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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,  
Plaintiff,  
v.  
FEDERAL EMERGENCY  
MANAGEMENT AGENCY,  
Defendant.

Case No. [16-cv-05254-MEJ](#)  
**ORDER RE: MOTION FOR  
ATTORNEYS' FEES AND COSTS**  
Re: Dkt. No. 98

**INTRODUCTION**

Plaintiff Ecological Rights Foundation (EcoRights) moves to recover \$702,000 in attorneys' fees and \$1,728.79 in costs it incurred litigating this Freedom of Information Act (FOIA) action. *See* Mot., Dkt. No. 98; Reply at 1 n.1 (providing updated figures), Dkt. No. 128; Reply C. Sproul Decl., Dkt. No. 128-2; May 31, 2018 FTR at 11:20 (fees at issue are \$702,000). Defendant Federal Emergency Management Agency (FEMA) asks the Court to reduce the fee award to a "still significant \$200,878.71." Opp'n at 22, Dkt. No. 124. FEMA does not oppose the request for costs. *Id.* at 22-23.

After EcoRights and FEMA attended an unsuccessful settlement conference regarding the fee dispute, the Motion was fully briefed and argued before this Court on May 31, 2018.

For the reasons set forth below, the Court **GRANTS IN PART** EcoRights' Motion, and awards EcoRights \$316,000 in reasonable attorneys' fees and \$1,728.79 in costs.

**LEGAL STANDARD**

FOIA's fee-shifting provision grants courts discretion "to assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

1 “Substantially prevailed” means that a “complainant has obtained relief through either . . . a  
2 judicial order, or an enforceable written agreement or consent decree; or . . . a voluntary or  
3 unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” *Id.*  
4 Fee and cost awards are not automatically awarded to a prevailing party under FOIA. *See Church*  
5 *of Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983). Plaintiffs “must  
6 present convincing evidence” that they are both eligible for an award of attorney’s fees and that  
7 they are entitled to such an award. *Id.* at 489, 492; *see also Long v. U.S. I.R.S.*, 932 F.2d 1309,  
8 1313 (9th Cir.1991) (“In order to receive an award of fees, a prevailing party in a FOIA action  
9 must demonstrate both eligibility for and entitlement to such a recovery.”).

10 To be eligible for an award, a party must show that “(1) the filing of the action could  
11 reasonably have been regarded as necessary to obtain the information,” and that “(2) the filing of  
12 the action had a substantial causative effect on the delivery of the information.” *Church of*  
13 *Scientology*, 700 F.2d at 489.

14 Once a court determines a party is eligible for an award, it exercises its “discretion to  
15 determine whether the plaintiff is entitled to fees.” *Oregon Nat. Desert Ass’n v. Locke*, 572 F.3d  
16 610, 614 (9th Cir. 2009) (emphasis added); *see also Church of Scientology*, 700 F.2d at 489  
17 (entitlement to an award of fees under FOIA is a separate analysis; a “determination of eligibility  
18 does not automatically entitle the plaintiff to attorney’s fees.”). In making this determination,  
19 courts consider “(1) the benefit to the public, if any, deriving from the case; (2) the commercial  
20 benefit to the complainant; (3) the nature of the complainant’s interest in the records sought; and  
21 (4) whether the government’s withholding of the records sought had a reasonable basis in law.”  
22 *Id.* at 492.

23 If a court determines that a party is both eligible and entitled to an award, that party “must  
24 submit [a] fee bill to the court for its scrutiny of the reasonableness of (a) the number of hours  
25 expended and (b) the hourly fee claimed.” *Long*, 932 F.2d at 1313-14. If these two figures are  
26 reasonable in light of the difficulty of the case and the skill of the attorneys involved, there is a  
27 “strong presumption” that their product “represents a reasonable award.” *Id.* at 1314. A court  
28 may revise upward or downward the resulting “lodestar figure” if “factors relating to the nature

1 and difficulty of the case overcome this strong presumption and indicate that such an adjustment is  
2 necessary.” *Id.* However, once a party is deemed both eligible and entitled to fees, “the award  
3 must be given and the only room for discretion concerns the reasonableness of the amount  
4 requested.” *Id.* A district court awarding fees and costs “should provide a detailed account of  
5 how it arrive[d] at appropriate figures for the number of hours reasonably expended and a  
6 reasonable hourly rate.” *Id.*

### 7 **DICUSSION<sup>1</sup>**

8 FEMA concedes EcoRights is eligible to recover attorneys’ fees, and that it is entitled to  
9 recover at least some of the fees it requests. However, FEMA argues EcoRights’ fees are  
10 generally unreasonable because the matter was overstaffed, the requested hourly rates are  
11 excessive, and EcoRights billed excessively. FEMA further argues that EcoRights is not entitled  
12 to recover fees billed for specific tasks, including:

- 13 • Arguing issues upon which it did not prevail, including the search cut off dates, the  
14 adequacy of FEMA’s Vaughn Index at the administrative stage, and forward-  
15 looking injunctive relief. *See* Opp’n at 7-8, 16.
- 16 • Preparing documents it eventually withdrew, such as its first motion for summary  
17 judgment and the claims asserted in the proposed third amended complaint.<sup>2</sup> *Id.* at  
18 8-9, 16-17.
- 19 • Working on papers it did not file (a motion to enforce a court order or a motion to  
20 shorten time), on work related to other matters, or on work performed at the  
21 administrative stage of the FOIA process. *Id.* at 17.
- 22 • Opposing FEMA’s motion to stay this Court’s Order pending appeal. *Id.* at 12, 15.
- 23 • Working on the instant fees motion. *Id.* at 18-19.

24  
25 \_\_\_\_\_  
26 <sup>1</sup> The Court previously summarized the long and somewhat tortuous course of this action in its  
27 Order granting EcoRights’ Motion for Summary Judgment; it will not reproduce that background  
here. *See* Order re: Summ. J., Dkt. No. 74; *see also* Mot. at 3-12 (summarizing litigation).

28 <sup>2</sup> EcoRights moved for leave to file a third amended complaint (Dkt. No. 53), and subsequently  
withdrew that motion (Dkt. No. 64).

1           EcoRights in its Reply agreed to eliminate approximately \$40,000 in fees for time spent on  
2 the administrative stage of the FOIA proceedings, “getting up to speed” on the case, quality  
3 control work, and for a portion of the fees requested in connection with the present Motion;  
4 EcoRights otherwise opposes FEMA’s arguments to cut its fees request. *See* Reply at 9, 11, 13 ns.  
5 5-6; *see also* Reply C. Sproul Decl.<sup>3</sup>

6           The Court agrees that EcoRights is eligible to recover attorneys’ fees, and turns to FEMA’s  
7 arguments regarding entitlement and reasonableness.

8       **A.     Entitlement to Fees**

9           Applying the *Church of Scientology* factors, the Court finds EcoRights is entitled to  
10 recover the reasonable attorneys’ fees it incurred in securing the release of FEMA governments  
11 under FOIA.

12           In considering the public benefit factor, courts consider “the degree of dissemination and  
13 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
14 493. When the information is broadly disseminated to the public, this factor favors an award. *See*,  
15 *e.g.*, *Electronic Frontier Found. v. Office of Dir. of Nat’l Intelligence*, 2008 WL 2331959, at \*3  
16 (N.D. Cal. June 4, 2008) (public benefit factor satisfied where plaintiff “immediately posted the  
17 requested information on its website” and “created press releases for public access”). Even where  
18 the degree of dissemination is limited, or where the level of public interest in the information is  
19 minimal, this factor may still favor an award “as long as there is a public benefit from the fact of . .  
20 . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D. Cal. 1996). This  
21 factor may still favor an award under these circumstances where the plaintiffs were environmental  
22 nonprofit groups whose purpose was “to oversee and enforce compliance with the [Clean Air  
23 Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing oversight  
24 and enforcement efforts.” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F. Supp. 3d  
25 1125, 1143-44 (N.D. Cal. 2014).

26  
27 \_\_\_\_\_  
28 <sup>3</sup> During the hearing on the Motion, EcoRights also conceded a February 14, 2018 time entry for  
M. Coyne included an error in the amount of \$18,759, and abandoned its request for those fees.  
*See* May 31, 2018 FTR at 11:13, 11:16 (“The fees we are seeking should be reduced by \$19,000”).

1 EcoRights is a “nonprofit public interest group[] organized [to] alert the public of issues  
2 concerning environmental and health risks.” Mot. at 16 (quoting *Sierra Club*, 75 F. Supp. 3d at  
3 1143); *see also* Lamport Decl. ¶¶ 2-3, Dkt. No. 103. It sought documents from FEMA through  
4 FOIA, and used the information obtained, “to advance its efforts to promote compliance with  
5 environmental laws intended to broadly benefit the public interest [in] environmental protection.”  
6 Mot. at 16. It disseminated the information to its members, other organizations, the public, and  
7 the press by sharing documents or their summarized contents in messages, website postings, press  
8 releases, and interviews. Lamport Decl. ¶¶ 4-5. EcoRights’ efforts to obtain records regarding  
9 FEMA’s compliance with the Endangered Species Act benefited the public by bringing this  
10 information to light and by supporting EcoRights’ efforts to enforce federal environmental laws.  
11 *Id.* ¶ 4. This factor favors awarding EcoRights its fees.

12 “The second and third factors are the commercial benefit to the complainant and the nature  
13 of the complainant’s interest in the records sought. Courts regularly consider these factors  
14 together.” *Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 2017 WL 783490, at \*8  
15 (N.D. Cal. Mar. 1, 2017) (“*Our Children’s Earth II*”) (internal quotation marks and citations  
16 omitted). Where the plaintiff “is indigent or a nonprofit public interest group, an award of  
17 attorney’s fees furthers the FOIA policy of expanding access to government information.” *Church*  
18 *of Scientology*, 700 F.2d at 494. Pursuant to the second and third factors, a court “should  
19 generally award fees if the complainant’s interest in the information sought was scholarly or  
20 journalistic or public-oriented,” but should not do so “if [the plaintiff’s] interest was of a frivolous  
21 or purely commercial nature.” *Long*, 932 F.2d at 1316. As discussed immediately above,  
22 EcoRights is a nonprofit organization that sought the requested documents in connection with its  
23 public-interest mission of educating the public about the government’s compliance with  
24 environmental laws and enforcing those laws. That EcoRights also may have used the documents  
25 in litigation in a different case (Opp’n at 11-12), does not change the analysis. *See Our Children’s*  
26 *Earth II*, 2017 WL 783490, at \*8-9 (citing cases for the proposition that private litigants using  
27 FOIA to secure evidence in support of their private lawsuits should not recover fees “do not  
28 address the situation here, where non-profit environmental advocacy organizations bring suit

1 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
2 the environment, albeit with respect to a specific project. Moreover, while plaintiffs were  
3 undoubtedly motivated in some part to secure documents from NMFS in order to assist their  
4 litigation against Stanford, there was a significant and separate public benefit sought and secured  
5 by plaintiffs—shedding light on the actions of NMFS (as opposed to the actions of Stanford) in  
6 carrying out its agency duties and on its handling of plaintiffs’ and others’ FOIA requests.”); *see*  
7 *also Sierra Club*, 75 F. Supp. 3d at 1144 (plaintiffs, an environmental organization dedicated to  
8 educating the public on health issues and a nonprofit that oversees compliance with environmental  
9 laws, had no commercial interest in documents requested under FOIA, even though they initiated  
10 private lawsuit after initiating their FOIA request). Even though EcoRights may have pursued the  
11 FOIA requests *in part* to help its litigation against FEMA (*see* May 11, 2017 FTR at 10:23  
12 (articulating urgent need for documents because of pending litigation)), the fact remains that  
13 EcoRights, an environmental non-profit, used the documents to carry out its mission and educate  
14 its constituents and the public. This compels the conclusion that these two factors weigh in favor  
15 of EcoRights’ entitlement to fees.

16 The fourth factor is “whether the government’s withholding had a reasonable basis in law”;  
17 in other words, whether the government’s actions appeared to have “a colorable basis in law” or  
18 instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.”  
19 *Church of Scientology*, 700 F.2d at 492, 492 n.6. The burden is on the government to demonstrate  
20 that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145. FEMA argues that any  
21 delay in producing responsive documents and information in this matter should be attributed to  
22 confusion or bureaucratic difficulty in handling the FOIA requests, rather than obdurate behavior  
23 or bad faith. Opp’n at 12-14. The record in this case documents FEMA’s repeated inability or  
24 unwillingness to timely comply with its obligations under FOIA, its agreements with EcoRights,  
25 and this Court’s orders. For example, FEMA repeatedly failed to timely respond to EcoRights’  
26 FOIA requests within the statutory timeframe or produce documents by Court-ordered deadlines.  
27 Order re: Summ. J. at 17-18; Status Order, Dkt. No. 87. As another example, despite being  
28 granted leave to amend them, FEMA’s corrected Vaughn Indices were deficient and did not allow

1 either EcoRights or the Court to evaluate the validity of the exemptions claimed by FEMA. *See*  
2 May 11, 2017 FTR at 10:22-23 (FEMA’s acknowledgement its first Vaughn Index was not as  
3 helpful or detailed as it could have been, and asking for opportunity to provide amended index);  
4 May 11, 2017 Order at ¶ 4, Dkt. No. 50; Order re: Summ. J. at 2-4 (summarizing deficiencies in  
5 FEMA’s three Vaughn indices); *id.* at 12-13, 15. The Court does not impute bad faith to the  
6 government, but cannot find that the repeated missed deadlines, incomplete productions, and  
7 failures to obey Court orders had a colorable basis in law. FEMA cannot now complain that  
8 EcoRights’ attorneys request to be compensated for the time they spent attempting, frequently in  
9 vain, to have FEMA comply with its statutory and Court-ordered obligations. This factor also  
10 weighs in favor of fees.

11 To summarize, all the *Church of Scientology* factors weigh in favor of awarding fees to  
12 EcoRights in this action.

13 **B. Reasonableness of Fees**

14 Having found EcoRights is entitled to fees, the Court considers the reasonableness of its  
15 request.

16 1. Applicable Standard

17 “[A] ‘reasonable’ number of hours equals the number of hours which could reasonably  
18 have been billed to a private client.” *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir.  
19 2013) (internal quotation marks and edits omitted). “In determining the appropriate number of  
20 hours to be included in a lodestar calculation, the district court should exclude hours ‘that are  
21 excessive, redundant, or otherwise unnecessary.’” *McCown v. City of Fontana*, 565 F.3d 1097,  
22 1102 (9th Cir. 2009) (quoting *Hensley*, 461 U.S. at 434). Courts may exclude such hours in one of  
23 two ways. *Gonzalez*, 729 F.3d at 1203. First, courts may exclude unreasonable hours after  
24 “conduct[ing] an hour-by-hour analysis of the fee request[.]” *Id.* (internal quotation marks  
25 omitted). Second, courts “faced with a massive fee application” may “make across-the-board  
26 percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical  
27 means of excluding non-compensable hours from a fee application.” *Id.* (internal quotation marks  
28 and brackets omitted); *see also Fox v. Vice*, 563 U.S. 826, 838 (2011) (“[T]rial courts need not,

1 and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to  
 2 either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into  
 3 account their overall sense of a suit, and may use estimates in calculating and allocating an  
 4 attorney’s time.”). Nevertheless, a district court must explain how it came up with the amount of  
 5 an attorneys’ fees award. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008)  
 6 (“The explanation need not be elaborate, but it must be comprehensible. . . Where the difference  
 7 between the lawyer’s request and the court’s award is relatively small, a somewhat cursory  
 8 explanation will suffice. But where the disparity is larger, a more specific articulation of the  
 9 court’s reasoning is expected.” (citations omitted)).

10 2. FEMA’s Claims- or Task-Based Arguments

11 FEMA argues EcoRights should not recover for work performed in connection with claims  
 12 it “lost” such as the search cut-off date or the argument FEMA should have provided more  
 13 complete Vaughn indices at the administrative stage. *See* Opp’n at 7-8 (citing *Hajro v. U.S. CIS*,  
 14 811 F.3d 1086, 1107 (9th Cir. 2015), and *Oregon Nat. Desert Ass’n*, 572 F.3d at 612).<sup>4</sup> Fees may

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16 <sup>4</sup> In *Hajro*, the claimant asserted nine factually and legally distinct causes of action: two actions by  
 17 CIS violated a prior settlement agreement; the timing of CIS’ FOIA responses violated FOIA; CIS  
 18 failed to notify the claimant that it could not timely process his request; CIS had a pattern and  
 19 practice of failing to comply with FOIA timing requirements; CIS unlawfully withheld  
 20 information; withholding of nonexempt material violated claimant’s due process rights because it  
 21 interfered with his ability to appeal his naturalization denial and violated his right to a fair hearing;  
 22 CIS’ policy violated Fifth Amendment guarantee of Equal Protection; and adoption of policy  
 23 without notice and comment rulemaking procedure violated the APA. 811 F.3d at 1094-95. The  
 24 claims at issue in *Hajro* thus were based on distinct factual and legal issues. The district court  
 25 found for the claimant on all but one of the claims; on appeal, the Ninth Circuit reversed the  
 26 judgment on three of the claims, and remanded with instructions, including re-computation of the  
 27 attorneys’ fees.

24 In *Oregon Natural Desert Ass’n*, the district court granted summary judgment to the FOIA  
 25 claimant on three out of four claims. 572 F.3d at 616. Although the government had produced  
 26 documents pursuant to claimant’s first two claims before the district court granted summary  
 27 judgment to the claimant, the district court reasoned the claimant was still entitled to fees under a  
 28 catalyst theory. *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health &*  
*Human Res.*, 532 U.S. 598, 605 (2001)). The Ninth Circuit reversed, finding the catalyst theory  
 was unavailable as a basis for recovering attorneys’ fees against the government after the 2007  
 amendments to FOIA. *Id.* It held that the attorneys’ fees the district court awarded pursuant to the  
*Buckhannon* rule on the claimant’s first two claims also must be reversed. The district court had



1 be reduced where counsel spent time on unsuccessful claims, but generally only if the  
2 unsuccessful claims were also unrelated to the successful claims. *Hensley v. Eckerhart*, 461 U.S.  
3 424, 434-35 (1983) (where counsel works on cases involving a common core of facts or related  
4 legal theories, in which much of counsel’s time will be devoted to litigation as a whole, hours may  
5 not be amenable to division on a claim by claim basis). “[C]laims are unrelated when the relief  
6 sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and  
7 separate from the course of conduct that gave rise to the injury on which the relief granted is  
8 premised. But, even if a specific claim fails, the time spent on that claim may be compensable, in  
9 full or in part, if it contributes to the success of other claims.” *Community Ass’n for Restoration of*  
10 *the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002) (internal citations and  
11 quotation marks omitted) (affirming district court’s conclusion that all initial claims had similar  
12 factual bases, were based on similar legal theories, and targeted single course of conduct by  
13 defendant).

14 The Court cannot find the claims EcoRights lost or abandoned “intended to remedy a  
15 course of conduct entirely distinct and separate from the course of conduct that gave rise to the  
16 injury on which the relief granted [by this Court] is premised.” *See* Second Am. Compl., Dkt. No.  
17 43. Each of the claims EcoRights asserted in the SAC sought to remedy the same course of  
18 conduct: FEMA’s failure to timely and fully comply with its obligations under FOIA. While  
19 FEMA contends EcoRights should not recover fees for its request for forward-looking injunctive  
20 relief, that claim was not “distinctly different” from the claims upon which EcoRights succeeded;  
21 it merely sought different type of relief for FEMA’s FOIA violations. EcoRights did lose its claim  
22 based on the use of search cut off, and the Court did not accept EcoRights’ argument that FEMA  
23 should have made more fulsome disclosures regarding exemptions at the administrative stage.

24  
25  
26 also granted attorneys’ fees to the claimant on his fourth claim for injunctive relief under FOIA;  
27 the Ninth Circuit affirmed that ruling because the claimant obtained that relief when the district  
28 court ruled in its favor on the merits and thus had “substantially prevailed” on the claim. The  
Ninth Circuit remanded for recomputation of fees because the claimant was eligible for attorneys’  
fees as to only one of the claims. *Id.*

1 See Order re: Summ. J. But those claims also were based on the same factual underpinnings:  
2 FEMA’s failure to timely and adequately produce documents regarding the ESA pursuant to  
3 FOIA.<sup>5</sup> EcoRights squarely prevailed on its core claims and achieved compelling results in this  
4 action: rejection of FEMA’s exemption claims and production of an additional 2,000 pages.  
5 EcoRights thus is entitled to a fully compensatory award to the extent the fees billed on tasks that  
6 supported that result. See generally *Our Children’s Earth Foundation v. EPA*, 2016 WL 1165214,  
7 at \*5-6 (N.D. Cal. Mar. 25, 2016) (“*Our Children’s Earth I*”); *Schwartz v. Sec’y of Health &*  
8 *Human Servs.*, 73 F.3d 895 (9th Cir. 1995) (concluding claims were not “unrelated” because they  
9 arose from the same basic facts and the same basic course of conduct).

10 EcoRights seeks to recover fees incurred in drafting documents it ultimately did not file,  
11 but the Court cannot find that EcoRights work to draft these documents was not necessary to the  
12 case, or that preparing these documents was not necessary to force FEMA to abide by its  
13 discovery obligations. For example, while EcoRights withdrew its first summary judgment  
14 motion, EcoRights used that motion to guide settlement conference negotiations and obtain a  
15 partial settlement of its claims. See Reply C. Sproul Decl. ¶ 4. Similarly, while EcoRights never  
16 filed its Third Amended Complaint, the Court cannot find that FEMA’s knowledge of the  
17 document and EcoRights’ intention to file it, did not lead FEMA to respond to the FOIA request.  
18 *Id.* ¶¶ 6-7.

19 FEMA also argues EcoRights should not be compensated for opposing FEMA’s motion to  
20 stay because the opposition “relates to plaintiff’s desire to use the unredacted documents obtained  
21 from FEMA in the ESA lawsuits before Judge Donato.” Opp’n at 12. FEMA offers no legal  
22 support for this position, and the Court finds EcoRights’ opposition to the stay was necessary and  
23 reasonable to finally obtain the information FEMA had been withholding for approximately two  
24 years.

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25  
26 <sup>5</sup> Assuming these claims are sufficiently factually and legally distinct to warrant reducing a fee  
27 award, EcoRights counsel declares “a very small portion of EcoRights hours on its summary  
28 judgment motions were spent on these issues, no more than about 5% maximum.” Reply C.  
Sproul Decl. ¶ 8. To the extent the award must be reduced to reflect this small portion of the fees,  
that reduction would be captured by the adjustment reflected below.

1           The Court thus rejects FEMA’s request to cut fees connected to particular tasks,  
2 arguments, or documents. EcoRights prevailed on its core claims. This merits a fully  
3 compensatory award of reasonable fees. *See Hensley*, 461 U.S. at 435. The Court now addresses  
4 the reasonableness of the fees sought.

5           3.       General Reasonableness

6           FEMA argues that EcoRights’ request reflects overstaffing, unreasonably high hourly rates  
7 and excessive and cumulative billing. Opp’n at 15-16, 20-22. Based on its overall sense of the  
8 suit and the following three examples, FEMA’s arguments about the reasonableness of EcoRights’  
9 fees are well taken.

10           i.       CMC Statement

11           FEMA contends EcoRights seeks to recover \$12,066 for 25.6 hours spent on the initial  
12 case management statement. *See* Opp’n at 21 (citing Wall Decl., Ex. L.1, Dkt. No. 124-1).  
13 EcoRights does not dispute the accuracy of this figure, nor explain why it was reasonable to spend  
14 this amount of time on a form document, in a case concerning an area of law with which  
15 EcoRights’ attorneys are familiar. *See* Reply; Sproul Decl. ¶¶ 6-11, Dkt. No. 102. The Court  
16 cannot find that this was reasonable, and instead finds that a reasonable client would not have paid  
17 for even half of those hours at the rate counsel charged. *See Fleming v. Kemper Nat. Servs., Inc.*,  
18 373 F. Supp. 2d 1000, 1008 (N.D. Cal. 2005) (“Although work on the case management  
19 conference statement may reflect ‘behind the scenes’ disputes that do not appear in the final  
20 product, neither party has adequately explained how counsel spent a combined total of more than  
21 12 hours preparing the relatively straightforward case management statement. Given the absence  
22 of an explanation, the Court finds the 7.85 hours billed by plaintiff on this matter to be excessive,  
23 and finds that no more than 5 hours of time reasonably could have been spent preparing the case  
24 management statement.”); *Bd. of Trustees in their capacities as Trustees of Laborers Health &*  
25 *Welfare Tr. Fund for N. California v. Geotech Const., Inc.*, 2008 WL 3496474, at \*3 (N.D. Cal.  
26 July 18, 2008) (“Nor does 3.5 hours to draft a boilerplate case management statement seem  
27 reasonable.”).  
28

1                   ii.       Motions for Summary Judgment

2                   EcoRights also spent more than \$150,000 in preparing two motions for summary judgment  
3 in this matter. *See* Wall Decl., Ex. B (\$32,500 on first (withdrawn) MSJ; \$120,500 on second  
4 MSJ). EcoRights argues these figures are inaccurate but does not offer its own calculations  
5 (Reply at 5); it also argues that “the work for this first motion expedited EcoRights’ ultimately  
6 successful second summary judgment motion as EcoRights re-used some of the arguments and  
7 legal research in the first motion in the second motion” (*id.* at 5 (citing Reply C. Sproul Decl. ¶  
8 5)). The summary judgment motions addressed issues that were relatively legally straightforward.  
9 Moreover, EcoRights’ counsel already had researched the issues in the second motion for  
10 summary judgment and briefed them not only in connection with the first, withdrawn motion in  
11 this case, but in connection with a motion for summary judgment EcoRights filed in another case  
12 last year. *See Our Children’s Earth*, N.D. Cal. Case No. 14-cv-1130, Dkt. No. 32 (Mot. for  
13 Summ. J.). For instance, of the 47 cases EcoRights cited in its second motion for summary  
14 judgment, it had relied on all but two of them in its first, withdrawn motion. *Compare* Second  
15 Mot. at 3-6, Dkt. No. 42, *with* First Motion at 3-4, Dkt. No. 26. Moreover, EcoRights had cited 28  
16 of those cases in the motion for summary judgment its counsel filed in *Our Children’s Earth*  
17 *Foundation*. *Compare* Second Mot. at 3-6, *with Our Children’s Earth Mot.* at 3-6.

18                   EcoRights’ first and second summary judgment motions were largely substantively  
19 identical in content; the only difference in the table of contents for the two motions is a factual  
20 discussion of FEMA’s response to EcoRights’ third FOIA request and of the parties’ partial  
21 settlement agreement. *Compare* Second Mot. at 2, *with* First Motion at 2.

22                   The requested \$120,500 for fees incurred in connection with the second motion of course  
23 includes fees for reviewing the Opposition and drafting the Reply, and arguing before this Court;  
24 however, under these circumstances, the Court cannot find that billing anywhere close to \$120,500  
25 for the Second Motion was reasonable.

26                   This is all the more so given the significant hourly rate charged by EcoRights’ counsel, a  
27 rate they justify by their expertise in environmental law and their previous experience litigating  
28

1 FOIA cases. *See, e.g.*, Sproul Decl. ¶¶ 4-14<sup>6</sup>; Hudak Decl. ¶¶ 2-8, Dkt. No. 111; Hunt Decl. ¶¶ 2-  
2 12, Dkt. No. 101-6; Coyne Decl. ¶ 2, Dkt. No. 99; Rathje Decl. ¶¶ 2-6, Dkt. No. 110.

3 Again, the Court cannot find that this was reasonable. Given the \$30,000 counsel already  
4 had incurred in drafting the substantively identical First Motion, the Court finds a reasonable  
5 client would not have paid for even half of the hours that counsel charged at the rates charged. *See*  
6 *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 950 (9th Cir. 2007) (“[T]he district court did not err  
7 in reducing the requested 13 hours for preparation of Welch’s motion for attorney’s fees by 9  
8 hours because the motion’s language was ‘boilerplate.’ A reduction in hours is appropriate if the  
9 court reasonably concludes that preparation of a motion ‘demanded little of counsel’s time.’ The  
10 district court found that much of the language in Welch’s motion for fees was recycled from  
11 submissions to other courts.”) (quoting *Webb v. Sloan*, 330 F.3d 1158, 1170 (9th Cir. 2003)).

12 iii. Fees Motion

13 EcoRights seeks to recover more than \$200,000 for fees incurred in connection with the  
14 Fees Motion (including drafting the briefs, conferring with FEMA, preparing for and attending the  
15 settlement conference with Judge Kim). *See* Wall Decl., Ex. L (identifying 343.4 hours in  
16 FEMA’s billing records related to Fees Motion, totaling \$181,043.05 through filing of the  
17 Motion); Reply C. Sproul Suppl. Dec. ¶ 12 (Exhibit L includes time spent on negotiation,  
18 settlement, working out briefing schedule for fees motion, not just drafting of fees motion; also  
19 one entry for 0.25 hours included not only time spent on fees issue, but “time spent on the Court’s  
20 ordered status report”); *id.* ¶ 16 (exercising further billing judgment to reduce fees on fees); *id.* ¶  
21 22 (EcoRights incurred more than an additional \$100,000 in attorneys’ fees after filing opening  
22

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23  
24 <sup>6</sup> *Id.* ¶ 6 (“I have exclusively represented non-profit environmental organizations and individuals  
25 seeking to advance environmental protection through judicial litigation and administrative  
26 advocacy under the major environmental laws, . . . including the Freedom of Information Act  
27 (‘FOIA’)); *id.* ¶ 7 (“I have also represented such clients in various suits brought under FOIA  
28 against federal agencies. . . . My clients and I frequently utilize FOIA to acquire the documents  
necessary for our public interest advocacy work.”); *id.* ¶ 9 (“[M]any of these cases [Mr. Sproul  
brought on behalf of clients] have established important precedent in environmental law or under  
FOIA.”); *id.* ¶ 11 (“While at EPA, one of my areas of responsibility was to advise EPA officials  
concerning compliance with FOIA and to assist with EPA responses to FOIA requests.”).

1 brief on Motion).<sup>7</sup> During the hearing on the Motion, counsel for EcoRights acknowledged it  
2 spent over 300 hours on the recovery of fees, including time spent trying to mediate a solution,  
3 prepare mediation statements, and attend a settlement conference. *See* May 31, 2018 FTR at  
4 10:50-51. FEMA represented that, based on its review of the billing records, EcoRights billed  
5 approximately 60 hours on fee issues after FEMA filed its Opposition, and had spent  
6 approximately 330 hours on fee issues before that, for a total of 390 hours. May 31, 2018 FTR at  
7 10:55.

8 On January 25, 2018, the parties appeared for a telephonic status conference before the  
9 undersigned. *See* Jan. 25, 2018 FTR at 10:31. EcoRights explained it had provided a fee demand  
10 to FEMA regarding the fees and costs issues, and asked the Court to direct the parties to meet and  
11 confer in person regarding those issues before EcoRights were to file a fees motion. *Id.* at 10:37-  
12 38. FEMA explained it required authority from the Agency to settle EcoRight’s “significant” fee  
13 demand, and that this would take “some time” to obtain. *Id.* at 10:38-10:39; *see also id.* at 10:40-  
14 41 (explaining FEMA requires five levels of authority to approve demands as large as EcoRights’,  
15 and based on experience, estimating it could take 3-4 months for FEMA to go through these  
16 levels). FEMA counsel suggested the parties continue to discuss the matter informally, and that it  
17 would be happy to attend a settlement conference with a magistrate judge. *Id.* at 10:39. FEMA  
18 counsel was “hopeful” he could make meaningful progress in next month and make a counter-  
19 offer; EcoRights could then decide whether to file a fees motion. *Id.* at 10:41-42, 10:44. The  
20 Court scheduled a status conference in 30 days “to determine whether we’re going to have a fees  
21 motion or whether I’m going to send you to a settlement conference.” *Id.* at 10:42. EcoRights  
22 expressed frustration at the timeline proposed by FEMA and the Court and asked the Court to  
23 clarify what was being ordered. *Id.* at 10:45. The Court stated, on the record: “Within 30 days,  
24 [counsel for FEMA] is directed to pursue a counter-offer to your demand from the Government  
25 and get authority for that. . . . I’ll keep a leash on it. It’s not going to be as short as you want. . . .  
26 But honestly, having done these cases before, it doesn’t matter what I order, they’re going to go  
27

28 <sup>7</sup> EcoRight challenges FEMA’s calculation, but does not offer one of its own.

1 through their channels. . . .” *Id.* The Court set a further telephonic status conference for February  
2 22, 2018. *See* Minute Entry, Dkt. No. 94.

3 EcoRights filed its Fees Motion on February 16, 2018 – six days before the conference that  
4 would determine *whether* the parties would proceed by motion or by settlement conference. *See*  
5 Mot. EcoRights contends it was forced to file its Motion for Attorneys’ Fees on February 16,  
6 2018 because of the Court’s deadline for doing so. *See* Reply at 10 n.3. This argument borders on  
7 the disingenuous. On January 23, 2018, the Court granted the parties’ stipulation and ordered  
8 EcoRights to file its Fees Motion by February 16 (Dkt. No. 91); but it subsequently scheduled the  
9 February 22 status conference to determine *how* the parties would proceed – by motion or  
10 settlement conference. In light of the discussion during the January 25, 2018 status conference,  
11 EcoRights should have been well-aware that the Court would continue any deadline for filing a  
12 fees motion. Rather than seek an extension or clarification, EcoRights chose to spend hundreds of  
13 hours drafting the Motion. In deciding to forge ahead and incur these significant fees, EcoRights  
14 increased the amount of attorneys’ fees at issue, which made settlement more difficult to reach.  
15 The Court cannot find a reasonable paying, private client would have authorized this approach, but  
16 instead would have requested counsel stand down and stop accruing fees until the Court and the  
17 parties determined whether the matter would proceed to mediation or by motion.

18 Nor can the Court conclude the hours EcoRights expended on the Motion were otherwise  
19 reasonable.<sup>8</sup> For example, EcoRights represents it spent “many” hours researching the prevailing  
20 attorney rates in this District by reviewing unpublished decisions on PACER and Courtlink, and  
21

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22 <sup>8</sup> EcoRights does not break out the fees it is claiming for “fees on fees” but in a demonstrative  
23 FEMA handed to the Court on May 31, 2018, to which EcoRights objected on the basis of unfair  
24 surprise, FEMA contends the “fees on fees” incurred by EcoRights through the Reply amount to  
25 \$214,266, or almost 30% of the total \$702,000 sought. The Court has not parsed through  
26 EcoRights’ voluminous entries to confirm FEMA’s calculations, and it sustains EcoRights’  
27 objection to the introduction of the demonstrative as evidence in the record. EcoRights admitted  
28 at the May 31 hearing that it has spent over 300 hours in connection with the Motion and  
associated proceedings. *See supra.* EcoRights claims a total of 1,367 hours. Reply C. Sproul  
Decl., Ex. 1; Coyne Suppl. Decl. Ex. 1 (48.75 hour error on Feb. 14, 2018). Based on these  
figures, the Court can estimate that the fees on fees hours account for at least 22 percent of the  
total hours (as revised on Reply and at the hearing) that EcoRights requests through this Motion.  
This is a significant portion of the total fees sought in this matter.

1 acknowledges that this time “may seem like an excessive amount.” Reply C. Sproul Decl. ¶ 14;  
2 *see also* Hunt Decl. ¶¶ 33-44 (describing careful analysis performed and cases considered in  
3 selecting appropriate hourly rate); Hudak Decl. ¶¶ 9-43 (same). The Court appreciates that  
4 EcoRights wanted to provide additional comparative rates given Judge Orrick’s position that  
5 reasonable hourly rates should be based on FOIA cases and not general civil litigation (Hudak  
6 Decl. ¶ 42), but EcoRights’ submissions are – frankly – overkill. C. Hudak alone billed more than  
7 11 hours conducting legal (not factual) research for the Fees Motion; M. Coyne billed almost 5  
8 hours researching fee awards for attorneys with 1-3 years of experience; D. Edberg spent more  
9 than 5 hours researching prevailing attorney rates. *See* Hudak Suppl. Decl., Ex. 1 (billable records  
10 after EcoRights exercised additional billing judgment), Dkt. No. 128-4 (same); Reply Coyne  
11 Decl., Ex. 1, Dkt. No. 128-16 (same); Reply Edberg Decl., Ex. 1, Dkt. No. 128-18 (same). The  
12 Court cannot find that a reasonable client would have paid for more than 5 hours of time pursuing  
13 this avenue of research, as numerous cases in this District (including by this Court) have found  
14 reasonable rates for attorneys in the district matching the rates sought by EcoRights here. *See,*  
15 *e.g., Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at \*10-11 (N.D. Cal. Sept. 28, 2016) (citing  
16 cases); *Walsh v. CorePower Yoga LLC*, 2017 WL 4390168, at \*10 (N.D. Cal. Oct. 3, 2017)  
17 (which Mr. Hunt cites (Hunt Decl. ¶ 42)). The hours spent are even less reasonable in light of the  
18 fact that Mr. Hudak conducted very similar research to support a fees application in 2017, less  
19 than one year prior to EcoRights’ filing of the instant Motion. *See Our Children’s Earth II*, 2017  
20 WL 783490, at \*11 (“Plaintiffs undertook a ‘market rate’ analysis and seek compensation for that  
21 research from this case. The analysis was performed primarily by billing attorney Christopher  
22 Hudak. Hudak reviewed fee awards in a number of different types of cases from the Northern  
23 District, including class action litigation (antitrust, wage and hour, consumer protection, and  
24 securities) as well as one anti-SLAPP case and one FOIA case.”). Mr. Sproul also declares that, in  
25 the course of drafting fees motion in three other cases in the past three years (*Our Children’s*  
26 *Earth I and II*, and *Pacificans for a Scenic Coast v. Cal. DOT*, N.D. Cal. Case No. 15-2090), he  
27 has “necessarily acquired expertise and extensive data concerning the prevailing hourly rates for  
28 attorneys in the San Francisco Bay Area legal market.” C. Sproul Decl. ¶ 14, Dkt. No. 102. It is



1 reasonable for EcoRights to update the research it performed in connection with those recent  
2 cases; however, EcoRights does not explain why this alone would require 21 hours of research.  
3 And the 21 hours described above also do not include the dozens of hours EcoRights counsel  
4 spent communicating about this issue, or drafting, editing and revising attorney declarations in  
5 support of the Motion. *See id.*; *see also* Reply C. Sproul Decl.; Hunt Decl.

6 The Court cannot find that a reasonable client would have authorized counsel to forge  
7 ahead with incurring significant fees in drafting a motion before the Court determined whether the  
8 parties would proceed by briefing or by settlement; nor can the Court find that a reasonable client  
9 would have paid counsel to spend more than 300 hours on a fee application, especially at the  
10 hourly rates charged by counsel in this matter, and the amount of prior research that counsel  
11 already had performed on this topic. *Cf. Pollinator Stewardship Council v. U.S. E.P.A.*, 2017 WL  
12 3096105, at \*14 (9th Cir. 2017) (declining to reduce EAJA fee request for 85 hours petitioners  
13 spent on fee application in “complex and important appeal” of EPA decision to register pesticide  
14 petitioners claimed was harmful to bees, where petitioners requested a total of 884 hours for the  
15 case).

16 **C. Lodestar**

17 The Court finds that counsel could not have billed a private client \$702,000 for what was  
18 essentially a contentious, hard-fought discovery dispute, which did not involve depositions,  
19 experts, or particularly complex issues. *See Gonzalez*, 729 F.3d at 1202; *see also Our Children’s*  
20 *Earth II*, 2017 WL 783490, at \*11 (“I also do not find plaintiffs’ focus—as support for their  
21 requested hourly rates in these cases—on large scale, complex class action cases to be persuasive.  
22 That is not to say that FOIA cases cannot be complex. But the high rates awarded for complex  
23 class action cases can be explained in large part by the necessity in those cases for plaintiffs’  
24 counsel to incur significant cost outlays (for experts, document review systems, travel,  
25 depositions, etc.) as well as attorney time (to review hundreds of thousands of documents,  
26 numerous depositions, etc.) which are not typically required in FOIA cases and were not required  
27 in these cases.”). The Court finds EcoRights’ counsel staffed the matter robustly with six  
28 attorneys, which necessarily increased fees for communications and coordination of activities;

1 requests a very high hourly rate<sup>9</sup>; prematurely incurred hundreds of thousands of dollars in  
2 preparing and filing the Fees Motion, which increased the overall fees at issue and made  
3 settlement of the fees issue less likely; and spent excessive hours drafting documents such as the  
4 initial case management conference statement, motions for summary judgment that recycled  
5 previously-briefed arguments, and the instant Motion.

6 Extrapolating counsel's billing on the CMC statement, Second Summary Judgment  
7 Motion, and Fees Motion, and based on the Court's overall experience with the case and its review  
8 of the billing records, the Court finds the claimed hours are excessive and that a 55% across-the-  
9 board reduction is appropriate. The resulting \$316,000 in fees is a considerable award, which  
10 reflects the fact that FEMA's ability or willingness to timely comply with its obligations under  
11 FEMA significantly increased EcoRights' fees in this matter.

12 **D. Costs**

13 EcoRights seeks \$1,728 in costs. FEMA does not oppose the request. The Court awards  
14 EcoRights the full amount it seeks in costs.

15 **CONCLUSION**

16 For the reasons set forth above, the Court GRANTS IN PART EcoRights' Motion, and  
17 awards \$316,000 in fees and \$1,728 in costs to EcoRights.

18 **IT IS SO ORDERED.**

19

20 Dated: June 14, 2018

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MARIA-ELENA JAMES  
United States Magistrate Judge

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<sup>9</sup> Based on the year in which work was performed, C. Sproul requests an hourly rate between \$775 and \$825; F. Evanson requests an hourly rate between \$675 and \$735; and D. Hunt between \$610 and \$655. Reply C. Sproul Decl., Ex. 1. More junior attorneys billed between \$350 and \$470 per hour. *Id.*