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Chief Judge Stanley A. Bastian

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiff,

v.

CITY OF YAKIMA, a municipal corporation,

Defendant.

No. 1:20-cv-03156-SAB

DEFENDANT CITY OF YAKIMA'S MOTION FOR SUMMARY JUDGMENT

June 22, 2022
Without Oral Argument

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I. INTRODUCTION

Defendant City of Yakima (City) moves for summary judgment, asking that this Court dismiss all claims against it as a matter of law because Plaintiff Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) cannot prove essential elements of its claim under the Comprehensive Environmental Response Cost and Liability Act (CERCLA). 42 U.S.C. § 9607(a)(1)(A).

This case relates to a state cleanup site being administered by the Washington State Department of Ecology (Ecology) under the state cleanup law, the Model Toxics Control Act (MTCA), RCW Chapter 70A.305. The site is a former municipal landfill (Landfill Site) that was used by the City from 1963 to 1970. It was designated a cleanup site by Ecology in 1996. The City, in coordination with Ecology, conducted soil and groundwater investigations to assess the nature and extent of contamination at the site. To that end, it completed remedial investigations for the site in 2010 and 2015. In 2018, for the first time, Yakama Nation began reviewing and submitting comments to Ecology on site documents. It now seeks to recover costs for those purported oversight activities under CERCLA.

Yakama Nation's activities, however, were merely duplicative of work already being performed by Ecology. Plaintiff has not conducted any independent investigation or additional analysis of the site and has, in fact, disclaimed the ability

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to do so. It has explicitly relied on Ecology to ensure the site is protective of human health and the environment. Moreover, because Ecology is ensuring the cleanup meets MTCA standards—which, by law, are at least as protective as CERCLA standards—Plaintiff's attempt to oversee the site under CERCLA is superfluous and does not advance cleanup goals or otherwise further the purposes of CERCLA. Its actions are contrary to CERCLA's prescription for efficient and cost-effective cleanups. For these and other reasons discussed below, Plaintiff's activities at the site—for which it seeks to recover costs against the City—do not constitute "removal" actions within the meaning of CERCLA and are inconsistent with the National Contingency Plan (NCP). This is fatal to Plaintiff's claims.

In addition, Plaintiff's claims for response costs fail as the costs are unsubstantiated, do not relate to the Landfill Site, and cannot be properly differentiated without guesswork. For instance, Plaintiff is claiming costs against the City for Plaintiff's work on a separate cleanup site—the Mill Site, at which the City is not a party—and for work related to a larger county development project, the E/W Corridor Project, most of which is unrelated to the Landfill Site. Plaintiff's claimed costs for these other sites—which it has attempted to disguise as Landfill Site costs—fail on all four elements of a CERCLA claim. Because Plaintiff has made no effort to distinguish landfill costs from other costs, and because its cost

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documentation is deficient in other respects, Plaintiff cannot meet its burden to establish a prima facie case for its claimed response costs. Accordingly, the City is entitled to a summary judgment of dismissal.

II. STATEMENT OF FACTS AND EVIDENCE RELIED UPON

The City relies on its Statement of Undisputed Material Facts (hereinafter "SUMF") submitted with this response, the Declaration of Spencer Gheen, and Exhibits 1 through 46 thereto.

III. STATEMENT OF ISSUES

1. Should the Court grant summary judgment for the City where (1) under CERCLA, Plaintiff must show that its purported response activities constitute "removal" actions; (2) Plaintiff's only activities at the site are redundant of work being performed by Ecology; (3) Plaintiff's activities have not improved the understanding of the site, advanced cleanup goals, or provided any other benefit; and (4) Plaintiff's actions are not a reasonable means of furthering the statute's purposes and therefore do not meet the definition of "removal"?

2. Should the Court grant summary judgment for the City where (1) CERCLA requires, as an essential element of Plaintiff's case, that its claimed response activities "be not inconsistent with" the NCP; (2) Plaintiff's only activities at the site are duplicative of Ecology's work; (3) Plaintiff has not performed any

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independent investigation but has merely engaged in a perfunctory review of and comment on existing site documents; (4) the existing MTCA cleanup, by law, is required to be at least as protective as CERCLA and thus Plaintiff's oversight under CERCLA is superfluous; and (5) this undisputed evidence shows Plaintiff has acted in an arbitrary and capricious manner which is inconsistent with the NCP?

3. Should the Court grant summary judgment for the City because Plaintiff cannot meet its burden to prove a prima facie case for response costs where (1) Plaintiff's cost summaries are not accurate; (2) Plaintiff cannot substantiate the work it performed for many of its claimed costs; (3) Plaintiff has attempted to claim costs for activities at other sites; and (4) Plaintiff's deficient and unreliable cost documentation prevents it from meeting the elements of a CERCLA claim?

4. Should the Court dismiss Plaintiff's claim for declaratory relief because, as a matter of law, it is not entitled to a declaration of future costs without first establishing a valid claim for past costs, and Plaintiff has failed to do so here for the reasons set forth in this motion?

IV. LEGAL AUTHORITY AND ARGUMENT

A. Summary judgment is appropriate because Plaintiff cannot meet essential elements of its CERCLA claim.

Summary judgment is appropriate if there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a). To satisfy its burden on summary judgment, "the moving

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party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The opposing party must then point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Here, summary judgment is appropriate because Plaintiff does not have sufficient evidence to establish essential elements of its CERCLA cost recovery claim. In addition, the City has produced evidence that negates elements of Plaintiff's CERCLA claim.

In order to establish a prima facie case for cost recovery under CERCLA, Yakama Nation must demonstrate the following elements: (1) defendant falls within one of four categories of responsible parties; (2) the site qualifies as a "facility"; (3) Yakama Nation incurred "response costs" caused by the release or threatened release of a hazardous substance at the facility; and (4) Yakama Nation's underlying response actions were "not inconsistent with the NCP." *Confederated Tribes &*

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Bands of the Yakama Nation v. United States, 2015 U.S. Dist. LEXIS 175785, *9-10 (D. Or. 2015) (citations omitted).

Plaintiff's claims fail entirely under the third and fourth elements. Yakama Nation has not incurred qualifying "response costs" under CERCLA because its activities do not qualify as "removal" action within the meaning of the statute. And Plaintiff's purported response activities are "inconsistent with the NCP," as they are duplicative, wasteful, and do not advance any legitimate cleanup objective.

Additionally, many of Plaintiff's claimed costs are unrelated to the Landfill Site or are unsubstantiated. Plaintiff has attempted to claim costs for a separate cleanup site and a larger county development project. SUMF ¶¶ 19–27, 47. Those claimed costs fail on all four elements of a CERCLA claim, because the City has not been identified as a potentially liable party (PLP) at those other sites (SUMF ¶ 22); much of the county development project is not a "facility"; Plaintiff has no evidence that the releases at the Landfill Site caused it to incur costs for those other sites (SUMF ¶ 48); and the inclusion of unrelated and unsubstantiated costs is by definition "arbitrary and capricious" action which is inconsistent with the NCP. Because Plaintiff cannot verify its costs for the Landfill Site or differentiate them from its other costs without guesswork, it cannot prove its claims. See SUMF ¶¶ 18, 57, and 60. Accordingly, the Court must dismiss this action.

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B. Plaintiff's costs are not recoverable "response costs" within the meaning of CERCLA.

As part of its case, Plaintiff must prove that it has incurred qualifying "response costs" within the meaning of CERCLA. Response costs are costs incurred for either "removal or remedial action." 42 U.S.C. § 9601(25); 42 U.S.C. § 9607(a) (PRP liable for "all *costs of removal and remedial action* incurred by [an] . . . Indian tribe not inconsistent with the national contingency plan").

CERCLA defines "removal" as

> … the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment….

Id. at § 9601(23); *see also id.* at § 9601(24) (defining "remedial action" as "those actions consistent with permanent remedy taken … to prevent or minimize the release of hazardous substances…").[1]

The definition of "removal" covers "all acts that 'are not an unreasonable means' of furthering section 101(23)'s enumerated ends." *Pakootas v. Teck Cominco*

[1] Because Plaintiff has not taken any action consistent with a permanent remedy, we assume it seeks recovery of costs under the definition of "removal."

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Metals, Ltd., 905 F.3d 565, 579 (9th Cir. 2018). Although this definition is broad, it is not boundless. The activities must be a reasonable means of furthering the ends of monitoring, assessing, and evaluating the release of hazardous substances or such other actions as may be necessary to prevent or minimize damage to public health or the environment. *Id.* In *Pakootas*, for instance, the plaintiff-tribes had engaged in independent, original sampling and analysis and identification of responsible parties—investigation activities that clearly furthered the purposes of CERCLA and were not yet otherwise being performed.

Here, by contrast, the site is already being monitored, assessed, and evaluated by Ecology, which is administering the cleanup and performing oversight functions. SUMF ¶¶ 1–6, 8. Two Remedial Investigations were completed and the site was already well characterized before plaintiff unilaterally began to conduct its own "oversight." SUMF ¶ 15. Plaintiff itself has not engaged in independent data collection and has not identified additional responsible parties. SUMF ¶ 6. It has only performed additional review of analyses already completed by the City and overseen by Ecology. SUMF ¶ 7. Those activities have not improved the understanding of the site, advanced cleanup goals, or provided any other benefit. SUMF ¶¶ 16–17. Plaintiff's activities are, in fact, redundant of work already being performed. That redundant work is wasteful and unreasonable, and it is inconsistent

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with one of the main purposes of CERCLA, which is to encourage efficient and cost-effective cleanups. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001). As such, plaintiff's activities were not a reasonable means of furthering the ends of "removal" and thus fail to meet the statutory definition.

Because Plaintiff's activities at the site do not constitute "removal" actions, Plaintiff cannot prove a fundamental element of its CERCLA claims. Accordingly, its claims must be dismissed.

C. Plaintiff's purported response actions were inconsistent with the NCP as a matter of law because they are duplicative, wasteful, and do not advance any legitimate cleanup objective.

Even if this Court determines that Plaintiff performed qualifying "removal" actions, it cannot recover its costs if those actions were inconsistent with the NCP. *United States v. P.R. Indus. Dev. Co.*, 368 F. Supp. 3d 326, 337 (D.P.R. 2019). The NCP is the "playbook" that details "the steps that government must take to identify, evaluate, and respond to hazardous substances in the environment." *Id.* (internal citation and quotes omitted); 40 C.F.R. § 300.1 (purpose of the NCP is to provide "structure and procedure" for response actions). "It is designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment." *Carson Harbor Village Ltd. v. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006).

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Where the federal government, state government, or an Indian tribe are seeking recovery of response costs, consistency with the NCP is initially presumed: "Once a tribe shows that it has incurred response costs as a result of a release or threatened release of hazardous substances, the burden shifts to the defendants to show that the response action for which the costs were incurred was inconsistent with the NCP." *Yakama Nation*, 2015 U.S. Dist. LEXIS 175785 at *5 (citing *U.S. v. Chapman*, 146 F.3d 1166, 1170-71 (9th Cir. 1998)).

However, the City can "'rebut the presumption of consistency by establishing that [Yakama Nation's] response action was arbitrary and capricious.'"[2] *Id.* (quoting *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 949 (9th Cir. 2002)); *Wash. State Dep't of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 802 (9th Cir. 1995) (arbitrary and capricious actions are inconsistent with the NCP). The

[2] This standard of review is ill-fitting in the instant case because Yakama Nation has not participated in the selection of cleanup actions, engaged in any decisionmaking relevant to cleanup, or otherwise applied expertise. *See Wash. State Dep't of Transp.*, 59 F.3d 793 at 802 (applying this review standard to the government is justified because determining the appropriate removal and remedial action involves specialized knowledge and expertise). It lacks a basic understanding of the site. SUMF ¶¶ 8–12. The court should therefore apply a less deferential standard of review, such as reasonableness review, to Yakama Nation's actions.

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focus of the inquiry is on Yakama Nation's chosen response actions. *Chapman*, 146 F.3d at 1169-70; *U.S. v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992).

Although deferential, the arbitrary and capricious standard is not toothless:

> While deferential to agency decision making, the arbitrary and capricious standard contemplates a searching inquiry into the facts in order to determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment…. [C]osts that are *unnecessary and excessive* in light of the [NCP] are arbitrary and capricious and should be disallowed under this standard of review.

United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 179 (3d Cir. 2005) (emphasis added); *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 905 (5th Cir. 1993) (court will not consider post-hoc rationalizations or supply its own basis for EPA's decision; determination of consistency must be based on more than "trust and faith" in EPA's experience); *cf. United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1077, 1082, 1085 (E.D. Wash. 2007) (agency action usually satisfies the "arbitrary and capricious" standard if the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made,'" but action that is "unnecessary and duplicative" is inconsistent with the NCP) (internal quotation marks and citation omitted).

Indeed, several courts have found circumstances in which response costs were inconsistent with the NCP under the arbitrary and capricious standard of review. *See Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024-25 (8th Cir.

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1998) (state agency acted inconsistently with the NCP where it failed to undertake a feasibility study, ignored risks in selecting its action, did not give adequate opportunity for public comment, and failed to notify and involve responsible persons); *Wash. Natural Gas Co.*, 59 F.3d at 803-05 (WSDOT and its consultant acted inconsistently with the NCP where they failed to determine the nature and extent of the threat posed by contamination at the Site, failed to adequately consider remedial alternatives, and failed to provide an opportunity for public comment); *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 904-908 (5th Cir. 1993) (EPA's decision to provide alternate water supply as interim action was arbitrary and capricious and "a waste of money" where it did not reduce any health threat).

Under the arbitrary and capricious standard, Yakama Nation's response actions are inconsistent with the NCP. Yakama Nation has not performed any independent investigative activity or taken independent enforcement action against other PRPs. SUMF ¶ 6. Its activities are limited to reviewing and analyzing existing site documents, providing public comment on two of the documents, communicating with Ecology and the City, and attending meetings. SUMF ¶¶ 7, 17. Even that work was perfunctory and inconsistent with the action of an oversight agency. SUMF ¶ 8. Indeed, oversight would require having a technical understanding of the site, which Yakama Nation does not have and refused to acquire. SUMF ¶ 9, 50–51. It is acting

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not as an oversight agency that ensures work is performed properly—that role is being filled by Ecology—but merely as a consulting tribe under MTCA and the MOU. *See* WAC 173-340-130(7); SUMF ¶¶ 13–14, 52. Yakama Nation's actions are not contributing to the understanding of the site or advancing any legitimate cleanup objectives. SUMF ¶ 16–17. Rather, its actions are unnecessary, duplicative, and wasteful because Ecology is already performing oversight.

Moreover, Ecology is administering the Site under MTCA. That statute requires that cleanup standards be "at least as stringent as the clean-up standards under section 121 of the federal cleanup law, 42 U.S.C. Sec. 9621, and at least as stringent as all applicable state and federal laws, including health-based standards under state and federal law." RCW 70A.305.030(2)(e). In other words, Ecology must enforce MTCA's cleanup standards at the Landfill Site, and those cleanup standards are at least as protective—and probably, in most cases, more protective—than the standards required under CERCLA. There is no indication that Ecology has failed to fulfill this role at the Site. *See* SUMF ¶¶ 16–17. It is supervising the City's work to ensure that the private party cleanup is adequate to protect public health, public welfare, and the environment under MTCA's exacting standards. SUMF ¶¶ 1–6, 13, 16–17. Yakama Nation's attempt to simultaneously administer the Site under CERCLA's less exacting standards cannot, by definition, ensure a more protective

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remedy is implemented.[3] Yakama Nation's response actions fail to advance the goals of CERCLA or the NCP.

Yakama Nation's involvement only serves to frustrate the goals of CERCLA. As noted, it is not engaged in any independent data collection or enforcement that might assist in the cleanup. SUMF ¶¶ 6–10. Nor has its participation meaningfully affected Ecology's decision-making or the City's cleanup activities at the site. SUMF ¶ 17. Because cleanup goals are already being enforced by Ecology, Yakama Nation's oversight actions are not helping to achieve those goals. SUMF ¶¶ 16–17. Yakama Nation has simply added an unnecessary layer of review that adds costs to the regulatory process. Such a process is not cost-effective or efficient, and it runs counter to the principles of the NCP. *Chapman*, 146 F.3d at 1170 (the NCP is "designed to make the party seeking response costs choose a cost-effective course of action to protect the public health and the environment"); *Hardage*, 982 F.2d at 1444 (one way to establish inconsistency with the NCP is for a defendant to "show that the government acted arbitrarily and capriciously in failing to consider cost, or

[3] It is not apparent that Yakama Nation is even attempting to apply CERCLA standards to the cleanup. SUMF ¶ 14. Nor has it made any determinations under 40 C.F.R. § 300 415(b)(2), which is required before taking any removal action. This is further evidence that its actions are inconsistent with the NCP.

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in selecting a remedial alternative that is not cost-effective"); *Kalman W. Abrams Metals, Inc.*, 155 F.3d at 1026 ("the kind of arbitrary and wasteful agency action that occurred in this case cannot be rewarded"). Yakama Nation's actions in this case were therefore inconsistent with the NCP.

As further described in Section D., below, Yakama Nation also acted inconsistently with the NCP in failing to accurately account for its costs, including costs for other sites, and in failing to create a sufficient factual record to verify its activities and costs. *See* 40 C.F.R. § 300.160(a)(1) (agency must maintain documentation to support all of its actions, including a record of the actions taken and an accurate accounting of costs incurred); *P.R. Indus. Dev. Co.*, 368 F. Supp. 3d at 340-41; SUMF ¶¶ 18, 47, 55–57, 60.

In sum, Yakama Nation's oversight activities at the Landfill Site were ineffectual, unnecessary to any legitimate cleanup objective, and duplicative of work already being performed by Ecology. Those response actions are therefore arbitrary and capricious and inconsistent with the NCP.

D. Plaintiff's claims for unrelated and unsubstantiated costs fail under all four elements of a CERCLA claim.

Plaintiff does not possess or has refused to produce any contemporaneous documentation for much of the work that forms the basis of its response cost claims against the City at the Landfill Site. SUMF ¶ 18. The documents and testimony that

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it has produced reveal that Plaintiff's response cost summaries are not accurate and include illegitimate costs. For instance, Plaintiff is claiming costs against the City for Plaintiff's work on a separate cleanup site—the Mill Site, at which the City is not a PLP—and for work related to a larger county development project, the E/W Corridor Project, most of which is unrelated to the Landfill Site. SUMF ¶¶ 18–25, 27. Plaintiff's landfill costs can't be differentiated from its other costs because Plaintiff created no verifiable record of its activities, and those records cannot be accurately created now. SUMF ¶¶ 55–57, 60. As such, Plaintiff's claims must fail.

1. Many of Plaintiff's costs are unsubstantiated.

Plaintiff has produced annual cost reports that summarize its claimed past costs for its activities at the Landfill Site. SUMF ¶ 18. Plaintiff did not provide—and in fact affirmatively refused to provide—any itemization or specific description of the work performed for those costs. SUMF ¶¶ 28–40, 54–57. In many cases, documentation of the work apparently does not exist, as its employees largely failed to keep any contemporaneous description of the work performed on the dates they billed activity to the Landfill Site. SUMF ¶ 18. Plaintiff has also redacted—in many cases entirely—its legal invoices, which it is seeking to recover as response costs in this action. SUMF ¶ 18. This is improper. *See, e.g.*, *Clarke v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992).

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Many of Plaintiff's claimed costs simply are not substantiated. It is impossible to tell what work was performed, for what purpose or site, and in what duration. SUMF ¶ 18, 55–57. It is not adequate, at least in the context of this case, for Plaintiff to simply provide a blanket affirmation that the costs were incurred for response actions related to the Landfill Site. This is because we know from the record—discussed further below—that Plaintiff has attempted to claim costs for other sites. SUMF ¶ 18. We also know, because Plaintiff has admitted, that its employees billed only in one-hour increments. SUMF ¶ 56. This has resulted in claims for costs which were not incurred.

Under CERCLA, it is Plaintiff's burden to prove that it incurred response costs caused by the release or threatened release of a hazardous substance at the facility. Plaintiff has insufficient evidence to do that for most of its claimed costs. The Court should therefore enter summary judgment denying all costs which Plaintiff cannot specifically substantiate. To do otherwise would allow Plaintiff to insulate its costs from review.

2. Plaintiff claims costs for other sites.

As noted, in its claim for oversight costs at the Landfill Site, Plaintiff has included costs for work related to the Mill Site and the E/W Corridor Project. SUMF ¶¶ 18–27, 47. Plaintiff's legal claims, however, do not include allegations related to

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the Mill Site or E/W Corridor Project. SUMF ¶¶ 18–27. Plaintiff lacks evidence that these costs are recoverable against the City. The limited existing evidence shows Plaintiff's claimed costs fail to meet the requirements for recoverable costs under CERCLA. SUMF ¶¶ 58–59.

The Landfill Site is not the Mill Site. The Mill Site is a separate cleanup site being administered by Ecology. It is being investigated and cleaned up in a separate regulatory process. The City has not been identified as a PLP at the Mill Site. All costs for Plaintiff's activities related to the Mill Site are not recoverable against the City. Those costs fail on the first, third, and fourth elements of a CERCLA claim. SUMF ¶¶ 19–25.

Similarly, Plaintiff is not entitled to response costs associated with the E/W Corridor Project. Although the E/W Corridor Project includes a right of way crossing over the Landfill Site, the majority of the development project is unrelated to the site. Indeed, much of it is on the other side of the Yakama River. Plaintiff's costs for its activities related to the project are not recoverable against the City. SUMF ¶¶ 26–27.

Plaintiff's claimed costs for these other sites—which it has attempted to disguise as landfill costs or is unwilling to properly account for—fail on all four elements of a CERCLA claim. The City is not a PLP at those other sites, as is

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required to satisfy the first element of a CERCLA claim. SUMF ¶ 22. The development project as a whole is not a "facility," as is required to satisfy the second element of a CERCLA claim. SUMF ¶ 26. Plaintiff has no evidence that the releases at the Landfill Site caused it to incur costs for those other sites, as would be required to satisfy the third element of a CERCLA claim. SUMF ¶¶ 48, 53. Finally, the attempt to claim costs for other sites under the guise of the landfill is the very definition of "arbitrary and capricious" action, and thus fails under the fourth element of a CERCLA claim. Accordingly, this Court should enter an order denying Plaintiff recovery on all unrelated site costs. Because Plaintiff has made no effort to distinguish landfill costs from other costs—and has acknowledged that it cannot separate the costs due to insufficient recordkeeping—the Court should enter an order denying all of Plaintiff's claimed costs.

E. Plaintiff's claim for a declaratory judgment for future costs must be dismissed.

Where a plaintiff fails to establish liability in its initial cost-recovery action under CERCLA, no declaratory relief is available as a matter of law. *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1008 (9th Cir. 2010).

Because Plaintiff cannot establish essential elements of its CERCLA claim and its costs are inconsistent with the NCP, this Court must also dismiss Plaintiff's claim for a declaratory judgment of future costs. Even if this Court does not

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determine that Plaintiff's past costs are unrecoverable as a matter of law, the Court should nevertheless deny Plaintiff's claim for declaratory relief given its failure to sufficiently document costs and its troubling attempt to recover improper costs. *See, e.g.*, *id.* (CERCLA's purposes "would be better served by encouraging a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup"). Given Plaintiff's unreliable past cost claims, it is not entitled to declaratory relief in this case.

V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of the City and enter an order dismissing Plaintiff's claims with prejudice.

Respectfully submitted this 3rd day of May, 2022.

s/Spencer N. Gheen
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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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