Kurt B. Peterson WSBA #27580
Spencer N. Gheen, WSBA #43343
Andrew T. King, WSBA #47909
PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121
Telephone: (206) 257-5866
Facsimile: (206) 316-8351
Email: kurt.peterson@pkglaw.com
spencer.gheen@pkglaw.com
andy.king@pkglaw.com
aaron.gilligan@pkglaw.com
Attorneys for Defendant
City of Yakima

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 OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

June 22, 2022
Without Oral Argument

I. INTRODUCTION

Defendant City of Yakima (City) requests that this Court deny Plaintiff's Motion for Summary Judgment on Liability. Because Plaintiff Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) has not proved and cannot prove

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

essential elements of its claim under the Comprehensive Environmental Response Cost and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(1)(A), it is not entitled to summary judgment.[1]

Plaintiff's claims fall short in several respects. First, Yakama Nation's activities at the site do not constitute "removal" actions within the meaning of CERCLA, as its activities were not a reasonable means of furthering the ends of site assessment, investigation, or cleanup. It has not engaged in independent data collection or other investigative activities; has performed no non-redundant monitoring; has not conducted any independent analysis of site conditions; and has not identified additional responsible parties. It has merely performed a duplicative review of analyses already completed by the City and overseen by the Washington State Department of Ecology (Ecology). Plaintiff's activities have not improved the understanding of the site, advanced cleanup goals, or provided any other identifiable benefit. As such, they do not qualify as "removal" actions under the statute.

Second, Plaintiff failed to comply with specific provisions of the National Contingency Plan (NCP) that require it to create a sufficient factual record of its activities, maintain an accurate accounting of costs, and make specific

[1] For the reasons expressed in ECF No. 71 and further elucidated in this brief, the City is entitled to summary judgment of dismissal.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

determinations on the record before taking a response action. Moreover, Plaintiff's activities were antithetical to the recognized policy of the NCP, which is designed to ensure efficient and cost-effective cleanup. Plaintiff has not made any meaningful contributions to oversight, assessment, investigation, monitoring, or cleanup at the site. Its actions were redundant of Ecology's oversight and therefore wasteful. This amounts to arbitrary and capricious action that is inconsistent with the NCP.

Third, Plaintiff has failed to substantiate many of its costs, has claimed costs for other sites, has overbilled, and has otherwise submitted defective and improper cost claims. For instance:

- Plaintiff admits to claiming costs against the City for work on a separate cleanup site—the Mill Site, at which the City is not a party. Plaintiff further admits that it cannot differentiate those costs without guesswork.
- Plaintiff admits that there are no descriptions of most of the billed work and that many of the billing entries were not kept contemporaneously, preventing verification of the work done and time billed.
- Plaintiff admits to billing errors.
- Plaintiff admits to billing in minimum one-hour increments, which necessarily leads to overbilling.

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Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

- Plaintiff has over-redacted its attorney bills—which it is claiming as response costs—to frustrate meaningful review of those costs.

In sum, Plaintiff has not provided an accurate accounting of Landfill Site costs and the costs are not verifiable, as Plaintiff's billing processes are deficient and its documentation insufficient to substantiate what work was performed, for what amount of time, on what days. Due to these deficiencies, Plaintiff cannot meet its burden to establish a prima facie case for its claimed response costs.

Finally, even if this Court determines that the City is liable, it is not jointly and severally liable for all site costs, as its current ownership of the right of way—from which the municipal solid waste has been removed—has been brief and is divisible from the harm at the site. Because there is no evidence that the City's ownership caused or contributed to the harm, the City is entitled to an apportionment of zero liability. Other empty-chair parties—past and current owners or operators—are liable for Plaintiff's costs.

For any or all of these reasons, Plaintiff's motion for summary judgment should be denied.

II. STATEMENT OF FACTS AND EVIDENCE RELIED UPON

The City relies on its Statement of Disputed and Undisputed Material Facts, which includes a statement of additional material facts (collectively "SAMF"),

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

submitted with this response, the Declaration of Spencer Gheen, and Exhibits 47 through 49 thereto.

III. LEGAL AUTHORITY AND ARGUMENT

A. Plaintiff is not entitled to summary judgment because it 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 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). When considering a motion for summary judgment, a court should not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In order to establish a prima facie case for cost recovery under CERCLA, Yakama Nation must demonstrate the following elements: (1) defendant falls within

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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 & Bands of the Yakama Nation v. United States*, 2015 U.S. Dist. LEXIS 175785, *9-10 (D. Or. 2015) (citations omitted). As described below, Plaintiff's claims fail entirely under the third and fourth elements. Additionally, Plaintiff's claimed costs which are unsubstantiated or unrelated to the Landfill Site fail on all four elements of a CERCLA claim. Accordingly, the Court should deny Plaintiff's motion for summary judgment.

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). Plaintiff claims that it has engaged in "removal" actions, which are defined, in relevant part, as "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances … 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).

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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 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. SAMF ¶¶ 17, 19-21, 24. Two Remedial Investigations were completed, and the site was already well characterized before Plaintiff unilaterally began to conduct its own "oversight." *Id.* ¶ 31. Plaintiff admits that it has not engaged in independent data collection, has not performed any independent analysis, and has not identified additional responsible parties. *Id.* ¶ 22. Nor has it performed any non-redundant monitoring, assessment, or evaluation. *Id.* ¶¶ 22-26. It has merely performed additional review of analyses already completed by the City and overseen by

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

Ecology. *Id.* Those activities have not improved the understanding of the site, advanced cleanup goals, or provided any other benefit. Plaintiff's activities are, in fact, redundant of work already being performed. *Id.* ¶¶ 32-33. That redundant work is wasteful and unreasonable, and it is inconsistent with the 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). Because the site was already investigated and characterized, and continued to be fully monitored, assessed, and evaluated by others, Plaintiff's activities were not a reasonable means of furthering—and, in fact, did not further—those ends of removal.

Nor did Plaintiff's actions in any way further the ends of preventing or minimizing damage to public health or the environment. Plaintiff argues that its oversight was conducted to prevent or minimize damage to the river environment and the health of its enrolled members. However, unrebutted expert testimony establishes that there is no current or future threat to the river, and there is no evidence whatsoever of a threat to the health of tribal members. SAMF ¶¶ 26-28, 64-65. Moreover, Ecology was already administering the Site under the Model Toxics Control Act (MTCA), which requires cleanup standards be at least as protective as the standards required under CERCLA. *See* RCW 70A.305.030(2)(e). Thus, Yakama Nation could do nothing more—and did do nothing more—to

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

prevent, minimize, or mitigate any danger to public health and the environment. Its actions did not further the purposes of removal and were unreasonable under the circumstances. Because Plaintiff's activities at the site do not constitute "removal" actions, Plaintiff cannot prove a fundamental element of its CERCLA claims.

C. Plaintiff's actions were inconsistent with the NCP.

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[2] 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 (NCP prescribes 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).

Where the federal government, state government, or an Indian tribe are seeking recovery of response costs, consistency with the NCP is initially presumed.

[2] Plaintiff acknowledges that these requirements apply with equal force to Indian tribes. *See* ECF No. 69 at 10, n. 2.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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.'"[3] *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 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).

> 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"

[3] For the reasons expressed in ECF No. 71 at 11, n. 2, Plaintiff's actions should be reviewed under a less deferential standard of review.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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, e.g.*, *Wash. Natural Gas Co.*, 59 F.3d at 803-05; *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024-25 (8th Cir. 1998); *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 904-908 (5th Cir. 1993).

Plaintiff's actions are inconsistent with the NCP, as it failed to document the work performed, failed to make required determinations before taking removal action, and failed to accurately account for its costs.[4] *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); *id.* at § 300.415(b)(2) (agency must consider eight factors in selecting a removal action);

[4] Plaintiff's recordkeeping and accounting failures are addressed further in Section D., below.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

P.R. Indus. Dev. Co., 368 F. Supp. 3d at 340-41 (agency must specify what work underlies its claimed costs, and a defendant is entitled to review the accuracy of such costs and whether they comport with the NCP); SAMF ¶¶ 34, 63, 70-76. Plaintiff's removal actions also failed to "contribute to the efficient performance of long-term remedial action." 40 C.F.R. § 300.415(d). Yakama Nation has not participated in the selection of any cleanup actions, engaged in any decision-making relevant to cleanup, or otherwise contributed any independent analysis that would improve or influence the cleanup. SAMF ¶¶ 22-26, 30-33. If anything, it has undermined the efficient performance of cleanup by adding a duplicative layer of review, slowing the process, and increasing site costs.

Plaintiff has also acted inconsistently with the NCP as a whole by contravening its prescription for efficient and cost-effective cleanups. *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 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"). As noted,

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

Plaintiff has not performed any independent investigative activity or taken independent enforcement action against other responsible parties. SAMF ¶¶ 22-26, 30-33. 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. *Id.* Even that work was perfunctory and inconsistent with the action of an oversight agency. *Id.* ¶¶ 22-27, 30-33, 66-68. Indeed, oversight would require having a technical understanding of the site, which Yakama Nation does not have and refuses to acquire. *Id.* It is acting 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); SAMF ¶¶ 29-30, 68. Yakama Nation's actions are not contributing to the understanding of the site, nor are they advancing any legitimate cleanup objectives. SAMF ¶¶ 32-33. 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

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

enforce MTCA's cleanup standards at the Landfill Site, and those cleanup standards are at least as protective as the standards required under CERCLA. There is no evidence that Ecology has failed to fulfill this role at the Site. SAMF ¶¶ 24, 32-33. 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. *Id.* ¶¶ 17, 19-21, 29, 32-33. Yakama Nation's attempt to simultaneously administer the Site under CERCLA's less exacting standards cannot, by definition, ensure a more protective remedy is implemented. *Id.* ¶ 30. Yakama Nation's response actions fail to advance the goals of CERCLA or the NCP.

In sum, Yakama Nation has simply added an unnecessary layer of review that increases the cost of the regulatory process without contributing to the understanding of the site or improving the protectiveness of the cleanup. Those actions were unnecessary, ineffectual, and duplicative of work already being performed. Its oversight was 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. SAMF ¶¶ 34, 70-71. The documents and testimony that it has produced reveal that Plaintiff's response cost summaries are not

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

accurate and include illegitimate costs. *Id.* ¶¶ 34-43, 63, 70-76. 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. *Id.* 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. *Id.* 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. Plaintiff did not provide—and in fact affirmatively refused to provide—any itemization or specific description of the work performed for those costs. *Id.* ¶¶ 34, 45-57, 70-76. 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. *Id.* Plaintiff has also redacted—in many cases entirely—its legal invoices, which it is seeking to recover as response costs in this action. *Id.* This is improper. *See, e.g.*, *Clarke v. American Commerce National Bank*, 974 F.2d 127

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

(9th Cir. 1992).[5]

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. SAMF ¶¶ 34, 70-76. 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 and has made billing errors. *Id.* We also know, because Plaintiff has admitted, that its employees billed only in one-hour increments. *Id.* ¶ 72. 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.

[5] Moreover, Plaintiff cannot rely on summaries to establish those costs where the original documents (unredacted invoices) have not been provided. *See* FRE 1006.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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. *Id.* ¶¶ 34-43, 63, 72-75. Plaintiff's legal claims, however, do not include allegations related to the Mill Site or E/W Corridor Project. 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. *Id.*

The Mill Site is and has been at all relevant times a separate cleanup site being administered by Ecology. *Id.* ¶¶ 35-40. It is being investigated and cleaned up in a separate regulatory process. *Id.* The City has not been identified as a PLP at the Mill Site. *Id.* 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.

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. *Id.* ¶¶ 42-43. Indeed, much of it is on the other side of the Yakama River. *Id.* Plaintiff's costs for its activities related to the project are not recoverable against the City.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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 required to satisfy the first element of a CERCLA claim. The development project as a whole is not a "facility," as is required to satisfy the second element of a CERCLA claim. 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. 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 deny all of Plaintiff's claimed costs.

E. The City's divisibility defense precludes summary judgment.

A defendant may not be held jointly and severally liable for all response costs where the harm is divisible. *United States v. Burlington Northern & Santa Fe Ry.*, 479 F.3d 1113, 1126 (9th Cir. 2007) (apportionment is available at the liability stage of a CERCLA case). A defendant can avoid joint and several liability by showing

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

that it did not contribute to the release and cleanup costs that followed, or contributed only a divisible portion of the harm. *US v. Alcan Aluminum Corp.*, 315 F.3d 179, 185 (2d Cir. 2003); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 868 F. Supp. 2d 1106, 1111 (E.D. Wash. 2012) (divisibility is essentially the burden to show that a defendant caused only some part of the contamination and how much).

The only basis for liability against the City in this case is as a current owner of a small portion of the site.[6] Specifically, since October 27, 2020, the City has owned a right of way that runs across the site. ECF No. 68 at Exs. 1, 2. There is no evidence that, during its brief period of ownership, the City has caused or contributed to contamination at the site. No disposal or other polluting activity has taken place. The City has, in fact, reduced potentially harmful conditions at the site by removing the municipal solid waste from its portion of the property. SAMF ¶ 77. Because the City's brief period of ownership did not contribute to the harm at the site or to Plaintiff's costs—many of which were incurred before the City even owned a portion

[6] Plaintiff has not been able to prove—and does not argue in its brief—that the City is an "operator" within the meaning of CERCLA, as there is no evidence that hazardous substances were released at the site between 1963 and 1970, the years the City used it as a municipal landfill. *See* 42 U.S.C. § 9607(a)(2).

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

of the site—the only appropriate apportionment of liability to the City is zero.[7]

Accordingly, even if this Court determines that the City is liable, a factual issue of divisibility precludes entry of judgment against the City for Plaintiff's costs.

F. 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 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,*

[7] There are both past and current owners or operators who Plaintiff elected not to pursue for these costs. SAMF ¶ 2; ECF No. 43-3 at 3, ¶¶ A, B. Plaintiff argues that the City indemnified one of those parties for site costs, but that is not relevant to liability, as a party cannot contract away its liability under CERCLA. *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 107 (3d Cir. 2005). Because the City can show that its proper apportionment is zero, it need not show what the proper apportionment is to those empty chairs.

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351

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.

IV. CONCLUSION

For the foregoing reasons, the Court should enter an order denying Plaintiff's motion for summary judgment.

Respectfully submitted this 24th day of May, 2022.

s/Spencer N. Gheen
Spencer N. Gheen, WSBA #43343
Kurt B. Peterson WSBA #27580
Andrew T. King, WSBA #47909
Aaron P. Gilligan, WSBA #29614
Attorneys for Defendant City of Yakima
PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, WA 98121
Telephone: (206) 257-5853
Facsimile: (206) 316-8351
Email: kurt.peterson@pkglaw.com
spencer.gheen@pkglaw.com
andy.king@pkglaw.com
aaron.gilligan@pkglaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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:

Thomas Zeilman, WSBA #28470
LAW OFFICES OF THOMAS ZEILMAN
32 N. 3rd Street, Suite 310
P.O. Box 34
Yakima, WA 98901
Telephone: (509) 575-1500
Email: tzeilman@qwestoffice.net

David F. Askman, CO Bar #44423
Michael M. Frandina, CO Bar #42116
THE ASKMAN LAW FIRM LLC
1543 Champa Street, Suite 400
Denver, CO 80202
Telephone: (720) 407-4331
Email: dave@askmanlaw.com
michael@askmanlaw.com

Shona Voelckers, WSBA #50068
Anthony Aronica, WSBA #54725
YAKAMA NATION OFFICE OF LEGAL COUNSEL
P.O. Box 151 / 401 Fort Road
Toppenish, WA 98948
Telephone: (509) 865-7268
Emails: shona@yakamanation-olc.org,
anthony@yakamanation-olc.org

Attorneys for Plaintiff

By: *s/Mary V. Allen*
Mary V. Allen, Paralegal

PKG LAW, P.S.
2701 First Avenue, Suite 410
Seattle, Washington 98121-1121
Phone (206) 257-5866 Fax (206) 316-8351