

1 negligence. (*Id.* at 16–19.)

2 Plaintiffs filed this motion to compel the following discovery: (1) all documents related
3 to Defendant’s communications with regulatory agencies related to activities, authorizations,
4 violations, or conditions on Defendant’s property; (2) photographs of Defendant’s property that
5 is at issue in this lawsuit; and (3) all documentation related to Defendant’s restoration plan and
6 “stream functions assessment.”¹ (Dkt. No. 22 at 9.) Defendant responded with a three-page
7 declaration by its defense counsel, who admitted that some of the documents Plaintiffs identified
8 had not been previously produced, but indicated that Defendant had fully supplemented its
9 discovery responses. (*See* Dkt. No. 29 at 2) (“Defendant has given over every document
10 Plaintiffs have requested and produced documents they could have just as easily acquired on
11 their own.”) In their reply brief, Plaintiffs suggest that Defendant has still not provided all
12 responsive documents.² (Dkt. No. 30.)

13 **II. DISCUSSION**

14 **A. Legal Standard**

15 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
16 party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). If requested discovery is not answered, the
17 requesting party may move for an order compelling such discovery. Fed. R. Civ. P. 37(a)(1). If a
18 party fails to comply with a discovery order, the district court may also sanction that party

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20 ¹ Plaintiffs also state that they “respectfully request the court to compel [Defendant] to
21 produce any other unproduced records responsive to RFP Nos. 1, 3, 8, 9, 14, 15, 16, 18.” (Dkt.
22 No. 22 at 10.) Plaintiffs do not explain how Defendant has failed to respond to these individual
23 requests for production, and the Court will not examine each request in an attempt to guess.

24 ² Additionally, for the first time in their reply brief, Plaintiffs ask the Court to compel
25 Defendant to produce various financial records. (*See* Dkt. No. 30 at 3.) The Court will not
26 consider Plaintiffs’ request because it was not contained in their original motion. *See Glenn K.*
Jackson v. Roe, 273 F.3d 1192, 1201–02 (9th Cir. 2001) (noting that district courts have
discretion to consider issues raised for first time in a reply brief). With this in mind, Defendant’s
motion to strike Plaintiffs’ reply brief (Dkt. No. 32) is DENIED.

1 accordingly. Fed. R. Civ. P. 37(b)(2). The Court has broad discretion to decide whether to
2 compel disclosure of discovery. *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307
3 F.3d 1206, 1211 (9th Cir. 2002).

4 **B. Communications with Regulatory Agencies**

5 Plaintiffs' Request for Production 8, originally sent to Defendant on June 13, 2018,
6 stated: "Produce all documents related to communications with regulatory agencies (including
7 U.S. EPA, U.S. Corps of Engineers, City of Everett, Snohomish County, Marshland Flood
8 Control District, Washington Department of Ecology, and Washington Department of Fish and
9 Wildlife) related to activities, authorizations, violations, or conditions on [Defendant's]
10 property." (Dkt. No. 23-1 at 10.) Defendant initially responded, "there are none." (Dkt. No. 23-4
11 at 13.) In May 2019, Defendant subsequently submitted a declaration in opposition to Plaintiffs'
12 motion for partial summary judgment, which referenced communications with the City of
13 Everett that had not been previously produced in discovery. (*See* Dkt. No. 21-2.)

14 In its response to Plaintiffs' motion to compel, Defendant does not specifically address
15 whether it has disclosed all responsive documents to Plaintiffs' Request for Production 8, other
16 than to generally state that "[a]ll of the documents requested have only been recently generated."
17 (Dkt. No. 29 at 2.) In their reply, Plaintiffs assert that Defendant has still not produced various
18 records related to pending regulatory enforcement actions by the City of Everett. (Dkt. No. 30 at
19 2.)

20 The Court FINDS that the information sought by Plaintiffs' Request for Production 8 is
21 relevant to proving each of their causes of action against Defendant. Moreover, it appears that
22 Defendant has failed to produce all responsive documents. Therefore, Plaintiffs' motion to
23 compel is GRANTED as to Request for Production 8.

24 **C. Photographs of Defendant's Property**

25 Plaintiffs' Request for Production 9 stated: "Produce all documents depicting
26 [Defendant's] property." (Dkt. No. 23-1 at 10.) Defendant responded by attaching a "parcel

1 map” of its property. (Dkt. No. 23-4 at 13.) Defendant subsequently filed photographs of the
2 relevant area with its opposition to Plaintiffs’ motion for partial summary judgment, which had
3 not been previously produced in discovery. (Dkt. No. 21-1 at 22–27.)

4 In its response, Defendant states that it made an “additional search for photos and turned
5 up a few additional items taken in April or May of this year.” (Dkt. No. 29 at 2.) Defendant
6 asserts that it has now provided Plaintiffs with all of the relevant photographs. (*Id.*) Plaintiffs do
7 not dispute Defendant’s assertion in their reply brief. (*See* Dkt. No. 31.) It appears from the
8 record before the Court that Defendant has satisfied its discovery obligations regarding
9 producing relevant photographs of its property. Therefore, Plaintiffs’ motion to compel is
10 DENIED as to Request for Production 9.

11 **D. Restoration Plan and Stream Functions Assessment**

12 Defendant included with its response to Plaintiffs’ motion for partial summary judgment
13 a “Stream Functions Assessment.” (*See* Dkt. No. 21-4.) This document is a detailed report
14 created by a third party in response to a regulatory enforcement action by the City of Everett
15 against Defendant related to the ditching and drainage work that is at issue in this lawsuit. (*See*
16 *id.*; Dkt. No. 1.) Plaintiffs allege that this report, and its supporting documentation, are
17 responsive to several of its prior requests for production and relevant to “assessing the
18 appropriate injunctive relief and to assess the CWA penalty factors,” that they ask the Court to
19 impose. (Dkt. No. 22 at 9.) In its response, defense counsel stated: “after review we learned that
20 we had already disclosed that document in our June 7th submission. I delivered a second
21 courtesy copy of [the Steam Functions Assessment] yesterday.” (Dkt. No. 29 at 2.) Production of
22 the report itself, however, does not address whether Defendant disclosed the documents used in
23 developing this assessment.

24 The Court FINDS that such supporting documentation is responsive to Plaintiffs’ Request
25 for Production 1, which sought documents describing “the modifications of [Defendant’s]
26 property, including but not limited to changes in land elevation or grade, to watercourse, other

1 changes made in preparation for use of [Defendant’s] property, dredging, filling, digging, and
2 implementation of erosion control or other environmental protection measures, which
3 [Defendant] made from 2017 to the present.” (Dkt. No. 23-1 at 6.) Such information is relevant
4 to proving Plaintiffs’ claims and seeking appropriate relief. Therefore, Plaintiffs’ motion to
5 compel is GRANTED as to its request for any documents used in developing Defendant’s
6 Stream Functions Assessment.

7 **E. Monetary Sanctions**

8 Plaintiffs ask the Court to impose sanctions pursuant to Federal Rule of Civil Procedure
9 37(a)(3)(A)–(B). (Dkt. No. 22 at 10.) Plaintiffs ask the Court to require Defendant to pay their
10 reasonable attorney fees and expenses incurred in making this motion and in informally
11 resolving prior discovery disputes. (*Id.* at 11–12.) Defendant states that “Plaintiffs seek to
12 compel production of material they already possess, and ask for sanctions to produce information
13 they could and should have procured before filing this Complaint. Their Motions are ill-
14 considered at best.” (Dkt. No. 31 at 3.) The Court disagrees.

15 The record before the Court amply demonstrates that Plaintiffs have previously sought to
16 informally resolve discovery disputes on several occasions. Indeed, Plaintiffs point to at least
17 three examples where Defendant did not produce responsive documents until Plaintiffs requested
18 a discovery dispute conference. (Dkt. No. 23 at 2–4.) It appears that Defendant has continually
19 failed to fully respond to Plaintiffs’ discovery requests and also failed to adequately supplement
20 its responses. (*See id.*) This motion to compel is just the latest example of Defendant’s dilatory
21 conduct. (*See* Dkt. No. 31 at 2) (Defense Counsel: “I believed I had provided [the requested]
22 documents in our second response to the Requests for Production I asked my client to make
23 an additional search for photos and turned up a few additional items taken in April or May of this
24 year and only recently sent to us.”)

25 Given Defendant’s discovery conduct, and the fact that the Court has partially granted
26

1 Plaintiffs' motion to compel, a monetary sanction is warranted. *See* Fed. R. Civ. P. 37(a)(5)(A).³
2 Defendant shall pay Plaintiffs' reasonable attorney fees and expenses incurred in filing their
3 motion to compel.

4 **III. CONCLUSION**

5 For the foregoing reasons, Plaintiffs' motion to compel (Dkt. No. 22) is GRANTED in
6 part and DENIED in part. In accordance with the Court's order:

7 1. No later than July 24, 2019, Defendant shall produce all responsive documents to
8 Plaintiffs' Request for Production 8, to include supplementing its previous document production.

9 2. No later than July 24, 2019, Defendant shall produce any documents used in
10 developing its Stream Functions Assessment.

11 3. No later than July 24, 2019, Plaintiffs shall file a declaration documenting their
12 reasonable attorney fees and expenses incurred in making their motion to compel.

13 4. No later than July 26, 2019, Defendant may file up to a three-page response
14 regarding the reasonableness of Plaintiffs' requested fees and expenses.

15 DATED this 18th day of July 2019.

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19 John C. Coughenour
20 UNITED STATES DISTRICT JUDGE

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24 ³ "If the motion is granted--or if the disclosure or requested discovery is provided after
25 the motion was filed--the court must, after giving an opportunity to be heard, require the party or
26 deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or
both to pay the movant's reasonable expenses incurred in making the motion, including
attorney's fees." Fed. R. Civ. P. 37(a)(5)(A).