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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

REPLY IN SUPPORT OF DEFENDANT CITY OF YAKIMA'S MOTION FOR SUMMARY JUDGMENT

June 22, 2022
Without Oral Argument

Defendant City of Yakima (the City) offers this reply memorandum in support of its motion for summary judgment. The City also submits and relies upon its Reply Statement of Material Facts Not in Dispute ("RSOMF") under LCivR 56(c)(1)(C).

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A. Plaintiff has not engaged in "removal" action at the site.

Under CERCLA, a plaintiff's activity at a cleanup site is not a "removal" action if it is an unreasonable means of furthering the ends of monitoring, assessing, and evaluating the release of hazardous substances or preventing or minimizing damage to public health or the environment. 42 U.S.C. § 9601(23); *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 579 (9th Cir. 2018).[1]

Plaintiff argues that it engaged in "investigation, monitoring, assessing, and evaluating" the releases and threats of release at the Site. ECF No. 75 at 3:2-7. This is contradicted by evidence in the record—in many cases, Plaintiff's own testimony—establishing that it did not engage directly in any independent data collection or other investigative activities; did not perform any non-redundant monitoring; did not conduct any independent analysis of site conditions; and did not identify additional responsible parties that were not already known. RSOMF ¶¶ 6–7. The most Plaintiff can say is that "it *will* evaluate the Landfill Site" in the future once it has sufficient funding. ECF No. 76 at 4:3–12. This merely proves Plaintiff has not engaged in "removal" action, even if it intends to do so in the future.

[1] Plaintiff argues that the City misrepresents the *Pakootas* decision. However, the case plainly and expressly supports the proposition for which the City cites it. Plaintiff similarly mischaracterizes the City's citation of other cases.

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It is undisputed that Plaintiff has "*only* performed an additional review of analyses already completed by the City and overseen by [the Washington State Department of] Ecology and has not used any independent sources of information in furtherance of its oversight activities." RSOMF ¶ 7 (emphasis added). Thus, to the extent Plaintiff did engage in any of the statutorily listed removal activities, its activity was redundant of Ecology's performance of those same activities. Because the site was already investigated and characterized, and continued to be fully monitored, assessed, and evaluated by others, Plaintiff's activities were an unreasonable means of furthering—and, in fact, did not further—the ends of removal. *Id.* ¶¶ 4, 5, 7, 15. As such, they do not qualify as "removal" actions under CERCLA.

Plaintiff also argues that its activity ensured that the remedy was protective of human health and the environment and, specifically, that its oversight prevented or minimized damage to the river environment and the health of its enrolled members. ECF No. 75 at 3:14–20. Plaintiff offers only generalized, conclusory statements that its activity ensured the protectiveness of the remedy but does not explain how its actions did so. *Id*. Nor could it, as it is undisputed that "the hazardous substances at the site alone do not represent a threat to human health and the environment." RSOMF ¶ 12. Moreover, unrebutted and uncontested expert testimony establishes

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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.[2] *Id.* ¶¶ 10–12, 48–49; ECF No. 55 ¶ 4, Ex. 1 at 10–11.[3]

In addition, 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, Plaintiff could do nothing more—and did do nothing more—to prevent, minimize, or mitigate any danger to public health and the environment. Plaintiff effectively admits that it did not ensure the protectiveness of the remedy, as it relied on Ecology to do that. RSOMF ¶¶ 8, 14.

Plaintiff does not cite a single case involving the circumstances here, where a tribe (or government agency) uses CERCLA to conduct secondary oversight

[2] Plaintiff did not disclose any expert testimony in this case, much less testimony that could establish the nature and extent of any threat from the site. Without that testimony, Plaintiff cannot show how its actions ensured the remedy was protective of human health in the environment. RSOMF ¶¶ 10–12. Plaintiff's new, unsupported opinions offered in its response are inadmissible. RSOMF ¶ 5.

[3] Plaintiff challenged limited aspects of Mr. Wall's opinions in its pending *Daubert* motion. *See* ECF No. 50; ECF No. 54 at 3, n. 1. It did not challenge Mr. Wall's opinion regarding the lack of threat to the river. *Id.* Plaintiff cannot do so now, as the case deadline for *Daubert* motions passed long ago.

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activities at a state cleanup site already being overseen by another regulatory agency under state law. This is because this type of secondary oversight is not contemplated under CERCA. *See* 40 C.F.R. § 300.400(h) (only lead agency or EPA may conduct oversight). Allowing Plaintiff to conduct such oversight in this case would stretch the definition of "removal" to encompass even unreasonable, duplicative activity that does not advance the statutory purposes specified in CERCLA. This would obliterate any limitation on governmental or tribal action at cleanup sites and conflict with CERCLA's prescription for cost-effective cleanups.

Plaintiff's 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. Its claims must therefore be dismissed.

B. Plaintiff's actions were inconsistent with the National Contingency Plan.

A tribe's actions are inconsistent with the National Contingency Plan (NCP) under CERCLA if they are arbitrary and capricious. *Confederated Tribes & Bands of the Yakama Nation v. United States*, 2015 U.S. Dist. LEXIS 175785, *5 (Dist. Ct Oregon 2015); *but see* ECF No. 71 at 11, n. 2.

Plaintiff argues that the City has not identified specific provisions of the NCP that Plaintiff's actions are at variance with. ECF No. 75 at 8:3–6. Contrary to

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Plaintiff's assertions, the City cited specific provisions of the NCP with which Plaintiff's actions are inconsistent. *See* ECF No. 71 at 15, n. 3 (citing 40 C.F.R. § 300.415(b)(2) (agency must consider eight factors in selecting a removal action)); ECF No. 71 at 16 (citing 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)). As set out in its initial brief, Plaintiff's actions are inconsistent with the NCP because it failed to document the work performed, failed to make required determinations before taking removal action, and failed to accurately account for its costs. *See, e.g.*, *United States v. P.R. Indus. Dev. Co.*, 368 F. Supp. 3d 326, 340–41 (Dist. Ct. Puerto Rico 2019) (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); RSOMF ¶¶ 18, 47, 54–60. Plaintiff's failure to address those issues should be treated as a concession that its actions were inconsistent with those provisions of the NCP.

To the extent Plaintiff would contend that those provisions do not apply because it is not a "lead agency," then Plaintiff is not entitled to conduct oversight under the NCP. *See* 40 C.F.R. § 300.400(h) (only lead agency or EPA may conduct oversight). Indeed, the NCP does not contemplate the type of secondary oversight

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that Plaintiff is trying to conduct at this state cleanup site. Plaintiff's attempt to do so is necessarily inconsistent with the NCP.

The City, in any event, need not identify a specific provision of the NCP to establish arbitrary and capricious action on the part of Plaintiff. Several reviewing courts have scrutinized the government's response actions at other cleanup sites without reference to any provision of the NCP. *See, e.g.*, *U.S. v. Chapman*, 146 F.3d 1166, 1171 (9th Cir. 1998) (examining, in part, whether EPA's removal order was arbitrary and capricious without reference to any provision of the NCP); *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 905 (5th Cir. 1993) (finding EPA's action arbitrary and capricious without applying a specific provision of the NCP); *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1077 (E.D. Wash. 2007) (examining inconsistency without resort to provisions of the NCP). The plain language of the statute—which focuses on the "consistency" or "inconsistency" of a given action with the NCP, rather than on whether the action directly violates a provision of the NCP—supports this understanding. 42 U.S.C. § 9607(a)(1)(A).

Plaintiff has acted arbitrarily and capriciously in performing unnecessary and duplicative oversight without articulating any satisfactory rationale for doing so. *See Newmont USA Ltd.*, 504 F. Supp. 2d at 1085 (suggesting that "unnecessary and duplicative" action by the EPA could be inconsistent with the NCP); *Chapman*, 146

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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"). As previously noted, it is undisputed that Plaintiff has "*only* performed an additional review of analyses already completed by the City and overseen by Ecology and has not used any independent sources of information in furtherance of its oversight activities." RSOMF ¶ 7 (emphasis added). It did not engage in any independent data collection or other investigative activities; did not perform any non-redundant monitoring; did not conduct any independent analysis of site conditions; and did not identify additional responsible parties that were not already known. *Id.* ¶¶ 6–7. Thus, Plaintiff's actions were unnecessary, duplicative, and wasteful.

It is also undisputed that Plaintiff "relies on Ecology to ensure adequate cleanup at the Landfill Site." *Id.* ¶ 8; *see also* ¶ 14 (it is undisputed that Plaintiff was not seeking to apply CERCLA standards to the cleanup of the Landfill Site). There is no evidence that Ecology was not performing oversight adequately; that cleanup standards were not being met; or that there was a danger to public health or the environment, including tribal members or the river. *Id.* ¶¶ 10–12; 48–49; ECF No. 55 ¶ 4, Ex. 1 at 10–11. In other words, Plaintiff's secondary oversight served no real purpose, and there is no rationale to support it. As such, its actions were "arbitrary and capricious" and inconsistent with the NCP.

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Rather than address those issues, Plaintiff argues to this court that no conduct—no matter how wasteful, ineffective, excessive, or inefficient—could run afoul of the NCP. This view, if adopted, would incentivize cost abuse in cleanups and insulate agency action from meaningful review. The Court should avoid this result.

C. Plaintiff's deficient cost documentation and accounting negates elements of its CERCLA claim.

Plaintiff argues that its general cost documentation is sufficient to support its cost claims. ECF No. 75 at 11:7–12. However, Plaintiff has not provided any documentation that shows what work was performed for the specific costs that it is claiming against the City. RSOMF ¶¶ 18, 47, 54–60. Plaintiff provides only a generalized narrative of site activities that cannot be connected to its cost entries. *Id*. Plaintiff's response is superficial and does nothing to cure the insufficient record of its work and costs. *See 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).

Moreover, the record shows that Plaintiff's cost summaries are unreliable and inaccurate: there are no descriptions of most of the billed work and many of the billing entries were not kept contemporaneously, preventing verification of the work done and time billed; there were admitted billing errors; Plaintiff billed in one-hour

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increments, resulting in overbilling; Plaintiff has redacted attorney bills to prevent meaningful review; and Plaintiff has billed the City for costs on a separate site and separate development project. RSOMF ¶¶ 18–27, 47, 54–60.

Plaintiff offers a post-hoc rationale for claiming other site costs as Landfill Site costs, contending that those other costs were necessarily related to the landfill and were part of a single CERCLA "facility." However, Plaintiff lacks any technical evidence to support this position, as it has not disclosed any expert testimony in this case.[4] Nor is it relevant, as neither the Mill Site nor the Landfill Site is being remediated pursuant to CERCLA, and Plaintiff has admitted that it is not seeking to apply CERCLA standards to the Landfill Site. RSOMF ¶ 14. Further, Plaintiff does not explain why its efforts "to understand the relationship between the two sites" should be billed entirely to the Landfill Site. The reason is that Plaintiff failed to keep adequate documentation to separate its costs for the two sites. *Id.* ¶ 57. Documentary evidence shows that Plaintiff knew the sites were separate and knew that it should be separating its costs. *Id.* ¶ 18; ECF No. 73-45;73-46. Plaintiff acknowledges that it now separates costs for the Mill Site from its costs for the

[4] Plaintiff acknowledges that the Mill Site is upgradient of the Landfill Site. Thus, to the extent contamination is commingled, the source of those releases is necessarily the Mill Site, where the City is not a party and has no nexus to the releases. Thus, it was unreasonable to bill those costs to the Landfill Site.

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Landfill Site. ECF No. 76-2 ¶ 10. This is an admission that the costs should have been separated all along. In any event, due to Plaintiff's inadequate documentation, there is no contemporaneous corroboration that supports its proffered reason for including other site activities in its Landfill Site costs. A post-hoc rationale is, by definition, arbitrary and capricious.

The record before the Court is sufficient to establish that Plaintiff's unsubstantiated and improper cost claims fail on all four elements of a CERCLA claim, as described in the City's opening brief.

D. Conclusion

The record before the court is sufficient to grant summary judgment in favor of the City and enter an order dismissing Plaintiff's claims with prejudice.

Respectfully submitted this 7th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 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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