrative Officer, Veronica Moten, searched for the requested landowner list was FERC’s publicly available website database, called the E-Library. Pl.’s Ex. 9, 13:2-4 (Moten Depo.). Ms. Moten did not ask the project manager or anyone else at FERC, or search any internal files, emails, or databases. *Id.* at 23:8-21.
2. Ms. Moten admitted that during her 500 FOIA searches in the last 5 years, her search is typically limited to the publicly available E-Library. *Id.* 9:17,25, 23:12. In Ms. Moten’s deposition, FERC’s attorney asked Ms. Moten if she “learned anything” from this FOIA request to which she replied: “Most definitely. I would definitely seek the input of the manager, the analyst, assigned to the project to ensure that we provide information that was complete.” *Id.* at 33-34.

¹ The 211-mile Palomar Pipeline would connect the Bradwood Landing LNG terminal in the Columbia River
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3. FERC claims that it did not save any records to demonstrate to whom it mailed the October 27, 2007 Notice letter. Pl.'s Ex. 3, 1. FERC's project manager, who was in charge of sending out the mailing list, stated that he deleted all electronic copies of the mailing list. Pl.'s Ex. 8, 22:17-19.
4. During discovery, plaintiffs learned that FERC had the October 2007 mailing list used to send out the Notice in its possession at the time of plaintiffs' request and has had this mailing list ever since.

Riverkeeper's third claim for relief, which is specific to FOIA request #2, alleges that FERC's decision to redact the April 18, 2007 list violates FOIA by improperly using FOIA exemption 6. Section B of the Argument demonstrates that FERC improperly invoked FOIA exemption 6 because the public interest in disclosure outweighs any minor privacy interest.

JURISDICTION

This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as well as under 28 U.S.C. § 1331 because this action arises under the FOIA, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq.

Riverkeeper has a right to judicial review under FOIA, 5 U.S.C. § 552(a)(4)(B), and because Riverkeeper has challenged agency action unlawfully withheld or unreasonably delayed as defined by the APA, 5 U.S.C. § 706(1), and an agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2), as well as final agency action as defined by the APA, 5 U.S.C. §§ 551(13) and 704. The Court has jurisdiction over this action because it raises a federal question, 28 U.S.C. § 1331, seeks declaratory relief, 28 U.S.C. § 2201, and seeks injunctive relief, 28 U.S.C. § 2202. Riverkeeper has standing because a

estuary to an interstate pipeline near Maupin, OR. Pl.'s Ex. 1, 1.

“plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1988) (citing *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 449 (1989)). The injury to Riverkeeper caused by FERC's violations of the FOIA can be remedied by the relief sought in this action.

LEGAL BACKGROUND

Congress enacted the FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed,” *NRLB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The FOIA requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure. 5 U.S.C. § 552. A requester is entitled to receive all responsive documents in an agency’s possession or control up to or near the date of the release of records. *See, e.g., Public Citizen v. Dept. of State*, 276 F.3d 634, 642 (D.C. Cir. 2002). When an agency has improperly withheld agency records from a requester, the FOIA instructs the courts to order the production of those documents. 5 U.S.C. § 552(a)(4)(B). Above all, the law requires federal agencies to provide the fullest possible disclosure of information to the public.

FACTUAL BACKGROUND

On October 29th, 2007, FERC mailed out a Notice of Intent to Prepare an Environmental Impact Statement for the Palomar Gas Transmission Project and Notice of Public Meetings. *Id.* This Notice is required by NEPA. 40 C.F.R § 1506.6(a),(b). The Notice described the project, informed effected landowners of public meetings, and requested comments on the Environmental Impact Statement. Pl.’s Ex. 6. The Notice also informed the landowners that the Palomar Pipeline Company would contact the landowner to negotiate property rights, but warns the landowner that if the “negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings” *Id.* at 2. The Notice further informed landowners about

how to intervene in the administrative process and appeal rights. *Id.* at 7. The Notice, therefore, provides important information about the scope of the project, the landowners' legal rights, and comment and appeal deadlines.

After learning that several landowners along the pipeline route did not receive the Notice, plaintiffs submitted a FOIA request to FERC. In FOIA request #1, plaintiffs sought the landowner address list to which FERC sent the Notice on February 12th, 2008. Pl.s' Ex. 1 at 1. Specifically, plaintiffs requested any and all lists that FERC used to send mailings inviting the public to meetings in October through December 2007, and any and all lists compiled at FERC's Palomar Project Scoping meetings in November and December 2007. *Id.*

By letter dated March 12, 2008, Plaintiffs received a response from FERC that stated “[a] search of the Commission's non-public files found no responsive documents to your request.” Pl.'s Ex. 3 at 1. Therefore, FERC stated that it did not have the mailing list that it had used to mail the Notice to landowners on October 29, 2007.

By letter dated April 22, 2008, Plaintiffs appealed the denial of their FOIA request, stating that it was highly unlikely that FERC did not have the mailing list in its possession. Pl.'s Ex. 7 at 2. By letter dated June 11, 2008, FERC rejected Plaintiffs' administrative appeal, again claiming that there are no responsive documents to Plaintiffs' request. Pl.'s Ex. 4 at 2. In its April 22, 2008, denial letter FERC attached “as a courtesy” a redacted version of a landowner list that was submitted by Palomar on April 18, 2008. Pl.'s Ex. 22. However, Plaintiffs requested the mailing list from October to December of 2007, not the April 22, 2008 mailing list. Therefore, the April list is not responsive to FOIA request # 1. Pl.'s Ex. 1 at 1. Indeed, FERC's April 2008 list is different from the October, 2007 list. Pl.'s Ex. 8 at 36:9-11 (Sipe Depo.) (“Q: Is it correct that the October 2007 list is different from the April 2008 list? A: Yes. That's why they call it an updated mailing list.”). Mr. Sipe also stated that the “list is constantly changing.”

Id. at 22:22.

On June 17, 2008, plaintiffs submitted a FOIA # 2 asking FERC to produce the April 18, 2008 mailing list pursuant to FOIA. Pl.'s Ex. 20 at 1. FERC's previous production of the nonresponsive April 18, 2008 list "as a courtesy" was not produced under FOIA and did not carry any appeal rights. FERC responded by producing the April 18, 2008 list, but redacted individual landowners' names and addresses. Pl.'s Ex. 22.

STANDARD OF REVIEW

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved. *See, e.g., Wickwire Gavin P.C. v. USPS*, 356 F.3d 588, 591 (4th Cir. 2004) (declaring FOIA cases generally resolved on summary judgment). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987).

Federal courts review FOIA decisions *de novo*. 5 U.S.C. § 552(a)(4)(B). FERC has the burden of justifying its nondisclosures. *Id.* The APA sets forth standards governing judicial review of decisions made by federal administrative agencies.² *See Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *Mtn. Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir. 2002). Pursuant to the APA, the court shall hold unlawful agency actions that are "arbitrary, capricious, an abuse of

² Defendant's summary judgment brief argues that FOIA provides a full remedy for Riverkeeper's claims, and that it is not necessary to rely on the APA. Plaintiffs agree that all of the relief requested is available under FOIA. However, Courts may grant relief under both FOIA and the APA. *Oregon Natural Desert Ass'n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D. Or. 2006) (granting summary judgment under FOIA and APA for claim that agency's response to FOIA request was untimely.) If any of the requested remedies are not available under

discretion, or otherwise not in accordance with law” as well as those actions taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D); 335 F.3d at 853. Review of final agency action is narrow; however, the agency must articulate a rational connection between the facts found and the conclusions made. *See Envtl. Def. Ctr. v. EPA*, 319 F.3d 398, 428 n.46 (9th Cir. 2003). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003). An agency’s decision can be upheld only on the basis of the reasoning in that decision. *Anaheim Mem’l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

ARGUMENT

A. FERC violated FOIA and the APA by failing to conduct an adequate search and withholding responsive documents

In granting plaintiffs’ Motion to Compel a Discovery Response, this Court raised doubt about whether FERC conducted an adequate search or improperly withheld documents responsive to the FOIA request. The Court’s Order stated:

The record before the court, including evidence proffered by both plaintiffs and FERC, and admissions by FERC, is inconsistent with FERC’s denial of plaintiffs’ request on the ground that documents responsive to the request did not exist. The inconsistencies in FERC’s representations suggest that the potential exists for an investigation of whether FERC arbitrarily or capriciously withheld information from plaintiffs. See 5 U.S.C. § 552(a)(4)(F).

Columbia Riverkeeper v. FERC, No. 08-935, Order on Plaintiffs’ Motion to Compel at 3.

Further investigation during discovery verified the Court’s concern. Discovery revealed that: a) the search for responsive documents was woefully inadequate, consisting of a search of FERC’s publicly available website; b) FERC has withheld responsive documents that it has had in its

FOIA, the APA provides a remedy. *Bennett v. Spear*, 520 U.S. 154, 175-176.

possession since the time of plaintiffs' FOIA request; and c) FERC's actions warrant a special counsel investigation.

1) FERC Did Not Conduct an Adequate Search

FERC must demonstrate that it conducted a "search reasonably calculated to uncover all relevant documents." *Zemansky v. United States*, 767 F.2d 569, 571 (9th Cir.1985). The key inquiry is "not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Id.* (quoting *Weisberg v. U.S. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). In making a determination of whether an agency adequately searched for records pursuant to a FOIA request, facts must be viewed in light most favorable to requestor.

The only place that FERC Administrative Officer Veronica Moten looked for responsive documents was on FERC's publicly available website database called the E-Library.³ Pl.'s Ex. 9 at 13:3-8 (Moten Depo.). Ms. Moten acknowledged that she found the October 29, 2007 Notice letter that FERC mailed, but did not search beyond the E-Library for the requested mailing list:

Q: [D]id you find [the October 29th, 2007 Notice letter] during the scope of your search?

A: Yes, I did.

Q: Okay. Did you see the mailing list associated with this document?

A: No, I did not.

Q: Where did you search for responsive documents?

A: In our E-library database system.

Q: Was that the only place you searched?

A: It is.

Q: Is that the same E-library that's available to the public?

A: It is.

Q: Did you search any e-mails, paper files?

A: No, I did not.

Q: Is this your typical process for a FOIA response, to only look at the E-library, to search in the E-library?

A: It is. . . .

Q: . . . Prior to your report, did you ask [your employer] any questions about the FOIA request?

³ The E-Library is available <http://www.ferc.gov/docs-filing/elibrary.asp>. The docket number for Palomar Pipeline is CP09-35-000.

A: No, I did not.

Q: Did you ask any FERC employees?

A: No, I did not.

Id. at 12:21-25, 13:1-25.

Ms. Moten stated that she had no idea whether any other responsive documents exist elsewhere:

Q: Do you think staff at FERC have documents or e-mails regarding Palomar that are not filed on the E-library?

A: Could not respond to that. I have no idea.

Id. at 16:4-7.

Ms. Moten's search was clearly inadequate because she did not search any other computer or paper files, or ask the project manager who mailed the Notice. *Id.* at 13:1-25. Ms. Moten's affidavit does not support FERC in meeting its burden to demonstrate that it conducted a "search reasonably calculated to uncover all relevant documents." *Zemansky*, 767 F.2d at 571. In *Zemansky*, the Ninth Circuit concluded that an agency conducted an adequate search when its affidavits from the FOIA coordinator and her supervisor described in detail that the searcher contacted prior and current office directors and followed a lead to the regional office, where files were searched on her request. *Id.* Unlike the searcher in *Zemansky*, Ms. Moten simply reviewed the publicly available E-Library, which is an arbitrary restriction of what is a relevant document. Pl.'s Ex. 9 at 13:2-5. Ms. Moten acknowledged that the breadth of her search was not adequate and that this whole process has been a learning lesson, as demonstrated in this deposition exchange between FERC's attorney and Ms. Moten:

Q: [H]ave you learned anything from -- from this FOIA request in terms --

A: Most definitely.

Q: Tell me what you've learned.

A: When I cannot find something in our system, which I believe to be very complete, then I need to find out who the project manager is and solicit their input directly to the request as filed.

Q: Has -- have there been any changes in your FOIA search procedures, then, at this point?

A: Are you asking me personally, or are you asking of the agency?

Q: Well -- I'll just ask you personally. Have you changed how you would -- I think you've just answered the question. Have you changed how you would do a similar FOIA request?

A: Most definitely. I would definitely seek the input of the manager, the analyst, assigned to that project to ensure that we provide information that was complete.

Id. at 33:22-25, 34:1-5.

While it is nice that Ms. Moten has learned how to conduct a search, that learning experience delayed production of the documents for over a year and cost plaintiffs a tremendous amount of time and resources in the administrative appeal and this litigation due to FERC's failure to adequately search.

The inadequate search in this case is not a one-time mistake. Ms. Moten has conducted approximately 500 FOIA requests in the last five years. *Id.* 9:17,25, 23:12. She acknowledged that her typical process for searches is limited to the publicly available E-Library. *Id.* at 13:2-5. Therefore, it is likely that each of those 500 requestors over the last five years received nothing more than documents that were publicly available on FERC's website.

FERC is responsible for training and managing its employees. Ms. Moten's long-term violation of FOIA raises serious questions about FERC's training and oversight. Ms. Moten stated that she makes the decisions on what is and what is not a responsive document and that she has been trained by FERC. *Id.* at 14:3-8. This case highlights FERC's immediate and long-term violations of FOIA.

2) FERC Improperly Withheld Responsive Documents

FERC and FERC counsel stated that it did not have any responsive documents to Plaintiffs' FOIA request # 1 for the October to December, 2007 mailing list. Pl.'s Ex. 3 at 1, Pl.'s Ex. 4 at 2. However, during discovery, Plaintiffs learned that FERC had mailing lists dated October 17, 2007 and October 28, 2007, which are clearly responsive documents. Pl.'s Ex. 21, Pl.'s Ex 13, Pl's. Ex. 5. Therefore, FERC had in its possession mailing lists that plaintiffs

requested. FERC withheld the responsive documents.

FERC's decision to withhold the responsive October 2007 lists was not an oversight or a one-time mistake. Even after plaintiffs' administrative appeal explained that FERC must have the mailing list, FERC counsel denied the existence of the lists. Pl.'s Ex. 4 at 2. Throughout discovery, FERC staff continued to deny having a copy of the October to December mailing lists. In his deposition on December 17, 2008, Mr. Sipe acknowledged that FERC must have had the list to send the Notice letters, but he claims that he either deleted an electronic version of the mailing list, or that FERC's consultants sent him printed labels to use for the mailing. Pl.'s Ex. 8 at 22:8-25 (Sipe Depo).

Mr. Sipe's testimony is completely inconsistent with the fact that he was in possession of a FERC mailing list dated October 28, 2007 for over a year. Pl.'s Ex. 10. In fact, Mr. Sipe sent an email to FERC counsel Michael Watson that contained the FERC mailing list dated October 28, 2008. *Id.* After having denied the existence of this mailing list, Mr. Sipe emailed it to Mr. Watson two days before FERC submitted its answer in this lawsuit. Pl.'s Ex. 10.

To date, FERC has not generated any responsive documents for FOIA request #1. Notably, discovery in this case revealed the existence of multiple documents that FERC should have produced, but did not. FERC's discovery responses show that it had possession of mailing lists dated October 17, 2007 and October 28, 2007. Pl.'s Ex. 21; Pl.'s Ex. 13. Yet, FERC has not produced these or any other responsive documents as a formal FOIA response.

The fact that plaintiffs uncovered potentially responsive documents during discovery does not obviate FERC's obligation to produce documents pursuant to FOIA. The discovery documents only provide evidence that there are additional responsive documents that FERC did not produce. FERC has never claimed that the mailing lists produced during discovery are responsive documents under FOIA. *See e.g.* Pl.'s Ex. 5. Further, discovery documents cannot

substitute for FOIA because plaintiffs have no appeal rights to challenge the discovery responses under FOIA and FERC's production of discovery documents is not a final agency action under FOIA. The only final actions FERC has made are the initial response to plaintiffs' FOIA request and the denial of plaintiffs' administrative appeal.

In addition, FERC has failed to produce any responsive documents to Plaintiffs' request for "any and all mailing lists compiled at FERC's Palomar Project Scoping meetings in November and December 2007." Pl.'s Ex. 1 at 1. FERC has not provided any explanation for why it will not produce these documents.

Because FERC has responsive documents in its possession and that FERC has not produced any documents in response to plaintiffs' first FOIA request # 1, the Court should order FERC to produce, pursuant to FOIA, all relevant documents, including the mailing lists dated October 17, 2007 and October 28, 2007, and the sign-in sheets from the public meetings. Whether or not FERC redacts any information from these documents does not affect FERC's duty to *produce* the documents in the first place. FERC has not produced these documents, provided a Vaughn Index, or otherwise indicated which documents it is withholding.

It is important to recognize that the April 2008 list that FERC produced does not somehow substitute for the October to December 2007 mailing lists that were requested. First, Plaintiffs requested the Oct 2007 lists for the purpose of determining who FERC notified about the initial scoping meetings in November of 2007. This original list is important to review to ensure that FERC was upholding its regulatory duties to provide notice to affected landowners. Second, the April 2008 list is substantially different from the October 2007 list because the list is constantly updated. Pl.'s Ex. At 22:22 (Sipe Depo.). FERC added and removed names due to complaints at the public hearing and letters. In an attempt to conflate the two lists, Mr. Sipe stated that the April 17, 2008 list "contains all the names included in the list staff used to mail the October 29,

2007 NOI [notice of intent].” *Id.* 52:4-10. This is simply not true. In his deposition, Mr. Sipe contradicts his own declaration by admitting that this list is constantly changed by the *addition and removal* of names. *Id.* at 15:5-24 (“Q: Is it correct that the October 2007 list is different from the April 2008 list? A: Yes. That’s why they call it an updated mailing list.”). Mr. Sipe also stated that “list is constantly changing.” *Id.* at 22:22. The April 22nd list has no value for verifying that landowners were not sent the NOI because it is not the same list of names.

3. FERC’s Actions Warrant a Special Counsel Investigation.

FERC’s improper actions in this case warrant a special counsel investigation into the cause of FERC’s behavior. FOIA provides that whenever the court orders the production of any agency records and awards attorney fees, “and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding” 5 U.S.C. § 552(a)(4)(F)

In this case, FERC’s actions to withhold the documents are arbitrary and capricious. In addition to Ms. Moten’s inadequate search and the lack of oversight, FERC project manager, Mr. Sipe, also failed to produce the requested documents. After FERC repeatedly stated that there were no response documents to FOIA request #1, project manager Douglas Sipe sent an email with a spreadsheet containing the mailing list dated October 28, 2007 to FERC counsel, Michael Watson, on September 22, 2008. Pl.’s Ex. 10. The entire text of the email reads: “here you go this was the first mailing list used for the initial NOI . . . any questions please call my cell” *Id.* This demonstrates that Mr. Sipe either had the responsive document the entire time or that he could easily obtain it from FERC’s consultants, Tetra Tech. In his deposition, Mr. Sipe

acknowledges that he knew Tetra Tech maintained a copy of the list and that Tetra-Tech is “acting as FERC staff.” Pl.’s Ex. 8 at 42:16-19; Id. at 19-20 (Sipe Depo.). Where an agency relinquishes possession of its agency records to a contractor for the purposes of records management, those records remain subject to the FOIA, just as if possession had not been transferred. *U.S. Dep’t of Justice v. Tax Analysts*, 492 US 136, 144-45 (1989). The responsive documents were readily accessible to FERC and should have been produced.

4. Conclusion to FOIA Request # 1 Claims

FERC violated FOIA by conducting an admittedly inadequate search and withholding responsive documents. Plaintiffs request that this Court declare the FERC violated FOIA and the APA and order FERC to produce responsive documents.

B. FERC Violated FOIA by Improperly Redacting Information From the April 18, 2008 Mailing List

In response to plaintiffs’ FOIA request #2, FERC produced a mailing list dated April 18, 2008. Pl.’s Ex. 22. FERC erred by improperly redacting individual names and addresses of the April 18, 2008 mailing list, relying on FOIA exemption 6. The question of whether the redaction is proper is limited to the April 18, 2008 mailing list because that is the only redacted document that FERC has produced pursuant to FOIA.

The purpose of FOIA is to encourage the maximum feasible public access to government information. *Local 598 v. Dept of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th Cir. 1988). While FOIA provides exemptions to the normal disclosure rule, the agencies must construe the exemptions narrowly. *Dept. of the Air Force v. Rose*, 525 U.S. 352, 361 (1976). Courts have repeatedly emphasized that “an agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed

exemption." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); see also *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987). FERC has failed to meet its burden of proof in the present case.

FOIA exemption 6 permits the government to withhold information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To assess whether disclosure would create a clearly unwarranted invasion of privacy, a court must balance the public interest in disclosure against the privacy interests of citizens. *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495-496, 114 S.Ct. 1006, 1013 (U.S.,1994). Here, disclosure of the mailing list is strongly in the public interest because disclosure is the only way the public can assess whether FERC is upholding its regulatory duty to provide notice to affected landowners, while the privacy interest is minimal.

1. The public interest in ensuring that FERC follows the law is great

FERC uses mailing lists, including the April 18, 2008 list at issue, to send information to landowners and others regarding their legal rights under both the National Environmental Policy Act (NEPA) and FERC regulations. Plaintiffs seek to assess whether FERC was complying with its regulatory obligations to provide notice under NEPA and FERC regulations. Pl.'s Ex. 1. Key to NEPA's success is its requirements that ensure environmental information is available to government decision makers and the interested public *before* decisions are made and actions taken. 40 CFR §1500.1(b). Federal agencies are specifically directed to encourage and facilitate public involvement in decisions which affect the quality of the the human environment. Id. at §1500.2(d).

To that end, most federal agencies have adopted public engagement policies and regulations to ensure compliance with NEPA. FERC's policy simply directs the commission to

comply with NEPA's requirement for public involvement. 18 CFR §380.9. NEPA's regulations state that federal agencies shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures, and provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. 40 CFR §1506.6 (a), (b). The regulations further direct the ways that public notice should be disseminated, which include direct mailing to owners and occupants of nearby or affected property. *Id.* at §1506.6 (b)(3)(viii).

FERC used the mailing list to announce upcoming meetings for the Palomar pipeline and inform landowners that their land may be taken through eminent domain for the pipeline. Pl.'s Ex. 6 at 1-2. Unfortunately, multiple affected landowners did not receive proper notice. See Pl.'s Ex. 14 (Dryden Decl.), Pl.'s Ex. 2 (Sansone Decl.).

For example, Mr. Dryden submitted a letter to FERC, which is attached to his declaration, explaining that he learned about a FERC pipeline hearing from a Columbia Riverkeeper informational meeting and it was only after he attended a FERC hearing and saw a FERC map that he learned that his property is on the pipeline route. Pl.'s Ex. 14 (Dryden Decl.). FERC's failure to uphold its regulatory obligations of adequate notice harmed the landowners' ability to participate in the FERC process and to protect their interests. In fact, the controversy over FERC's failure to notify landowners was so great that Senator Wyden's staff had a meeting on FERC's inadequate notice in Oregon with FERC Commissioner (now Chair) John Wellinghoff, FERC staff, Governor Kulongoski's Natural Resources Policy Director Mike Carrier, Oregon Senator Betsy Johnson, a Clackamas County Commissioner, and several affected landowners. Pl.'s Ex. 15 (Second Sansone Decl.)

a. Disclosure of the list will shed light on FERC's performance of its duties

FERC improperly relied on FOIA exemption 6 to redact the names and addresses from
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the April 18, 2008 mailing list. Regarding FOIA exemption 6, the Court must consider whether disclosure of the landowner list would “shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.” *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997) (quoting *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). The mailing list Riverkeeper requested provides precisely this type of information: allowing the public to review whether FERC complied with its public notice requirements under 40 C.F.R § 1506.6. Disclosure of the mailing list in its entirety furthers the public interest by providing oversight of FERC's process, ensuring no landowners are left out, and ensuring that stakeholders who requested notice are on the list. Whether FERC provided adequate notice to all of the affected landowners is an ongoing question. There may be citizens who are still unaware of how the pipeline will affect their property or their rights under NEPA.

The public interest in disclosure of the mailing list is especially strong because the mailing lists are the only way for the public to assess whether FERC is performing its statutory duties to notify affected landowners. The Supreme Court stated, “[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA’s] statutory purpose. *U.S. Dept. of Defense*, 510 U.S. at 495-496. Here, the mailing list sheds light on whether FERC complied with its regulatory duty of notifying affected landowners.

b. FERC fails to overcome the strong presumption of disclosure

Without any analysis or explanation, Defendant asserts that “the public interest is negligible or non-existent because disclosure of the names and addresses of individuals owning property adjacent to the pipeline would not contribute to the public's understanding of the activities or operations of the government.” Def. S.J. Memo at 9 (hereinafter “Memo”). This conclusory statement regarding the public interest does not overcome the overarching

presumption favoring disclosure.

Defendant's statement ignores the fact that disclosure of the mailing list will allow the public to see who the government has communicated with about this project, and who was left off the list. This is exactly the type of interest FOIA was enacted to protect: to give a window into government's performance of its duties, including its interactions with the public.

In its Memorandum, Defendant misrepresents the Supreme Court's holding in *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1996). In the case, ONDA submitted a FOIA request to the Bureau of Land Management (BLM) requesting the mailing list that BLM used to communicate with interested parties about upcoming projects on BLM land. BLM refused to release the names and addresses of individuals, citing FOIA Exemption 6. While the Supreme Court reversed the Ninth Circuit on other grounds as discussed below, the Ninth Circuit's discussion on balancing public interest and privacy is instructive. *Oregon Natural Desert Ass'n v. Bibles*, 83 F.3d 1168, 1171 (9th Cir. 1996), *rev'd by Bibles*, 519 U.S. 355 (1996).

The Ninth Circuit held that the BLM improperly withheld the mailing list because the public interest in obtaining the mailing list outweighed any privacy interests. *ONDA*, 83 F.3d at 1172. The Ninth Circuit identified two areas that gave rise to a significant public interest: 1) in knowing with whom the government has chosen to communicate; and 2) in providing those persons with additional information. *Id.* In its reversal of that decision, the Supreme Court only examined – and reversed – the second prong, stating that the public interest in FOIA is limited to knowing what the government is up to, not in educating the public. *Bibles*, 519 U.S. at 356 (1997) (“the purposes for which the request for information is made . . . have no bearing on whether information must be disclosed under FOIA.” and “the *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know

what their government is up to.” (internal quotes omitted)).

Consistent with *Bibles v. ONDA*, plaintiffs seek the mailing list to ensure that FERC is performing its statutory duties. The Court should not consider whether plaintiffs will use the list for educational purposes.

The Supreme Court did *not* find, as Defendant suggests, that “the public interest in the release of information would not shed light on the performance of an agency's statutory duties or otherwise inform the public about the government.” Def’s Memo at 11. As noted above, the Supreme Court did not reverse *ONDA* because it found no public interest in the disclosure of federal mailing lists; rather, it reversed *ONDA* because the Ninth Circuit improperly considered how the requester would utilize the mailing list. *Bibles*, 519 U.S. at 356. The Supreme Court was altogether silent as to whether disclosure of a federal mailing list would “let citizens know what their government is up to.” *Id.* However, the Ninth Circuit concluded that disclosure of the mailing list would help inform the public what the government was up to. *ONDA*, 83 F.3d at 1171. This conclusion was not questioned by the Supreme Court. *Bibles*, 519 U.S. at 356.

This case presents an even stronger public interest in disclosure than *ONDA*. Not only will the mailing list allow plaintiffs to see what the government is up to generally, but it allows plaintiffs specifically to check FERC’s compliance with the statutory requirement of providing notice.

2. The personal private interest is minimal

Exemption 6 protects only against disclosure which amounts to a “clearly unwarranted invasion of personal privacy.” That strong language instructs the court “to tilt the balance of disclosure interests against privacy interests in favor of disclosure.” *Local 598 v. Dept of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th Cir. 1988), quoting *Washington Post Co. v. Dep’t of Health & Human Svcs.* 690 F.2d 252, 261 (D.C. Cir. 1982).

The disclosure of the mailing list will have minimal impacts on personal privacy because:

- a) FERC routinely releases landowner lists for similar pipelines;
- b) the mailing list does not reveal any private information;
- c) FERC provided the landowner list to private corporations; and
- 4) there is little risk of harm or embarrassment to the landowners.

a. The privacy interest in minimal because FERC routinely releases landowner lists for pipelines

FERC routinely publishes on its website the names and addresses for all landowners along pipeline routes. For example, there are three other prominent pipelines proposed for Oregon – Ruby, NorthernStar, and Oregon LNG – for which the FERC website contains fully disclosed (not redacted) lists of names and addresses of landowners on the pipeline route. Pl.’s Ex. 16⁴, Pl.’s Ex. 17⁵, Pl.’s Ex. 18. FERC’s argument that individuals on the Palomar Pipeline have a strong privacy interest is contradicted by FERC’s regular practice of publishing similar lists on its website. *Id.* FERC fails to explain why the Palomar Pipeline landowner list has a stronger privacy interest than the other pipeline lists published on FERC’s website. FERC also fails to provide any evidence that landowners along the Ruby, NorthernStar and Oregon LNG pipelines, whose addresses were previously published, have suffered any harm. It is incongruous for FERC to claim that individuals affected by the Palomar project have a significant privacy interest in their home addresses, after already releasing that information for thousands of other similarly situated individuals.

b. The landowner list does not reveal private information

The individuals on the landowner list did not make a personal choice to have the pipeline constructed on their property so there is no private information revealed about their actions or

⁴ Plaintiffs’ Exhibit 16 contains an excerpt of 4 pages of 21 pages total of names and addresses of landowners affected by the Ruby Pipeline.

⁵ Plaintiffs’ Exhibit 16 contains an excerpt of 4 pages of 58 pages total of names and addresses of landowners affected by the Oregon LNG Pipeline.

thoughts. 510 U.S. 487, (1994).

In *Department of Defense v. Federal Labor Relations Authority (DOD)*, two unions sought to obtain nonunion employees' names and addresses. 510 U.S. 487 (1994). The Court found a heightened privacy interest because "these employees have *chosen not to become union members* or to provide unions with their addresses" and that there is an interest in avoiding the "union-related telephone calls or home visits that would follow disclosure." *Id.* at 501 (emphasis added). Therefore, the non-union list would reveal the private and personal decision made by each individual on whether or not to join the union. *Id.* at 500. To the contrary, here landowners had the pipeline thrust upon them – they have not made any decisions that could be revealed by disclosure of the list. Therefore, the *Dept. of Defense* Court's concern about retaliation by the union simply does not apply to the pipeline list because the landowners did not make any decisions from which to retaliate. Defendant relies entirely on *DOD* to support its claim of a strong privacy interest, yet failed to apply its facts or holding to the case at hand.

In contrast, *Oregon Natural Desert Ass'n v. Bibles* is one of the few cases that addresses the question of the privacy interest associated with being on a government general informational mailing list. In *ONDA*, the Ninth Circuit found that the privacy interest of individuals already on the mailing list is minimal in light of the mailings already received by the individuals and the similar subject matter of the mailings likely to be received as a result of the disclosure. *Or. Natural Desert Ass'n* 83 F. 3d 1168 (*rev'd on other grounds*).

Multnomah County Medical Soc. v. Scott is also instructive on what is a strong privacy interest. 825 F.2d 1410, 1415 (9th Cir. 1987). In that case, the Court concluded that a list of all medicare recipients in Multnomah County has a high privacy interest because the "beneficiaries' identities would reveal either that they are senior citizens or disabled." To the contrary, the pipeline mailing list would not reveal any personal information.

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In *Oregon Natural Desert Ass'n v. U.S. Dept. of the Interior*, this Court ordered the disclosure of a list of cattle trespassers. 24 F.Supp.2d 1088, 1094 (D.Or.1998). The Court stated the facts favor disclosure because the individuals admitted violating the law, “the information sought is not highly personal information contained in a compiled record like rap sheets,” and plaintiffs have no other way to access the information. *Id.* at 1093. While the April 18, 2008 mailing list is not related to a criminal violation, the mailing list is similar to the disclosed information in *ONDA* because it does not contain any personal information like a rap sheet and plaintiffs have no other access to the information.

c. FERC regularly shared the landowner list with a private corporation, which mailed multiple unsolicited letters

FERC has already shared the mailing list with a private pipeline corporation, Palomar Pipeline Company, which has sent landowners numerous letters. *Sipe Depo.* p 21, ¶4-25. That both the government and a corporation are already contacting all of the names on the list, with or without a request from the landowner, means that the privacy interest has been greatly reduced. Defendant has failed to set forth convincing reasons for assigning a strong privacy interest to the names and addresses of individuals already on a mailing list used by FERC and Palomar.

d. Disclosure of the landowner list will not cause harm or embarrassment

Finally, there are very low personal consequences for individuals identified on the mailing list. The Supreme Court noted that whether disclosure of information is “de minimis or significant depends on the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.” *US Dep't of State v. Ray*, 502 U.S. 164, 177 n. 12, 112 S.Ct. 541, 548 n. 12. In particular, Exemption 6 seeks to protect individuals from harm and embarrassment that may stem from the disclosure of personal information. *ONDA*, 24 F.Supp.2d at 1091 (citing *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982)).

Here, Plaintiffs simply seek the information to monitor who FERC is communicating with and ensure that all those who should be receiving notice of this project are. More harm might come to individuals who are inadvertently left off FERC's mailing list and not alerted to the proposed pipeline crossing their property. Furthermore, FERC has made no representation of any harm that would come to individuals as a result of release of the list, undermining the reasonableness of withholding the mailing list.

CONCLUSION

Regarding plaintiffs' FOIA request # 1, FERC violated FOIA by failing to conduct an adequate search, failing to respond within the time limits proscribed by FOIA, and withholding responsive documents. FERC's actions also violate the APA because its actions are arbitrary and capricious and not in accordance with the law.

Regarding plaintiffs' FOIA request # 2, FERC violated FOIA by improperly redacting the April 18, 2008 mailing list under FOIA exemption 6.

Plaintiffs' seek the following relief:

1. Regarding plaintiffs' FOIA request # 1 (February 12, 2008),
 - a. Declare that FERC violated FOIA by failing to conduct an adequate search and withholding responsive documents.
 - b. Declare that FERC violated the APA by failing to conduct an adequate search and withholding responsive documents.
 - c. Order the production of and enjoin FERC from withholding documents responsive to plaintiffs' February 12, 2008 FOIA request, including the multiple October 2007 mailing lists that plaintiffs exposed during discovery.
2. Regarding plaintiffs' FOIA request #2 (June 17, 2008):

- a. Declare that FERC violated FOIA by improperly using exemption 6 to redact the April 18, 2008 mailing list;
 - b. Order the production of and enjoin FERC from withholding the full April 18, 2008 mailing list.
3. Award Plaintiffs their costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
 4. Grant such other and further relief as this Court may deem just and proper.

Dated: March 19, 2009

Respectfully submitted,

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