

ATTACHMENT 5

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,

No. C-08-00484 JSW (EDL)

Plaintiffs,

**REPORT AND RECOMMENDATION
RE: PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES**

v.

THOMAS VILSACK, et al.,

Defendants.

Plaintiffs Center for Food Safety, Organic Seed Alliance, High Mowing Organic Seeds and Sierra Club brought this action in January 2008, challenging Defendants' deregulation of a variety of sugar beet known as Event H7-1, genetically engineered by Monsanto Company to be resistant to Monsanto's Roundup herbicide ("Roundup Ready sugar beets"). Plaintiffs alleged that the deregulation decision violated the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321-4335, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the Plant Protection Act (PPA), 7 U.S.C. § 7711, et seq. Judge White granted intervention with respect to the remedy phase for Intervenor Monsanto Company, seed companies and root crop growing cooperatives, and allowed the Intervenor to file amicus briefs in the merits phase.

On September 21, 2009, Judge White granted Plaintiffs' motion for summary judgment and denied Defendants' cross-motion for summary judgment, finding that Defendants violated NEPA in some aspects of their analysis. Judge White ordered Defendants to prepare an EIS, and concluded that since Defendants would have to do so before issuing a new decision as to whether to deregulate, it was unnecessary to decide Plaintiffs' PPA claim. In January 2010, Plaintiffs sought a preliminary

1 injunction, which was denied.

2 On August 13, 2010, Judge White vacated Defendants' deregulation of Event H7-1 sugar
3 beets, immediately making all further planting of the crop unlawful. Finding that the vacatur was
4 sufficient to redress Plaintiffs' injuries, Judge White denied Plaintiffs' requested permanent
5 injunctive relief. Judge White also denied Defendants' request that the matter be remanded without
6 vacatur, denied Defendants' request that the vacatur be stayed, denied Defendants' request that the
7 court order a partial deregulation or interim conditions that would allow continued planting of the
8 crop, and denied Defendants' request for an evidentiary hearing.

9 On June 16, 2011, Plaintiffs filed a motion for attorneys' fees pursuant to the Equal Access
10 to Justice Act (EAJA), 28 U.S.C. § 2412. Plaintiffs seek \$2,814,056 in fees and \$66,553.59 in costs.
11 Defendants argue that Plaintiffs are not entitled to any more than \$604,215.06 in fees and
12 \$66,553.59 in costs. See Defs.' Ex. 9. On June 22, 2011, Judge White referred this motion to this
13 Court for a Report and Recommendation. The Court held a hearing on August 23, 2011. For the
14 reasons stated at the hearing and in this Order, the Court recommends granting in part Plaintiffs'
15 motion as described below.¹

16 **Legal Standard**

17 A party seeking an award of attorney's fees, costs, and other expenses under the EAJA must,
18 within thirty days of final judgment, submit an application which shows that the party is a prevailing
19 party and is eligible to receive an award under the EAJA as well as the amount sought, including an
20 itemized statement from the attorneys. 28 U.S.C. § 2412(d)(1)(B). For the court to award attorneys'
21 fees and costs, Plaintiffs must show that (1) plaintiff is the prevailing party; (2) the government has
22 not met its burden of showing that its positions were substantially justified or that special
23 circumstances make the award unjust; and (3) the requested attorneys' fees and costs are reasonable.
24 28 U.S.C. § 2412(d)(1)(A).

25 "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed
26 on any significant issue in litigation which achieves some of the benefit the parties sought in
27

28 ¹ The amount of costs is undisputed and should therefore be paid by Defendants in the amount of \$66,553.59.

1 bringing suit.” Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (citing Nadeau v. Helgemoe, 581
 2 F.2d 275, 278-79 (1st Cir.1978)). “A litigant need not prevail on every issue, or even on the ‘central
 3 issue’ in the case, to be considered the prevailing party. It is enough that he succeed ‘on any
 4 significant claim affording some of the relief sought, either pendente lite or at the conclusion of the
 5 litigation.’” Stivers v. Pierce, 71 F.3d 732, 751 (9th Cir. 1995) (citing Tex. State Teachers Ass'n v.
 6 Garland Indep. Sch. Dist., 489 U.S. 782, 790-91 (1989)). “Prevailing party” status may be
 7 established by showing a “material alteration of the legal relationship between the parties.” Tex.
 8 State Teachers Ass'n, 489 U.S. at 792-793. A material “alteration of the legal relationship between
 9 the parties” may be effectuated by a judgment on the merits or a court-ordered consent decree.
 10 Buckhannon Board v. Dept. of Health & Human Resources, 532 U.S. 598, 605 (2001).

11 However, an enforceable judgment on the merits and a consent decree ordered by a court are
 12 only two examples of such a “material alteration in the legal relationship of the parties” warranting
 13 fees under a “prevailing party” fee statute such as the EAJA. See Watson v. County of Riverside,
 14 300 F.3d 1092, 1096 (9th Cir. 2002). Other examples include preliminary injunctions (see Watson,
 15 300 F.3d at 1096 (holding that the plaintiff was still considered a “prevailing party” pursuant to 42
 16 U.S.C. § 1988 since he had a “judicial imprimatur ” by successfully obtaining a preliminary
 17 injunction, which prohibited the defendants from introducing an arrest report)) and declaratory
 18 judgments even in the absence of injunctive relief (see Animal Lovers Volunteer Assoc. v. Carlucci,
 19 867 F.2d 1224, 1225 (9th Cir.1989) (finding that the plaintiffs who received a declaratory judgment
 20 that the EA did not support a finding of no significant impact could be considered a “prevailing
 21 party”)).

22 Discussion

23 Defendants do not dispute that Plaintiffs are entitled to a fee award under the EAJA. Instead,
 24 Defendants argue that any fee award should be reduced because Defendants’ position in the
 25 remedies phase was substantially justified, and because the fees sought are not reasonable for several
 26 reasons, including because Plaintiffs did not prevail on all of their claims, Plaintiffs seek fees for
 27 time spent on issues related to intervenors only and Plaintiffs seek fees for other time that is not
 28 compensable. Further, Defendants argue that the enhanced hourly rates sought by Plaintiffs’ counsel

1 are excessive.

2 **1. Substantial justification**

3 The federal government bears the burden of showing that its position was “substantially
4 justified.” ONRC v. Marsh, 52 F.3d 1485, 1492 (9th Cir.1995); see also Pierce v. Underwood, 487
5 U.S. 552, 565 (1988) (stating that substantially justified does not mean “ ‘justified to a high degree,’
6 but rather ‘justified in substance or in the main’—that is, justified to a degree that could satisfy a
7 reasonable person.”). Defendants do not argue that the agency action that precipitated this lawsuit
8 or the agency’s position during the liability phase of the litigation was substantially justified.
9 Instead, they argue that their position in the remedies phase of the litigation was substantially
10 justified because it was grounded in Supreme Court precedent, and that therefore, Plaintiffs are not
11 entitled to any fees after the summary judgment order in September 2009. See Monsanto v.
12 Geertson Seed Farms, 130 S. Ct. 2743 (2010).

13 Defendants, however, have cited no authority for parsing an EAJA fee request in this
14 manner, and there is authority to the contrary. See Commissioner, INS v. Jean, 496 U.S. 154, 158-
15 59, 161-62, 165 (1990) (“The most telling answer to petitioners' submission that they may assert a
16 “substantial justification” defense at multiple stages of an action is the complete absence of any
17 textual support for this position. . . . While the parties' postures on individual matters may be more
18 or less justified, the EAJA - like other fee-shifting statutes - favors treating a case as an inclusive
19 whole, rather than as atomized line-items. . . . The “substantial justification” requirement of the
20 EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that
21 properly focuses on the governmental misconduct giving rise to the litigation.”); United States v.
22 Marolf, 277 F.3d 1156, 1163-64, n.5 (9th Cir. 2002) (“Notwithstanding the government's partly
23 reasonable litigation position, we hold that the government's position as a whole was not
24 substantially justified. In so holding, we ‘properly focus[] on the governmental misconduct giving
25 rise to the litigation.’ A reasonable litigation position does not establish substantial justification in
26 the face of a clearly unjustified underlying action,” although stopping short of adopting an automatic
27 rule) (internal citation omitted); Hells Canyon Pres. Council v. US Forest Service, 2004 WL
28 1853134, at *1 (D. Or. Aug. 18, 2004) (“Thus, even if the government's litigation position is

1 justified, it cannot meet its burden if the underlying conduct was not. And even when some aspects
2 of the government's position were substantially justified, the court may still find that the
3 government's overall position was not.”) (internal citations omitted). Here, Defendants have not
4 shown that their conduct prior to the remedies phase was substantially justified, so they have not
5 shown substantial justification.

6 **2. Reasonableness of the fee request**

7 Plaintiffs state that they have expended 6,475.52 hours in this case, for total attorneys’ fees
8 in the amount of \$3,111,208.00. Declaration of Paul Achitoff (Achitoff Decl.) ¶ 22. Plaintiffs
9 applied billing judgment to eliminate 638 hours of attorney time with a market value of over
10 \$297,000. Id. ¶ 18. Plaintiffs also eliminated time spent by attorneys Henkin, Reames, Mendelson,
11 Haskins, Kaulukukui, and all the time spent by two law clerks. Accordingly, Plaintiffs seek a total
12 of \$2,814,056.00 in attorneys’ fees for 5,837.52 hours of time spent on this case.

13 **A. Success on Plaintiffs’ claims**

14 A court may consider the results obtained when considering whether to adjust a fee award
15 upward or downward. See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). “Litigants in good faith
16 may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to
17 reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.”

18 Hensley, 461 U.S. at 435. The Hensley Court stated:

19 This [results obtained] factor is particularly crucial where a plaintiff is deemed
20 “prevailing” even though he succeeded on only some of his claims for relief. In this
21 situation two questions must be addressed. First, did the plaintiff fail to prevail on
22 claims that were unrelated to the claims on which he succeeded? Second, did the
23 plaintiff achieve a level of success that makes the hours reasonably expended a
24 satisfactory basis for making a fee award?

25 Hensley, 461 U.S. at 434. As to the first question, “in some cases a plaintiff may present in one
26 lawsuit distinctly different claims for relief that are based on different facts and legal theories,” such
27 that “counsel's work on one claim will be unrelated to his work on another claim.” Id. at 435. In
28 those cases, “work on an unsuccessful claim cannot be deemed to have been ‘expended in pursuit of
the ultimate result achieved.’” Id. (internal citation omitted). As to the second question, “a reduced
fee award is appropriate if the relief, however significant, is limited in comparison to the scope of

1 the litigation as a whole.” Id. at 440. Further,

2 [w]here a plaintiff has obtained excellent results, his attorney should recover a fully
3 compensatory fee. Normally this will encompass all hours reasonably expended on
4 the litigation, and indeed in some cases of exceptional success an enhanced award
may be justified. In these circumstances the fee award should not be reduced simply
because the plaintiff failed to prevail on every contention raised in the lawsuit.

5 Hensley, 461 U.S. at 435. Defendants argue that any fee award should be reduced in light of the
6 limited degree of success that Plaintiffs obtained in this case.

7 **i. PPA claim**

8 Defendants argue that Plaintiffs’ PPA claim was unsuccessful, so the fee award should be
9 reduced by ten percent to account for that claim. Defendants argue that the PPA claim was
10 unrelated to the NEPA claim, and involved a distinct challenge to Defendants’ determination that
11 Roundup Ready sugar beets did not pose a plant pest risk based on the analysis in its Plant Pest Risk
12 Assessment. Further, Defendants note that the factual and legal issues raised under the substantive
13 PPA were different than those raised under the procedural NEPA, citing Hells Canyon, 2004 WL
14 1853134, at *5 (excluding time spent on unsuccessful ESA claim when the plaintiff prevailed on
15 NEPA claim) and Sierra Club v. US Dep’t of Transp., 1998 WL 289316, at *6 (N.D. Cal. Apr. 6,
16 1998) (“In fixing the fee amount to be awarded, the Court will look to only those expenditures
17 related to the noise impact violation upon which plaintiffs prevailed, and will not grant an award for
18 those expenditures related to alleged NEPA violations upon which plaintiffs were unsuccessful.”).
19 However, Hells Canyon and Sierra Club are inapposite. In Hells Canyon, the plaintiff conceded that
20 it was not entitled to fees on the ESA claim. Further, in both Hells Canyon and Sierra Club, the
21 courts declined to award fees for claims and legal theories that were expressly found to have no
22 merit.

23 Here, by contrast, Judge White did not conclude that the PPA claim lacked merit, but instead
24 found it unnecessary to reach the PPA claim because he had already held that Defendants violated
25 NEPA. See Center for Food Safety v. Vilsack, C-08-484 JSW (EDL) (N.D. Cal. Sept. 21, 2009)
26 (Order Regarding Cross-Motions for Summary Judgment (docket no. 139) at 14, n.4) (“Moreover,
27 because the Court has concluded that APHIS must prepare an EIS before approving the petition to
28 deregulate Roundup Ready sugar beets, the Court need not address whether APHIS also violated the

1 PPA.”). Therefore, the fee award should not be reduced to account for time spent on the PPA claim.

2
3 **ii. Remedies phase**

4 Defendants argue that Plaintiffs’ fee award should be reduced due to Plaintiffs’ limited
5 success in the remedies phase of this case. See Citizens for Better Forestry v. USDA, 567 F.3d
6 1128, 1133 (9th Cir. 2009) (in determining that a plaintiff was not a prevailing party, stating that:
7 “But a favorable determination on a legal issue, even if it might have put the handwriting on the
8 wall, is not enough by itself. A ‘favorable judicial statement of law,’ as Citizens obtained here,
9 cannot substitute for ‘a form of judicial relief,’ such as declaratory judgment.”); see also Save San
10 Francisco Bay Ass’n v. US Dep’t of Interior, 2006 WL 1581882, at *6-7, 9-10 (E.D. Cal. June 6,
11 2006) (reducing the fee award for various phases of the case that the court determined could stand-
12 alone). Defendants argue that because Judge White denied Plaintiffs’ preliminary injunction
13 motion, filed after his ruling on the merits, Plaintiffs are not entitled to recover any fees related to
14 this component of the case. See Defs.’ Ex. 2. The Ninth Circuit, however, has rejected Defendants’
15 argument:

16 Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning
17 the war. Lawsuits usually involve many reasonably disputed issues and a lawyer who
18 takes on only those battles he is certain of winning is probably not serving his client
19 vigorously enough; losing is part of winning. The County would have us scalpel out
20 attorney's fees for every setback, no matter how temporary, regardless of its
21 relationship to the ultimate disposition of the case. This makes little sense.

22 We hold, instead, that a plaintiff who is unsuccessful at a stage of litigation that was a
23 necessary step to her ultimate victory is entitled to attorney's fees even for the
24 unsuccessful stage.

25 Cabrales v. County of Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991).

26 Further, Plaintiffs persuasively argue that even though the motion was denied, Judge White
27 made findings of irreparable harm and the inequity of continuing the status quo at that time that he
28 later cited in support of the order of vacatur. Defendants have not shown that the denial of the
preliminary injunction motion was such a separate phase of this case that the fee award should be
reduced by the amount attributable to that motion. Plaintiffs ultimately obtained the relief they
sought, that is, an order requiring the preparation of an EIS, and a halt to further production of

1 Roundup Ready sugar beets absent a new agency action.

2 Defendants also argue that in the permanent remedy phase of this case, Judge White denied
3 Plaintiffs' request for permanent injunctive relief and granted only a vacatur, while allowing
4 already-planted Roundup Ready sugar beets to remain in the ground. Thus, Defendants argue that
5 Plaintiffs did not obtain all the relief they sought in this case and the award for fees related to the
6 remedy phase should be reduced by thirty percent because the majority of Plaintiffs' briefing on
7 permanent relief focused on entry of an injunction and expressed concern with a vacatur-only
8 remedy. See Defs.' Ex. 3. Plaintiffs, however, note that Judge White declined to issue a permanent
9 injunction because he concluded that the relief that he ordered was sufficient to address Plaintiffs'
10 injury, and ruled that the denial was without prejudice to further relief if Intervenors violated the
11 vacatur in the future:

12 Plaintiffs seek an injunction in addition to the vacatur of the deregulation decision.
13 The Supreme Court recently stated in Monsanto, 130 S.Ct. at 2761, that recourse to
14 the "additional and extraordinary relief of an injunction" was not warranted if a less
15 drastic remedy, such as a vacatur of APHIS's deregulation decision, was sufficient to
16 redress the plaintiff's injury. Here, Plaintiffs' only argument that a vacatur would not
17 be sufficient to redress their injury is that Defendant-Intervenors or other third parties
18 might violate the vacatur and APHIS might not be able to enforce the reinstated
19 regulated status of genetically engineered sugar beets. (Plaintiffs' Suppl. Br. at 5-6.)
The Court finds that any injury from such conduct is purely speculative and
dependant on future conduct, and therefore, finds that Plaintiffs' request for an
injunction is not warranted. Accordingly, the Court denies Plaintiffs' request for a
permanent injunction. This Order is without prejudice to Plaintiffs seeking further
redress if, after the deregulation decision is vacated, Plaintiffs can demonstrate that
Defendant-Intervenors or other third parties have in fact violated the vacatur.

20 See Center for Food Safety v. Vilsack, C-08-484 JSW (EDL) (N.D. Cal. Aug. 13, 2010) (Order
21 Regarding Remedies (docket no. 570) at 8-9). Thus, Plaintiffs have argued persuasively that they
22 obtained "excellent results" despite the denial of permanent injunctive relief and are therefore
23 entitled to a "fully compensable fee." Hensley, 461 U.S. at 435.

24 **B. Time spent on intervenors' issues**

25 Defendants argue that Plaintiffs should not be compensated for hours spent on issues raised
26 by the intervenors rather than by government defendants.² See Love v. Reilly, 924 F.2d 1492, 1495-
27 96 (9th Cir. 1991) ("Similarly, an award against the government for fees incurred by [the plaintiff] in

28 _____
² Plaintiffs note that they do not seek fees relating to the intervention motions themselves.

1 opposing the stay is unjust because the government did not join the intervenors' motion to stay, and
2 [the plaintiff] has not shown that the attorney's fees attributable to fighting the stay were incurred in
3 opposing government resistance. Consequently, the award of fees by the district court for the
4 opposition to the stay was error.”); Sw. Ctr. for Biological Diversity v. Bartel, 2007 WL 2506605, at
5 *9-10 (S.D. Cal. Aug. 30, 2007) (denying fee award for time spent on tasks that were generated
6 solely by private parties); Lands Council v. Swick, 2005 WL 3241184, at *8 (D. Idaho Nov. 23,
7 2005) (“Where plaintiffs are opposing a motion filed by private defendants and the government did
8 not join the motion, an award for fees against the government for that particular motion ‘would be
9 manifestly unfair and contrary to historic fee-shifting principles.’”) (internal citation omitted); Hells
10 Canyon, 2004 WL 1853134 at *7 (excluding time spent on intervenors’ motion). Here, Defendants
11 argue that they took no position on intervention in this case. Defendants deny that they worked
12 “hand in glove” with intervenors, and argue that Defendants’ litigation efforts were in furtherance of
13 the interests of the United States, not the Intervenors. Further, Defendants note that Plaintiffs and
14 Intervenors had discovery disputes in which Defendants had no role. See Center for Food Safety v.
15 Vilsack, C-08-484 JSW (EDL) (N.D. Cal. Apr. 29, 2010, May 5, 2010, May 12, 2010) (Minute
16 Orders at docket numbers 347, 350, 402). Defendants argue that the bulk of document review in this
17 case involved document produced by the Intervenors, not by Defendants, and that Plaintiffs
18 expended time on evidentiary objections brought by the Intervenors, not by Defendants.
19 Accordingly, Defendants argue that 1085.5 hours should be deleted from the fee request for time
20 spent on matters relating only to Intervenors on intervention issues, discovery or evidentiary
21 objections.

22 Even if Defendants and the Intervenors did not have identical interests in this case, Plaintiffs
23 persuasively argue that the time entries challenged by Defendants in this category were incurred in
24 the remedies phase, during which time Defendants were heavily involved in the motion practice and
25 litigation, and often aligned with the Intervenors. Further, Defendants have cited no authority for
26 Defendants’ request to exclude fees attributable to review of Intervenors’ documents for the purpose
27 of countering Defendants’ and Intervenors’ joint resistance to Plaintiffs’ remedy request. See Defs.’
28 Opp. Ex. 4 at 4.

1 Finally, Plaintiffs argue that Defendants chose to vigorously oppose any relief directed at
2 halting planting, which was primarily for the benefit of Intervenor, so the tasks associated with
3 opposing the Intervenor's position are compensable. See Sw Ctr. for Biological Diversity v. Bartel,
4 2007 WL 2506605, at *10 (S.D. Cal. Aug. 30, 2007) ("To the extent that there are overlapping
5 expenses during the preparation of the summary judgment motions that disposed of the merits of the
6 entire action, the Court finds that the issues raised by the Builder Intervenor were variations of the
7 positions of the Federal Defendants. Both the Builder Intervenor and the Federal Defendants
8 opposed the Plaintiffs' motion for summary judgment on the Third Amended Complaint. Federal
9 Defendants, like the Builder Intervenor, sought to defeat the Plaintiffs' claims, for instance, that the
10 ITP violated the ESA because the regional plan provided inadequate mitigation measures. In some
11 instances, the Builder Intervenor provided additional arguments to those provided by the Federal
12 Defendants, but the Federal Defendants were clearly adverse to the Plaintiffs' position in this aspect
13 of the case. Plaintiffs' reply brief quickly disposes of any additional arguments presented by the
14 Builder Intervenor.").

15 Plaintiffs have shown that the positions of Defendants and Intervenor were intertwined in
16 the relief phase and not readily compartmentalized. Accordingly, the hours in this category should
17 not be reduced.

18 C. Depositions

19 Defendants argue that the Court should reduce the time Plaintiffs spent on deposition
20 activities by thirty percent because Defendants did not notice any depositions in this case, nor did
21 Plaintiffs notice any depositions of Defendants' witnesses. Defendants also argue that they played a
22 minor role in the depositions that were taken in this case, and that they only attended (at times
23 telephonically) seven depositions. Thus, Defendants argue that the Court should reduce the time
24 spent on deposition activities by thirty percent. See Defs.' Ex. 5.

25 Plaintiffs counter that even though Defendants did not notice any depositions and may have
26 played a minor role in depositions that were taken, Defendants attended some depositions and used
27 evidence from the depositions in their briefs resisting Plaintiffs' remedy request. As an example, at
28 the hearing, Plaintiffs noted that even though Defendants did not attend the deposition of

1 Intervenor's expert Susan Manning, Defendants' expert relied on at least some portions of her expert
2 report.

3 However, given that Defendants did not notice any depositions and Plaintiffs did not depose
4 any government witnesses, there has been no showing that the entire amount of fees incurred for
5 deposition activities were attributable to Defendants' involvement in this case. Accordingly, fees in
6 this category should be reduced by thirty percent.

7 **D. Vague billing entries**

8 Vague billing entries may be excluded from the fee award. See Prineville Sawmill Co. v.
9 Longview Fibre Co., 2003 WL 23957141, at *2 (D. Or. 2003) ("Defendant's bills also reflect many
10 entries for items such as 'conference,' 'telephone call with ...,' 'correspondence to ...,' 'review
11 facsimile from ...' with no description of the subject of the conference, the call, or the
12 correspondence. The Court, therefore, cannot assess the reasonableness of the requested time based
13 on the information in these entries."). As an example of vague entries, Defendants point to billing
14 entries such as "t/c from W. Rostov; t/c to D. Reames; emails to/from G. Loarie." See Defs.' Ex. 6
15 at 1 (entry dated 12/05/07). This entry, which is .8 hours, is impermissibly vague; there is no
16 indication that the time spent was attributable to this case. Other entries challenged by Defendants,
17 however, are not unduly vague because they contain additional information in the entry that could
18 connect the entry to work done in the case, for example, "emails to/from P. Goldman; t/c to
19 G.Loarie; t/c to W. Rostov; emails to/from B. Smith; research facts re herbicide tolerant crops." Id.
20 at entry dated 12/14/07.

21 Defendants argue that 268.39 hours should be excluded due to vague billing entries. Instead,
22 because there are some billing entries that are too vague for Defendants to evaluate, the hours in this
23 category should be reduced by five percent.

24 **E. Block billing**

25 As stated at the August 23, 2011 hearing, Plaintiffs do not contest that some of attorney
26 Rakowsky's time was improperly block billed. See Defs.' Ex. 6. The total block billed hours are
27 92.79. Defendants argue that this time should be excluded. See Hells Canyon, 2004 WL 1853134,
28 at *8 (disallowing block billed time).

1 At the hearing, Plaintiffs reiterated its suggestion that the Court apply a discount to the
2 amount of the block billed time rather than disallow the entire amount. See Welch, 480 F.3d at 948
3 (finding that it was reasonable for the district court to conclude that block billing makes it more
4 difficult to determine how much time was spent on particular activities, but concluding that the
5 district court erred in applying a twenty percent reduction to all of the plaintiff's requested hours:
6 "In fact, barely more than half of all hours submitted by Welch's counsel were block billed.
7 Reducing the total hours by 20 percent thereby effectively served as a 40 percent penalty on those
8 hours actually block billed, well above the range justified by the Fee Report."). The Welch court
9 noted that a report from the California State Bar's Committee on Mandatory Fee Arbitration
10 concluded that block billing "may increase time by 10% to 30%." Accordingly, because it is
11 undisputed that there was some block billing in this case, Rakowsky's time should be reduced by
12 twenty-five percent to account for it.

13 **F. Non-compensable time**

14 Defendants argue that Plaintiffs should not be compensated for time spent on clerical tasks,
15 public relations, soliciting clients, and matters unrelated to the litigation. See, e.g., Davis v. City and
16 County of San Francisco, 976 F.2d 1536, 1542 (9th Cir. 1992) ("It simply is not reasonable for a
17 lawyer to bill, at her regular hourly rate, for tasks that a non-attorney employed by her could perform
18 at a much lower cost."); League for Coastal Protection v. Kempthorne, 2006 WL 3797911, at *8
19 (N.D. Cal. Dec. 22, 2006) (denying fee award for public relations because the "Plaintiffs have not
20 shown the required direct, intimate relationship between their press activities and success on the
21 merits of the case."). For example, Defendants argue that time spent on press releases is non-
22 compensable. See Defs.' Ex. 2 at 3, 9. Defendants also argue to clerical tasks, such as "filed
23 opening brief" and "discovery log, exporting, Bates stamping," are not compensable. See Defs.'
24 Ex. 2 at 9, 15. The attorney time spent on clerical tasks and press releases is non-compensable
25 because these tasks were not required to be handled by an attorney.

26 Defendants also argue that the Court should deduct time spent on matters not relevant to this
27 case, including work related to ESA, which was not at issue in this case. See Defs.' Ex. 2 at 3. In
28 addition, Defendants seek to exclude time spent related to Geertson Seed Farms as unrelated to this

1 case. Id. at 3. Geertson, however, was a relatively recent case involving similar issues to this case
 2 and therefore is not unrelated. Defendants also challenge time spent on research on sugar exports
 3 and sugar beets in Colorado as unrelated to this case (id. Ex. 6 at 13-14), but as Plaintiffs point out,
 4 Defendants argued in this case that granting Plaintiffs' relief would adversely affect sugar prices, so
 5 research on sugar beets in other parts of the country was relevant. Defendants challenge an entry
 6 that Plaintiffs argue was time spent to obtain a declaration from an organization on the effect
 7 denying relief would have on consumers. See id. Ex. 6 at 14 ("Catholic healthcare west dec
 8 discussion, consumer choice issue."). Plaintiffs also argue that the entry "West Coast Beta Seed RR
 9 bolters in potting soil" (id. at 14) is related to this litigation because it was related to a critical issue
 10 in the case. Plaintiffs provided many more examples that are persuasive that many of the time
 11 entries challenged by Defendants as unrelated to this litigation are actually related to this case.

12 The number and scope of the billing entries challenged by Defendants in this category are
 13 many, and Defendants have made a showing that at least some of the time is non-compensable.
 14 Thus, the hours in this category should be reduced by ten percent.

15 **G. Ineligible parties**

16 Plaintiffs concede in their motion that Plaintiffs Sierra Club and High Mowing Organic
 17 Seeds are not eligible for EAJA fees. See Mot. at n. 1. Defendants argue that the Court should
 18 account for this by applying a ten percent discount across the board on the entire fee request. See
 19 Defs.' Ex. 2. Also, Defendants argue that the three hours on the time sheets relating specifically to
 20 the Sierra Club should be excluded. See Defs.' Ex. 4 at 3, 28; see also Sierra Club v. US Army
 21 Corps of Engineers, 776 F.2d 383, 393 (2d Cir. 1985) (reversing district court's denial of fees under
 22 EAJA which was based on finding that one of the plaintiffs was ineligible).

23 In League for Coastal Protection v. Kempthorne, 2006 WL 3797911, at *3 (N.D. Cal. Dec.
 24 22, 2006), the court held that no reduction in an EAJA fee award was appropriate where the
 25 plaintiffs included the ineligible Sierra Club because Plaintiffs contended that the Sierra Club played
 26 a relatively minor role in the litigation and did not contribute significantly to attorneys' fees and
 27 expenses, and that the Sierra Club's role in the case was not material and the case would have been
 28 filed without it. Here, Plaintiffs have submitted similar evidence. See Kimbrell Decl. ¶ 7 ("CFS

1 [Center for Food Safety] would have joined this case without the participation of the Sierra Club.”);
 2 Stearns Decl. ¶ 2 (HMOS [High Mowing Organic Seeds] was not the Lead Plaintiff in this case. In
 3 fact, other than responding to requests for discovery made by Defendants, HMOS invested minimal
 4 time in the litigation. HMOS is not paying the costs of litigation for any other Plaintiffs in this case,
 5 not paying any fees to Center for Food Safety or Earthjustice for legal representation. HMOS staff
 6 did not draft any pleadings or briefs or argue the case, and its role was not otherwise material.”);
 7 Carman Decl. ¶ 4-5 (“ . . . Sierra Club did not have plans to independently litigate the deregulation of
 8 Roundup Ready sugarbeets and the Sierra Club would not have pursued the litigation without the
 9 involvement and leadership role of Center for Food Safety.”).

10 Thus, the Court does not recommend an across the board discount on fees due to the
 11 ineligibility of the Sierra Club and High Mowing Organic Seeds. However, the hours in this
 12 category should be reduced by three hours for time specifically relating to the Sierra Club.

13 H. Time spent on fees motion

14 “Preparation of an application for attorney fees does not require specialized or distinctive
 15 knowledge within the meaning of the EAJA.” Lucas v. White, 63 F. Supp. 2d 1046, 1063 (N.D. Cal.
 16 1999). Therefore, the time spent on the fees motion should be calculated at the EAJA statutory rate,
 17 rather than an enhanced rate. See Defs.’ Ex. 8.

18 I. Time spent in travel

19 Plaintiffs do not dispute that travel time should be compensated at the statutory rate rather
 20 than an enhanced rate. Thus, fees for travel time should be awarded at the EAJA statutory rate
 21 rather than at an enhanced rate.

22 2. Hourly rates

23 The EAJA sets a base rate of \$125 per hour, but provides that a court may award higher rates
 24 if it “determines that an increase in the cost of living or a special factor . . . justifies a higher fee.”
 25 28 U.S.C. § 2412(d)(2)(A). The statute states:

26 “fees and other expenses” includes the reasonable expenses of expert witnesses, the
 27 reasonable cost of any study, analysis, engineering report, test, or project which is
 28 found by the court to be necessary for the preparation of the party's case, and
 reasonable attorney fees (The amount of fees awarded under this subsection shall be
 based upon prevailing market rates for the kind and quality of the services furnished,
 except that (i) no expert witness shall be compensated at a rate in excess of the

1 highest rate of compensation for expert witnesses paid by the United States; and (ii)
 2 attorney fees shall not be awarded in excess of \$125 per hour unless the court
 3 determines that an increase in the cost of living or a special factor, such as the limited
 availability of qualified attorneys for the proceedings involved, justifies a higher fee.

4 Id. The rate should be adjusted for the cost of living since 1996. See U.S. v. Real Property Known
 5 as 22249 Dolorosa Street, Woodland Hills, Cal., 190 F.3d 977, 984-85 (9th Cir. 1999) (stating that
 6 adjustment of cost of living is proper). The adjusted rate is calculated by enhancing the base hourly
 7 rate of \$125 by the consumer price index for urban consumers for the year in which the fees were
 8 earned. Sorenson v. Mink, 239 F.3d 1140, 1149 (9th Cir. 2001). Plaintiffs' counsel states that the
 9 adjusted rate in San Francisco is \$186.48. Achitoff Decl. ¶ 20. Defendants state, however, without
 10 dispute from Plaintiffs, that the Ninth Circuit has published adjusted rates of \$172.85 in 2008,
 11 \$172.24 in 2009 and \$175.06 in 2010, so the Court will apply those rates.

12 To determine whether a special factor justifies an enhanced rate, the Court applies a three-
 13 part test: "First, the attorney must possess distinctive knowledge and skills developed through a
 14 practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those
 15 skills must not be available elsewhere at the statutory rate." Love v. Reilly, 924 F.2d 1492, 1496
 16 (9th Cir. 1991); Natural Res. Def. Council v. Winter, 543 F.3d 1152, 1158 (9th Cir. 2008)
 17 (overturning fee determination for one attorney who did not possess specialized knowledge).
 18 "Environmental litigation is an identifiable practice specialty that requires distinctive knowledge."
 19 Love, 924 F.2d at 1496; see also Winter, 543 F.3d at 1158 ("the statute [EAJA] contemplated
 20 attorneys qualified 'in some specialized sense, rather than just in their general legal competence,'
 21 such that 'attorneys hav[e] some distinctive knowledge or specialized skill needful for the litigation
 22 in question.'") (citing Pierce, 487 U.S. at 572). Further, the Ninth Circuit stated:

23 Although environmental litigation may constitute an identifiable practice specialty,
 24 Plaintiffs must first establish that their counsel had such a specialty. Animal Lovers
 25 Volunteer Ass'n, Inc. v. Carlucci, 867 F.2d 1224, 1226 (9th Cir. 1989), abrogated on
other grounds by Sorenson v. Mink, 239 F.3d 1140, 1149 (9th Cir. 2001).

26 Winter, 543 F.3d at 1159-60.

27 Plaintiffs seek the following enhanced hourly rates for counsel: (1) Paul Achitoff, \$650; (2)
 28 Andrew Kimbrell, \$650; (3) Will Rostov, \$575; (4) Isaac Moriwake, \$525; (5) Greg Loarie, \$450;

1 (6) George Kimbrell, \$410; (7) Kevin Golden, \$410; (8) Paige Tomaselli, \$385; and (9) Kateryna
 2 Rakowsky, \$350. Defendants argue that attorneys Andrew Kimbrell, Isaac Moriwake, Will Rostov
 3 and Kateryna Rakowsky are not entitled to an enhanced rate because they lack distinctive
 4 knowledge or skills or because they did not do work in this case that required any specialized
 5 knowledge. Further, Defendants argue that the enhanced rates sought by Paige Tomaselli, Paul
 6 Achitoff, Greg Loarie, George Kimbrell and Kevin Golden are well beyond the rates normally
 7 charged to environmental clients and should be reduced.

8 **A. Specialized knowledge**

9 **1. Andrew Kimbrell**

10 Andrew Kimbrell spent sixty-two hours over three years on this case, which is approximately
 11 1% of the total hours that Plaintiffs incurred. Achitoff Decl. Ex. B at 9. Defendants argue that
 12 Kimbrell's hours do not show any substantive work on briefs in this matter, so there is no evidence
 13 to suggest that his contribution of alleged skills in and knowledge of environmental law or genetic
 14 engineering were needed in this case. However, Andrew Kimbrell is the Executive Director and
 15 Founder of the Center for Food Safety, and his declaration establishes that he has had over twenty
 16 years of experience in environmental law and has litigated cases involving biotechnology and
 17 genetic engineering. A. Kimbrell Decl. ¶¶ 2, 10-12, 17. He has authored several books on the
 18 environment, technology and society and food issues. *Id.* ¶ 13. He gives speeches at universities
 19 and other public forums, was recently in a film called "The Future of Food," and has testified in
 20 congressional and regulatory hearings on environmental and biotechnology issues. *Id.* ¶¶ 15-16. In
 21 this litigation, his timesheet shows that he was heavily involved in settlement discussions and legal
 22 strategy, both of which would necessarily involve specialized knowledge of environmental law and
 23 genetic engineering in particular. There is no question that Andrew Kimbrell possesses specialized
 24 knowledge in the issues raised by this litigation. While Defendants argue that Kimbrell did not use
 25 those specialized skills in the work he did in this case, as described below, the Court declines to
 26 adopt Defendants' view that each attorney must have specialized skills in each specific task assigned
 27 to him in a case.

28 **2. Moriwake**

1 Moriwake spent fifty-six hours on this case, which is approximately 1% of the total hours
2 that Plaintiffs incurred. Achitoff Decl. Ex. A. Moriwake graduated from law school in 1998 with a
3 certificate in environmental law. Achitoff Decl. ¶ 10. He has been working at Earthjustice for nine
4 years, where he has litigated environmental cases, including two involving genetic engineering. Id.
5 ¶¶ 11-12. Moriwake worked for two months on this case on issues relating to an expert. Achitoff
6 Decl. Ex. A at 15. Defendants argue that this general litigation work does not support an enhanced
7 hourly rate. There is no question that Moriwake has specialized experience in environmental law
8 and in particular, genetic engineering. While Defendants argue that Moriwake did not use those
9 specialized skills in the work he did in this case, as described below, the Court declines to adopt
10 Defendants' view that each attorney must have specialized skills in each specific task assigned to
11 him in a case.

12 3. Rostov

13 Rostov spent 35.5 hours in this case, which is approximately .5% of the hours spent in this
14 case. See Achitoff Decl. Ex. B at 26. Rostov worked at the Center for Food Safety from October
15 2005 to April 2008, after graduating from law school in 1996 and working in a law firm and at
16 Communities for a Better Environment. G. Kimbrell Decl. ¶¶ 19-21. Rostov litigated and
17 developed cases concerning genetically engineered crops, and worked on administrative comments
18 related to the regulation of genetic engineered crops. Id. ¶ 21. Since April 2008, Rostov has been
19 employed at Earthjustice, focusing on global warming and energy issues. Id. ¶ 22. He is an adjunct
20 professor and does speaking engagements relating to environmental law. Id. ¶ 23. Rostov possesses
21 specialized knowledge in the issues raised in this case.

22 4. Rakowsky

23 Rakowsky graduated from Stanford law school in 2006, and worked as a litigator at Latham
24 & Watkins from September 2006 until May 2009, when she began teaching at the University of
25 California at Hastings College of the Law before joining Center for Food Safety on a contract basis
26 in January 2010 and then full time in March 2010. G. Kimbrell Decl. ¶ 16. Rakowsky has worked
27 on several cases involving genetically engineered food at the Center for Food Safety. Id. ¶ 17. It
28 appears that Rakowsky's experience in environmental law began in 2010 when she joined Center for

1 Food Safety. Thus, while Rakowsky lacks extensive experience, she does possess specialized skills
2 in the issues raised in this case.

3 **B. Hourly rates**

4 **1. Achitoff**

5 Achitoff is Plaintiffs' lead counsel. He graduated from law school in 1983, and worked as a
6 litigator from 1983 to 1990, when he joined another law firm where he eventually founded the firm's
7 environmental law practice through which he tried cases involving NEPA and other environmental
8 statutes. Achitoff Decl. ¶ 14. In 1994, he became a staff attorney with the Sierra Club Legal
9 Defense Fund, which later became known as Earthjustice. Id. ¶ 15. He has been managing attorney
10 of Earthjustice's Mid-Pacific office since 1995, and in addition to supervising all of the
11 environmental litigation, he litigates cases. Id. ¶ 15. For the past eight years, his specialty has been
12 the environmental impacts of genetically engineered organisms, and he has litigated two cases and is
13 currently litigating three others, including this case. Id. ¶ 16. He has taught courses in
14 environmental law, lectured widely on these issues, given continuing legal education classes, and
15 testified to the state legislature about genetic engineering. Id. ¶ 17. Achitoff seeks a rate of \$650,
16 which he states is the market rate for his time. Id. ¶ 18.

17 Defendants argue that Achitoff's enhanced rate should be based on his known hourly rate of
18 \$250 in two cases in the District of Hawaii, and should not exceed \$300 per hour. See People Who
19 Care v. Rockford Bd. of Educ., School Dist. No. 205, 90 F.3d 1307 (7th Cir. 1996) ("The attorney's
20 actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate.");
21 see also Defs' Ex. 7 (Ocean Mammal Inst. v. Gates, C-07-254 DAE (LEK) (D. Haw. 2/13/2009)
22 ("My normal hourly rate is \$250.00."); Center for Food Safety v. Johanns, 2007 U.S. Dist LEXIS
23 77438, * 42-43 (D. Haw. Oct. 18, 2007) (awarding Achitoff \$250 per hour for work performed
24 related to the ESA and awarding him the EAJA statutory rate of \$143 for work performed related to
25 NEPA). The Court rejects Defendants' argument that Achitoff's hourly rate in this case should be
26 based on rates that he received several years ago in Hawaii. The Bay Area legal market is much
27 different than the market in Hawaii, and justifies a higher rate. See Prison Legal News v.
28 Schwarzenegger, 608 F.3d 446, 454-55 (9th Cir. 2010) ("Generally, when determining a reasonable

1 hourly rate, the relevant community is the forum in which the district court sits.’ Here, the forum is
2 the Northern District of California. The rates prevailing in that district for “similar services by
3 lawyers of reasonably comparable skill, experience, and reputation” thus furnish the proper measure
4 of the reasonableness of the rates billed by PLN’s attorneys. Although the state officials urge us to
5 look only to the rates charged by other attorneys involved in prison litigation, the proper scope of
6 comparison is not so limited, but rather extends to all attorneys in the relevant community engaged
7 in ‘equally complex Federal litigation,’ no matter the subject matter.’”) (internal citations omitted).
8 Achitoff’s enhanced hourly rate of \$650 is supported by the declaration of Richard Drury, who has
9 extensive specific experience in attorney’s fees matters, particularly in the environmental law area.
10 See Drury Decl. ¶¶ 7-19. Further, as nonprofit pro bono counsel, Achitoff does not have a regular
11 hourly rate independent of the market in the forum where a fee motion is pending. See Achitoff
12 Reply Decl. ¶ 2. Thus, the Court finds that Achitoff’s enhanced hourly rate of \$650 is reasonable.

13 2. Tomaselli

14 Tomaselli graduated from law school in 2004 where she focused on environmental law. G.
15 Kimbrell Decl. ¶ 12. Prior to joining the Center for Food Safety, she worked at Sher Leff from 2006
16 to 2008 representing public water suppliers and public agencies in mass tort litigation involving
17 groundwater contamination. Id. ¶ 13. She has been with the Center for Food Safety since 2008,
18 working on litigation and policy relating to, among other things, genetic engineering. Id. ¶ 14.
19 Plaintiffs seek a hourly rate of \$385 for Tomaselli. Id. at ¶ 15; Drury Decl. ¶ 27 (stating that the
20 reasonable hourly rate for Tomaselli is at least \$390 per hour).

21 Defendants argue that Tomaselli should receive an hourly rate of no more than \$200 based
22 on their argument, which the Court has rejected, that Achitoff is only entitled to \$300 per hour.
23 Defendants provide no evidence to rebut Drury’s declaration regarding the reasonable rate for
24 Tomaselli. Further, at the hearing, Plaintiffs stated that Tomaselli has five years of experience in
25 environmental law and that she was an environmental attorney before joining the Center for Food
26 Safety, although her past experience was in mass tort litigation rather than NEPA-related cases.
27 Accordingly, the Court finds that Tomaselli’s enhanced rate of \$385 per hour is reasonable.

28 3. Loarie

1 Loarie graduated from law school in 2001, and began his career at Earthjustice following his
2 second year of law school. Achitoff Decl. ¶¶ 4-5. In his ten years at Earthjustice, Loarie had
3 litigated several environmental law cases. Id. ¶ 8. Plaintiffs seek an hourly rate of \$450 for his time.
4 See Drury Decl. ¶ 27.

5 Defendants argue that Loarie, who had only seven years experience when this case was filed
6 is only entitled to \$275 per hour based on their unpersuasive argument that Achitoff is entitled to
7 \$300 per hour. Defendants have failed to rebut Plaintiffs' evidence that Loarie is entitled to an
8 enhanced hourly rate of \$450. Thus, the Court finds that Loarie's enhanced hourly rate of \$450 is
9 reasonable.

10 4. George Kimbrell

11 George Kimbrell graduated from law school in 2004, and completed a clerkship in the Ninth
12 Circuit. G. Kimbrell Decl. ¶¶ 3-4. In his six years at the Center for Food Safety, he has focused on
13 litigation involving the impacts of industrial agriculture on the environment, farmers and the public,
14 including working on issues involving genetic engineered food and crops. Id. ¶ 5. He has worked
15 on many cases involving genetic engineering, and that also involve NEPA and the PPA. Id. ¶ 6. He
16 has authored law review articles on environmental law issues, presented at numerous legal
17 conferences on genetic engineering crop litigation, and has been an adjunct professor in
18 environmental law issues, including genetic engineering. Id. ¶¶ 8-9. He also helps to develop legal
19 and policy strategies at the Center for Food Safety. Id. ¶ 7. Kimbrell seeks an hourly rate of \$410.
20 Id. ¶ 10; Drury Decl. ¶ 27.

21 Defendants argue that when this case was filed, Kimbrell had at most four years of
22 experience and that therefore, his rate should be \$250 per hour based on the rejected argument that
23 Achitoff is entitled to \$300 per hour. However, Defendants have provided no authority for that rate
24 and have failed to rebut Plaintiffs' evidence to support this rate. Accordingly, the Court finds that
25 Kimbrell's enhanced hourly rate of \$410 is reasonable.

26 5. Golden

27 Golden graduated from law school in 2004 with a certificate in environmental law. G.
28 Kimbrell Decl. ¶ 25. During his summers in law school he clerked for Communities for a Better

1 Environment and Earthjustice. Id. Upon graduation, he worked for two years as a legal fellow for
2 Adams Broadwell Joseph & Cardozo, a plaintiff-oriented environmental law firm where he practiced
3 administrative law and environmental law. Id. He worked at the Center for Food Safety from
4 November 2006 through March 2010. Id. While at the Center for Food Safety, Golden focused on
5 public interest environmental litigation and policy concerning genetically engineered crops,
6 including this case and two others. Id. ¶ 26. Plaintiffs seek the hourly rate of \$410 for Golden.

7 Defendants argue that when this case was filed, Golden had at most four years of experience
8 and that therefore, his rate should be \$250 per hour based on their unpersuasive argument that
9 Achitoff is entitled to \$300 per hour. However, Defendants have provided no authority for that rate
10 and have failed to rebut Plaintiffs' evidence to support this rate. Accordingly, the Court finds that
11 Golden's enhanced hourly rate of \$410 is reasonable.

12 **6. Andrew Kimbrell, Moriwake, Rostov, and Rakowsky**

13 Defendants do not specifically challenge the hourly rates sought by Plaintiffs' other counsel.
14 Based on the description of each attorney's experience set forth above, the Court finds that the rates
15 sought are reasonable for the level of each attorneys' experience, and are supported by evidence in
16 the record, including the Drury declaration.

17 **7. Law clerks**

18 During the summer of 2010, Center for Food Safety had three law clerks working on this
19 case. George Kimbrell Decl. ¶ 27. Plaintiffs seek an hourly rate of \$145 for these law clerks. Id.;
20 Drury Decl. ¶ 27.

21 Instead, Defendants argue that \$75 per hour is a reasonable hourly rate for law clerks. See
22 Nadarajah v. Holder, 569 F.3d 906, 918 (9th Cir. 2009) (awarding \$75 per hour for law clerks where
23 the plaintiffs only sought \$75 per hour for law clerks, the government did not object, the fees were
24 incurred on 2004 to 2006 and were incurred in another district, stating: "Based on the Appellate
25 Commissioner's experience, the requested paralegal and law student intern rates are 'in line with
26 those [rates] prevailing in the community for similar services by [paralegals] of reasonably
27 comparable skill, experience and reputation.'"); In re Hunt, 238 F.3d 1098, 1105 (9th Cir. 2001)
28 (awarding \$75 per hour for law clerk work and stating that the court was unable to analyze the

1 excessiveness of the fee award on appeal because the relevant documents had not been submitted).

2 Nadarajah and Hunt are inapposite. Defendants have provided no authority to support an
3 hourly rate of \$75 for law clerks in this district during the time this case was filed. By contrast,
4 Plaintiffs have provided evidence of the reasonableness of the \$145 hourly rate. See Drury Decl. ¶
5 27. Thus, fees for law clerk work should be awarded at the rate of \$145 per hour.

6 **B. Whether the distinctive knowledge and skills were needed in this litigation**

7 Under the second prong of the Love test, Plaintiffs must also show that counsel's distinctive
8 knowledge and skills were “needful to the litigation” in order to justify fees above the statutory cap.
9 Love, 924 F.2d at 1496. This case involved much more than a straightforward application of NEPA
10 and PPA. See Drury Decl. ¶¶ 21-22 (“Additionally, the environmental law field related to
11 genetically-engineered crops is an entirely new field requiring specialized knowledge. The case at
12 issue here is not a typical NEPA case.”). Rather, counsel’s knowledge of environmental law in
13 general, and genetically-engineered crops in particular, was necessary to appropriately craft the
14 complaint in this case and litigate the case successfully through the remedy phase. See id. ¶ 25 (“I
15 believes that Mr. Paul Achitoff’s, Mr. Greg Loarie’s and CFS’s attorneys’ special expertise in
16 environmental law, particularly related to the unique scientific and legal issues related to agricultural
17 biotechnology and the genetic engineering of agricultural crops, was necessary to the success of this
18 litigation.”); see also Love, 924 F.2d at 1496 (stating that attorney’s knowledge of the Federal
19 Insecticide, Fungicide and Rodenticide Act and familiarity with areas of expert testimony necessary
20 to quickly obtain a preliminary injunction constituted specialized knowledge necessary for
21 litigation).

22 Defendants have cited no authority, and the Court could find none, that requires the Court to
23 examine each specific task to determine whether specialized knowledge was required for each
24 specific task. Rather, the question is whether an attorney has specialized knowledge that was
25 “needful for the litigation,” even if some tasks within the case did not require that specific
26 knowledge. See Love, 924 F.2d 1496 (stating that an attorney’s distinctive knowledge and skills
27 must be “needed in the litigation”); see also Natural Resources Defense Council v. Winter, 543 F.3d
28 1152, 1158 (9th Cir. 2008) (analyzing whether the distinctive knowledge of counsel was “needful to

1 the litigation”); cf. United States v. 22249 Dolorosa St., 190 F.3d 977, 984 (9th Cir. 1999) (stating
2 that even if a case arises in a particular field of law, enhanced fees are not warranted when the action
3 is a “routine . . . case, not needing special skills.”). To accept Defendants’ invitation to the Court to
4 scrutinize the assignment of each specific task to a particular attorney on a team while in the heat of
5 litigating a complex case such as this one would create a logistical nightmare for staffing complex
6 cases eligible for EAJA fee awards. Such cases necessarily demand specialized substantive
7 experience, but also require generalized knowledge of the applicable federal rules and procedures.
8 In addition, allocating work as litigation unfolds requires flexibility.

9 Here, Plaintiffs have shown that the specialized knowledge of all counsel was needed in the
10 litigation. For example, as described above, Achitoff has extensive experience in the field of
11 genetically-engineered crops. His specialized experience was necessary to this litigation in his role
12 as lead counsel. Andrew Kimbrell was heavily involved in settlement discussions and legal strategy,
13 for which his extensive experience in environmental law and genetic engineering would have been
14 necessary. Further, even though Moriwake worked on more general aspects of this case, his lengthy
15 experience in environmental law and genetic engineering was needed in this litigation in general,
16 and the ruling on the motion on which Moriwake worked was important to Plaintiff’s success and
17 was cited by Judge White in his vacatur opinion. In addition, Rostov’s time records show that he
18 worked on drafting the complaint in this case, a task for which his specialized skill and knowledge
19 were necessary. Although Rakowsky and Tomaselli each have only a few years of experience, they
20 have worked on several cases involving genetically engineered food, experience which was needful
21 to this litigation. Finally, Loarie, George Kimbrell and Golden have experience with genetically-
22 engineered crops which is a sub-specialty that was necessary for this case. Under the circumstances
23 of this case, the Court finds that counsel’s specialized knowledge was needed in this litigation.

24 C. Unavailability of other counsel

25 Plaintiffs have the burden of providing evidence of the unavailability of appropriate counsel
26 at the statutory rate. See United States v. 22249 Dolorosa St., 190 F.3d 977, 985 (9th Cir.1999). “In
27 other words, the plaintiff must show that the skills required are not available elsewhere at the
28 statutory rate.” See Winter, 543 F.3d at 1162. Here, Plaintiffs’ counsel states that the specialized

1 skills needed for challenging agency decisions involving genetic engineering “are not generally
 2 shared among non-specialized attorneys, even among environmental lawyers.” A. Kimbrell Decl. ¶
 3 6. Plaintiff Center for Food Safety was “unsuccessful in locating any private attorney or firm in the
 4 environmental field that would accept the statutory rate under EAJA to litigate a case as complex as
 5 this.” Id. Further, Achitoff was hired as lead counsel for this case because Plaintiff Center for Food
 6 Safety could not “locate a lead attorney with necessary experience and capacity to take on this
 7 matter in the Bay Area.” Id.; see also Drury Decl. ¶ 22 (“No private attorney or firm in the
 8 environmental field would accept the statutory rate under EAJA to litigate a case as complex as
 9 this.”). Thus, Plaintiffs have met their burden of establishing that no other suitable counsel could be
 10 obtained at the statutory rate.

11 **Conclusion**

12 Accordingly, the Court recommends granting Plaintiffs’ Motion for Attorneys’ Fees with the
 13 reductions noted above. The parties shall meet and confer and file a stipulation no later than
 14 October 28, 2011 reflecting the revised amount of fees recoverable by Plaintiffs in light of the
 15 Court’s Report and Recommendation.

16 Any party may serve and file specific written objections to this recommendation within
 17 fourteen (14) days after being served with a copy. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P.
 18 72(b); Civil Local Rule 72-3. Failure to file objections within the specified time may waive the
 19 right to appeal the District Court’s order.

20 Dated: October 12, 2011

Elizabeth D. Laporte

 ELIZABETH D. LAPORTE
 United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.

Plaintiffs,

No. C 08-00484 JSW

v.

THOMAS J. VILSACK, et al.

**ORDER ADOPTING REPORT
AND RECOMMENDATIONS**

Defendants.

This matter comes before the Court upon consideration of Magistrate Judge Elizabeth D. Laporte’s Report and Recommendations (the “First Report” and “Second Report,” respectively), in which she recommends that this Court grant motion for attorneys’ fees and costs filed by Plaintiffs, but reduce the requested attorneys’ fees by certain amounts. Defendants filed objections to both Reports. The Court has considered Defendant’s objections and concludes that no response is necessary. *See* N.D. Civ. L.R. 72-1(a).

The Court concludes that Magistrate Judge Laporte’s First Report and Second Report are correct, well-reasoned and thorough and adopts her determination that Plaintiffs’s motion for attorneys’ fees and costs should be granted, with certain deductions. Accordingly, the Court **HEREBY ADOPTS** her Reports and Recommendations in every respect and **GRANTS** Plaintiff’s motion for attorneys’ fees and costs as modified for the reasons set forth in both Reports. Therefore, the Court reduces Plaintiffs’ amount of requested attorneys’ fees by

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1 \$175,689. Plaintiffs are HEREBY AWARDED \$2,638,367.00 in attorneys' fees and
2 \$66,552,59 in costs.

3 **IT IS SO ORDERED.**

4 Dated: December 15, 2011

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6 _____
7 JEFFREY S. WHITE
8 UNITED STATES DISTRICT JUDGE

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