HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, a municipal corporation, located in the County of King, State of Washington,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA CORPORATION, and DOES 1 through 100,

Defendant.

CASE NO. 2:16-CV-00107 RAJ

DEFENDANTS MONSANTO COMPANY, SOLUTIA INC. AND PHARMACIA LLC'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR: SEPTEMBER 2, 2022

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I. INTRODUCTION AND REQUEST FOR RELIEF

Defendants Monsanto Company ("New Monsanto"), Solutia Inc. ("Solutia"), and Pharmacia LLC (hereinafter referred to as "Old Monsanto") (collectively "Defendants") are entitled to summary judgment on the City's sole remaining cause of action – intentional nuisance – because the City's claims were released by the State of Washington ("State") in connection with the settlement of the State's lawsuit previously brought against Defendants, and are additionally barred by principles of res judicata. Defendants also are entitled to summary judgment because the City cannot establish the essential elements of its intentional public nuisance cause of action. In the alternative, Defendants are entitled to summary judgment on some or all of the relief requested.

Release and Res Judicata. The Court should enter summary judgment in favor of Defendants because the City cannot establish liability for several reasons. First, the City's claims were released in their entirety by the State of Washington in June 2020 when the State settled its own lawsuit against Defendants for the same injuries the City alleges here. The State generally and specifically released all legal and equitable claims, known or unknown, that were or could have been alleged in its lawsuit related to the manufacture, sale, testing, disposal, release, marketing or management of PCBs by Defendants. And the State's settlement binds not only the State itself, but also all of its officers, agencies, and departments, including the City. Moreover, separate from the terms of the release, the City's claims – whether asserted or unasserted in the State's lawsuit – are also barred by the doctrine of res judicata because the State and City are in privity and their lawsuits address the same claims. In short, Defendants are entitled to summary judgment because they previously paid in a prior lawsuit to resolve the claims that are now reasserted here, and that prior settlement binds the City.

Liability Elements. Even if the City's claims had not been previously resolved, Defendants still would be entitled to summary judgment because the City cannot prove three

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of the essential elements of its sole remaining cause of action, intentional public nuisance. ***First***, the City cannot prove that Defendants' conduct constituted a nuisance because Defendants' conduct was expressly authorized by statute, which exempts it from being deemed a nuisance under Washington law. The City also cannot prove that Defendants' actions constituted a nuisance because no Washington court has ever extended nuisance to cover the lawful manufacture and sale of a product, and doing so in the first instance is not the province of a federal court. ***Second,*** the City cannot prove the intent element of its claim and instead urges the application of a negligence standard, which fails a matter of law. ***Third***, the City cannot prove proximate causation because it lacks evidence that Defendants retained control of the PCBs at the time the alleged nuisance was created, and because Defendants' conduct was not sufficiently proximate to the alleged harm. Defendants are entitled to summary judgment because the City cannot prove all essential elements of its claim.

Relief. In the alternative, Defendants are entitled to summary judgment, in whole or in part, on the various forms and categories of relief requested by the City. First, Defendants are entitled to summary judgment on all claims for money damages because abatement is the sole relief available for the City's public nuisance claim. Second, even if abatement were not the only available remedy, Defendants would be entitled to summary judgment on the City's request for speculative, unripe, and remote money damages in the amount of $701,884,524. These damages include the costs of (1) future construction/operation/maintenance costs for 440 bioretention basins (2024-2033); (2) future land acquisition necessary for 440 bioretention basins, plus $5,258,462 in staff, property management, and transaction-related costs (2024-2033); (3) future construction/ operation costs of the South Park stormwater treatment facility; (4) past planning costs for the South Park stormwater treatment facility; (5) the City's allocated share of unknown future cleanup costs for the Lower Duwamish Waterway ("LDW"); and (6) future enhancements to the City's current source-control programs. The City cannot recover these proposed costs because they are speculative, remote, and unripe, and because

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Washington law does not allow future damages where, as here, a continuing nuisance is alleged.

In addition, for separate and additional reasons set forth more fully below, Defendants are entitled to summary judgment on the City's requests for: (1) future damages because the City alleges a continuing nuisance for which future damages are not available; (2) costs to investigate and remediate the LDW because the City does not assert such claims against Old Monsanto and any liability of New Monsanto and Solutia is derivative of the liability of Old Monsanto; (3) costs of proposed future remedial actions not approved by the U.S. Environmental Protection Agency ("EPA"); (4) damages claims that are preempted by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or barred by CERCLA's and/or Washington law's prohibition on double recovery; (5) unsegregated remediation and other costs, which are barred by this Court's prior rulings and Washington law; (6) relief for which it lacks standing, including for harm from the Fish Consumption Advisory as measured by funding to expand the existing Community Health Advocate outreach programs, and for natural resource damages; (7) costs to bring the City into compliance with its existing wastewater and stormwater permits, because permit compliance costs incurred to discharge stormwater lawfully are not recoverable damages for public nuisance; and (8) attorneys' fees. The Court should enter summary judgment for Defendants on all of these categories of damages if it does not enter summary judgment in favor of Defendants on the issue of liability.

On August 8, 2022, counsel for Defendants participated in a meeting and conferral with Plaintiff's counsel regarding the substance of Defendants' motion; the parties were unable to reach agreement on the issues. *See* Declaration of Lisa DeBord in Support of Defendants' Statement of Material Facts ("DeBord Decl."), ¶ 142.

II. LEGAL STANDARD

"Summary judgment is the time to 'fish or cut bait' – come forward with the evidence

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to support the claim/defense, or abandon it." *Voight v. HAL Nederland, N.V.*, 2018 WL 4583903, at *2 (W.D. Wash. Sept. 25, 2018). Summary judgment is appropriate if there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Ingenco Holdings, LLC v. ACE Am. Ins. Co.*, 2022 WL 716880, at *2 (W.D. Wash. Mar. 10, 2022) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* (citing *Celotex Corp.*, 477 U.S. at 323). "[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial'" to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). The purpose of summary judgment is to avoid unnecessary trials when there is no genuine dispute as to the material facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir. 1975). If the nonmoving party fails to proffer a *prima facie* showing of any of the elements essential to its case as to which it would have the burden of proof at trial, summary judgment is required. *Celotex Corp.*, 477 U.S. at 322-23.

III. STATEMENT OF FACTS

A. OVERVIEW

Old Monsanto Company manufactured polychlorinated biphenyls for more than 40 years until voluntarily ceasing manufacture and sale in 1977. PCB production in the United States began in response to the electrical industry's need for improved dielectric insulating

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fluids which would also provide increased fire resistance when used in transformers and capacitors. In many instances, fire and building codes required PCBs for the protection of life and property. As the unique functional characteristics of these materials became more fully understood, additional uses were developed for industry and specified by the United States for military applications.

The damages the City seeks include damages related both to constituents other than PCBs, and damages purportedly caused by PCBs not manufactured by Old Monsanto. The City has done nothing to differentiate between Old Monsanto PCBs and non-Old Monsanto PCBs in its damage models, nor has it made any effort to allocate clean-up costs according to those entities that released PCBs and other constituents.

B. BACKGROUND

1. From 1935 to 1977, Old Monsanto manufactured and sold PCBs in bulk to sophisticated users.

1. The original Monsanto Company, now Pharmacia (hereinafter "Old Monsanto"), manufactured polychlorinated biphenyls ("PCBs") from approximately 1935 to 1977. *See* DeBord Decl., ¶ 3, Ex. 2 (alleging that Pharmacia (Old Monsanto) is the successor to the original Monsanto Company)

2. Old Monsanto manufactured PCBs in its facilities in Anniston, Alabama and Sauget, Illinois. Old Monsanto never manufactured PCBs in Seattle, Washington.

3. Old Monsanto shipped its raw PCBs in bulk to transformer and capacitor manufacturers, industrial users, formulators, and distributors. DeBord Decl., ¶¶ 4-7, Exs. 3, 4, 5 and 6.

4. Distributors resold the PCBs to their customers; in most cases, Old Monsanto did not know who those customers were. DeBord Decl., ¶¶ 4, 8-9, Exs. 3, 7 and 8. *See also* DeBord Decl., ¶ 10, Ex. 9. At all times relevant to this case during the manufacture and sale of PCBs, Old Monsanto supplied Aroclor product bulletins to its customers and potential

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customers and warning labels to its customers. DeBord Decl., ¶¶ 62-66, Exs. 61, 62, 63, 64 and 65. However, once the product left Old Monsanto's hands, it had no control over how those products were used, handled or disposed of by the purchaser or end user.

5. Old Monsanto did not sell PCBs to the City of Seattle ("the City"). DeBord Decl., ¶ 10, Ex. 9, at 182:14-23; *see also* DeBord Decl., ¶¶ 11-12, Exs. 10, 11.

6. PCBs were a useful industrial product sold in bulk to sophisticated manufacturers of electrical and other industrial equipment, such as transformers and capacitors, as well as manufacturers of other products such as specialty paints and coatings. Old Monsanto also sold PCBs for use in industrial applications such as hydraulic and heat exchange systems. DeBord Decl., ¶¶ 4-6, 13-14, Exs. 3, 4, 5, 12 and 13. PCBs have properties that make them advantageous for use in heat-transfer systems and electrical equipment, such as transformers and capacitors. They have low solubility in water, low vapor pressure, low flammability, high heat capacity, low electrical conductivity, favorable dielectric constant, and little acute toxicity to humans. DeBord Decl., ¶ 15, Ex. 14, at 1. Old Monsanto never manufactured, formulated, sold, or marketed PCB-containing caulks, paints, or electrical equipment. DeBord Decl., ¶ 16, Ex. 15, at 575:6-11.

7. PCB production in the United States began in response to the electrical industry's need for improved dielectric insulating fluids which would also provide increased fire resistance when used in transformers and capacitors. DeBord Decl., ¶ 17-19, Exs. 16, 17, 18. As the unique functional characteristics of these materials became more fully understood, additional uses were found. DeBord Decl., ¶ 17, Ex. 16.

8. Their nonflammability made them an excellent choice in high pressure hydraulic applications associated with high risk of fire such as die casting and steel production. DeBord Decl., ¶ 17, Ex. 16. Their non-flammability, thermal stability, compatibility with other compounds, low volatility and low water solubility, and viscosity characteristics made their use desirable in hot melt adhesives and other plasticizer applications. DeBord Decl., ¶¶ 16,

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20-24, Exs. 15, 19, 20, 21, 22 and 23.

9. The U.S. Department of Defense specifically selected PCBs for use in many applications because of their performance characteristics:

> Older Department of Defense (DOD) systems employed a variety of components which have been identified as containing polychlorinated biphenyls (PCBs) …. These PCB articles were selected for their performance characteristics including fire retardant properties.

DeBord Decl., ¶ 25, Ex. 24, at 1.

10. On older U.S. Navy vessels "PCBs are common in insulation material, electrical cable, and ventilation gaskets … soundproofing material, missile launch tubes, electrical cables, banding and sheet rubber, heat-resistant paints, hull coatings and electrical transformers, because of their performance characteristics including fire retardant properties." DeBord Decl., ¶ 26, Ex. 25 at 737.

11. At times, the majority of PCBs produced by Old Monsanto were for the U.S. military. *See, e.g.,* DeBord Decl., ¶ 27, Ex. 26, at 1 ("In the case of aroclors, we understand the majority of our current production is used in end products for use in war plants and for use as Army and Navy material."); DeBord Decl., ¶ 28, Ex. 27, at 1 (application for Necessity Certificate, noting that 100% of facilities to increase diphenyl production by 480,000 pounds per month would be devoted to defense purposes).

12. Federal specification TT-P-28c for heat-resisting aluminum paint used by the military called for the use of Old Monsanto's PCB-containing product Aroclor 1254. *See* DeBord Decl., ¶ 29, Ex. 28. The Navy used "a great deal" of this paint, which was used on high pressure steam lines and steam stacks. *See* DeBord Decl., ¶ 30, Ex. 29 (Old Monsanto sold Aroclor 1254 to defense contractor for the production of "heat resistant aluminum paint. . . . The Navy uses the paint (covered under govt. spec. TTP-28C) a great deal."). *See also* DeBord Decl., ¶ 26, Ex. 25, at 743.

13. Old Monsanto also manufactured Aroclor 1254 to meet military specifications

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for other products, including certain electrical wire and cable applications. *See* DeBord Decl., ¶ 31, Ex. 30 (Old Monsanto produced Aroclor 1254 for defense contractor Chemical Products, which "used [it] exclusively in cellulosic lacquer utilized to meet Military Specs for lacquer used in wire and cable applications"); DeBord Decl., ¶ 32, Ex. 31 (Old Monsanto manufactured Aroclor 1254 for defense contractor Marblette Company, which used it to meet specifications of a defense contract with the U.S. military for electrical wire); DeBord Decl., ¶ 33, Ex. 32 (Old Monsanto produced Aroclor-1254 for company whose "usage (25,000 lbs.) all goes into one wire coating compound for the U.S. Navy").

14. A military report identifies several PCB-containing items found on nuclear submarines and their related military specifications, including: (1) Ensolite hull insulation (MIL-P-15280); (2) Cork hull insulation (MIL-C-561/HH-C-561); (3) Armaflex hull insulation (MIL-P-15280); (4) Heat resistant and aluminum paste paint (TT-P-28, MIL-P-14276 or DOD-P-24555); and (5) Wool felt ventilation gaskets (MIL-G-20241/MIL-STD-2148). DeBord Decl., ¶ 25, Ex. 24, at 19.

15. The federal government invoked the Defense Production Act to require Old Monsanto to produce PCBs for military contractors. For example, a 1972 letter from the U.S. Department of Commerce to Old Monsanto states:

> You are hereby directed to accept Emerson and Cuming, Inc. purchase order number 1-71039-EAD, rated DO-D1 for 3,000 pounds of Aroclor #1242….
> You are further directed to notify the Priorities Officer, Bureau of Domestic Commerce, U.S. Department of Commerce, Washington, D.C. 20230, by letter within three days after shipment is complete on the order.
> …
> This action is taken pursuant to Section 101 of the Defense Production Act of 1950, as amended.

DeBord Decl., ¶ 34, Ex. 33. Old Monsanto complied with the government's directive. *See* DeBord Decl., ¶ 35, Ex. 34.

16. A 1973 telex from Raytheon to Old Monsanto reported:

> We make these concessions and agreements only to obtain your agreement

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> promptly to ship Aroclor 1242 and because *the government has directed us to proceed to manufacture missiles but has refused to authorize Raytheon to qualify a new potting material which would avoid use of Aroclor 1242. We also wish to acknowledge the fact that* ***Monsanto in all of our dealings has expressed a strong preference not to sell this product to us and is proceeding with the sale only at the direction of the government*** ....

DeBord Decl., ¶ 36, Ex. 35, at 3.

17. The federal government invoked the Defense Production Act to require Old Monsanto to continue selling PCBs to defense contractors through at least mid-1974. *See, e.g.*, DeBord Decl., ¶ 37, Ex. 36 (directing Old Monsanto to sell PCBs to Raytheon); DeBord Decl., ¶ 38, Ex. 37 (confirming compliance with directive to sell PCBs to Raytheon).

18. PCBs remain in use today consistent with EPA's promulgated rules. *See* DeBord Decl., ¶ 39, Ex. 38, at 1-6. For example, the Department of Defense recognized that in 1990, consistent with EPA regulations, the military had tens of thousands of applications in continuing use that contained PCBs. *See* DeBord Decl., ¶ 40, Ex. 39.

19. PCBs therefore evolved as a unique class of chemicals which met important needs for both industry and society.

20. In 1971, the U.S. government convened an Interdepartmental Task Force to assess the risks associated with PCBs. DeBord Decl., ¶ 42, Ex. 41, at 1.

21. The Task Force included five Executive Branch Departments: Department of Agriculture; Department of Commerce; Environmental Protection Agency ("EPA"); Department of Health, Education, and Welfare (Food and Drug Administration and National Institute of Environmental Health Sciences); and the Department of the Interior (Bureau of Sport Fisheries and Wildlife). DeBord Decl., ¶ 42, Ex. 41, at 1.

22. In 1972, the Task Force issued a report "reflect[ing] the position of the operating agencies of the Federal Government which have major responsibilities concerning such chemicals as PCBs in food and in the environment." DeBord Decl., ¶ 42, Ex. 41, at 1.

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After reviewing "all of the available scientific information on various aspects of the PCB problem," the task force reached nine conclusions concerning PCBs, including that continued use of PCBs in certain applications remained "necessary" and that there were "no present or prospective substitutes" for PCBs:

> The use of PCBs should not be banned entirely. **Their continued use for transformers and capacitors in the near future is considered necessary because of the significantly increased risk of fire and explosion and the disruption of electrical service which would result from a ban on PCB use.** Also, continued use of PCBs in transformers and capacitors presents a minimal risk of environmental contamination.
> ….
> The advantages to the public in terms of safe, reliable, and efficient electrical equipment made possible by the use of PCBs have been documented in … this report. **It is also clear that there are no present or prospective substitutes for these materials, and that the functions they perform are essential.** Thus the continuing need for PCBs in closed electrical system applications is conclusive.

DeBord Decl., ¶ 42, Ex. 41, at 4, 81 (emphasis added).

23. As of 1972, there was "no toxicological . . . data available to indicate that the levels of PCBs currently known to be in the environment constitute a threat to human health." DeBord Decl., ¶ 42, Ex. 41, at 3.

24. The Interdepartmental Task Force reported that "continued use of PCBs in transformers and capacitors presents a minimal risk of environmental contamination." DeBord Decl., ¶ 42, Ex. 41, at 4.

25. PCBs were produced in many countries, including: USA (1930–1977); West Germany (1930–1983); Russian Federation (1939–1993); France (1930–1984); United Kingdom (1954–1977); Japan (1954–1972); Italy (1958–1983); Democratic Republic of Korea (1960s–2012); Spain (1955–1984); former Czechoslovakia (1959–1984); China (1965–1980); Poland (1966–1977). DeBord Decl., ¶¶ 42-43, Exs. 42 and 41. PCBs were also manufactured in Poland, East Germany and Austria in unknown amounts. DeBord Decl., ¶

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44, Ex. 43.

26. The U.S. was responsible for approximately half of the world's production of PCBs. The U.S. imported approximately 50% of the remainder produced by other countries (minus exports). Most PCBs manufactured by Old Monsanto were used in closed electrical systems.

27. PCBs not manufactured by Old Monsanto were imported into the U.S. DeBord Decl., ¶ 42, Ex. 41, at 209-210, 220.

28. In 1970, Old Monsanto began to voluntarily phase out the sale of PCBs for various applications. DeBord Decl., ¶ 45, Ex. 44. Sales of PCBs for use as plasticizers were voluntarily discontinued in August 1970. DeBord Decl., ¶¶ 45-46, Exs. 44 and 45. By 1972, Old Monsanto had ceased the manufacture and sale of PCBs for all uses other than as a dielectric fluid for use in enclosed electrical equipment. DeBord Decl., ¶ 47, Ex. 46.

29. In May 1970, Old Monsanto also initiated a buyback program for PCBs. DeBord Decl., ¶ 5, Ex. 4. Old Monsanto informed its customers about this program and strongly urged its customers to inform their own customers to make use of its return program for proper disposal of PCB materials. DeBord Decl., ¶¶ 6-7, Exs. 6 and 5.

30. Sales of PCBs for electrical equipment continued because, according to the United States Government and the electrical industry, a cessation of sales would shut down the United States electrical power grid and cripple United States industry. DeBord Decl., ¶¶ 42, 48, Exs. 41 and 47.

31. Old Monsanto voluntarily ended the manufacture and sale of PCBs for all uses in 1977 after the electrical industry identified alternative dielectric fluids that were compatible with the advancements made in fire suppression. DeBord Decl., ¶ 49, Ex. 48.

2. The City of Seattle specified the use of PCB-containing equipment in city buildings.

32. In many instances fire and building codes required PCBs for the protection of

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life and property. DeBord Decl., ¶ 17, Ex. 16.

33. The National Electric Code ("NEC") is published by the National Fire Protection Association ("NFPA"). The NEC is a consensus standard that specifies the acceptable installation of electrical wiring and equipment in the United States. DeBord Decl., ¶ 50, Ex. 49, at Articles 90-1, 90-2. The NEC is not a federal law. *Id.* at 70-i. It is a standardized code that is voluntarily adopted by states, cities, and municipalities. *Id.* at 70-2.

34. Certain "[i]ndustry codes, such as the National Electrical Code, specif[ied] the use of PCB-filled transformers and capacitors under a number of conditions." DeBord Decl., ¶ 15, Ex. 14, at 5; *see also* DeBord Decl., ¶ 51, Ex. 50, at 7 ("Various federal, state and local codes, therefore, require [PCBs] continued use in or adjacent to public, commercial, and industrial buildings, which locations present the greatest potential danger to life and property.").

35. In 1932, the City adopted the 1931 version of the NEC with City amendments. DeBord Decl., ¶ 52, Ex. 51.

36. In 1952, the City repealed the adoption of the 1931 version of the NEC. The City replaced it with the Electric Code of the City of Seattle. The 1952 and 1955 versions of the Electrical Code of the City of Seattle contained sections on Askarel insulating fluids in transformers and sections on capacitors with wording identical to the 1951 edition of the NEC. DeBord Decl., ¶¶ 53-55, Exs. 52, 53, 54.

37. Between 1964 and 1974, there were three ordinances regarding the Electrical Code of the City of Seattle. In each version, there were no changes to the sections pertaining to Askarel insulating fluids in transformers or the sections pertaining to capacitors. In all versions, the capacitor sections are identical to the sections in the 1962 version of the NEC. DeBord Decl., ¶¶ 56-60, Exs. 55, 56-57, 58, 59. In addition, the wording of the sections pertaining to Askarel insulating fluids in transformers was similar to that of the 1962 version of the NEC, but had stricter regulations on the requirement for when a vault was needed.

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DeBord Decl., ¶ 56, Ex. 55.

38. In 1974, the City again directly adopted the NEC with city specific amendments as its Electrical Code. DeBord Decl., ¶ 61, Ex. 60. In subsequent updates to its electrical codes, the City adopted updated versions of the NEC. The portions of the Electrical Code of the City of Seattle and the NEC when adopted by the City include sections related to electrical insulating fluids used in transformers and capacitors. Through its adoption of portions of the Electrical Code and the NEC, the City actively specified the use of PCB-containing equipment in their buildings.

3. Old Monsanto appropriately warned its customers.

39. At all times relevant to this case during the manufacture and sale of PCBs, Old Monsanto supplied Aroclor product bulletins and warning labels to its customers. DeBord Decl., ¶¶ 62-66, Exs. 61, 62, 63, 64 and 65.

40. These bulletins contained then-known toxicological information regarding exposures to PCBs and information on their safe handling. In 1937, Old Monsanto warned its customers: "Experimental work in animals shows that prolonged exposure to Aroclor vapors evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic effects." DeBord Decl., ¶67, Ex. 66. This warning was repeated in product bulletins and technical information Old Monsanto issued throughout the time it sold PCBs. DeBord Decl., ¶¶ 63-64, 66, Exs. 62, 63 and 65.

41. Old Monsanto's Aroclor bulletins also provided physical and chemical characteristics for the Aroclors, including that Aroclors that contained PCBs. DeBord Decl., ¶¶ 62-66, 68, Exs. 61, 62, 63, 64, 65 and 67.

42. In 1970, Old Monsanto issued warning letters to all of its known customers and distributors alerting them to the developing information regarding the environmental presence of PCBs. DeBord Decl., ¶¶ 69, 4-7, Exs. 68, 3, 4, 5 and 6. Old Monsanto provided its PCB customers and distributors with an environmental warning, which stated: "PCBs had been

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discovered at some points in some marine, aquatic, and wildlife environments. . . . [W]e feel that all possible care should be taken in the application, processing, and effluent disposal to prevent them becoming environmental contaminants." DeBord Decl., ¶ 69, Ex. 68. Old Monsanto encouraged its customers to provide similar information to their customers. *Id.*

43. Old Monsanto provided further environmental warnings in its Aroclor technical bulletins, which included an "Environmental Hazards" section that warned: "Extreme care should therefore be taken by all users of PCB-containing products to prevent any entry into the environment through spills, leakage, use, disposal, vaporization or otherwise." DeBord Decl., ¶ 68, Ex. 67, at 13.

44. Old Monsanto's letters, product bulletins, labels, Material Safety Data Sheets, and invoices, warned its customers to be careful in the use and disposal of PCBs to prevent their entry into the environment. DeBord Decl., ¶¶ 68-73, Exs. 68, 69, 70, 71, 67 and 72.

45. Old Monsanto provided further environmental warnings in its Aroclor technical bulletins, which included an "Environmental Hazards" section that warned: "Extreme care should therefore be taken by all users of PCB-containing products to prevent any entry into the environment through spills, leakage, use, disposal, vaporization or otherwise." DeBord Decl., ¶ 68, Ex. 67, at 13.

46. In 1972, the Interdepartmental Task Force noted that PCB waste had been disposed of in landfills and stated "PCB containing material buried in soil is not expected to migrate but should remain in place." DeBord Decl., ¶ 42, Ex. 41. The Task Force further stated: "It seems reasonable that by far the largest amount is present in dumps and landfills where it is thought to be more or less sequestered from the rest of the environment." *Id.* Because of the chemical and physical properties of PCBs, including low solubility, low vapor pressure, and strong adsorption characteristics, PCBs do not easily migrate from landfills into groundwater or water bodies. *Id.*

4. Solutia and New Monsanto never manufactured PCBs.

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47. Neither New Monsanto nor Solutia ever manufactured PCBs. DeBord Decl., Ex. 2, ¶30 ("The corporation now known as Monsanto operates Old Monsanto's agricultural products business. Old Monsanto's chemical products business is now operated by Solutia."); DeBord Decl., ¶ 2, Ex. 1, Appendix A, ¶6 ("Neither Solutia [or] New Monsanto … ever conducted any operations involving the production, sale, or distribution of PCBs.").

48. Neither New Monsanto nor Solutia were in existence during the period that such manufacture was permitted in the United States. DeBord Decl., ¶ 2, Ex. 1, Appendix A, ¶¶2, 3.

49. As part of Solutia's emergence from bankruptcy in 2008, Solutia and New Monsanto entered into certain agreements concerning the parties' responsibilities for tort and environmental claims. DeBord Decl., ¶ 3, Ex. 2, ¶33; DeBord Decl., ¶ 2, Ex. 1, Appendix A, ¶7. Specifically, New Monsanto agreed to indemnify Solutia in relation to "Legacy Tort Claims" as defined by terms of those agreements. *See* DeBord Decl., ¶ 129, Ex. 128. In addition, New Monsanto owes certain indemnity obligations to Old Monsanto associated with claims related to PCBs.

5. PCBs are inadvertently produced today in manufacturing processes, present in many consumer and industrial products, and continued uses are permitted by the EPA.

50. PCBs are unintentionally created through hundreds of manufacturing processes involving heat, carbon and chlorine, as well as by simple combustion/incineration (hereinafter, "byproduct PCBs"). DeBord Decl., ¶ 74, Ex. 73.

51. The EPA has identified 200 chemical processes with a potential for generating byproduct PCBs. DeBord Decl., ¶ 75, Ex. 74, at 3.

52. Byproduct PCBs are found in consumer products at concentrations of up to 2,000 ppm DeBord Decl., ¶ 75, Ex. 74, at 4.

53. The USEPA allows products to contain up to 50 ppm of byproduct PCBs.

54. Byproduct PCBs are ubiquitous in the air worldwide. DeBord Decl., ¶¶ 74-75,

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Exs. 74, 73.

55. The City understands that some of the PCBs discharged in Washington State are byproduct PCBs, rather than PCBs manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75, at 290:19-25.

6. Lower Duwamish Waterway Superfund Site and DUWAMISH Allocation

a. The EPA identified the City of Seattle as a Potentially Responsible Party for the Lower Duwamish Waterway Superfund Site.

56. The City of Seattle has been identified as a potentially responsible party for the Lower Duwamish Waterway Superfund Site. DeBord Decl. ¶ 130, Ex. 129, at 1; DeBord Decl., ¶ 76, Ex. 75, at 109:2-17.

57. The EPA has determined that the City "may be responsible under CERCLA for the cleanup of the [LDW] Superfund Site or costs incurred to clean up the Superfund Site." DeBord Decl., ¶ 130, Ex. 129, at 1.

58. In connection with its General Notice of Potential Liability to the City, the EPA required the City to provide information and documents related to: (1) the South Service Center and storage yard; (2) the former Georgetown Steam Plant facility; and (3) "[a]ll current and historical substations located within the Lower Duwamish Waterway (LDW) engineered drainage basins as defined in the LDW RI/FS." DeBord Decl., ¶ 130, Ex. 129, at 1, 5.

59. Since 1951, the City has owned the Georgetown Steam Plant. Logbooks of daily activities recorded the transfer and disposal of used transformer oil at the Georgetown Steam Plant from 1953 to 1965, and logged activities included:

- September 27-29, 1954: "*Sprayed old transformer oil on weeds.*"
- April 20-22, 1955: "*Dumped 45 drums of dirty trans oil.*"
- April 6, 1959: "*Dump trailer load of trans oil.*"

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60. DeBord Decl., ¶ 122, Ex. 121. Although the Georgetown Steam Plant officially shut down in 1977, City records show 489 barrels of transformer oil were transported to the site in 1980. DeBord Decl., ¶ 129, Ex. 128.

61. In 1983 King County Metro Transit Department ("Metro") noted that PCBs were being discharged from the City's electrical utility (Seattle City Light's) Georgetown Steam Plant because "former drainage from the Seattle City Light Georgetown Steam Plant passed through a flume that combined with the Boeing Field runoff to enter Slip 4 in the Duwamish River." DeBord Decl., ¶¶ 117-119, Exs. 116, 117, 118. Metro included samples taken from the LDW showing the presence of PCBs. *Id*.

62. In 1984, sediment samples collected from the plant discharge tunnel of the Georgetown Steam Plant were found to contain PCB concentrations up to 2,500 ppm. DeBord Decl., ¶ 129, Ex. 128.

63. Since 1924, Seattle City Light ("SCL") has occupied the South Service Center ("South Service Center") at 3613 4th Avenue South since 1924.

64. The South Service Center is located approximately 3,500 feet from the LDW.

65. In November 1976 Metro evaluated the City's "PCB Handling Procedures" at the South Service Center and found that "all capacitors presently in service contain PCB's." Further, Metro noted that a City Light employee, Don Sherwood, "recalled incidents three or four years ago when waste capacitor oil was drained to the steam cleaning catch basin." DeBord Decl., ¶ 120, Ex. 119.

66. In 1977, Metro issued a warning letter to SCL after finding "extremely high" PCB concentrations in samples from steam cleaning sump and sewer manhole. Metro requested cooperation in "taking all steps possible to control and prevent any further PCB concentrations from reaching the Municipal sewer system." DeBord Decl., ¶ 121, Ex. 120.

67. An EPA Inspection of the South Service Center in 1979 found PCB-containing capacitors were not properly marked and PCB-debris was improperly contained. DeBord

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Decl., ¶ 138, Ex. 137.

68. In 1982, the EPA documented further labeling and containment violations at the South Service Center. Other violations included a leaking PCB transformer and a capacitor leaking PCB-containing oil. The EPA issued a Notice of Warning documenting these compliance failures. DeBord Decl., ¶¶ 130-132, Exs. 129, 130, 131.

69. A 1983 SCL Memorandum documented the historical practice of the South Service Center to drain transformers and capacitors over storm water catch basins. DeBord Decl. ¶ 133, Ex. 132.

70. An 1984 EPA inspection led to the filing of a complaint against EPA for violation of TSCA regulations related to disposal, marking, storage, leaking, and recordkeeping. These violations included the disposal of at least 917 putative PCB-contaminated transformers of unspecified oil and PCB content and 2,422 small PCB containing capacitors by means other than those specified in TSCA. DeBord Decl. ¶ 134, Ex. 133.

71. In 1989, an internal audit stated that transformers at the South Service Center Electric Ship were not promptly tested for PCBs and the lack of containment structures (dikes or drip pans) to prevent discharge to uncontrolled drains and catch basis which empty directly to the LDW. DeBord Decl., ¶ 135, Ex. 134.

72. In 2014, an Ecology inspection of the South Service Center found that the exterior storage area for old and/or broken large transformers were exposed to rain and had visible oil sheens and stains. The inspector also noted that a large, leaking PCB transformer had been located in the outdoor storage area until it was moved inside the day prior to the inspection for draining. DeBord Decl., ¶ 136, Ex. 135.

73. An October 27, 2015 "Corrective Action Required" letter from Seattle Public Utilities to Seattle City Light's South Service Center noted that PCB-contaminated transformers with visible external oil stains were located in a temporary storage area and stated, "[i]t is unclear how long these transformers are temporarily stored exposed to stormwater in

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this holding area." DeBord Decl., ¶ 123, Ex. 122, at 6.

74. During the Arab oil embargo in the early 1970s, Seattle City Light gave away its PCB-laden waste oil to asphalt manufacturers along the LDW rather than properly disposing of the product. DeBord Decl., ¶ 124, Ex. 123. In turn, the asphalt manufacturers used the waste oil as fuel, receiving approximately 1000 gallons of the product each month from Seattle City Light. *Id.; see also* DeBord Decl., ¶ 125, Ex. 124; DeBord Decl., ¶ 126, Ex. 125 (admitting that the waste oil at issue contained PCBs). EPA later determined that these activities resulted in oil and PCB contamination in the LDW sediments, along the bank of the waterway, and on some of the land next to the river (upland, streets, and yards). DeBord Decl., ¶ 127, Ex. 126. When EPA confronted Seattle City Light about its role in contributing to PCBs in the LDW, Seattle City Light sought to downplay and disclaim its blame for the PCB contamination, which EPA described as "misleading." DeBord Decl., ¶ 128, Ex. 127.

b. Lower Duwamish Waterway Superfund Site Investigation and Remediation

75. December 2000, the City, King County, the Port of Seattle, and Boeing (collectively, "Lower Duwamish Waterway Group" or "LDWG") signed an EPA Administrative Order to investigate contamination in the Lower Duwamish Waterway ("LDW"). DeBord Decl., ¶ 78, Ex. 77, ¶6; *see also* DeBord Decl., ¶ 79, Ex. 78, at 4.

76. The EPA added the Lower Duwamish Waterway ("LDW") to the Superfund National Priorities List in 2001. DeBord Decl., ¶ 79, Ex. 78, at 1.

77. The EPA issued a Record of Decision for the LDW in November 2014 ("LDW Record of Decision"). DeBord Decl., ¶ 79, Ex. 78.

78. EPA has the lead for the in-water portion of the LDW, which "extends from approximately 5 miles from the area around the Norfolk Combined Sewer Outflow/Storm Drain (CSO/SD) at the southern end of the site at river mile (RM) 5 to the southern tip of Harbor Island at RM 0[.]" DeBord Decl., ¶ 79, Ex. 78, at 1.

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79. The EPA has identified 4 constituents of concern for human health risk: arsenic, cPAHs, dioxins/furans, and PCBs. DeBord Decl., ¶ 79, Ex. 78, at 22. The EPA has identified 41 constituents of concern for benthic invertebrates. DeBord Decl., ¶ 79, Ex. 78, at 25.

80. According to the LDW Record of Decision, EPA's "Selected Remedy is protective of human health and the environment." DeBord Decl., ¶ 79, Ex. 78, at iii.

81. The LDW Record of Decision "includes addressing environmental justice concerns before, during, and after implementation of the cleanup remedy." DeBord Decl., ¶ 80, Ex. 79, at 21. Section 13.2.8 explicitly identifies certain actions to be taken with respect to these community concerns, including "to learn more about the affected community … to enhance outreach efforts," consultation with affected tribes, and "reduce impacts of the cleanup on residents." DeBord Decl., **¶ 80,** Ex. 79, at 21.

82. "Ecology is the lead agency for identifying direct and indirect sources of contaminants in the In-waterway Portion of the site. Ecology uses its regulatory authority and works with other governments that have regulatory authority (EPA, King County, and City of Seattle), also referred to as the Source Control Work Group (SCWG), to control ongoing sources to the extent possible." DeBord Decl., ¶ 79, Ex. 78, at 7.

83. Source control is necessary in order to prevent recontamination above specified sediment cleanup objectives and remedial action levels ("RALs") prior to the implementation of the Selected Remedy. DeBord Decl., ¶ 79, Ex. 78, at 12.

84. The City admits that the goal of its source control plan is to minimize the potential for waterway sediments to exceed the RALs set by EPA. DeBord Decl., ¶ 81, Ex. 80, at 1.

c. Duwamish Allocation

85. Since 2014, the City has participated in an alternative dispute resolution process, called the Duwamish Allocation. DeBord Decl., ¶ 78, Ex. 77, ¶¶9, 11.

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86. There are forty-four participants in the Duwamish Allocation. DeBord Decl., ¶ 82, Ex. 81, ¶3.

87. Other parties participating in the Duwamish Allocation include King County, the Port of Seattle, and Old Monsanto. DeBord Decl., ¶ 78, Ex. 77, ¶¶9, 10.

88. The Duwamish Allocation seeks to resolve the participating parties' respective percentages of liability for past and future costs to investigate and remediate contamination in the LDW. DeBord Decl., ¶ 78, Ex. 77, ¶9.

89. The Duwamish Allocation is governed by the *Alternative Dispute Resolution Memorandum of Agreement* ("Allocation MOA"). DeBord Decl., ¶ 82, Ex. 81, ¶ 4; DeBord Decl., ¶ 77, Ex. 76.

90. The Allocation MOA defines a Participating Party as "a PRP that signs this MOA and has not withdrawn or been expelled from participation in the Allocation Process." DeBord Decl., ¶ 77, Ex. 76, at 3.

91. On April 7, 2014, the City signed the Allocation MOA as a "Participating Party." DeBord Decl., ¶ 77, Ex. 76, at 36.

92. The MOA defines "Claims Addressed in the Allocation Process", in part, as "(1) costs to implement the AOC; (2) costs incurred to perform work required by EPA or Ecology in preparation for the Lower Duwamish Waterway ROD or Consent Decree between completion of the Feasibility Study and issuance of the Consent Decree for the Site; and (3) costs to perform actions required under the Site ROD or Consent Decree, including costs incurred as a result of contamination spread from [Early Action Areas] and including costs of monitoring to assess compliance with the ROD or Consent Decree…." DeBord Decl., ¶ 77, Ex.76, at 2.

93. On May 18, 2022, the Final Allocation Report ("FAR") was issued in the Duwamish Allocation. DeBord Decl., ¶ 139.

94. To determine the amount to be allocated to each PRP in the Allocation

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Proceeding, the Allocator considered all legal and equitable factors under CERCLA, the state law Model Toxics Control Act and any other applicable law or legal principle that, in the judgment of the Allocator, would be considered by any court in apportioning or allocating liability and costs for the LDW Superfund Site. DeBord Decl., ¶ 77, Ex. 76, at 16.

95. The City has been allocated a portion of the LDW's future cleanup costs. DeBord Decl., ¶ 140.

C. THE CITY OF SEATTLE'S LAWSUIT AGAINST DEFENDANTS

1. Procedural History

96. The City filed suit against Defendants on January 25, 2016. *See generally* DeBord Decl., ¶ 83, Ex. 82.

97. On June 7, 2018, Defendants filed a Motion to Dismiss Plaintiff's First Amended Complaint. *See generally* DeBord Decl., ¶ 84, Ex. 83.

98. The City filed its opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint on July 18, 2016. *See generally* DeBord Decl., ¶ 85, Ex. 84.

99. In opposing Defendants' Motion to dismiss on the basis of statute of limitations, the City alleged a continuing nuisance and relied on the continuing tort doctrine. DeBord Decl., ¶ 85, Ex. 84, at 9 (The City arguing that "A Continuing Nuisance Is Not Time-Barred"); *id*. at 10 (The City arguing "The nuisance in this case has not been permanently abated. PCBs are emitted every day. Every day they invade the City's streets and drainage system and contaminate the City's discharges to the river."); *id*. ("The City also is alleging that contamination in sediments in the East Waterway and Lower Duwamish and in fish and shellfish in the Duwamish is a continuing nuisance.").

100. On February 22, 2017, the Court issued an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. *See generally* DeBord Decl., ¶ 86, Ex. 85.

101. In its Order, the Court held that the City is acting pursuant to sovereign

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authority delegated by the State under RCW 35.22.280(29),(30). DeBord Decl., ¶ 86, Ex. 85, at 9.

102. In it Order, the Court explained: "This authority derives from the state's duty to hold all navigable waters within the state in trust for the public." DeBord Decl., ¶ 86, Ex. 85, at 9.

103. The Court held that the City is acting pursuant to statutorily delegated sovereign authority to hold all navigable waters within the state in trust for the people of Washington. DeBord Decl., ¶ 86, Ex. 85, at 9.

104. On July 22, 2022, the City filed a Stipulated Motion for Leave to Dismiss Negligence Claim and Amend Complaint. DeBord Decl., ¶ 87, Ex. 86. The City stated its intent "to dismiss the negligence claim with prejudice and clarify that the Plaintiff's remaining public nuisance claim is not based on negligence." *Id.* at 1. The City also noted that its proposed amended Complaint removed three claims dismissed by the Court on February 22, 2017: (1) products liability – defective design; (2) products liability – failure to warn; and (3) equitable indemnity." *Id.* at 1.

105. On July 25, 2022, the Court granted the City's stipulated motion to amend and dismiss with prejudice its negligence claim, leaving only its claim for public nuisance. DeBord Decl., ¶ 88, Ex. 87, at 1.

2. City of Seattle's Second Amended Complaint

106. The City filed its Second Amended Complaint on July 27, 2022. *See generally* DeBord Decl., ¶ 3, Ex. 2.

107. The City brings this lawsuit in a representative capacity "for the benefit of the state" to protect public rights under Wash. Rev. Code § 35.22.280(29), (30). DeBord Decl., ¶ 86, Ex. 85, at 8-9.

108. The City seeks to recover against Defendants under a public nuisance theory. DeBord Decl., ¶ 3, Ex. 2, ¶¶91-108.

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109. The City alleges that Old Monsanto was the sole manufacturer of PCBs in the United States. DeBord Decl., ¶ 3, Ex. 2, ¶3.

110. The City seeks to pursue a claim for intentional public nuisance for Old Monsanto's design, manufacture, sale, and promotion of PCBs. DeBord Decl., ¶ 3, Ex. 2; DeBord Decl., ¶ 85, Ex. 84, at 6.

111. The City specifically alleges: "As a direct and proximate result of **Monsanto's creation of a public nuisance**, Seattle has suffered, and continues to suffer monetary damages to be proven at trial." DeBord Decl., ¶ 3, Ex. 2, ¶193 (emphasis added).

112. The City's public nuisance claim is not based on any alleged conduct or duty held by Solutia or New Monsanto. *See generally* DeBord Decl., ¶ 3, Ex. 2, ¶¶ 93-97, 99-104; *cf.* DeBord Decl., ¶ 3, Ex. 2, ¶34 ("Monsanto, Solutia, and Pharmacia are collectively referred to in this Complaint as 'Defendants.'"). The City does not make a single allegation regarding Solutia or New Monsanto's conduct or duty in support of its public nuisance claim. *See generally* DeBord Decl., ¶ 3, Ex. 2, ¶¶ 93-107.

113. The City's public nuisance claims is not based on Old Monsanto's own alleged discharge of PCBs into the LDW or the City's stormwater conveyance system. *See generally* DeBord Decl., ¶ 3, Ex. 2, ¶¶ 93-107.

114. The City seeks to recover against Defendants for alleged harm to natural resources, including the LDW, for the benefit of the general public. DeBord Decl., ¶ 3, Ex. 2, ¶¶ 10-12, 23-24, 84-90, 91-108.

115. The City claims harm to the State's natural resources, including wildlife and the environment. *See, e.g.*, DeBord Decl., ¶ 3, Ex. 2, ¶3 (PCBs "were widely contaminating all natural resources and living organisms"); ¶ 24 ("Fish and shellfish that reside in the Lower Duwamish are contaminated with PCBs at levels that make them unfit for human consumption."); ¶ 122 ("it was a certainty that PCBs would become a global contaminate and contamination waterways and wildlife such as Seattle's stormwater and fish in the Duwamish

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River"); ¶ 90 ("PCB was also detected in almost all samples of fish, shellfish, and benthic invertebrate tissues."); ¶¶ 95, 99-100.

116. The City defines the claimed nuisance as the alleged risk to human health caused by the consumption of resident fish and shellfish harvested from the LDW as reflected in the Department of Health's fish consumption advisories. DeBord Decl., ¶ 76, Ex. 75, at 90:25-91:9, 113:14-114:11; DeBord Decl., ¶ 89, Ex. 88, at 765:24-766:9.

117. The Washington State Department of Health first issued a fish consumption advisory for the LDW in 2003 ("2003 LDW Fish Consumption Advisory"). DeBord Decl., ¶ 90, Ex. 89. In the 2003 LDW Fish Consumption Advisory, the Washington State Department of Health identified seven contaminants of concern in fish from the LDW: arsenic, cadmium, chlordane, cPAHs, DDE, PCBs, and mercury. DeBord Decl., ¶ 90, Ex. 89, at 19.

118. In 2005, the Washington State Department of Heath issued an updated fish consumption advisory for the LDW in 2005. DeBord Decl., ¶ 91, Ex. 90.

119. The City's experts, David O. Carpenter, Mark Chernaik, and Allison Hiltner, opine that the consumption of fish from the LDW increases the risk of cancer and non-cancer disease in humans, based on studies primarily post-dating Defendants' production of PCBs. DeBord Decl., ¶ 92, Ex. 91, at 2, 9, 28; DeBord Decl., ¶ 93, Ex. 92, at 18; DeBord Decl., ¶ 94, Ex. 93, at 7-8.

120. The City's experts opine that the Seattle area population is susceptible to the alleged risk of harm from PCBs in the Waterway because of particular socio-economic and cultural factors. DeBord Decl., ¶ 92, Ex. 91, at 2, 8, 9, 10, 28; DeBord Decl., ¶ 93, Ex. 92 at 11-14, 18; DeBord Decl., ¶ 94, Ex. 93, at 7-8.

121. The City's experts acknowledge the variability of PCB levels in waterways, the variability of PCBs in fish depending on where they are caught, and the variability of PCB levels in the LDW water depending on rainfall. DeBord Decl., ¶ 92, Ex. 91, at 10; DeBord Decl., ¶ 93, Ex. 92, at 8.

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122. The City's experts also identify recontamination as a critical factor causing or contributing to the alleged nuisance condition in the LDW based on the dynamics of the City's own conveyance systems, rainfall, and third-party source control in the region. DeBord Decl., ¶ 94, Ex. 93, at 14, 15.

123. The City's expert historians, Gerald Markowitz and David Rosner, offer nothing but gross generalizations regarding Defendants' knowledge of the general properties of PCBs, leaks and spills from improper handling and disposal of PCBs by third parties, and the detection of PCBs in the environment at large. DeBord Decl., ¶ 95, Ex. 94, at 6-9.

124. The City does not allege that Solutia and New Monsanto discharged PCBs into the LDW. *See generally* DeBord Decl., ¶ 3, Ex. 2.

3. City Alleged Damages

125. The City' prayer for relief requests "monetary damages to be proven at trial" and "[c]ompensatory damages accordingly to proof." *See* DeBord Decl., ¶ Ex. 3, Ex. 2, ¶ 108, Prayer for Relief.

126. The City seeks hundreds of millions of dollars in future damages. DeBord Decl., ¶ 96, Ex. 95, at 26.

a) LDW Remediation Costs

127. The City seeks to recover damages for costs of investigating and remediating contamination in the LDW ("LDW Remediation Costs"). *See* DeBord Decl., ¶ 3, Ex. 2, ¶ 28.

128. The City seeks past "[c]osts incurred by SPU to implement the 2000 EPA/Ecology Administrative Order and amendments thereto from 2000 through Q1 2021." *See* DeBord Decl., ¶ 97, Ex. 96, at 2.

129. As of August 9, 2021, the City seeks $9,369,816.58 in past costs to implement the 2000 EPA/Ecology Administrative Order and amendments thereto. *See* DeBord Decl., ¶ 97, Ex. 96, at 2.

130. The City claims future costs "*to remediate the Lower Duwamish CERCLA site*

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that is attributable to discharges from the [City's] conveyance system" and "[m]easures to treat stormwater to reduce PCBs discharged to the Lower Duwamish CERCLA site through the [City's] MS4." *See* DeBord Decl., ¶ 97, Ex. 96, at 3.

131. The City only seeks LDW Remediation Costs from Solutia and New Monsanto. DeBord Decl., ¶ 97, Ex. 96, at 2, 3; DeBord Decl., ¶ 3, Ex. 2, ¶¶28, 92.

132. The City explicitly disclaims that it is seeking LDW Remediation Costs from Old Monsanto. DeBord Decl., ¶ 97, Ex. 96, at 2, 3; DeBord Decl., ¶ 3, Ex. 2, ¶¶28, 92.

b) Mitigation of Alleged Public Nuisance

133. The City seeks costs for "[m]easures to mitigate the impact of the public nuisance on people who harvest resident seafood from the Lower Duwamish." DeBord Decl., ¶ 97, Ex. 96, at 3.

134. The public nuisance mitigation measures the City claims concern the "people who are impacted by the public nuisance that is due to Monsanto's PCBs in the Lower Duwamish" who continue to consume resident seafood or must now stop as a result of the contamination. DeBord Decl., ¶ 76, Ex. 75, at 113:14-114:11.

135. The EPA and the CERCLA process currently fund a Community Health Advocate (CHA) program "to reduce consumption of PCB-contaminated seafood from the Lower Duwamish." DeBord Decl., ¶ 96, Ex. 95, at 24-25. The City of Seattle seeks $19 million to expand the CHA program and operate it for 30 years. *Id*. at 25

c) Source Control Costs

136. The City also seeks to recover $11,625,577.57 in past source control costs for the Lower Duwamish Site. DeBord Decl., ¶ 97, Ex. 96, at 2.

137. The City seeks to recover more than 53 million in future costs for the continuation of its source control program for a 25-year period. DeBord Decl., ¶ 96, Ex. 95, at 18-19. The City contends this expenditure is necessary to prevent recontamination of the LDW. *Id.*

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d) Stormwater Projects

138. The City seeks to recover more than over a half-billion dollars to build public works projects to control stormwater to "comply with the ROD." DeBord Decl., ¶ 98, Ex. 97, Opinion 4, at 25.

139. According to the City's expert, Michael Trapp, these costs are directly required to comply with the Record of Decision. DeBord Decl., ¶ 98, Ex. 97, Section 3.4, Table 3-7, at 39.

e) The City has withdrawn all of its claims for damage to its own proprietary interests.

140. The City is "no longer seeking damages in this lawsuit" resulting from "the presence of Monsanto's PCBs within the drainage area of the East Waterway," or "for remediation of Slip 4 in the Lower Duwamish." DeBord Decl., ¶ 99, Ex. 98, at 1.

141. The City admits that it is no longer seeking damages in connection with the following: (1) the area of the East Waterway served by the City's conveyance system; (2) any damages incurred by Seattle City Light, including those relating to the presence of PCBs in the LDW drainage area and the conveyance system; (3) past and future costs relating to remediation at Slip 4; and (4) past and future costs relating to remediation at Terminal 117. DeBord Decl., ¶ 100, Ex. 99, at 5-6, 7, 9.

142. The City is not claiming actual injury to the conveyance system caused by PCBs. DeBord Decl., ¶ 78, Ex. 75, at 227:9–228:4. The City confirmed that its conveyance system remains at issue only insofar as the pipes need to be *cleaned of accumulated materials* as part of source control activities necessary to prevent recontamination. *Id*.

D. THE STATE OF WASHINGTON RELEASED THE CITY'S CLAIMS WHEN IT SETTLED ITS PCB LAWSUIT AGAINST DEFENDANTS

143. The State of Washington filed suit on December 8, 2016 against Defendants. DeBord Decl., ¶ 101, Ex. 100.

144. The State filed a First Amended Complaint on September 27, 2019. DeBord

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Decl., ¶ 102, Ex. 101.

145. In the State's lawsuit, the State claimed Defendants' manufacture, marketing, and sale of PCBs created a public nuisance injurious to human, animal, and environmental health in Washington's waterways, including the LDW. DeBord Decl., ¶ 102, Ex. 101, ¶¶6, 12, 84-101.

146. The State sought to recover for alleged harm to public trust properties, including the LDW, for the benefit of the State and the general public. DeBord Decl., ¶ 102, Ex. 101, ¶¶13-15, 16-18.

147. On June 24, 2020, the State settled its lawsuit against Defendants. *See generally* DeBord Decl., ¶ 103, Ex. 102.

148. In the Settlement Agreement, the State generally released all PCB-related environmental claims that were or could have been alleged, including all claims relating to remediation of the LDW. DeBord Decl., ¶ 103, Ex. 102, ¶15.

149. Under the terms of the settlement, Defendants agreed to pay the State $95 million. DeBord Decl., ¶ 103, Ex. 102, ¶22.

150. The State agreed to release all claims against Defendants relating to the presence of PCBs in the environment in the State:

> "Released Claims" means all claims, demands, rights, damages, obligations, suits, debts, liens, contracts, agreements, and causes of action of every nature and description whatsoever, ascertain or unascertained, suspected or unsuspected, existing now or arising in the future, whether known or unknown, both at law and in equity, which were or could have been alleged related to the manufacture, sale, testing, disposal, release, marketing or management of PCBs by Defendant, including but not limited to any and **all claims based upon or related to the alleged presence of or damage caused by PCBs in the environment, groundwater, stormwater, stormwater and wastewater drainage systems, waterbodies, sediment, soil, air, vapor, natural resources, fish and/or wildlife within the State, and regardless of the legal theory or type or nature of damages claimed**. . .. .

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DeBord Decl., ¶ 103, Ex. 102, ¶15.

151. The Settlement Agreement binds the State along with "each of its officers acting in their official capacities, agencies, departments, boards, and commissions and any predecessor, successor or assignee of any of the above." DeBord Decl., ¶ 103, Ex. 102, ¶17.

152. By order entered August 27, 2020, the court dismissed the State's action with prejudice. DeBord Decl., ¶ 104, Ex. 103.

E. THE CITY CONCEDES ITS ALLEGED INJURIES ARE CAUSED, IN PART, BY PRODUCTS HAVING NO CONNECTION TO OLD MONSANTO WHATSOEVER (INCLUDING PCBS).

153. The City's damages model includes damages related both to contaminants other than PCBs, and damages purportedly caused by PCBs not manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75, at 66:4–19, 67:12–68:18, 290:20–25.

154. The City's waterways contain many contaminants *other than* PCBs. DeBord Decl., ¶ 76, Ex. 75, at 66:4-19.

155. The City understands that some of the PCBs discharged in Washington State are byproduct PCBs, rather than PCBs manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75, at 290:19-25.

156. The City has no way to trace the PCBs in the City's stormwater, wastewater, or the LDW to PCBs manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75, at 66:4-19, 67:12-68:16.

157. In preparing its damages model for this case, the City did not make any allocation for other contaminants of concern to be addressed or other parties that released PCBs. DeBord Decl., ¶ 76, Ex. 75, at 66:4-68:18.

F. THE CITY OF SEATTLE'S ALLEGED INJURIES WERE CAUSED BY INTERVENING ACTS AND DECISION BY THIRD PARTIES, OUTSIDE OF OLD MONSANTO'S CONTROL

158. The City's alleged injuries were caused by thousands of intervening acts and

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decisions by third parties who were outside of Old Monsanto's control. *See* DeBord Decl., ¶ 76, Ex. 75, at 146:11-16 ("I will say it's well known that there were some releases of PCBs from the Boeing Company's facilities, and there were some releases of PCBs by the United States, and there were some releases of PCBs by others that I can't think of right now").

G. THE CITY'S ALLEGED DAMAGES ARE IMPERMISSIBLY SPECULATIVE, REMOTE, AND UNRIPE

159. The City seeks to recover almost $750 million in damages. *See* DeBord Decl., ¶ 97, Ex. 96, at 2-3; DeBord Decl., ¶ 96, Ex. 95, at 7, 26; DeBord Decl., ¶ 79, Ex. 78, at iii; DeBord Decl., ¶ 3, Ex. 2, ¶11. These approximately $750 million in damages for nine categories of past and future costs are outlined in Tale 1 of Defendants' Motion for Summary Judgment.

160. Michael Trapp has been retained by the City to offer opinions regarding "actions that were taken by the City of Seattle as an owner and operator of a municipal separate storm sewer system (MS4) regarding impairments caused by [PCBs] in the [LDW]." DeBord Decl., ¶ 98, Ex. 97, at 9.

161. Mark Buckley is an economist that has been retained by the City to "provide a set of economic analyses of costs for measures to abate the public nuisance created by Monsanto's PCBs and to mitigate some of the harm from the nuisance pending its abatement." DeBord Decl., ¶ 96, Ex. 95, at 2.

1. Damage Categories 1 and 2: The City's $321,601,606 Public Works Project to Construct 440 Additional Bioretention Basins For Eight City-Owned Outfalls—and $180,540,545 in Land Acquisition Costs for 50% of Those Basins—Are Unripe for Adjudication.

162. The City seeks $321,601,606 in costs to build and operate 440 stormwater bioretention basins for a Seattle public works project conceived by Trapp. *See* DeBord Decl., ¶ 96, Ex. 95, at 3-7, Table 1 at 7; DeBord Decl., ¶ 98, Ex. 97, Opinion 4, at 25-39.

163. Trapp opines that the City "will incur" $230,437,240 to construct 440

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bioretention basins around the LDW to reduce the volume of stormwater—and thus the amount of PCBs—entering into the LDW. DeBord Decl., ¶ 98, Ex. 97, at 25; Table 3-7, at 39.

164. Buckley opines that $321,601,606 in costs to build and operate 440 stormwater bioretention will be $321,601,606 in 2021 dollars. DeBord Decl., ¶ 96, Ex. 95, Table 1, at 7.

165. The City has taken no steps to commence the permit application process, or present the project for public comment. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19, 188:7-10. The project has never been evaluated for technical feasibility. *Id.* at 180:20-181:2. No environmental review of the project has commenced. *Id.* at 188:22-189:10.

166. The City must apply for and receive Ecology's approval for a construction stormwater general permit for the project through the National Pollutant Discharge Elimination System ("NPDES") program. *See* DeBord Decl., ¶ 106, Ex. 105, at 3, 7-9. This requires the City to prepare a Stormwater Pollution Prevention Plan and other construction plans that detail the measures the City will take during construction to prevent harmful stormwater discharges. *See id.* at 8-9. The City must then submit the plans as part of an application to Ecology for Ecology's approval. *Id.* The City has done nothing to permit its bioretention basin project. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19.

167. Seattle's Public Utilities Department spent two years studying a proposed single bio-retention project's environmental impacts before formally applying to the City for approval. *See* DeBord Decl., ¶ 114, Ex. 113, at 2.

168. The City has not commenced the internal municipal process to obtain permits. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19; 187:15-188:21. No City budgeting has occurred for the project. *Id.* at 190:12-17.

169. Trapp admits that this project *has not been proposed, reviewed, or permitted* by any governmental agency as required by law. *Id.* at 163:10-19, 188:7-10; 188:22-189:10.

170. The City's $321,601,606 demand for the public works project has been envisioned by Trapp and considered by no one outside the City's legal team. *Id.* at 189:24-

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190:5.

171. Trapp does not know where the 440 basins could be located. *Id.* at 177:18-21; DeBord Decl., ¶ 96, Ex. 95, at 7-16; Table 8, at 26.

172. Trapp concedes the project is "not at a point yet that I can even make [the] assumption" that it will be approved and permitted by state and local permitting authorities. DeBord Decl., ¶ 105, Ex. 104, at 192:9-16. According to Trapp, the City's lawyers asked him to provide a specific cost number, *id*. 167:5-12, unencumbered with any range, contingencies, or confidence-interval calculations. *Id.* 181:1-8; 182:6-8; 167:21-168:3; 234:10-22. Trapp acknowledges that the odds that the future cost for the public project will be exactly $230,437,240, and otherwise knowable to eight significant figures, are mathematically remote. *Id*. 167:13-20. There is no legal obligation to build the project envisioned by Trapp. *Id*. 90:20-91:16. Trapp considered no alternatives other than his one public works project. *Id.* 58:4-60:14.

173. Trapp described the project and cost estimate as a "planning level" exercise no less than 12 times during his deposition. *Id.* at 30:16-22; 31:8-12; 47:10-12; 167:23-168:1; 172:9-12; 180:23-181:2; 181:11-15; 182:6-12; 184:21-23; 239:10-14; 239:23-25; 244:7-9.

174. Trapp admitted that the 440 bioretention basins are a voluntary project the City may elect not to pursue at all. *Id.* at 90:20-91:16; 202:12-203:22.

175. The City seeks $180,540,545 in land acquisition and transactional costs to identify, acquire, and manage the property necessary to locate 50% of the proposed 440 bioretention basins—a process the City's designated land appraiser admits has not started and estimates would take ***over a decade*** to complete. *See* DeBord Decl., ¶ 96, Ex. 95, at 7-15; Table 5, at 15; Table 8, at 26.

176. The City's land appraiser, Buckley, is unlicensed. DeBord Decl., ¶ 107, Ex. 106, at 59:12-15; 117:9-11. He has never previously appraised land for a client's acquisition. *Id.* at 45:16-22. He never before offered opinions "about the cost to acquire real property." *Id.*

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at 62:22-63:2. He has never in his career recommended to a client a price for a particular piece of property. *Id.* at 45:16-22.

177. Buckley provides only a "planning level estimate." *Id.* at 46:19-23.

178. Buckley estimates land acquisition costs associated with locating just 50% of the hypothetical project's 440 basins to be $175,282,083, plus $5,258,462 in transactional costs. DeBord Decl., ¶ 96, Ex. 95, at 7-16; Table 8, at 26.

179. Buckley made no effort to identify any specific parcels to acquire. DeBord Decl., ¶ 107, Ex. 106, at 46:24-47:4.

180. The City has not actually acquired any land for the project or begun the process of identifying potential locations. DeBord Decl., ¶ 96, Ex. 95, at 8, 14.

181. Buckley admits that the City would not be in a position to begin land acquisition until 2024, and the land acquisition process would take 10 years to complete. *Id.* at 14.

182. Buckley doubts the City could find and acquire enough land to accommodate 440 bioretention basins given that "buildable land is particularly scarce" in Seattle. *Id.* at 7.

183. Buckley estimates that "roughly half of the [bioretention basins] could potentially be sited in publicly-owned areas and public right-of-way"—leaving 220 basins for which the City must acquire scarce vacant land or private property. *Id.* at 11. Yet "it is not likely that all vacant sites [identified] are actually available, given the scarcity of land and many competing sources of demand for land in Seattle." *Id.* at 13.

184. The City has not located each potential site for technical feasibility and suitability for a bioretention basin. DeBord Decl., ¶ 105, Ex. 104, at 177:18-21; 180:20-181:2.

185. The City's Stormwater Manual requires each potential site be assessed for technical feasibility and suitability for a bioretention basin. DeBord Decl., ¶ 106, Ex. 107, at 2-19.

186. The City's Stormwater Manual imposes a series of requirements and calculations that must be performed prior to siting a bioretention basin. DeBord Decl., ¶ 108,

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Ex. 107, at 2-19, 2-20, 2-21.

187. Buckley performed no market analysis. DeBord Decl., ¶ 107, Ex. 106, at 115:6-13.

188. Buckley erroneously relied upon King County's tax assessment database as a proxy for market values. *Id.* at 110:2-25.

2. *Damage Categories 3 and 4*: $1,102,156 to "Plan For" and $83,800,000 to Construct a South Park Water Quality Facility Are Unripe for Determination

189. The City claims as damages $1,102,156 to "plan for"—and an additional $83,800,000 to construct—a South Park Water Quality Facility to treat stormwater before it enters the LDW.

190. Per a July 2013 Consent Decree between the City, Ecology, and EPA, the City must implement a series of upgrades designed to prevent sewer overflows into the LDW. DeBord Decl., ¶ 109, Ex. 108, at 104:24-109:13; DeBord Decl., ¶ 110, Ex. 109.

191. While the City proposed project-related designs in 2009, prior to the 2014 Consent Decree, approximately 11 years later, in December 2020, the City submitted a request to Ecology to abandon its prior plans and asked Ecology to "lower[] the Project's performance goals." DeBord Decl., ¶ 109, Ex. 108, at 132:25-133:11, 173:14-174:19; DeBord Decl., ¶ 111, Ex. 110, at 3.

192. The City has not analyzed the feasibility of potential Facility design options, nor has it engaged a consultant to assist with the project, estimating it could take up to 10 years to design and complete. DeBord Decl., ¶ 109, Ex. 108, at 178:6-180:25.

193. The City's Rule 30(b)(6) witness testified that details of whether that project will be constructed at all, or at what time or scale, are beyond public inquiry at this stage. *Id.* at 108:17-109:13.

194. The City is actively in mediation with the Washington State Department of

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Ecology ("Ecology") to avoid constructing the LDW stormwater mandate altogether, or otherwise alter the project's schedule and materially reduce the project's scale. DeBord Decl., ¶ 109, Ex. 108, at 107:24-109:13; 171:12-174:19. There is an Ecology-City confidentiality agreement that prohibits public disclosure of key information of project details. *Id.* at 107:24-109:13; 171:12-174:19.

3. *Damage Category 5*: Any Future Costs Based on Allocation for Cleanup Costs for the LDW Are Speculative.

195. In 2014, the LDW Record of Decision estimated the cost of the EPA's Selected Remedy would be $342 million. DeBord Decl., ¶ 79, Ex. 78, at iii; *see also* DeBord Decl., ¶ 3, Ex. 2, ¶11.

196. The City believes that "[b]y the time construction begins, the cost [of the Selected Remedy] is expected to be $500 million or more." DeBord Decl., ¶ 78, Ex. 77 at ¶8.

197. According to the EPA, "[c]ompletion of the [Early Action Area] cleanups will reduce the LDW-wide spatially area-weighted average surface sediment PCB concentration by an estimated 50%." DeBord Decl., ¶ 79, Ex. 78, at 5; DeBord Decl., ¶ 89, Ex. 88, at 762:15-22.

198. The EPA is overseeing design investigation and planning for cleanup of the upper reach and middle reach of the LDW in 2022-2023. DeBord Decl., ¶ 115, Ex. 114, at 2.

4. *Damage Category 6*: $53,280,216 in "Enhanced" Source Controls for the Next 25 Years Is Unreliable and Contingent on Client's Hearsay

199. The City seeks $53,280,216 in "enhanced" stormwater control measures for the next 25 years. DeBord Decl., ¶ 96, Ex. 95, at 16-19.

200. The City's estimate of $53,280,216 for 25 years of "enhanced" stormwater source control measures are based exclusively on its damages expert Mark Buckley's adoption of a City employee's assumptions of mandated future stormwater source control measures and a one-page representation of annual costs from 2013-2019. DeBord Decl., ¶ 107, Ex. 106, at

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118:20-122:18.

201. The enhanced costs are extrapolations based on five years of past annual costs from 2013-2019 provided to Mark Buckley by City employee and strategic advisor Kevin Buckley. DeBord Decl., ¶ 96, Ex. 95, at 17; DeBord Decl., ¶ 107, Ex. 106, at 118:20-122:18.

202. The City employee's cost estimates and assumptions were accepted at face-value by Buckley, who deemed them "reliable," "accurate," and suitable to extrapolate for the next 25 years. *Id*. at 122:2-18.

203. Buckley never evaluated whether any of the City's "enhanced" source control measures sought to be funded through this lawsuit are legally mandated at all under the applicable City's permit, or simply voluntary add-on measures that the City desires. *Id.* at 148:12-149:4.

204. Trapp could point to no communications from EPA or Ecology expressing any disapproval with the City's existing Stormwater Source Control Implementation Plan mandated in its permit. DeBord Decl., ¶ 105, Ex. 104, at 199:8-21; 200:3-15.

205. Trapp admitted that EPA and Ecology "reviewed and approved" the City's Source Control Implementation Plan. *Id.* at 199:8-14.

206. The City reports that its existing source control efforts under the existing Source Control Implementation Plan are successful. DeBord Decl., ¶ 81, Ex. 80, at 3 ("Since its start in 2003, Seattle's source control program has been successful in identifying and controlling sources of contaminants to the LDW.").

H. DEFENDANTS ARE ENTITLED TO PARTIAL SUMMARY JUDGEMENT ON THE CITY'S REQUEST FOR FUTURE DAMAGES BECAUSE THE CITY ALLEGES A CONTINUING NUISANCE

207. The City testified that this case "is due in part to PCBs that went through the City's conveyance system *or are continuing* to go through the City's conveyance system." DeBord Decl., ¶ 76, Ex. 75, at 108:3-8.

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208. Buckley opined that the City expects efforts to remediate the LDW "to continue for 25 years." DeBord Decl., ¶ 96**,** Ex. 95, at 16.

209. Buckley "estimate[s] the present monetary funding requirements to meet *future costs* associated with" (1) stormwater BMP lifecycle costs, (2) stormwater BMP land acquisition costs, (3) stormwater BMP siting transaction costs, (4) source control program costs, and (5) expanded community outreach program costs. *Id.* at 26 (emphasis added). According to Mr. Buckley's calculations, "[t]hese costs in total sum to $574 million." *Id*.

I. DEFENDANTS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE CITY'S CLAIMED FUTURE COSTS FOR REMEDIAL ACTIONS NOT PREVIOUSLY APPROVED BY THE EPA

210. The City testified that "people who are impacted by the public nuisance that is due to Monsanto's PCBs in the Lower Duwamish" must either "continue to eat resident seafood that's contaminated with PCBs," or "refrain from eating it because of contamination." DeBord Decl., ¶ 76, Ex. 75, at 113:14–114:11. When subsequently asked about the anticipated costs in connection with "any action the City considers appropriate for remediation," the City deferred to its experts on public nuisance mitigation measures. *Id*. at 126:5–127:17.

211. Buckley testified that he could not capture "all of the costs to abate the nuisance and to mitigate the harm pending its abatement." DeBord Decl., ¶ 96, Ex. 95, at 3. One of his uncalculated additional costs was "community mitigation efforts for public health purposes," which includes "measures … to mitigate the harm from the public nuisance" on those that consume resident seafood from the LDW. *Id*.

212. The City relatedly claims $19,000,000 in future "cost to expand existing community programs to reach additional ethnic groups and further reduce public health risk from unsafe fish consumption in the Lower Duwamish." *Id*. In his report, Buckley describes extensive "Community Outreach for Public Health" that discusses fishing, angler activity, and outreach programs, all of which concern "PCB-contaminated seafood from the Lower

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Duwamish." *Id*. at pp. 23–25.

213. The Record of Decision for the Lower Duwamish already "includes addressing environmental justice concerns before, during, and after implementation of the cleanup remedy." DeBord Decl., ¶ 80, Ex. 79, at 21. Section 13.2.8 of the Record of Decision explicitly identifies certain actions to be taken with respect to these community concerns, including "to learn more about the affected community … to enhance outreach efforts," consultation with affected tribes, and "reduce impacts of the cleanup on residents." *Id*.

214. Buckley admits that the community programs he identifies "are outside the scope of the identified [Community Health Advocate] costs as well as EPA's program." DeBord Decl., ¶ 96, Ex. 95, at 25 (citing to Ex. 79).

215. The City has not attempted to reduce any of these costs in light of its status as a PRP in the Allocation Proceeding. DeBord Decl., ¶76, Ex. 75, at 109:2–110:3.

J. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CITY'S DAMAGES CLAIMS THAT WOULD EFFECT AN IMPROPER DOUBLE RECOVERY

216. The City claims over $5.8 million for source control and other costs it allegedly incurred in relation to the LDW for which it has received funding from the Department of Ecology. DeBord Decl., ¶ 76, Ex. 75, at 241:7 – 243:3; DeBord Decl., ¶ 113, Ex. 112.

217. The City has received $2,044,028.49 attributable to in-water investigation of the LDW and $3,791,027.94 in grant funding for source control efforts. DeBord Decl., ¶ 76, Ex. 75, at 242:19–243:3; 245:7-12, 242:25-243:12, 244:9–20.

218. The City has not excluded the $5.8 million it received in State funding from its damage claims in this case. *Id.* at 242:19-243:12; 244:15-245:20.

219. The City has not reduced its claims against Defendants in light of these grants. The City claims doing so "wouldn't be appropriate". *Id.* at 243:4 – 12; 244:15 – 245:20.

220. The City does not claim that it has sustained any physical property damage

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caused by the presence of PCBs in its conveyance systems. *Id.* at 227:9–228:4.

221. Instead, in opposition to Defendants' Motion to Dismiss, the City identified "costs" to investigate, remediate, and abate the alleged nuisance as its alleged injury. DeBord Decl., ¶ 85, Ex. 84 at 21-22.

222. In ruling on Defendants' Motion to Dismiss, the Court recognized that the City's public nuisance claim is "grounded on the financial loss that Seattle has suffered (and continues to suffer) due to the costs of investigating and cleaning up PCB contamination in its waterways." DeBord Decl., ¶ 86, Ex. 85, at 7-8.

223. The City received the state funding to address constituents other than PCBs. DeBord Decl., ¶ 76, Ex. 75, at 240:6–241:4.

224. In the State of Washington's lawsuit, the State claimed that "[it] has spent and will continue to spend many millions of dollars to remediate Monsanto's PCBs, including through grants to local governments." DeBord Decl., ¶102, Ex. 101, ¶20.

K. THE CITY LACKS EVIDENCE SEGREGATING THE PORTION OF DAMAGES OR ABATEMENT COSTS ATTRIBUTABLE TO DEFENDANTS

225. PCBs are only one of forty-one EPA-identified chemicals of concern in the LDW. DeBord Decl., ¶ 79, Ex. 78, at 25.

226. David Schuchardt, the Strategic Advisor at City Public Utilities for Seattle, testified that remediating the LDW involves numerous chemicals of concern and that the City's cleanup costs related to the LDW are attributable to *all of the chemicals of concern within the LDW,* not just PCBs. DeBord Decl., ¶ 116, Ex. 115, at 77:3-21; 119-9-24; 145:22-146:16 (emphasis added).

227. Mr. Schuchardt testified that monitoring in the upper reaches of the LDW will be required for any chemical of concern that exceeds threshold values, not just PCBs. DeBord Decl., ¶ 41, Ex. 40 at 307:23-308:20.

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228. EPA rejected attempts to classify PCBs as the primary risk driver of the clean-up of the LDW. DeBord Decl., ¶ 79, Ex. 78, at 111-112.

229. The City has done nothing to differentiate between Old Monsanto PCBs and non-Old Monsanto PCBs in its damage models, nor has it made any effort to allocate clean-up costs according to those entities that released PCBs. DeBord Decl., ¶ 76, Ex. 75 at, 67:12-20; 68:7-18.

230. Trapp made no attempt to mitigate the effects of any of the 41 other chemicals of concern in forming his opinions about what the City needs to do to clean up the LDW. DeBord Decl., ¶ 105, Ex. 104, at 145:3-9. Trapp testified that examining the effect of any other chemical other than PCBs "was beyond the scope" of his assignment. *Id*. 145:18-22. Finally, Trapp admitted that other than PCBs, he had not mapped the data for the other contaminants of concern in the LDW Record of Decision. *Id*. 144:23-145:2.

231. Buckley simply used the cost data that was provided to him, and did not factor into his opinions whether those costs would also address the 41 other contaminants of concern in the LDW. DeBord Decl., ¶ 107, Ex. 106, at 96:18-97:17. Buckley's "assignment" in this case did not include investigating the benefits of Mr. Trapp's best management practices, beyond PCB capture and treatment function. *Id.* 97:8-17; 97:25-98:3. Buckley did not allocate any of the clean-up costs he estimated to contaminants other than PCBs. *Id.* 102:21-25.

L. THE CITY LACKS STANDING TO SUE FOR CERTAIN DAMAGES

1. Damages for Injuries to Tribal Treaty-Protected Fisheries Cannot Be Recovered by the City.

232. The City asserts that the LDW is part of the Muckleshoot Indian Tribe's commercial, ceremonial, and subsistence fishing area. DeBord Decl., ¶ 3, Ex. 2, ¶85.

233. The City's expert witness Carpenter opined that "the issue of consumption of fish containing high concentrations of PCBs is a particular issue for some specific populations,

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especially many Native American tribes whose tradition is that fish are a major food source of protein. . .” DeBord Decl., ¶ 92, Ex. 91, at 8.

234. City expert witness, Mark Chernaik, Ph.D., includes opinions regarding the Muckleshoot, and Suquamish tribal consumption of fish from the LDW and alleged injury to tribes and tribal members. DeBord Decl., ¶ 93, Ex. 92, Section 5.2, at 11-13.

2. The City Lacks Standing to Sue for Harm from Fish Consumption Advisory.

235. The City does not know how many people harvest fish from the LDW. DeBord Decl., ¶ 76, Ex. 75, at 113:14-114:23.

236. Buckley does not know the extent of fish consumption: “I’m not making any estimates regarding overall population level consumption rates or patterns.” DeBord Decl., ¶ 107, Ex. 106, at 178:15-17.

237. The only support Buckley provides for the need to expand the existing community outreach program is that “[s]taff managing the CHA program identified a need to expand it.” DeBord Decl., ¶ 96, Ex. 95, at 25. He states that “[t]his information was transferred to me by City Counsel, City of Seattle, personal communication.” *Id*., at 25 n.74.

M. CITY EMPLOYEES AND TITLES

238. Laura Wishik is an Assistant City Attorney for the City and the City’s lead in-house counsel regarding the Lower Duwamish Waterway and the City’s lawsuit against Defendants. DeBord Decl., ¶ 78, Ex. 77, ¶ 1.

239. Ms. Wishik also served as the City’s corporate representative in this lawsuit. DeBord Decl., ¶ 76, Ex. 75, at 9:12-10:11. Ms. Wishik was deposed in this case on October 14, 15, 18, 19, 20, and 21, 2021.

240. Kevin Buckley is a Strategic Advisor with Seattle Public Utilities and provides regulatory compliance advice to the City. DeBord Decl., ¶ 109, Ex. 108, at 37:23-40:16.

241. Mr. Buckley served as the City’s corporate representative in this lawsuit and

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testified about the South Park Water Quality Facility. DeBord Decl., ¶ 109, Ex. 108, at 17:22-25. Mr. Buckley was deposed in this case on October 12 and 13, 2021.

IV. ARGUMENT

A. THE STATE OF WASHINGTON'S SETTLEMENT BARS THE CITY'S CLAIMS BY THE TERMS OF THE RELEASE AND RES JUDICATA

The City impermissibly seeks to recover against Defendants for alleged harm to the LDW after the State of Washington settled a nearly identical public nuisance lawsuit it, the State, brought against Defendants. Defendants may not be called upon twice to pay for the same alleged harm. By the terms of the release and the doctrine of res judicata, the Settlement Agreement bars the City from seeking the same relief against Defendants in this action.

1. The State of Washington Released the City's Claims When It Settled Its PCB Lawsuit against Defendants

a) The City's Claims Duplicate the State's Prior Lawsuit

In the State's lawsuit, the State claimed Defendants' manufacture, marketing, and sale of PCBs created a public nuisance injurious to human, animal, and environmental health in Washington's waterways, including the LDW. Declaration of Lisa DeBord in Support of Defendants' Motion for Summary Judgment ("DeBord Decl."), ¶ 102, Ex. 101, at ¶¶6, 12, 84-101. The LDW is a navigable body of water owned by the State. *Hill v. Newell*, 86 Wash. 227, 227 (1915). The State sought to recover for alleged harm to public trust properties, including the LDW, for the benefit of the State and the general public. *Id.* at ¶¶13-15, 16-18. The State settled its lawsuit, including all claims relating to remediation of the LDW, on June 24, 2020. DeBord Decl., ¶ 103, Ex. 102. By order entered August 27, 2020, the court dismissed the State's action with prejudice. DeBord Decl., ¶ 104, Ex. 103.

In this lawsuit, the City of Seattle seeks to recover against the same Defendants, under an identical public nuisance theory, for the same alleged harm to natural resources, including the LDW, for the benefit of the general public. DeBord Decl., ¶ 3, Ex. 2, at ¶¶ 10-12, 23-24, 84-90, 91-108. This Court specifically held that the City is acting pursuant to sovereign

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authority delegated by the State under RCW 35.22.280(29) , (30), explaining, "This authority derives from the state's duty to hold all navigable waters within the state in trust for the public." DeBord Decl., ¶ 86, Ex. 85, at 9. The City thus brings this lawsuit in a representative capacity "for the benefit of the state" to protect public rights under Wash. Rev. Code § 35.22.280(29), (30). DeBord Decl., ¶ 86, Ex. 85 at 8-9.

b) The State of Washington Released the City's Claims

The Settlement Agreement, executed by the State with Defendants, bars the City's lawsuit against them with respect to the alleged public nuisance in the LDW. Under the terms of the settlement, Defendants agreed to pay the State $95 million. DeBord Decl., ¶ 103, Ex. 102 at ¶22. In return, the State broadly agreed to release all claims against Defendants relating to the presence of PCBs in the environment in the State:

> "Released Claims" means all claims, demands, rights, damages, obligations, suits, debts, liens, contracts, agreements, and causes of action of every nature and description whatsoever, ascertain or unascertained, suspected or unsuspected, existing now or arising in the future, whether known or unknown, both at law and in equity, which were or could have been alleged related to the manufacture, sale, testing, disposal, release, marketing or management of PCBs by Defendant, including but not limited to any and **all claims based upon or related to the alleged presence of or damage caused by PCBs in the environment, groundwater, stormwater, stormwater and wastewater drainage systems, waterbodies, sediment, soil, air, vapor, natural resources, fish and/or wildlife within the State, and regardless of the legal theory or type or nature of damages claimed** . . . "Released Claims" also include any claim for attorneys' fees, expenses, and costs under state or federal law.

Id. at ¶15 (emphasis added).

The Settlement Agreement binds the State along with "each of its officers acting in their official capacities, *agencies*, departments, boards, and commissions and any predecessor, successor or assignee of any of the above." *Id.* at ¶17. The City falls within the scope of the release because a municipal corporation, like Seattle, is a body politic established by law as "an agency of the state." *City of Spokane v. J-R Distribs., Inc.*, 90 Wn.2d 722, 726 (1978).

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The City has no sovereignty of its own; it is only sovereign as far as it represents the State. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 916-17 (1964). Indeed, specifically with respect to the City's public nuisance claim relating to the LDW, this Court held that the City is acting pursuant to statutorily delegated sovereign authority to hold all navigable waters within the state in trust for the people of Washington. DeBord Decl., ¶ 86, Ex. 85, at 9. As the City is acting in a representative capacity for the State with respect to its public nuisance claim, *id.* at 8-9, its claims against Defendants were released by the State. In other words, the City cannot assert claims to vindicate sovereign interests already released by the State.

2. The City's Claims Are Barred by Res Judicata

In addition to the terms of the release, the doctrine of res judicata bars the City's lawsuit against Defendants with respect to the alleged public nuisance in the LDW. Washington law governs the preclusive effect of the State's settlement. *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005). Under Washington law, the doctrine of res judicata precludes so-called "claim splitting." *Ensley v. Pitcher*, 152 Wn. App. 891, 898 (2009), *review denied*, 168 Wn.2d 1028 (2010). All claims that might have been raised and determined are precluded. *Id.* "In Washington, res judicata is 'the rule, not the exception.'" *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1165-66 (W.D. Wash. 2014) (citation omitted).

The Settlement Agreement has the same force and effect as a final judgment on the claim for purposes of res judicata under Washington law. *In re Estate of Phillips*, 46 Wn.2d 1, 13-14 (1955); *see also Hadley v. Cowan*, 60 Wn. App. 433, 439 (1991) ("Res judicata applies to claims that were, or should have been, litigated in a prior proceeding between the parties, including settlement agreements.").

The doctrine of res judicata bars re-litigation of a claim that has a concurrence of identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Loveridge v. Fred Meyer, Inc.*, 125

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Wn.2d 759, 763 (1995). "[I]t is not necessary that all four factors favor preclusion to bar the claim." *Zweber*, 39 F. Supp. 3d at 1166 (citation omitted). Rather, the overarching goal is the preclusion of claim-splitting. *Id.* All factors mandate preclusion of the City's claim.

a) Subject Matter and Cause of Action

Both the State and the City's lawsuits sought/seek redress for the identical cause of action – public nuisance – and for identical reasons, the presence of PCBs in the LDW. As such, there is unquestionably a concurrence of identity of subject matter with the State's claims because the City's claims against Defendants (i) arose from the identical transactional nucleus of facts, *i.e.*, Old Monsanto's manufacture, marketing, and sale of PCBs; (ii) seek to redress the same wrongs, *i.e.*, the alleged harm caused by the presence of PCBs in the LDW; and (iii) would involve presentation of the same evidence as the State's action, *e.g.*, the chemical properties of PCBs, Old Monsanto's design, manufacture, marketing, and sale of PCBs, and the alleged harm to the waterway, natural resources, and the general public. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 713 (identifying factors determining concurrence of subject matter), *opinion corrected by* 943 P.2d 265 (Wash. 1997).

Because the claims relating to the LDW are identical, Defendants' rights established by the settlement of the State's claims would be destroyed or substantially impaired if the City were permitted to prosecute the same claim against them in this action. In other words, the City impermissibly seeks to call upon the same defendants to answer again the same charge based on the same facts by the mere substitution of the named party. *See In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 261-62 (1998).

b) Persons and Parties/Quality of Persons

Under the principles of res judicata, a judgment is binding upon parties to the litigation and persons in privity with those parties. *Loveridge*, 125 Wn.2d at 764. Privity within the meaning of the doctrine of res judicata denotes a "mutual relationship" to the same right or property. *Id.* "The identity of parties is not a mere matter of form, but is one of substance; the

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court will look to the legal effect of the identity of the parties even though they may be nominally different." *Snyder v. Munro*, 106 Wn.2d 380, 383-84 (1986). Because the State represented the City's legal interests relating to the LDW in reaching the Settlement Agreement, the City is in privity with the State with respect to State's settlement of its claims.

The City seeks to enforce the same sovereign interests with respect to the presence of PCBs in the LDW that the State addressed in its lawsuit. The City's statutory authority to address the alleged public nuisance in the LDW, which derives wholly from the State, did not give it any enforceable right that the State did not already address in its lawsuit. Rather, the State represented the same legal interests as the City with respect to the settlement of its claims for the alleged public nuisance in the LDW. The City is thus in privity with the State. *Snyder*, 106 Wn.2d at 384 ("a party is in privity for res judicata purposes if represented by one with the authority to do so").

The City also seeks to enforce the same public interest with respect to the presence of PCBs in the LDW that the State addressed in its lawsuit. Both the State and the City brought public nuisance claims for the benefit of the general public of the State. All citizens of Washington were represented by the State in the Settlement Agreement. Because the City seeks to enforce the same common public rights of the citizens of Washington as the State with respect to the LDW, it is in privity with the State. *Snyder*, 106 Wn.2d at 384 ("[A] final judgment effective against the State may also be effective against its citizens because their common public rights as citizens were represented by the State in proceedings.") (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *see also In re Coday*, 156 Wn.2d 485, 501 (2006) (finding different voters who pursue election contests on behalf of the body politic generally have sufficiently identical interests to satisfy the "identity of parties" inquiry "because they possess 'the same legal interests as all citizens of the state'"); *In re Recall of Pearsall-Stipek*, 136 Wn.2d at 261 (same).

Because the City is in privity with, indeed represents, the State, it is bound by the

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State's resolution of its claims for PCB-related environmental harm. *See Ensley,* 152 Wn. App. at 905 ("The fourth element of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit."). To permit the City to relitigate the same charge based on the same facts against the same defendants would defeat the finality of the Settlement Agreement and conservation of judicial resources that underpin the res judicata doctrine. *See In re Recall of Pearsall-Stipek*, 136 Wn.2d at 262.

B. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE CITY CANNOT PROVE THE ESSENTIAL ELEMENTS OF ITS PUBLIC NUISANCE CLAIM.

On July 22, 2022, the City filed a Stipulated Motion for Leave to Dismiss Negligence Claim and Amend Complaint. DeBord Decl., ¶ 87, Ex. 86, at 1. The City stated its intent "to dismiss the negligence claim with prejudice and clarify that the Plaintiff's remaining public nuisance claim is not based on negligence." *Id.* at 1. On July 25, 2022, the Court granted the City's stipulated motion to amend and dismissed the City's negligence claim and all of its other claims with prejudice, leaving only its claim for public nuisance. DeBord Decl., ¶ 88, Ex. 87. The City seeks to pursue a claim for intentional public nuisance for Old Monsanto's design, manufacture, sale, and promotion of PCBs. DeBord Decl., ¶ 3, Ex. 2, First Cause of Action; *id*. at 6; DeBord Decl., ¶ 85, Ex. 84, at 6. Defendants are entitled to summary judgment on that remaining claim because the City cannot prove three of its essential elements – (1) conduct constituting a nuisance; (2) proximate causation; and (3) intent.

1. Plaintiff Cannot Prove Defendants' Conduct Constituted a Nuisance because The Conduct Was Expressly Authorized by Statute and Was Lawful.

Defendants are entitled to summary judgment for two reasons. First, the manufacture and sale of PCBs was expressly authorized by federal statutes and Washington law expressly provides that conduct authorized by statute cannot be deemed a nuisance. Second, the lawful manufacture of a product does not constitute a nuisance under Washington law.

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a) The Manufacture of PCBs Was Authorized by Statute and, Thus, Cannot Be Deemed a Nuisance.

The Washington legislature has specifically provided that conduct authorized by statute cannot be deemed a nuisance. *See* RCW 7.48.160. That provision entitles Defendants to summary judgment because the manufacture of PCBs was authorized by multiple federal statutes: (1) the Defense Supply Management Act, 10 U.S.C. §§ 2451 *et seq*., under which the Secretary of Defense developed product specifications requiring the use of PCBs; (2) the Defense Production Act, 50 U.S.C. §§ 4511 *et seq*., under which Old Monsanto was required to produce PCBs for the national defense; (3) the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq*., under which the Secretary of Labor adopted electrical standards requiring the use of PCBs in certain applications; and (4) the federal Toxic Substances Control Act, 15 U.S.C. § 2605(e)(3)(A)(i), which expressly authorized the continued manufacture of PCBs through January 1, 1979. These statutes require entry of summary judgment in favor of Defendants on the City's nuisance claim.

(1) The Defense Production Act, 50 U.S.C. § 4511 *et seq*. and the Defense Supply Management Act, 10 U.S.C. § 2451 *et seq*.

The United States military was an important consumer of PCBs from the 1940s through the mid-1970s. Many products used by the U.S. Army, Navy, and Air Force had exacting military specifications for fire resistance, thermal and electrical conductivity, and other attributes, which required the use of PCBs in their manufacture. The U.S. Department of Defense specifically selected PCBs for use in many applications because of their performance characteristics:

> Older Department of Defense (DOD) systems employed a variety of components which have been identified as containing polychlorinated biphenyls (PCBs) …. These PCB articles were selected for their performance characteristics including fire retardant properties.

DeBord Decl., ¶ 25, Ex. 24, at 1.

On older U.S. Navy vessels "PCBs are common in insulation material, electrical cable,

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and ventilation gaskets … soundproofing material, missile launch tubes, electrical cables, banding and sheet rubber, heat-resistant paints, hull coatings and electrical transformers, because of their performance characteristics including fire retardant properties." ." DeBord Decl., ¶ 26, Ex. 25, at 737. At times, the majority of PCBs produced by Old Monsanto were for the U.S. military.[1]

At least two federal statutes authorized the manufacture of PCBs for the U.S. military. The Defense Standardization Program required the Secretary of Defense to "standardize items used throughout the Department of Defense by developing and using single specifications … and reducing the number of sizes and kinds of items that are generally similar." 10 U.S.C. § 2451(c)(1). The Secretary was required to "establish, publish, review, and revise, within the Department of Defense, military specifications, standards, and lists of qualified products." 10 U.S.C. § 2452(5). Various military specifications expressly authorized, if not required, the use of Old Monsanto's PCB-containing Aroclors in manufacturing products for the Department of Defense. For example, federal specification TT-P-28c for heat-resisting aluminum paint used by the military called for the use of Old Monsanto's PCB-containing product Aroclor 1254. DeBord Decl., ¶ 29, Ex. 28. The Navy used "a great deal" of this paint, which was used on high pressure steam lines and steam stacks. *See* DeBord Decl., ¶ 30, Ex. 29 (Old Monsanto sold Aroclor 1254 to defense contractor for the production of "heat resistant aluminum paint. . . . The Navy uses the paint (covered under govt. spec. TTP-28C) a great deal."). *See also* DeBord Decl., ¶ 26, Ex. 25 at 743.

See DeBord Decl., ¶ 31, Ex. 30 (Old Monsanto produced Aroclor 1254 for defense contractor Chemical Products, which "used [it] exclusively in cellulosic lacquer utilized to meet ilitary Specs for lacquer used in wire and cable applications"); DeBord Decl., ¶ 32, Ex.

[1] *See, e.g.,* DeBord Decl., ¶ 27, Ex. 26, at 1 ("In the case of aroclors, we understand the majority of our current production is used in end products for use in war plants and for use as Army and Navy material."); DeBord Decl., ¶ 28, Ex. 27, at 1] (application for Necessity Certificate, noting that 100% of facilities to increase diphenyl production by 480,000 pounds per month would be devoted to defense purposes).

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31 (Old Monsanto manufactured Aroclor 1254 for defense contractor Marblette Company, which used it to meet specifications of a defense contract with the U.S. military for electrical wire); DeBord Decl., ¶ 33, Ex. 32 (Old Monsanto produced Aroclor-1254 for company whose "usage (25,000 lbs.) all goes into one wire coating compound for the U.S. Navy"). A military report identifies several PCB-containing items found on nuclear submarines and their related military specifications, including: (1) Ensolite hull insulation (MIL-P-15280); (2) Cork hull insulation (MIL-C-561/HH-C-561); (3) Armaflex hull insulation (MIL-P-15280); (4) Heat resistant and aluminum paste paint (TT-P-28, MIL-P-14276 or DOD-P-24555); and (5) Wool felt ventilation gaskets (MIL-G-20241/MIL-STD-2148). DeBord Decl., ¶ 25, Ex. 24, at 19.

In addition, the Defense Production Act "was passed in 1950 at the outset of the Korean war to ensure governmental access to materials necessary for the war effort." *Ryan v. Dow Chem. Co*., 781 F. Supp. 934, 945 (E.D.N.Y. 1992). Under the Act, contractors "were forced under threat of criminal sanction to perform contracts for the Defense Department." *Id*. The federal government invoked the act to require Old Monsanto to produce PCBs for military contractors. For example, a 1972 letter from the U.S. Department of Commerce to Old Monsanto states:

> You are hereby directed to accept Emerson and Cuming, Inc. purchase order number 1-71039-EAD, rated DO-D1 for 3,000 pounds of Aroclor #1242….
> You are further directed to notify the Priorities Officer, Bureau of Domestic Commerce, U.S. Department of Commerce, Washington, D.C. 20230, by letter within three days after shipment is complete on the order.
> …
> This action is taken pursuant to Section 101 of the Defense Production Act of 1950, as amended.

DeBord Decl., ¶ 34, Ex. 33. Old Monsanto complied with the government's directive. *See* DeBord Decl., ¶ 35, Ex. 34. Similarly, a 1973 telex from Raytheon to Old Monsanto reported:

> We make these concessions and agreements only to obtain your agreement promptly to ship Aroclor 1242 and because *the government has directed us to proceed to manufacture missiles but has refused to authorize Raytheon to qualify a new potting material which would avoid use of Aroclor 1242. We also wish to acknowledge the fact that* ***Monsanto in all of our dealings has***

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> ***expressed a strong preference not to sell this product to us and is proceeding with the sale only at the direction of the government*** ....

DeBord Decl., ¶ 36, Ex. 35, at 3 (emphasis added). The federal government invoked the Defense Production Act to require Old Monsanto to continue selling PCBs to defense contractors through at least mid-1974. *See, e.g.*, DeBord Decl., ¶ 37, Ex. 36 (directing Old Monsanto to sell PCBs to Raytheon); DeBord Decl., ¶ 38, Ex. 37 (confirming compliance with directive to sell PCBs to Raytheon). The Defense Production Act not only authorized but required Old Monsanto to manufacture PCBs.

(2) The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*.

The manufacture of PCBs was authorized by other federal statutes as well. PCBs have properties that make them advantageous for use in heat-transfer systems and electrical equipment, such as transformers and capacitors. They have low solubility in water, low vapor pressure, low flammability, high heat capacity, low electrical conductivity, favorable dielectric constant, and little acute toxicity to humans. DeBord Decl., ¶ 15, Ex. 14, at 1. In light of these beneficial properties, certain "[i]ndustry codes, such as the National Electrical Code, specif[ied] the use of PCB-filled transformers and capacitors under a number of conditions." *Id.* at 5; *see also* DeBord Decl., ¶ 51, Ex. 50, at 7 ("Various federal, state and local codes, therefore, require [PCBs] continued use in or adjacent to public, commercial, and industrial buildings, which locations present the greatest potential danger to life and property.").

In 1970, Congress passed the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq*., "to assure safe and healthful working conditions for the nation's work force and to preserve the nation's human resources." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin*., 727 F.2d 415, 417 (5th Cir. 1984). The Act provided that "the Secretary [of Labor] shall, as soon as practicable … by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or

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health . . . ." 29 U.S.C. § 655(a). Pursuant to this directive, in February 1972, the U.S. Department of Labor, Occupational Safety & Health Administration adopted electrical standards that required the use of PCBs in a number of applications consistent with the 1971 National Electrical Code. *See* Electrical Standard, 72 Fed. Reg. 7136 (Feb. 14, 2007) (to be codified at 29 C.F.R. pt. 1910); Applicability of Certain Electrical Standards, 37 Fed. Reg., 3431 (Feb. 16, 1972) (to be codified at 29 C.F.R. pt. 1910 and 1926) (adopting National Electrical Code); *see also* 19 C.F.R. § 1910.307 (explaining that "[t]he National Electrical Code, NFPA 70, contains guidelines for determining the type and design of equipment and installations which will meet" requirements for fire protection); 72 Fed. Reg. 7136-7205 (discussing askarel-insulated transformers); at 7215 (defining Askarel as "[a] generic term for a group of nonflammable synthetic chlorinated hydrocarbons used as electrical insulating media"). In short, 29 U.S.C. § 655 also authorized the manufacture of PCBs.

(3) The Toxic Substances Control Act, 15 U.S.C. § 2605(e)(3)(A)(i)

Finally, the manufacture and sale of PCBs was expressly authorized by the federal Toxic Substances Control Act ("TSCA"). *See* 15 U.S.C. § 2605(e)(3)(A)(i) (expressly authorizing continued manufacture of PCBs through January 1, 1979). In 1971, the U.S. government convened an Interdepartmental Task Force to assess the risks associated with PCBs. DeBord Decl., ¶ 42, Ex. 41, at 1. The Task Force included five Executive Branch Departments: Department of Agriculture; Department of Commerce; Environmental Protection Agency ("EPA"); Department of Health, Education, and Welfare (Food and Drug Administration and National Institute of Environmental Health Sciences); and the Department of the Interior (Bureau of Sport Fisheries and Wildlife). *Id.* In 1972, the Task Force issued a report "reflect[ing] the position of the operating agencies of the Federal Government which have major responsibilities concerning such chemicals as PCBs in food and in the environment." *Id.* After reviewing "all of the available scientific information on various aspects of the PCB problem," the task force reached nine conclusions concerning PCBs,

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including that continued use of PCBs in certain applications remained "necessary" and that there were "no present or prospective substitutes" for PCBs:

> The use of PCBs should not be banned entirely. **Their continued use for transformers and capacitors in the near future is considered necessary because of the significantly increased risk of fire and explosion and the disruption of electrical service which would result from a ban on PCB use.** Also, continued use of PCBs in transformers and capacitors presents a minimal risk of environmental contamination.
> ….
> The advantages to the public in terms of safe, reliable, and efficient electrical equipment made possible by the use of PCBs have been documented in … this report. **It is also clear that there are no present or prospective substitutes for these materials, and that the functions they perform are essential.** Thus the continuing need for PCBs in closed electrical system applications is conclusive.

Id. at 2-5, 81 (emphases added).

Thus, when it passed TSCA, Congress expressly authorized the continued manufacture of PCBs through January 1, 1979. *See* 15 U.S.C. § 2605(e)(3)(A)(i) (expressly authorizing continued manufacture of PCBs through January 1, 1979). In addition, while TSCA also prohibited the manufacture of PCBs after January 1, 1979, it delegated to EPA the authority to allow continuing use of existing PCBs where it did not present an "unreasonable risk of injury to health." *See* 15 U.S.C § 2605(e)(2)(B). EPA allowed many continuing uses of PCBs based on its findings that these continuing uses did not present unreasonable health risks. *See, e.g.*, 40 C.F.R. § 761.20 (identifying permitted uses of PCBs); 40 C.F.R. § 761.30(a) ("PCBs at any concentration may be used in transformers … and may be used for purposes of servicing including rebuilding these transformers for the remainder of their useful lives, subject to the following conditions[]"); 40 C.F.R. § 761.30 (authorizing certain "non-totally enclosed PCB activities"). Accordingly, PCBs remain in use today consistent with EPA's promulgated rules. For example, the Department of Defense recognized that in 1990, consistent with EPA regulations, the military had tens of thousands of applications in continuing use that contained PCBs. *See* DeBord Decl., ¶ 40, Ex. 39.

(4) RCW 7.48.160

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The Washington legislature has specifically provided that conduct authorized by statute cannot be deemed a nuisance. RCW 7.48.160 provides: "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." Applying this provision, Washington courts have not hesitated to dismiss nuisance claims predicated on conduct authorized by statute. *See Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378,408 (1965) (lower court erred in finding freeway constituted a nuisance where it was "to be built not only under general statutory authority of the highway statutes, but also pursuant to the specific enactment of the legislature establishing this highway as state primary highway No. 2"); *Carlson v. City of Wenatchee*, 56 Wn.2d 932, 935-36 (placement of traffic control box could not be deemed a nuisance; "The controls and traffic lights are placed and maintained in the city of Wenatchee under express authority of statute. RCW §§ 47.36.060, 46.60.230. The manner of the placement of the control box was not unlawful."), *amended on denial of rehearing by* 355 P.2d 823 (Wash. 1960);[2] *Judd v. Bernard*, 49 Wn.2d 619, 621 (1956) ("And, even if the killing of the fish should create a condition which would ordinarily be termed a nuisance, the activity could not be enjoined by the courts. The director of the game commission is expressly authorized to engage in such activities by statute. RCW 77.12.240 ….");[3] *Mola v. Metro. Park Dist. of Tacoma*, 181 Wash. 177181 (1935) (swimming pool "maintained under the specific statute authorizing such park districts to maintain bathing pools" could not be deemed a nuisance). Because the manufacture and sale of PCBs was expressly authorized by federal statutes, it cannot be deemed a nuisance under Washington law and Defendants are entitled to summary judgment.

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[2] RCW 47.36.060 provides, in relevant part: "Local authorities in their respective jurisdictions shall place and maintain such traffic devices upon public highways under their jurisdiction as are necessary to carry out the provisions of the law or local traffic ordinances or to regulate, warn, or guide traffic. … The traffic devices, signs, signals, and markers shall comply with the uniform state standard for the manufacture, display, direction, and location thereof as designated by the department."

[3] RCW 77.12.240 provides: "The department may authorize the removal or killing of wildlife that is destroying or injuring property, or when it is necessary for wildlife management or research."

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b) The Manufacture of a Lawful Product Does Not Constitute a Nuisance under Washington Law.

Defendants also are entitled to summary judgment for the additional reason that Washington law limits nuisance to wrongful conduct. Thus, no Washington court has ever allowed a public nuisance claim to proceed against a defendant for the manufacture of a lawful product, which was lawfully placed in the stream of commerce. Nor could they. Because the manufacture and sale of PCBs was at all times lawful while Old Monsanto was engaged in such activity, its conduct cannot be deemed a nuisance. In light of the absence of any Washington authority ever permitting such a claim to proceed, this Court should enter summary judgment for Defendants because "public nuisance is a matter of state law, and it is not the role of a federal court to expand state law in ways not foreshadowed by state precedent." *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (affirming dismissal of nuisance claim against gun manufacturer based on lawful manufacture and sale of product).

Under Washington law, a nuisance must be a wrongful act. *See Miotke v. City of Spokane*, 101 Wn.2d 307, 309, 331 (1984), *abrogated on other grounds by Blue Sky Advocates v. State*, 107 Wn.2d 112, 120-21 (1986). By statute, it consists of "unlawfully doing an act" or failing to perform a legal duty. *See* RCW 7.48.120 ("Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others …."). The manufacture and sale of PCBs does not satisfy that statutory requirement because such conduct was not only *lawful* for the entire period that Old Monsanto was engaged in it, the federal government also deemed it "*necessary*" for the safe functioning of the nation's power grid. Because the manufacture and sale of PCBs was lawful at all times while Old Monsanto was engaged in such activity, Old Monsanto's conduct cannot be deemed a nuisance under Washington law.

Washington nuisance law is consistent with that of other jurisdictions. Courts

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nationwide have refused to expand public nuisance liability to cover the lawful sale of products – even defective products. *See, e.g., Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) ("Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law.") (finding plaintiff failed to state a claim for nuisance against handgun manufacturer); *City of Bloomington v. Westinghouse Elec. Corp*., 891 F.2d 611, 614 (7th Cir. 1989) (affirming dismissal of nuisance claims against Monsanto for manufacture of PCBs and finding no authority in Indiana law for "holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); *State ex rel. Jennings v. Monsanto Co.*, 2022 WL 2663220, at *4 (Del. Super. Ct. July 11, 2022) (dismissing nuisance claim against manufacturer of PCBs because "the great weight of authority in other jurisdictions support the conclusion that product claims are not encompassed within the public nuisance doctrine"); *City of Philadelphia v. Beretta U.S.A., Corp*., 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000) ("One way in which the role of public nuisance law has been restricted is the refusal to apply the tort in the context of injuries caused by defective product design and distribution. Surely if defective products cannot constitute a public nuisance, then products which function properly do not constitute a public nuisance."), *aff'd*, 277 F.3d 415 (3d Cir. 2002); *Detroit Bd. of Educ. v. Celotex Corp*., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("We agree and hold that manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect."); *see also In re Syngenta AG MIR 162 Corn Litig*., 131 F. Supp. 3d 1177 (D. Kan 2015) (dismissing nuisance claim brought against manufacturer and seller of genetically modified seed for contaminating the plaintiffs' corn supply).

In ruling "that nuisance law does not afford a remedy against the manufacturer of an

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asbestos-containing product to an owner whose building has been contaminated" by asbestos, the Eighth Circuit explained that otherwise "[n]uisance thus would become a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15 of Williams Cty., v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993); *see also State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (manufacturers of lead for paint were not liable for public nuisance; "[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause – even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable – is not an actionable violation of a public right. … The sheer number of violations does not transform the harm from individual injury to communal injury.") (alterations in original) (quoting Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 817 (2003)).

Defendants are entitled to summary judgment because their conduct, the manufacture and sale of a lawful product, does not satisfy the requirements for nuisance under Washington law.

2. The City Cannot Prove Proximate Causation.

Proximate causation is a required element of a nuisance claim. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 888, 893 (2000) (holding both negligence and nuisance claims require the same showing of proximate cause under Washington law), *review denied*, 146 Wn.2d 1016 (2002); *see also Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 706 (9th Cir. 2001). "When the operative facts are undisputed, and the inferences therefrom are plain and not subject to reasonable doubt or difference of opinion, the question of proximate cause becomes a question of law rather than a question of fact." *Litts v. Pierce Cty.*, 9 Wn. App. 843, 848 (1973). "Accordingly, the issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible."

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Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 683 (2008).

"Proximate causation has two elements: cause in fact and legal causation." *Dewar v. Smith*, 185 Wn. App. 544, 563, *review denied*, 183 Wn.2d 1024 (2015) (citation omitted). The City cannot show a genuine dispute of material fact as to either element. First, the City cannot establish that Old Monsanto's conduct was the cause in fact of it alleged injuries because it has no evidence that Old Monsanto retained post-sale control of its products, and because the City admits that its alleged injuries were caused by other contaminants and by PCBs not manufactured by Old Monsanto to an indeterminate extent. Second, the City cannot establish that Old Monsanto's conduct was the legal cause of its injuries because Old Monsanto's conduct was too remote to be deemed the legal cause of its injuries, as a matter of law.

a) The City Cannot Establish Cause in Fact

"Cause in fact refers to the 'but for' consequences of an act, or the physical connection between an act and the resulting injury." *Fabrique*, 144 Wn. App. at 683. A cause in fact is "a cause which in a **direct sequence, unbroken by any new independent cause**, produces the [injury] complained of and without which such [injury] would not have happened." *Hartley v. State*, 103 Wn.2d 768, 778 (1985) (emphasis added). The City cannot point to any direct connection whatsoever between any alleged act by Old Monsanto and any alleged injury it sustained. The City does not allege that Old Monsanto released PCBs into the LDW. Nor does it have any evidence suggesting that Old Monsanto maintained control of the product after sale to its customers. Old Monsanto stopped manufacturing PCBs, a product then deemed "essential" by the federal government, approximately 45 years ago. Given this decades-long time gap and the City's failure to show that Old Monsanto retained the right to control the PCBs beyond the point of sale, it is undisputed that Old Monsanto was not the cause in fact of the City's alleged injuries.

Indeed, courts across the country repeatedly have held that the causation element of a public nuisance claim cannot be met absent proof that that the defendant product manufacturer

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retained post-sale control of the product whose use is alleged to constitute a nuisance. *See, e.g., City of Bloomington*, 891 F.2d at 614 (affirming dismissal of nuisance claim against Monsanto because "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product."); *Tioga Pub. Sch. Dist. No. 15*, 984 F.2d at 920 ("courts have noted that liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constituted a nuisance, since without control a defendant cannot abate the nuisance"); *In re Dicamba Herbicides Litig*., 359 F. Supp. 3d 711, 728-29 (E.D. Mo. 2019) (manufacturer is not liable for nuisance caused by use of its product after the product left the manufacturer's control) (collecting cases); *SUEZ Water New York Inc. v. E.I du Pont de Nemours & Co*., -- F. Supp. 3d --, 2022 WL 36489, at *18-23 (S.D.N.Y. Jan. 4, 2022) (same; collecting cases); *In re Syngenta Mass Tort Actions*, 272 F. Supp. 3d 1074, 1091-92 (S.D. Ill. 2017) (same).

Moreover, the City has admitted that its alleged injuries were caused, in part, by products (including PCBs) having no connection to Old Monsanto whatsoever. Indeed, as the City's Fed. R. Civ. P. 30(b)(6) witness readily admitted, the City's damages model includes damages related both to contaminants other than PCBs, and damages purportedly caused by PCBs not manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75, at 66:4-19, 67:12–68:18, 290:20-25. The City's waterways contain many contaminants *other than* PCBs. *Id.* at 66:4-19. And the manufacturers of the PCBs in the waterways are unknown. PCBs are inadvertently produced as a by-product of more than 200 chemical processes and their inadvertent production continues today. DeBord Decl., ¶ 75, Ex. 74 at 3. The City understands that some of the PCBs discharged in Washington State are byproduct PCBs, rather than PCBs manufactured by Old Monsanto. DeBord Decl., ¶ 76, Ex. 75 , at 290:19-25. In addition, PCBs not manufactured by Old Monsanto were imported into the U.S. DeBord Decl., ¶ 15, Ex. 14, at 209-210, 220. According to the City, it has no way to trace the PCBs in the City's stormwater, wastewater, or the LDW to PCBs manufactured by Old Monsanto. DeBord Decl.,

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¶ 76, Ex. 75, at 66:4-19, 67:12-68:16.

In short, the undisputed evidence shows that the City cannot prove the nature or extent of injury allegedly caused by PCBs manufactured by Old Monsanto as distinguished from (i) those caused by other contaminants; or (ii) those caused by alternative sources of PCBs, including those released annually within its borders that were manufactured by others after Old Monsanto ceased manufacturing PCBs. Without such proof, Plaintiffs' claims fail. *See O'Donoghue v. Riggs*, 73 Wn.2d 814, 823-25 (1968) (where causation expert testified there were three possible or probable causes of the plaintiff's injury but could not eliminate any of the three hypotheses as a probable cause of plaintiff's injury, such testimony was speculative and insufficient to prove causation); *Maas v. Perkins*, 42 Wn.2d 38, 43 (1953) (summary judgment proper where plaintiff failed to segregate causes of pollution).

Laura Wishik, the assistant city attorney for the City who was the City's Fed. R. Civ. P. 30(b)(6) designee on topics concerning the City's alleged damages in this action, testified as follow:

> Q. When these costs were put into the [damages] model, was any allocation made for other contaminants of concern that would be addressed by these actions taken by the city?
>
> A. No.
>
> Q. Okay. So all of the costs, regardless of whether there were other contaminants of concern addressed by the actions, were attributable to the claims for PCB. Correct?
>
> A. Yes.
>
> ***
>
> Q. Okay. The costs that are included in the model, these costs, do they include costs segregated by the type of PCBs, that is, PCBs that would be present that were not produced by Monsanto?
>
> A. They are not segregated by type of PCB.
>
> Q. Was any testing done to ascertain what the proper allocation was of the cost to PCBs that allegedly were produced by Monsanto versus costs attributed to other sources of PCB?
>
> A. If by testing you mean an analysis for that specific purpose, the answer

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> is no.
>
> Q. Okay. Was there any allocation made in the model for costs attributable to the party that caused the release of PCBs as opposed to the manufacturer of PCBs?
>
> A. It's not as easy a question to answer as you might think. The costs that are reflected in these numbers are costs that were incurred to address PCBs -- well, actually, I think what I'll say is they were not allocated according to possible entities that released PCBs.

DeBord Decl., ¶ 76, Ex. 75, at 66:4-68:18. *See also id.* at 290:19-25 (acknowledging that the City understands that some of the PCBs that are discharged in Washington State are byproduct pigments inadvertently produced rather than manufactured by Old Monsanto). Thus, as a matter of law, Old Monsanto's conduct cannot qualify as a "but for" consequence of the City's alleged injuries. *See LaPlante v. State*, 85 Wn.2d 154, 160 (1975) (holding the State was not the cause in fact of the plaintiff's injury where its actions "were totally unrelated" to the plaintiff's injuries); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1029 (W.D. Wash. 2005) (holding that the defendant's sale of its bulldozers to Israel was too attenuated from the events which caused plaintiffs' injuries to be the "but for" cause of their injuries), *aff'd*, 503 F.3d 974 (9th Cir. 2007); *Litts*, 9 Wn. App. at 848-49 ("if an event would have happened regardless of defendant's conduct, that conduct is not the proximate cause of plaintiff's injury").

b) The City Also Cannot Establish Legal Causation.

The City also cannot establish legal causation. The undisputed facts establish that none of the Defendants manufactured PCBs in Washington State. The City does not allege that Solutia and New Monsanto discharged PCBs into the LDW. DeBord Decl., ¶ 3, Ex. 2.

Since 2014, the City of Seattle has participated in an alternative dispute resolution process, called the Duwamish Allocation. DeBord Decl., ¶ 76, Ex. 77, ¶¶ 9, 11. The Duwamish Allocation seeks to resolve the participating parties' respective percentages of liability for past and future costs to investigate and remediate contamination in the LDW. *Id. at* ¶ 9. The City of Seattle, King County, and the Port of Seattle also seek to recover costs

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from each other. *Id.*

There are forty-four participants in the Duwamish Allocation. DeBord Decl., ¶ 82, Ex. 81, ¶ 3. Old Monsanto is participating in the Duwamish Allocation. *Id.* at ¶¶ 9, 10. On May 18, 2022, the Final Allocation Report ("FAR") was issued in the Duwamish Allocation. DeBord Decl., ¶ 140, Ex. 139. The City has been allocated a portion of the LDW's future cleanup costs. DeBord Decl., ¶ 141, Ex. 140. Based on those undisputed facts, the City cannot establish legal causation.

Regardless of the tort theory, the focus for legal causation "is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial." *Medrano v. Schwendeman*, 66 Wn. App. 607, 611 (1992). "In deciding whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause, [courts] evaluate mixed considerations of logic, common sense, justice, policy, and precedent." *Lowman v. Wilbur*, 178 Wn.2d 165, 169 (2013) (internal quotation marks omitted). Legal causation "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend" and "'is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.'" *Id.* at 171(quoting *Crowe v. Gaston*, 134 Wn.2d 509, 518 (1998) and *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 479 (1998)).

> An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted "but for" the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the "cause" in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause.

Porter v. Sadri, 38 Wn. App. 174, 177 (quoting *Eckerson v. Ford's Prairie Sch. Dist. No. 11*, 3 Wn.2d 475, 482 (1940), *review denied*, 102 Wn.2d 1021 (1984). "[T]he rationale in many

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negligence cases combines aspects of causation, intervening events, duty, foreseeability, reliance, remoteness, and privity." *Hartley*, 103 Wn.2d at 780. In making these policy decisions, "courts must consider not only the interests of the litigants but also the interests of society in general, including the social and economic costs of any expansion of the outer boundaries of tort liability." *Port Auth. of New York & New Jersey v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999).

Applying these same considerations, Washington courts have declined to find proximate causation in various contexts in which the defendant's conduct was a but-for cause of the injury but remote. *See, e.g., Porter*, 38 Wn. App. at 177 (builder's installation of non-safety glass, which led homeowner to use non-safety glass for its replacement, which caused injury, "was too remote and not in itself a proximate or efficient legal cause" even though builder's misconduct "induced [homeowner] to repeat the error"); *Klein v. City of Seattle*, 41 Wn. App. 636, 639 (defect in design of road detour was not legal cause of death, as a matter of law, where intoxicated driver crossed center line and hit decedent's car, killing her), *review denied*, 104 Wn.2d 1025 (1985); *Duncan v. Fuji Indus., Inc.*, 91 Wn. App. 1065, 1998 WL 440806, at *3 (July 31, 1998) (intervening act broke causal connection between defendant's act and injury), *review denied*, 137 Wn.2d 1013 (1999).

The relevant policy considerations – intervening events, duty, foreseeability, reliance, privity, and remoteness – compel the same result here. The undisputed evidence shows that PCB-containing materials ended up in the City's waterways through thousands of intervening third-party actors over whom Old Monsanto had no control, including the City's stormwater and wastewater service customers and other private and governmental entities. These third parties improperly disposed of PCBs and negligently transported, leaked and spilled PCBs into the waterways. On these facts, the relevant policy considerations dictate that Old Monsanto's conduct was not the legal cause of the City's alleged injuries, as a matter of law.

(1) Intervening Events.

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The City does not even allege that Old Monsanto discharged PCBs into the LDW. DeBord Decl., ¶ 3, Ex. 2. Rather, the City's alleged injuries were caused by thousands of intervening acts and decisions by third parties who were outside of Old Monsanto's control. DeBord Decl., ¶ 76, Ex. 75, at 146:11-16 ("I will say it's well known that there were some releases of PCBs from the Boeing Company's facilities, and there were some releases of PCBs by the United States, and there were some releases of PCBs by others that I can't think of right now"). In fact, the Allocator in the Duwamish Allocation has allocated over 98% of future LDW costs to parties other than Defendants. DeBord Decl., ¶ 141. These third parties were not only customers of Old Monsanto, but rather customers of customers and other entities with which Old Monsanto had no relationship. *See* Defendants' statement of facts, *supra*, at ¶¶ 3, 4; DeBord Decl., ¶¶ 4-9, Exs. 3, 4, 5, 6, 7, 8; DeBord Decl., ¶ 10, Ex. 9, at 180:15-181:24. Courts across the country have repeatedly held that a manufacturer is not the proximate cause of alleged injuries resulting from the actions of such independent third-party actors under nearly identical circumstances. *See City of Bloomington*, 891 F.at 614 (holding that Monsanto could not be liable where "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product"); *Town of Westport v. Monsanto Co.*, 2015 WL 1321466, at *3-4 (D. Mass. Mar. 24, 2015) (holding that "because [Monsanto] 'did not have the power or authority to maintain or abate these PCB-containing building materials, they cannot be liable for a public nuisance'").

Courts applying Washington law have likewise recognized that proximate cause is lacking where the precise reason a plaintiff sustained injury is due to the conduct of a third party. *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 885 (9th Cir. 2002) (acknowledging that, under Washington law, "[i]f the actions or inactions of third parties were the reason that the lid flew open, then these actions were the cause of the accident, not Winston's design of the fryer. In that event, defective or not, the design of Winston's fryer did not legally cause the accident and Geurin's claim is defeated for failure of proof of the essential element of

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proximate cause"); *see also Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 701, 706-07 (affirming the trial court's holding that plaintiffs failed to show defendant's actions were the proximate cause of alleged injuries in their claim for public nuisance under Washington law and noting that "[a] direct relationship between the injury and the alleged wrongdoing has been one of the 'central elements' of the proximate cause determination").

(2) Duty.

The City has never identified any Washington authority holding that the manufacturer of a lawful product has a duty to prevent others from using its product in a manner that causes an alleged nuisance. While Old Monsanto owed a manufacturer's duty to warn its customers, the City does not assert a failure to warn cause of action and does not allege that Old Monsanto sold the City any PCBs. *See Duncan*, 1998 WL 440806, at *2 ("The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter"); *Hartley*, 103 Wn.2d at 784 (courts "have premised legal causation (liability) on the existence of some direct contact or special relationship between the defendant and the injured party").

(3) Foreseeability.

Until the late 1960s, PCBs were understood to "exhibit little acute toxicity (toxic effects from high level, short term exposure)." DeBord Decl., ¶ 15, Ex. 14, at 1. As of 1972, there was "no toxicological . . . data available to indicate that the levels of PCBs currently known to be in the environment constitute a threat to human health." DeBord Decl., ¶ 42, Ex. 41, at 3. In addition, the Interdepartmental Task Force reported that "continued use of PCBs in transformers and capacitors presents a minimal risk of environmental contamination." *Id.* at 4. It defies logic and common sense to claim that it was foreseeable to Old Monsanto that the City would incur compliance costs, including 2016 CERCLA response costs or permit costs, to reduce PCBs in its waterways pursuant to regulations that would not come into existence until decades after Old Monsanto last manufactured PCBs.

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(4) Privity and Reliance.

The City was never in privity with Old Monsanto because Old Monsanto did not sell PCBs to the City and had no relationship with the City. DeBord Decl., ¶ 10, Ex. 9, at 182:14-23; *see also* DeBord Decl., ¶¶ 11-12, Exs. 10, 11. Thus, the City was not in a position of reliance on Old Monsanto for information regarding PCBs.

(5) Remoteness.

Finally, Old Monsanto's conduct was removed in time from the allegedly injury-causing event by at least 40 years. *See Rayonier, Inc. v. Chi., M., St. P. & Pac. R.R.*, 68 Wn.2d 103, 105, 107, 108 (1966) (holding defendant did not create nuisance plaintiffs alleged because he did not control the pipeline in the years plaintiff alleged they were injured, another person did). The "interests of society in general" also favor finding third-party dischargers responsible. The primary policy goal of tort law – injury prevention – favors assigning responsibility for injuries to the actor(s) best situated to prevent them. *See Neff v. Desta*, 2020 WL 5893328, at *1 (W.D. Wash. Oct. 5, 2020) (noting "the policy goals underlying Washington state tort law…include preventing future harm through deterrence"); *Temple v. FDIC*, 1991 WL 496354, at *13 (W.D. Tex. June 20, 1991) ("An ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm."), *aff'd*, 988 F.2d 24 (5th Cir. 1993). Here, the third party dischargers were in a far superior position to prevent the injuries the City alleges as they were the ones who directly caused the release of PCBs into the LDW. As a matter of policy, the conduct of the third-party dischargers must be recognized as the proximate cause of the City' alleged injuries. To find otherwise would exonerate and fail to incentivize those in the best position to prevent injuries of the type alleged, contrary to the policy aims of tort law.

3. The City Cannot Prove the Intent Element of Its Public Nuisance Claim.

As noted above, no Washington appellate court has recognized the City's novel public

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nuisance theory for the sale of a lawful product. Nonetheless, under the City's own novel legal theory, it must prove that Defendants ***intended*** to cause the alleged public nuisance in the LDW. DeBord Decl., ¶ 3, Ex. 2, at ¶99 ("Monsanto's conduct and the presence of PCBs in the Duwamish River is injurious to human, animal, and environmental health."). Because the City cannot show that Defendants had "actual knowledge" of the alleged hazard at any time prior to 1977, when Defendants ceased production of PCBs, "the defendant's conduct may not be characterized as intentional." *Segura v. Cabrera*, 179 Wn. App. 630, 643 (2014) (dissenting opinion adopting majority regarding intent), *aff'd*, 184 Wn.2d 587 (2015).

The City, first, fails to recognize that its burden to prove intentional nuisance is stricter than for negligence. In its motion to amend, the City represented to the Court that "Plaintiff intends to . . . clarify that the Plaintiff's remaining public nuisance claim is not based on negligence." DeBord Decl., ¶ 87, Ex. 86, at 1. However, in its Second Amended Complaint, the City incorrectly substitutes a negligence standard for its burden to prove intentional nuisance. DeBord Decl., ¶ 3, Ex. 2, ¶107 ("Monsanto knew ***or should have known*** that the manufacture and sale of PCBs was causing and would cause the type of contamination now found in the Duwamish River.") (emphasis added)). "If the defendant lacks actual knowledge of a hazard, the defendant's conduct may not be characterized as intentional. A standard that asks whether the defendant ***knew or, in the exercise of reasonable care, should have known*** imposes liability for negligence. 'Negligence considers the defendant's conduct by asking what it knew or should have known about hazards.'" *Segura*, 179 Wn. App. at 643 (citations omitted) (emphasis added).

However, to prove an intentional tort, the plaintiff bears the burden to establish that "the person acted with a desire to cause the consequences of his conduct or believes that the consequence is substantially certain to result." *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 547 (1994) (dismissing intentional nuisance claim for lack of evidence of intent to cause harm), *as amended* (May 6, 1994), *and abrogated on other grounds by Phillips v. King*

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Cty., 87 Wn. App. 468 (1997). "A tort is not truly intentional unless the defendant intends both a wrongdoing and some injury to the plaintiff." *Segura*, 179 Wn. App. at 636 n.1 (citing Restatement (Second) of Torts §§ 8A & cmts. a-b, 500 & cmt. f).

To prove intentional nuisance, as with all intentional torts, proof of intentional conduct is not enough. *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 770-71 (2014), *review denied*, 182 Wn.2d 1008 (2015). Rather, the plaintiff must establish that the defendant intended to cause the plaintiff's alleged harm:

> Appellants argue that they asserted a nuisance claim independent of their negligence claim because the nuisance was the result of Respondents' intentional act of cutting down trees. Appellants misinterpret the meaning of "intentional act" in this context. "[N]uisance dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another." In contrast, tortious intent is found where "the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it."

Id. (citations omitted) (finding no tortious intent for act of felling trees absent evidence that defendant knew, or had substantial certainty, that its logging activities would cause damage to plaintiff's downhill property).

To prove its intentional nuisance theory, the City is required to establish that Defendants knew, or had substantial certainty, that the sale of PCBs for ordinary usage would cause the alleged nuisance in the LDW. *See id*. The City's Fed. R. Civ. P. 30(b)(6) witness, Laura Wishik, defines the claimed nuisance as the alleged risk to human health caused by the consumption of resident fish and shellfish harvested from the LDW as reflected in the Department of Health's fish consumption advisories. DeBord Decl., ¶ 76, Ex. 75, at 90:25-91:9, 113:14-114:11; DeBord Decl., ¶ 89, Ex. 88, at 765:24-766:9. To establish a triable claim, it is not enough for the City to prove that Defendants generally knew that PCBs could be toxic at certain levels, persistent, and escaped into the environment. Rather, the City is required to prove that Defendants affirmatively produced PCBs with actual knowledge of the alleged

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hazard: the escape of PCBs from ordinary usage into the LDW at levels known at the time to cause harm to human health. *Segura*, 179 Wn. App. at 643. The City failed, as a matter of law, to make a *prima facie* showing that Defendants intended to cause the alleged nuisance in the LDW.

The Washington State Department of Health first issued a fish consumption advisory for the LDW in 2003. DeBord Decl., ¶ 90, Ex. 89. The City's experts, David O. Carpenter, Mark Cherniak, and Allison Hiltner, opine that the consumption of fish from the LDW increases the risk of cancer and non-cancer disease in humans, based on studies primarily post-dating Defendants' production of PCBs. DeBord Decl., ¶ 92, Ex. 91, at 2, 9, 28; DeBord Decl., ¶ 93, Ex. 92, at 18; DeBord Decl., ¶ 94, Ex. 93, at 7-8. The City's experts opine that the Seattle area population is susceptible to the alleged risk of harm from PCBs in the Waterway because of particular socio-economic and cultural factors. DeBord Decl., ¶ 92, Ex. 91, at 2, 8, 9, 10, 28; DeBord Decl., ¶ 93, Ex. 92, at 11-14, 18; DeBord Decl., ¶ 94, Ex. 93, at 7-8. The City's experts acknowledge the variability of PCB levels in waterways, the variability of PCBs in fish depending on where they are caught, and the variability of PCB levels in the LDW water depending on rainfall. DeBord Decl., ¶ 92, Ex. 91, at 10; DeBord Decl., ¶ 93, Ex. 92, at 8. The City's experts also identify recontamination as a critical factor causing or contributing to the alleged nuisance condition in the LDW based on the dynamics of the City's own conveyance systems, rainfall, and third party source control in the region. DeBord Decl., ¶ 94, Ex. 93, at 14, 15.

The City has adduced no evidence that Defendants produced PCBs knowing that PCBs would escape from ordinary usage into the LDW at levels that render the consumption of resident fish and shellfish a danger to human health. The City's expert historians, Gerald Markowitz and David Rosner, offer nothing but gross generalizations regarding Defendants' knowledge of the general properties of PCBs, leaks and spills from improper handling and disposal of PCBs by third parties, and the detection of PCBs in the environment at large Def.

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DeBord Decl., ¶ 93, Ex. 94, at 6-9. The City certainly cannot establish that Defendants intended third parties, over whom Old Monsanto had no control, to improperly dispose of PCBs and/or discharge, leak, and spill PCBs into Seattle's waterways.

To the extent the City contends that the LDW fish consumption advisory itself constitutes the nuisance condition, the City cannot claim that Defendants knew, or had substantial certainty, that, after ceasing production in 1977, PCBs would escape into the Waterway at levels that would become subject to environmental regulations that did not exist until decades later. Indeed, the imposition of nuisance liability based on the retroactive application of fish consumption advisories, or any other regulation enacted after Defendants ceased production of PCBs in 1977, would violate Defendants' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and the due process limitations of the Washington Constitution as applied. *Schneider v. Cty. of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994), as amended on denial of reh'g and reh'g en banc (Oct. 11, 1994) ("Due process requires . . . notice and an 'opportunity to be heard at a meaningful time and in a meaningful manner.'"); *Score LLC v. City of Shoreline*, 128 Wn. App. 1019, 2005 WL 2540905, at *4 (June 27, 2005), *review denied*, 156 Wn.2d 1035 (2006) ("Due process requires that notice reasonably apprise an individual of the action against him and afford him an opportunity to respond.").

The City thus can point to no evidence that establishes that Defendants intended that PCBs would escape into the LDW from ordinary usage at levels that would trigger a fish consumption advisory. Because the City lacks evidence that Defendants designed, manufactured, marketed, and sold PCBs with the intent to cause the alleged public nuisance in the LDW, its nuisance claim fails as a matter of law.

C. IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT, IN WHOLE OR IN PART, ON THE RELIEF REQUESTED.

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In the alternative, Defendants are entitled to summary judgment, in whole or in part, on the various forms and categories of relief requested by the City.

1. Defendants Are Entitled to Summary Judgment on the City's Request for Monetary Damages Because Abatement Is a Public Body's Sole Remedy for Public Nuisance.

The City' prayer for relief requests "monetary damages to be proven at trial" and "[c]ompensatory damages accordingly to proof." *See* DeBord Decl., ¶ 3, Ex. 2, at ¶ 108, Prayer for Relief. Monetary damages are not, however, available to public bodies seeking to remedy a public nuisance for the benefit of the public. The plain language of Washington's public nuisance statutes makes clear that civil actions may only be maintained by ***private persons***, and that ***a city's sole available remedy is abatement***. RCW 7.48.210, RCW 7.48.220; *see also* Restatement (Second) of Torts § 821C ("authority as a public official or public agency to represent the state or a political subdivision" in a public nuisance matter affords an abatement remedy, not an action for damages). Accordingly, the Court should enter partial summary judgment against the City's claims for damages.

a) The City Has Withdrawn All of Its Previously Asserted Nuisance Claims Concerning Its Own Proprietary Interests.

The City has withdrawn all of its claims for damage to its own proprietary interests, which extinguishes any claim the City may have once had for damages as a remedy for the alleged public nuisance. *See* DeBord Decl., ¶ 99, Ex. 98, at 1; DeBord Decl., ¶ 100, Ex. 99, at 5-6, 7, 9; DeBord Decl., ¶ 76, Ex. 75, at 227:9–228:4.

The Court issued its Order on Defendants' Motion to Dismiss in February 2017. That motion did not present – and the Court did not decide – the issue of whether equitable abatement was the City's sole remedy for its public nuisance claim. At that early stage of this case, Defendants moved to dismiss based on the ground "that Seattle lack[ed] standing to bring a public nuisance claim" in its entirety. *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1105 (W.D. Wash. 2017). In denying Defendants' motion on that issue, the Court found that

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the City had a "municipal interest in eradicating" contamination. *Id*. at 1106. As to whether the City could seek damages for the alleged public nuisance, the Court focused on the City "[a]s the owner of property abutting the East and Lower Duwamish Waterways" and "as the operator of municipal wastewater and stormwater systems." *Id*.

Addressing the City's conveyance system, the Court relied solely upon *City of Spokane v. Monsanto Company*, which focused on Spokane's "sufficient property interests in its wastewater and stormwater systems to bring a nuisance action *based on injurious effects to those systems*." *City of Spokane v. Monsanto Co.*, 2016 WL 6275164, at *7 (E.D. Wash. Oct. 26, 2016) (emphasis added). Based on these proprietary interests, the Court concluded that the City had alleged "injury to its property" under Section 7.48.020, and a "special injury" under Section 7.48.210. *City of Seattle*, 237 F. Supp. 3d at 1106.

The City has since withdrawn all claims asserting injury to its own proprietary interests. First, in correspondence received on February 7, 2020 the City stated that it was "no longer seeking damages in this lawsuit" resulting from "the presence of Monsanto's PCBs within the drainage area of the East Waterway," or "for remediation of Slip 4 in the Lower Duwamish." DeBord Decl., ¶ 99, Ex. 98, at 1. Next, in discovery responses dated October 22, 2020, the City admitted that it was no longer seeking damages in connection with the following: (1) the area of the East Waterway served by the City's conveyance system; (2) any damages incurred by Seattle City Light, including those relating to the presence of PCBs in the LDW drainage area and the conveyance system; (3) past and future costs relating to remediation at Slip 4; and (4) past and future costs relating to remediation at Terminal 117. DeBord Decl., ¶ 100, Ex. 99, at 5-6, 7, 9. As a result, all claims for damages related to the City-owned real property "abutting the East and Lower Duwamish Waterways" are withdrawn. *See City of Seattle*, 237 F. Supp. 3d at 1106.

As for "injurious effect" to the City's wastewater and stormwater conveyance systems, the City testified that it is not claiming actual injury to the conveyance system caused by PCBs.

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DeBord Decl., ¶ 76, Ex. 75, at 227:9–228:4. The City confirmed the City's conveyance system remains at issue only insofar as the pipes need to be *cleaned of accumulated materials* as part of source control activities necessary to prevent recontamination. *Id*.

The City has therefore waived any claim of damage to its proprietary interests. To the extent the City claims it has a "municipal interest in eradicating" contamination, *see City of Seattle*, 237 F. Supp. 3d at 1106 (citing RCW 35.22.280(29)-(30)), it is limited to the equitable remedy of abatement, not a civil action for damages.

b) The Plain Language of Washington's Public Nuisance Law Makes Clear that Abatement is a City's Only Remedy for Public Nuisance.

Washington law prevents the City from maintaining a civil action for damages for the public nuisance claimed in this case. RCW 7.48.200. Here, the Court's "fundamental objective" in interpreting a statute is to "ascertain and carry out the Legislature's intent." *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). "The surest indication of legislative intent is the language enacted by the legislature" and, if the meaning of a statute is clear on its face, the Court should "give effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820 (2010) (quoting *State Dep't of Ecology*, 146 Wn.2d at 9). In construing the legislative intent behind a given statute, courts should ensure that "no portion" is "rendered meaningless or superfluous." *Associated Press v. Washington State Legislature*, 194 Wn.2d 915, 920 (2019) (quoting *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546 (1996)). The court should only look beyond the face of the statute—to legislative history, statutory construction, and relevant case law—if the plain language of a statute is ambiguous. *Ervin*, 169 Wn.2d at 820.

Washington's nuisance law provides three "remedies against a public nuisance": (1) indictment or information, (2) a civil action, and (3) abatement. RCW 7.48.200. Restricting who may seek which remedies, the code has three successive provisions that authorize different public nuisance remedies for three different groups:

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- "Civil action, who may maintain" (RCW 7.48.210): "[a] ***private person*** may maintain a civil action for a public nuisance, if it is specially injurious to ***himself or herself*** but not otherwise." (Emphasis added).
- "Abatement, by whom" (RCW 7.48.220): "[a] public nuisance may be abated by any ***public body*** authorized thereto by law." (Emphasis added). Unlike Section 210, this provision does not contain a requirement that the public body suffer special injury in order to abate a public nuisance in its sovereign capacity.
- "Public nuisance–Abatement" (RCW 7.48.230): "***[a]ny person*** may abate a public nuisance which is specially injurious to ***him or her*** by removing, or if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury." (Emphasis added). As in RCW 7.48.210 above, the special injury requirement returns with the code again turning to individual proprietary interests.

The plain language of RCW 7.48.210 and RCW 7.48.220 is clear and unambiguous. RCW 7.48.210 authorizes a *private person* to bring a civil action to remedy a public nuisance in the event the public nuisance is specially injurious to *him or her*. RCW 7.48.210. The terms apply to private, individual members of the public at large, not to a municipal entity such as the City. Washington law has long differentiated between *private persons* on the one hand and municipal entities, such as the City, on the other. *See, e.g.,* RCW 4.96.010 ("[a]ll local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages … to the same extent *as if they were a private person* or corporation") (emphasis added); RCW 57.08.005(4) ("from any municipal corporation, private person, *or* entity") (emphasis added); *Fransen v. Bd. of Nat. Res.*, 66 Wn.2d 672, 678 (1965) ("No person—private, corporate, *municipal or other*—acquires") (emphasis added); *In re Broad*, 36 Wash. 449, 459 (1904) ("whether the pavement be constructed for a city or other municipality, *or* for a private person, firm, or corporation") (emphasis added); *Lemon v. Waterman*, 2 Wash. Terr.

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485, 494 (1885) ("any person, or private *or* municipal corporation") (emphasis added). If the legislature had intended to allow municipal entities like the City to pursue non-abatement remedies, including a civil action, it would have done so explicitly.

Moreover, the special injury requirement in RCW 7.48.210 draws a distinction between individuals whom the legislature has decided can seek damages for a public nuisance, and those without particularized harm who cannot. *See Animal Legal Def. Fund v. Olympic Game Farm, Inc.*, 387 F. Supp. 3d 1202, 1205 (W.D. Wash. 2019) ("[F]or a private party to bring a public nuisance claim, the plaintiff must show special injury that is distinct from what has been suffered by the general public.").

Likewise, RCW 7.48.220 draws a distinction with RCW 7.48.210, between *public bodies* who can abate public nuisances on behalf of the public without any particularized harm, and *private individuals* who must make such a showing. If a private individual does not have a "specific injury over and above the injury suffered by the general public, the nuisance can only be abated by public authorities." *Id*. (citing *Lampa v. Graham*, 179 Wash. 184, 186-87 (1934)). That is precisely what the plain language of RCW 7.48.220 states: any public body, acting for its "municipal interests," may abate a public nuisance. RCW 7.48.220; *City of Seattle*, 237 F. Supp. 3d at 1106.

Under basic rules of statutory construction, the legislature's explicit choice to differentiate between *private* individuals in RCW 7.48.210 and *public* bodies in RCW 7.48.220 should be given its plain meaning. The City, as a public entity, can seek to abate a public nuisance but it cannot maintain a civil action seeking damages. This fulfills the legislative intent to distinguish between a "private person" and a "public body." *See Associated Press*, 194 Wn.2d at 920.

c) The Statutory Structure Further Shows there Is No Cognizable Claim for Damages by the City.

The plain language of RCW 7.48.210 and RCW 7.48.220 is conclusive against the

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City's claims for damages. But the City's claim is also refuted by an analysis of (a) the remainder of the public nuisance provisions in RCW Chapter 7.48 and, (b) the complete lack of Washington case law suggesting a contrary determination. Both support the conclusion that abatement is the City's sole remedy to address the public nuisance claimed in this action.

First, the City finds no support for its ability to maintain a civil action in the remainder of Washington's nuisance chapter. Specifically, RCW 7.48.058, which concerns the abatement of moral nuisances, contains the only other reference to "private persons" in the nuisance chapter. The provision's first paragraph refers to the "attorney general, prosecuting attorney, city attorney, city prosecutor, or any citizen of the county," while its second paragraph differentiates between actions brought by "private persons" and those brought by the aforementioned public actors. *Id.* This distinction between private persons and public actors is meaningless if both are treated the same.

Separately, RCW 7.48.230 expands the availability of abatement as a remedy beyond public bodies, to "any person" who has suffered a special injury by way of a public nuisance. This provides a companion to RCW 7.48.210's special injury language with respect to private person civil actions. However, *there is no provision that corresponds to RCW 7.48.210 that authorizes a public entity to maintain a civil action. See also* Restatement (Second) of Torts § 821C (similarly including both private and public abatement remedies, but only private damages). Moreover, while RCW 7.48.200 states that civil actions for damages must "conform" to RCW 7.48.010–040, none of those sections allows the City to seek the damages it attempts to here either. RCW 7.48.010 offers a general definition for "actionable nuisance," while RCW 7.48.030 and RCW 7.48.040 discuss the issuance of warrants for abatement. RCW 7.48.020 refers to actions brought by "any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance." Thus, it concerns nuisance actions brought to redress property or business-based harms, not a public nuisance claim brought by a city government in its "municipal interests." *City of*

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Seattle, 237 F. Supp. 3d at 1106. Simply put, there is no language anywhere within Washington's nuisance law that permits a ***public body*** to seek ***civil damages*** for a ***public nuisance***. *See* RCW 7.48.010, *et seq*.

As for relevant case law, Defendants have found no Washington case applying RCW 7.48.210 to allow a public entity to maintain a public nuisance civil action for damages in its sovereign capacity.

There is also no case where a Washington court has held that the term "private person" applied to a city government. To the contrary, Washington courts have long concluded that abatement is the proper remedy where a public body is acting on behalf of the public. *See City of Walla Walla v. Moore*, 2 Wash. Terr. 184, 189 (1883) ("The first objection urged by the appellants to the proceedings below is that the court overruled their demurrer to the complaint, which they claim should have been allowed because the complaint did not show the plaintiff entitled to equitable relief; but we think that the said city, in prosecuting this action, was acting for the public at large, and was, therefore, for the purpose of said suit, clothed with all the attributes of sovereignty …."); *see also Griffith v. Holman*, 23 Wash. 347, 350 (1900) ("the principle of law is well established that a public nuisance can be abated only by a public officer, except where the party who desires to abate it has some special interest in the abatement which is different from and greater than the interest of the community").

For all of these reasons, the City is limited to an abatement remedy and the Court should enter partial summary judgment in favor of Defendants on the City's request for non-abatement remedies, including monetary damages.

2. Defendants Are Entitled to Summary Judgment on the City's Damages that Are Impermissibly Speculative, Remote, and Unripe.

Defendants are also entitled to summary judgment on approximately $702 million of the $750 million in requested City damages because they are speculative, remote and unripe. "It is black-letter law that damages which are speculative, remote, imaginary, contingent, or

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merely possible cannot serve as a legal basis for recovery." *Navellier v. Sletten*, 262 F.3d 923, 939 (9th Cir. 2001) (internal quotation marks and citation omitted). In addition, damages that are "'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all'" are unripe and must not be considered. *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1079 (9th Cir. 2010) (citations omitted).

The City nonetheless seeks to recover almost $750 million in damages for nine categories of past and future costs (outlined below in Table 1) that it contends it will incur to reduce the amount of PCBs entering into LDW through stormwater. Four categories (totaling $587 million) pertain to two yet-to-be-designed public works projects that have undergone no regulatory approvals and permitting and are thus unripe for determination. The other two categories (totaling $114 million) are impermissibly speculative or remote. Defendants are entitled to summary judgment on the City's speculative, remote and unripe damage claims.

Table 1: Speculative, Remote, and Unripe City Damage Claims[4]

No.	City Damage Categories	Claimed Costs
1.	**Hypothetical Municipal Stormwater Project**—Future construction/operation/maintenance costs for 440 bioretention basins (2024-2033) (Unripe)	$321,601,606[5]
2.	**Hypothetical Municipal Stormwater Project**—$175,282,083 in future land acquisition necessary for 440 bioretention basins, plus $5,258,462 in staff, property management, and transaction-related costs (2024-2033) (Unripe)	$180,540,545[6]
3.	**Unapproved South Park Water Quality Facility**—Future construction/operation costs of a LDW stormwater treatment facility, which the City opposes and may be unnecessary or much smaller in scale (Unripe)	$83,800,000[7]
4.	**Past "Planning" Costs for Unapproved South Park Water Quality Facility**—From Q4 2017 to July 20, 2021 (Unripe)	$1,102,156.85[8]

[4] DeBord Decl., ¶ 97, Ex. 96, at 2-3.
[5] DeBord Decl., ¶ 96, Ex. 95, Table 1, at 7.
[6] DeBord Decl., ¶ 96, Ex. 95, Table 8, at 26.
[7] DeBord Decl., ¶ 97, Ex. 96, at 3.
[8] *Id.*

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5.	**City's Allocated Share of Future Lower Duwamish Cleanup Costs**—City's allocated 18% share of unknown future cleanup costs for LDW (Speculative)	Amount Unknown[9]
6.	**Future Enhanced Source Control Costs**—"Enhancements" to current City source-control programs, *e.g.,* add PCB-focused investigation team, enhanced street sweeping (2022-2046) (Speculative)	$53,280,216[10]
TOTAL SPECULATIVE, UNRIPE, REMOTE COSTS		$701,884,524

Table 2: City Damage Claims Not Challenged as Speculative, Remote and Unripe

No.	City Damage Categories	Claimed Cost
7.	**Past Costs: Stormwater Source Control**—Costs for source control for the LDW CERCLA Site from 2000 to Q1 2021	$11,625,577.57[11]
8.	**Past Costs: Lower Duwamish Administrative Order**—Costs to implement the 2000 EPA/Ecology Administrative Order and amendments from 2000 through Q1 2021	$9,369,816.58[12]
9.	**Future Costs: Public Nuisance Abatement**—Expansion of the Community Health Advocate program	$19,002,936[13]
TOTAL OTHER CLAIMED COSTS (OPPOSED ON OTHER GROUNDS)		**$39,998,330**

First, the City seeks $321,601,606 in costs to build and operate 440 stormwater bioretention basins for a hypothetical Seattle public works project conceived by Michael Trapp, the City's stormwater regulatory expert. *See* DeBord Decl., ¶ 96, Ex. 95 at 3-7, Table 1 at 7; DeBord Decl., ¶ 96, Ex. 97, Opinion 4, at 25-39. But even Trapp admits that this hypothetical project *has not been proposed, reviewed, or permitted* by any governmental agency as required by law. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19, 188:7-10; 188:22-189:10. That same City expert described the hypothetical project and cost estimate as a

[9] Per the 2014 Record of Decision, the selected remedy for the LDW CERCLA Site is projected to cost $342 million in 2014 dollars. DeBord Decl., ¶ 79, Ex. 78, at iii; DeBord Decl., ¶ 3, Ex. 2, ¶11. However, as explained below, that estimate is now outdated and unreliable.

[10] DeBord Decl., ¶ 96, Ex. 95, Table 8, at 26.

[11] DeBord Decl., ¶ 97, Ex. 96, a 2.

[12] *Id.*

[13] *Id.*

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"planning level" exercise no less than 12 times during his deposition[14]—and he admitted that the 440 bioretention basins are a voluntary project the City may elect not to pursue at all. *Id.* at 90:20-91:16; 202:12-203:22]; *see City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) (a city's voluntary expenditures designed to achieve full compliance with the law of the land cannot fairly be characterized as a legal wrong or injury).

Second, the City seeks $180,540,545 in land acquisition and transactional costs to identify, acquire, and manage the property necessary to locate 50% of the proposed 440 bioretention basins—a process the City's designated land appraiser admits has not started and estimates would take ***over a decade*** to complete. *See* DeBord Decl., ¶ 96, Ex. 95, at 7-15; Table 5 at 15; Table 8 at 26. Compounding the speculative nature of this property-acquisition estimate, the City's land appraiser is unlicensed, DeBord Decl., ¶ 107, Ex. 106, at 59:12-15, 117:9-11; provides only a "planning level estimate," *id.* at 46:19-23; and made no effort to identify any specific parcels to acquire, *id.* at 46:24-47:4.

Third, the City claims as damages $1,102,156 to "plan for"—and an additional $83,800,000 to construct—a South Park Water Quality Facility to treat stormwater before it enters the LDW. But the scope, design, schedule, scale, and cost of the future facility are unknowable because the City is actively in mediation with the Washington State Department of Ecology ("Ecology") to avoid constructing the LDW stormwater mandate altogether, or otherwise alter the project's schedule and materially reduce the project's scale. Of note, crucial project details remain shrouded in secrecy because, according to the City's Fed. R. Civ. P. 30(b)(6) witness, there is an Ecology-City confidentiality agreement that prohibits public disclosure of key information. DeBord Decl., ¶ 109, Ex. 108, at 107:24-109:13; 171:12-174:19.[15]

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[14] DeBord Decl., ¶ 105, Ex. 104, at 30:16-22; 31:8-12; 47:10-12; 167:23-168:1; 172:9-12; 180:23-181:2; 181:11-15; 182:6-12; 184:21-23; 239:10-14; 239:23-25; 244:7-9.

[15] The City's Fed. R. Civ. P. 30(b)(6) witness, Kevin Buckley, testified about the South Park Water Quality Facility and is a Seattle Public Utilities employee who is a "Strategic Advisor 3" and provides regulatory compliance advice to the City. DeBord Decl., ¶ 109, Ex. 108, at 37:23-40:16. EcoNorthwest economist Dr. Mark

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Fourth, the City seeks damages based on its allocation of future LDW cleanup costs, but the total amount of such cleanup remains uncertain and unknowable because the final remedy and total cleanup cost have not yet been determined. Further, five "Early Action Areas" have already been remediated by responsible parties following the 2014 EPA Record of Decision, the costs of which are not subject to this lawsuit. DeBord Decl., ¶ 76, Ex. 75, at 117:4-16. All the City knows at this point is that it will be responsible for an undetermined amount of future LDW work. *See* Defendants' statement of facts, *supra*, at ¶¶ 95, 197; DeBord Decl., ¶140; DeBord Decl., ¶ 78, Ex. 77, ¶ 8.

Fifth, the City's estimate of $53,280,216 for 25 years of "enhanced" stormwater source control measures are based exclusively on its damages expert Mark Buckley's adoption—without scrutiny or independent analysis—of a City employee's assumptions of mandated future stormwater source control measures and a one-page representation of annual costs from 2013-2019. DeBord Decl., ¶ 107, Ex. 106, at 118:20-122:18. The City employee's cost estimates and assumptions are accepted at face-value by the expert, who deemed them "reliable," "accurate," and suitable to extrapolate for the next 25 years. *Id*. An expert's acceptance and utterance of a client's hearsay for damage purposes, however, is not reliable. *See Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424-25 (S.D.N.Y. 2009) (expert who simply "regurgitates" the hearsay of the client who retained him, without any independent investigation or analysis, does not assist trier of fact in understanding matters that require specialized knowledge).

a) *Damage Categories 1 and 2*: The City's Hypothetical $321,601,606 Public Works Project to Construct 440 Additional Bioretention Basins For Eight City-Owned Outfalls—and $180,540,545 in Land Acquisition Costs for 50% of Those Basins—Are Unripe for Adjudication.

Buckley is unrelated to City employee Kevin Buckley.

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(1) The Uncertainty of the City's Hypothetical Public Works Project Is Undisputed and Thus It Is Unripe for the Court's Consideration.

The City's stormwater compliance expert, Michael Trapp, opines that the City "will incur" $230,437,240 (in 2013 dollars, or $321,601,606 in 2021 dollars according to economist Mark Buckley) to construct 440 bioretention basins around the LDW to reduce the volume of stormwater—and thus the amount of PCBs—entering into the LDW. DeBord Decl., ¶ 98, Ex. 97, at 25 & Table 3-7, at 39; DeBord Decl., ¶ 96, Ex. 95, at 7. Trapp's cost estimate is so preliminary that the City has taken no steps whatsoever to commence the permit application process, or even present the project for public comment. DeBord Decl., ¶ 105, Ex. 104, at 188:7-10. The hypothetical project has never been evaluated for technical feasibility. DeBord Decl., ¶ 105, Ex. 104, at 180:20-181:2. No environmental review of the project has commenced. *Id.* at 188:22-189:10. No City budgeting has occurred. *Id.* at 190:12-17. Trapp does not even know where the 440 basins could be located. *Id.* at 177:18-21.

Trapp concedes the hypothetical project is "not at a point yet that I can even make [the] assumption" that it will be approved and permitted by state and local permitting authorities. *Id.* at 192:9-16. According to Trapp, the City's lawyers asked him to provide a specific cost number, *id*. 167:5-12, unencumbered with any range, contingencies, or confidence-interval calculations. *Id.* 181:1-8; 182:6-8; 167:21-168:3; 234:10-22. The City's stormwater compliance expert acknowledges that the odds that the future cost for the hypothetical public project will be exactly $230,437,240, and otherwise knowable to eight significant figures, are mathematically remote. *Id*. 167:13-20. There is no legal obligation to build the project envisioned by Trapp. *Id*. 90:20-91:16. The City's expert considered no alternatives other than his one hypothetical public works project. *Id.* 58:4-60:14.

Under well-settled case law, the City's $321,601,606 demand for the hypothetical public works project envisioned by Trapp and considered by no one outside the City's legal team, *id*. at 189:24-190:5, is far too contingent to serve as a legal basis for recovery. Among

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other things, the City's legal team erroneously assumes for purposes of this lawsuit that all state, federal and local agencies will review and approve Trapp's hypothetical project. For that reason alone, the City's damages are unripe.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized ….'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). A matter is not ripe when "'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Lyon*, 626 F.3d at 1079 (citations omitted); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002); *Texas v. United States*, 523 U.S. 296, 300 (1998). The doctrine of ripeness is primarily a question of timing, designed to separate those matters that are premature for review because the injury is speculative and may never occur from those that are appropriate for court action. *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010).

Courts routinely find claims that are contingent on future regulatory approvals unfit for judicial decision under a ripeness analysis. *See S. Austin Coal. Cmty. Council v. SBC Commc'ns Inc.*, 191 F.3d 842, 844-45 (7th Cir. 1999) (antitrust action challenging merger not ripe where regulatory approvals had not been granted and approvals might impose conditions that could change impact of merger); *Franks v. Ross*, 313 F.3d 184, 195-96 (4th Cir. 2002) (controversy over landfill permitting not ripe because of "obvious factual contingencies," including lack of permit); *City of Fall River v. FERC*, 507 F.3d 1, 6-7 (1st Cir. 2007) (challenge to agency's conditional approval of project not ripe where the approval was contingent upon several other agency approvals). For example, in *New Hanover Twp. v. U.S. Army Corps of Eng'rs*, 992 F.2d 470, 473 (3d Cir. 1993), the court found a claim based on a proposed landfill project unripe because the project could not proceed without the state's certification. Without the state certification, work on the project could not begin "unless and until [the State] grants

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a water quality certificate." *Id*. Because the "results of the [state] process cannot be predicted," the case was not ripe for review. *Id.*; *see also Suburban Trails, Inc. v. New Jersey Transit Corp*., 800 F.2d 361 (3d Cir. 1986) (case unripe for review when claim is contingent upon further action by federal agency that was not party to suit). Thus, the Court should dismiss as unripe damages associated with this planning-level, yet-to-be designed and completely unapproved public works project.

(2) The City's Hypothetical Public Works Project Requires Permits and It Must Undergo Lengthy Environmental Review, Which the City Admits Has Not Commenced

The City's damages claim for the future costs of the 440 bioretention basins is wholly speculative and unripe because, as its expert-proponent admits, ***neither permitting nor any environmental review has begun for this project***. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19, 188:22-189:10. The project is contingent on a series of future approvals and environmental review—all of which could result in a project that is vastly different in scale from what the City proposes in this lawsuit, or even a project that is denied altogether. Thus, these approvals "'*may not occur as anticipated, or indeed may not occur at all.*'" *Lyon*, 626 F.3d at 1079 (citations omitted) (emphasis added). Importantly, the City cannot begin work "unless and until" the regulatory agencies sign off on the project and conduct the required environmental review. *See New Hanover Twp.*, 992 F.2d at 473 (finding case unripe because no construction or operation of project can begin "unless and until" state permits are obtained).

Stormwater and Construction Permit Requirements: New projects or changes impacting the City's stormwater discharge—such as the construction of 440 additional bioretention basins—must be studied and reviewed for consistency with the Municipal Stormwater Permit issued by Ecology. *See* SMC §§ 22.802.010, 22.803.020, 22.807.010. The City has not begun that process.

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Further, the City also must apply for and receive Ecology's approval for a construction stormwater general permit for the project through the National Pollutant Discharge Elimination System ("NPDES") program. *See* DeBord Decl., ¶ 106, Ex. 105, at 3, 7-9. This requires the City to prepare a Stormwater Pollution Prevention Plan and other construction plans that detail the measures the City will take during construction to prevent harmful stormwater discharges. *See id.* at 8-9. The City must then submit the plans as part of an application to Ecology for Ecology's approval. *Id.* Here, the City has done nothing to permit its hypothetical bioretention basin project. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19. In addition, the City must comply with the National Historic Preservation Act ("NHPA"), which if the project could impact cultural or historic resources, would impose tribal consultation, impact analysis, and mitigation requirements. *See* NHPA § 106, 54 U.S.C. § 306108. Of note, the City has not even identified the land on which it would site half of the projected 440 bioretention basins, DeBord Decl., ¶ 105, Ex. 104, at 177:18-21, and, thus, has not assessed what its NHPA obligations may be.

On the local level, the City must obtain permits from the Seattle Department of Construction and Inspection ("SDCI") and comply with the City's Stormwater Code. *See* SMC § 23.76.006; *see also* SMC §§ 22.800-22.808. For instance, Section 22.800.075 specifically requires the SDCI to review and approve permits for projects impacting drainage control. *See* SMC § 22.807.020. Other permits or approvals may be required depending on the eventual siting of the 440 bioretention basins, such as easements, condemnation proceedings, and grading permits, and utilities permits. *See, e.g.*, SMC §§ 22.170, 15.04, 15.32. The City has not commenced the internal municipal process to obtain any such City permits. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19; 187:15-188:21.

Environmental Review Requirements: The project will require environmental review under Washington's State Environmental Policy Act ("SEPA"). *See* RCW 43.21C. SEPA requires agencies to study closely the potential environmental impacts associated with a proposed development project. *See* RCW 43.21C.010, RCW 43.21C.030; *see also* WAC §

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197-11-060(4)(a). In fact, SEPA places particular emphasis on identifying and considering alternatives to a proposed project—rather than accepting a proposal outright. As such, a project may change throughout the course of a multi-year SEPA review.

At the beginning of the environmental review process, SEPA requires applicants to "properly define" the proposed project, including "describ[ing it] in ways that encourage considering and comparing alternatives" to allow agencies to perform the appropriate level of environmental review and make informed decisions. WAC § 197-11-060(3)(a). "Agencies are encouraged to describe public . . . proposals in terms of objectives rather than preferred solutions" in order to facilitate the public's consideration of alternatives. *Id*.

After evaluating the project proposal, the agency must make a threshold determination of whether environmental review is required and, if so, the appropriate level of review. *See* WAC §§ 197-11-310 *et seq*. If the project could result in significant environmental impacts, the agency must prepare an Environmental Impact Statement ("EIS"). WAC §§ 197-11-400 *et seq*. "An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality." WAC § 197-11-400(2). Once prepared, the draft EIS must be circulated for public review and comment, and the agency must review all comments received and respond in the final EIS. *See* WAC §§ 197-11-502, 197-11-560. Additionally, an agency may modify previously identified alternatives to the proposal or "[d]evelop and evaluate alternatives not previously given detailed consideration by the agency." WAC § 197-11-560(1)(a)-(b). Finally, when the decision-maker acts on a proposal, SEPA explicitly requires that the decision-maker consider the alternatives devised throughout the SEPA process and discussed in the final EIS. *See* WAC § 197-11-655(3). None of those tasks has occurred for the hypothetical public works project. DeBord Decl., ¶ 105, Ex. 104, at 188:22-189:10. This environmental review process can take several years depending on the scope of the proposed project and anticipated impacts. RCW

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43.21C.0311(1)(b), 43.21C.033. For example, even for a single bioretention project, Seattle's Public Utilities Department spent two years studying that project's proposed environmental impacts before formally applying to the City for approval. *See* DeBord Decl., ¶ 114, Ex. 113, at 2.

In contrast, the City's stormwater compliance expert has proposed a bioretention project over 400 times the scale of the Cloverdale project, and yet ***the City has taken no steps to plan, study, or permit the project***. DeBord Decl., ¶ 105, Ex. 104, at 163:10-19, 188:22-189:10. Nor has the City identified or considered any alternatives to the 440 bioretention basins—a core tenet of the SEPA process. (*Id*. 188:22-189:11: Trapp has not "perform[ed] any preliminary environmental review to determine what environmental impacts [the] proposed stormwater project could have"). The project's technical feasibility is unknown. *Id.* at 180:20-181:2. It is entirely speculative at this juncture whether an agency would approve the 440 bioretention basins or another alternative after a multi-year environmental review process not yet commenced. Tellingly, Trapp admits ***the hypothetical bioretention project is "not at a point yet that I can even make [the] assumption" that it will be approved and permitted***. *Id*. 192:9-16 (emphasis added). By definition, all damages related to this hypothetical project are unripe.

(3) The City Has Not Identified, Much Less Acquired, the Land Necessary to Locate 50% of the Estimated 440 Bioretention Basins

The bioretention basin project envisioned by Trapp has another layer of regulatory uncertainty—land acquisition, a necessary precursor to any permitting and public approval. The City's economist Mark Buckley estimates land acquisition costs associated with locating just 50% of the hypothetical project's 440 basins to be $175,282,083, plus $5,258,462 in transactional costs. DeBord Decl., ¶ 96, Ex. 95, at 7-16; Table 8, at 26. However, the City has not actually acquired any land for the project or begun the process of identifying potential locations. *Id*. at 14. The City's economist has made no effort to identify specific parcels to

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acquire for the basins. DeBord Decl., ¶ 107, Ex. 106, at 46:24-47:4. In fact, Buckley admits that the City would not be in a position to begin land acquisition until 2024, and ***the land acquisition process would take 10 years to complete***. *Id*. This is not surprising given that the City has not taken any of the steps to complete feasibility studies, site surveys, and process access agreements. Notably, Buckley doubts the City could find and acquire enough land to accommodate 440 bioretention basins given that "buildable land is particularly scarce" in Seattle. DeBord Decl., ¶ 96, Ex. 95, at 7.

Buckley estimates that "roughly half of the [bioretention basins] could potentially be sited in publicly-owned areas and public right-of-way"—leaving 220 basins for which the City must acquire scarce vacant land or private property. *Id*. at 11. Yet "it is not likely that all vacant sites [identified] are actually available, given the scarcity of land and many competing sources of demand for land in Seattle." *Id*. at 13. Despite recognizing that these bioretention basins would require the City to acquire private property, Buckley's report fails to discuss issues of feasibility and the regulatory burdens of implementing eminent domain procedures to acquire land—including lengthy negotiations and likely litigation with private landowners.

Moreover, Buckley glosses over the technical aspects of land acquisition that render the City's planning-level project all the more uncertain. The City has not located, much less assessed, each potential site for technical feasibility and suitability for a bioretention basin, DeBord Decl., ¶ 106, Ex. 105, at 177:18-21; 180:20-181:2, as required by the City's own Stormwater Manual. DeBord Decl., ¶ 108, Ex. 107, at Section 2-4. In fact, the Stormwater Manual imposes a series of requirements and calculations that must be performed prior to siting a bioretention basin, but the City has not performed any of that work here. *See id*., Ch. 2-5 (minimum requirements and standards for projects), Ch. 7 (site assessment and planning), Ch. 8 (drainage control review and application requirements).

The City's designated land appraiser is unlicensed, DeBord Decl., ¶ 107, Ex. 106, at 59:12-15, has never previously appraised land for a client's acquisition, *id.* 45:16-22,

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performed no market analysis, *id*. 115:6-13, and erroneously relied upon King County's tax assessment database as a proxy for market values, *id*. 110:2-25. It is improper for unlicensed people to offer expert opinions about the market value of land. *Kingsport Pavilion, LLC v. Crown Enters., Inc.*, 2010 WL 11435700, *3-5 (E.D. Tenn. Mar. 2, 2010). And it is error to rely on tax valuation as a reliable measure of market value. *See SunTrust Mortg. Inc. v. Busby*, 469 F. App'x 205, 207 (4th Cir. 2012) (finding "that the district court did not err in determining that tax valuations do not, by themselves, provide competent evidence sufficient to establish market value"); *see also Tarrify Props., LLC v. Cuyahoga Cty.*, 2020 WL 7490096, at *3 (N.D. Ohio Dec. 21, 2020) (noting that "tax valuations are unreliable measures of sale value"), *aff'd*, 37 F.4th 1101 (6th Cir. 2022).

Before this litigation, the City's land appraiser never before offered opinions "about the cost to acquire real property." DeBord Decl., ¶ 107, Ex. 106, at 62:22-63:2. Never in his career has he recommended to a client a price for a particular piece of property, *id*. 45:16-22. In this case, for purposes of Buckley's acquisition-related computations, "I provide a planning level estimate of what the costs will be in terms of the costs to acquire parcels for [s]iting half of the potential [basin] BMPs . . . ." *Id*. 46:19-23.

In sum, not only are the availability and cost of the potential land acquisitions speculative, it is highly uncertain that the City can even acquire the necessary land. Without securing and identifying the land on which to build 440 bioretention basins, the City cannot begin any of the required permitting and approval processes detailed above. Thus, the $180,540,545 (in land acquisition and transactional costs) and $321,601,606 (for 440 bioretention basins in 2021 dollars) are unripe and impermissible because they are contingent on future events that may never occur. *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997).

b) *Damage Categories 3 and 4*: $1,102,156 to "Plan For" and $83,800,000 to Construct a South Park Water Quality Facility Are Unripe for Determination

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The City's past and future estimated costs to construct the South Park Water Quality Facility ("Facility") are premised on a second unbuilt, yet-to-be-designed public works project in the LDW. The second aspirational public works project would treat stormwater before discharge into the LDW. The City's Fed. R. Civ. P. 30(b)(6) witness testified that details of whether that project will be constructed at all, or at what time or scale, are beyond public inquiry at this stage. DeBord Decl., ¶ 109, Ex. 108, at 108:17-109:13. An award of damages based on an unapproved and potentially unnecessary (or much smaller) Facility is unripe and premature.

Per a July 2013 Consent Decree between the City, Ecology, and EPA, the City must implement a series of upgrades designed to prevent sewer overflows into the LDW. *Id.* at 104:24-109:13; DeBord Decl., ¶ 110, Ex. 109 at Ex. 2-14. While the City proposed project-related designs in 2009, prior to the 2014 Consent Decree, approximately 11 years later, in December 2020, the City submitted a request to Ecology to abandon its prior plans and asked Ecology to "lower[] the Project's performance goals." DeBord Decl., ¶ 109, Ex. 108, at 132:25-133:11, 173:14-174:19; DeBord Decl., ¶ 111, Ex. 110 at 3. To this day, the City and Ecology are in mediation over the scope of the Consent Decree's requirements and the City's request to abandon its design plans. It is unknown how mediation will resolve, and what the City's resulting obligations may be. It is possible no Facility is required, or a much smaller project would suffice. It is impossible to predict the final costs for any Facility, and any attempt to do so here would be nothing more than pure (and improper) speculation. *Bardy v. Cardiac Sci. Corp*., 2014 WL 294526, at *6 (W.D. Wash. Jan. 27, 2014).

Even if the City and Ecology reach an agreement on the requirements of the Consent Decree, the City must still develop and propose design plans for the project and obtain the necessary approvals and permits for the plans. *See* Section I.A.2 *supra*. The City has not analyzed the feasibility of potential Facility design options, nor has it engaged a consultant to assist with the project, ***estimating it could take up to 10 years to design and complete***. DeBord

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Decl., ¶ 109, Ex. 108, at 178:6-180:25. Because the cost of the Facility is contingent on a series of regulatory approvals that may not occur, or result in material changes to project design from what is originally proposed, the City's claimed costs are not ripe for adjudication. *Lyon*, 626 F.3d at 1079 (case unripe when damages contingent on "'future events that may not occur as anticipated, or indeed may not occur at all'") (citations omitted); *New Hanover Twp.*, 992 F.2d at 473 (finding damages unripe when a project could not begin "unless and until" state permits are issued); *Suburban Trails, Inc.*, 800 F.2d at 367.

c) *Damage Category 5*: Any Future Costs Based on Allocation for Cleanup Costs for the LDW Are Speculative.

To the extent that the City seeks damages based on the allocation of future cleanup costs in the LDW, any such award is too speculative because it turns on EPA's unfinished work. *See* DeBord Decl., ¶ 115, Ex. 114, at 2 [LDW Superfund Site Information US EPA] (EPA is overseeing design investigation and planning for cleanup of the upper reach and middle reach of the LDW in 2022-2023). The LDW Record of Decision estimated the cost of the EPA's Selected Remedy would be $342 million. DeBord Decl., ¶ 79, Ex. 78, at iii; *see also* DeBord Decl., ¶ 3, Ex. 2, ¶11. However, the City of Seattle believes that "[b]y the time construction begins, the cost [of the Selected Remedy] is expected to be $500 million or more." DeBord Decl., ¶ 78, Ex. 77, at ¶1. Since 2014, the City of Seattle has participated in an alternative dispute resolution process, called the Duwamish Allocation. *Id.* at ¶¶ 9, 11. The Duwamish Allocation seeks to resolve the participating parties' respective percentages of liability for past and future costs to investigate and remediate contamination in the LDW. *Id.* at ¶ 9. But the City seeks to put the cart before the horse in this lawsuit.

"Damages must be established with reasonable certainty; speculative, uncertain, and conjectural damages are not recoverable." *Bardy*, 2014 WL 294526, at *6; *see also Navellier*, 262 F.3d at 939. On May 18, 2022, the Final Allocation Report ("FAR") was issued in the Duwamish Allocation. DeBord Decl., ¶ 139. While the City has been allocated a portion of the LDW's future cleanup costs, the overall remaining cleanup cost is currently unknown. *See*

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Def. SOF, ¶ ; *see also* DeBord Decl., ¶ 78, Ex. 77, at ¶1 (estimating that the cost of the Selected Remedy is expected to be $500 or more).

Moreover, the cost to remediate the LDW on a per-chemical basis is unknowable with 43 chemicals of concern. At best, the City has a rough estimate of the overall remedial cost from EPA's 2014 Record of Decision—$342 million—before Early Action Area remediation was completed that would cut PCB impacts in half. *See* DeBord Decl., ¶ 79, Ex. 78, at 5, 112; *see also* DeBord Decl., ¶ 89, Ex. 88, at 762:15-22. However, that cost pertains to all 43 chemicals and still needs to be adjusted for the Early Action Areas and final remedy. *See* DeBord Decl., ¶ 79, Ex. 78, at 22, 24. Given that the actual cost of the remedy has yet to be determined, it is speculative to award to the City damages for any share of the LDW cleanup. Without knowing the overall cost for the remaining LDW work and designing the City's PCB-related remediation cost cannot be "established with reasonable certainty." *Bardy*, 2014 WL 294526, at *6. The City's future LDW costs must be dismissed as too speculative and remote.

d) *Damage Category 6*: $53,280,216 in "Enhanced" Source Controls for the Next 25 Years Is Unreliable and Contingent on Client's Hearsay

The City seeks $53,280,216 in "enhanced" stormwater control measures for the next 25 years. DeBord Decl., ¶ 96, Ex. 95, at 16-19. The enhanced costs are extrapolations based on five years of past annual costs from 2013-2019 provided to Mark Buckley by City employee and strategic advisor Kevin Buckley. *Id.* at 17; DeBord Decl., ¶ 107, Ex. 106, at 118:20-122:18. Without any independent investigation and analysis, the City economist accepted the City employee's damages data and the assumed categories of enhanced stormwater control measures for the next 25 years to be "reliable" and "accurate."

> Q: I guess what I'm getting at is you took Mr. [Kevin] Buckley's – you took what this – his [2013-2019 annual stormwater control measure] estimates on this spreadsheet at face value. You didn't request or receive any documents that substantiated the estimates that are on the spreadsheet; is that right?
>
> A: I don't have any other receipts for these cost estimates.

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> Q: Did you ask for them?
>
> A: I asked if these were **reliable** and I could base my estimates on these numbers and I was told yes.
>
> Q: Okay. So you assumed, for the purposes of your analysis in your report, that the numbers on this spreadsheet were **accurate** and you based your analysis on these numbers?
>
> A: I did, yes.

DeBord Decl., ¶ 107, Ex. 106, at 122:2-18 (emphasis added).

But the dutiful acceptance by an expert of a client's damage calculations and assumptions of what will be mandated by regulatory authorities over the next 25 years fall short of the legal standard. An expert who simply accepts the hearsay of a client and regurgitates it as "expert opinion" fails to provide reliable evidence. *Arista Records LLC*, 608 F. Supp. 2d at 424-25 (professor's opinions about client's servers based on client's hearsay without independent evaluation is not reliable); *see also Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1314-15 (9th Cir. 1995) (inadmissible expert testimony does not create genuine issue of material fact). Further, Buckley admitted that he never evaluated whether any of the City's "enhanced" source control measures sought to be funded through this lawsuit are legally mandated at all under the applicable City's permit, or simply voluntary add-on measures that the City desires.

> Q: Is your opinion about the costs for enhanced source control based in any way on an understanding that what the City of Seattle is doing today is not sufficiently meeting its permit obligations under this Phase 1 municipal stormwater permit?
>
> A: My assignment was in no way intended to identify actions that the City needed to undertake. It was purely to estimate the costs of taking the actions that were identified for me.
>
> Q: Whether or not they are required by the permit, correct?
>
> A: Correct. I was not instructed to evaluate how they fit within the existing permit in any way.

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DeBord Decl., ¶ 107, Ex. 106, at 148:12-149:4.

Trapp could point to no communications from EPA or Ecology—the agencies that determine whether the City's source control efforts are adequate—expressing any disapproval with the City's existing Stormwater Source Control Implementation Plan mandated in its permit. DeBord Decl., ¶ 105, Ex. 104, at 199:8-21; 200:3-15. To the contrary, Trapp admitted that EPA and Ecology "reviewed and approved" the City's Source Control Implementation Plan. *Id.* at 199:8-14. In fact, the City itself reports that its existing source control efforts under the existing Source Control Implementation Plan are successful—without any indication that "enhanced" source controls are needed: "Since its start in 2003, Seattle's source control program has been successful in identifying and controlling sources of contaminants to the LDW." DeBord Decl., ¶ 81, Ex. 80, at 3. The City's demand for $53,280,216 is too speculative and remote to serve as a legal basis for recovery.

The City's combined $587,044,307 in damages to construct two planning-level, yet-to-be-designed public work projects are fundamentally unripe because they have not gone through the permitting process and may never be built. The yet-to-be-determined final LDW remedy costs (hypothesized by the City to be $61,560,000), and $53,280,216 over next 25 years for voluntary "enhanced" source control measures are impermissibly speculative. Therefore, Defendants are entitled to summary judgment on all six designated categories of the City's damages.

3. Defendants Are Entitled to Partial Summary Judgment on the City's Request for Future Damages because the City Alleges a Continuing Nuisance.

The continuing tort doctrine bars the City's claim for future damages. The City alleges a continuing nuisance and relied on the continuing tort doctrine in opposing Defendants' motion to dismiss based on the statute of limitations. DeBord Decl., ¶ 85, Ex. 84, at 9 (arguing that "A Continuing Nuisance Is Not Time-Barred"); *id*. at 10 (The City arguing "The nuisance in this case has not been permanently abated. PCBs are emitted every day. Every day they

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invade the City's streets and drainage system and contaminate the City's discharges to the river."); *id*. (The City arguing: "The City also is alleging that contamination in sediments in the East Waterway and Lower Duwamish and in fish and shellfish in the Duwamish is a continuing nuisance."). The City's testimony also makes clear that its public nuisance claim alleges a continuing, and thus abatable, nuisance. For example, the City testified that this case "is due in part to PCBs that went through the City's conveyance system *or are continuing* to go through the City's conveyance system." DeBord Decl., ¶ 76, Ex. 75, at 108:3-8 (emphasis added).

The City's expert Mark Buckley also opined in his report that the City expects efforts to remediate the LDW "to continue for 25 years." DeBord Decl., ¶ 96, Ex. 95, at 16. In his November 2021 report, economist Mark Buckley "estimate[s] the present monetary funding requirements to meet *future costs* associated with" (1) stormwater BMP lifecycle costs, (2) stormwater BMP land acquisition costs, (3) stormwater BMP siting transaction costs, (4) source control program costs, and (5) expanded community outreach program costs. *Id.* at 26 (emphasis added). According to Mr. Buckley's calculations, "[t]hese costs in total sum to $574 million." *Id*.

However, the City's claims for future damages are not recoverable. As the Washington Supreme Court held for continuing torts, "future damages are inherently speculative and may not be awarded" because the "continuing offending intrusion … may be removed or abated at any time." *Woldson v. Woodhead*, 159 Wn.2d 215, 219 (2006). The Court reiterated its prior "disapprov[al] of awarding prospective damages in a continuing nuisance claim." *Id.* at 220 (citing *Doran v. City of Seattle*, 24 Wash. 182, 188 (1901)); *Island Lime Co. v. City of Seattle*, 122 Wash. 632, 636 (1922) (holding successive actions must be brought to recover future damages for continuing nuisance); *Davis v. City of Seattle*, 134 Wash. 1, 6-7 (1925) (an award of prospective damages in a continuing tort claim would deny the defendant the right to mitigate damages by abating the tort); *see also* 4 Modern Tort Law: Liability and Litigation §

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34:19, Relief in nuisance actions—In general—Damages (noting that recovery in a continuing nuisance action is "limited to [damages] which have been sustained up to the time of the suit"); 58 Am. Jur. 2d Nuisances § 229 ("prospective damages may not be recovered where the nuisance is considered to be continuing in character"). Because the City claims that the contamination in the LDW is a continuing nuisance and, as such, future costs may not be awarded. *Woldson*, 159 Wn.2d at 219.

4. The City Cannot Recover Against New Monsanto and Solutia Costs to Investigate and Remediate the LDW that It Cannot Recover Against Old Monsanto.

The City improperly seeks to circumvent its inability to sue Old Monsanto, a party to the CERCLA Allocation for the LDW, by pursuing only New Monsanto and Solutia for costs relating to remediation of the LDW. The City cannot recover its alleged costs relating to remediation of the LDW from New Monsanto and Solutia in this action because the City expressly disavows any such claims against Old Monsanto and any potential liability of New Monsanto and Solutia is entirely derivative of the disclaimed liability of Old Monsanto.

As against New Monsanto and Solutia in this action, the City seeks to recover past "[c]osts incurred by SPU to implement the 2000 EPA/Ecology Administrative Order and amendments thereto from 2000 through Q1 2021" and the "portion of future costs to remediate the Lower Duwamish CERCLA site that is attributable to discharges from the Plaintiff's conveyance systems" in connection with the LDW Administrative Order. DeBord Decl., ¶ 97, Ex. 96, at 2, 3. As of August 9, 2021, the City seeks $9,369,816.58 in past costs to implement the 2000 EPA/Ecology Administrative Order and amendments thereto. *Id.* at 2. The City estimates the future LDW remediation costs will be "$500 million or more"; the City has been allocated a portion of responsibility for those future costs. DeBord Decl., ¶ 78, Ex. 77, at ¶ 8; DeBord Decl., ¶ 140.

The City pleads, "The City is not asserting this claim against Old Monsanto for costs to investigate and remediate contamination in the Lower Duwamish" in its Second Amended

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Complaint. DeBord Decl., ¶ 3, Ex. 2, ¶92. Old Monsanto thus cannot be held liable for such costs in this lawsuit. The City's carve-out of Old Monsanto precludes any recovery of those costs from New Monsanto and Solutia because the City's claims are based solely on Old Monsanto's conduct.

The City's lawsuit is solely about Old Monsanto Company's manufacture, marketing, and sale of PCBs. *Id.* at ¶¶ 3, 30, 93-97, 99-104, 107. The City specifically alleges that the original Monsanto Company's manufacture, marketing, and sale of PCBs created the alleged public nuisance at issue in this lawsuit. *Id.* at ¶93. Neither New Monsanto nor Solutia ever manufactured PCBs. *See id.* at ¶30. ("The corporation now known as Monsanto operates Old Monsanto's agricultural products business. Old Monsanto's chemical products business is now operated by Solutia."); DeBord Decl., ¶ 2, Ex. 1, Appendix A, at ¶6 ("Neither Solutia [or] New Monsanto … ever conducted any operations involving the production, sale, or distribution of PCBs."). Indeed, neither company even existed until after Old Monsanto ceased production of PCBs. *See* DeBord Decl., ¶ 2, Ex. 1, Appendix A, at ¶¶2, 3]. The City does not base its public nuisance claim on any alleged conduct on the part of New Monsanto or Solutia. *See generally* DeBord Decl., ¶ 3, Ex. 2, ¶¶93-107. And, the City has proffered no evidence regarding actions by New Monsanto or Solutia in support of its public nuisance claim.

Old Monsanto is the successor to the original Monsanto Company. *Id.* at ¶28 (alleging that Pharmacia is the successor to the original Monsanto Company); DeBord Decl., ¶ 2, Ex. 1, Appendix A, at ¶3 ("[I]n March 2000, Old Monsanto changed its name from Monsanto to Pharmacia Corporation, k/n/a Pharmacia LLC[.]"). By contract, Solutia and New Monsanto agreed to indemnify Old Monsanto for its liabilities relating to the original Monsanto's historical PCB business. As part of Solutia's emergence from bankruptcy in 2008, Solutia and New Monsanto entered into certain agreements concerning the parties' responsibilities for tort and environmental claims. DeBord Decl., ¶ 3, Ex. 2, at ¶ 33; DeBord Decl., ¶ 2, Ex. 1, Appendix A, at ¶ 7. Specifically, New Monsanto agreed to indemnify Solutia in relation to

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"Legacy Tort Claims" as defined by terms of those agreements. DeBord Decl., ¶ 137, Ex. 136; DeBord Decl., ¶ 139, Ex. 138. In addition, New Monsanto owes certain indemnity obligations to Old Monsanto associated with claims related to PCBs.

The fact that the City pursues New Monsanto and Solutia, but not Old Monsanto, in its claim for remediation of the LDW is not meaningful. The City has no direct claim for public nuisance, based on Old Monsanto's manufacture, marketing, and sale of PCBs, against companies, New Monsanto and Solutia, that did not even exist at the time Old Monsanto ceased production of PCBs. Rather, the City's claim for nuisance is based solely on the conduct of Old Monsanto, as the successor to the original Monsanto Company. DeBord Decl., ¶ 3, Ex. 2, at ¶ 28. Because any liability of New Monsanto and Solutia relating to remediation of the LDW would be derivative of Old Monsanto's liability, and the City disavows any claim against Old Monsanto for those costs, the City's claims against New Monsanto and Solutia fail as a matter of law.

5. Defendants Are Entitled to Partial Summary Judgment on the City's Claimed Future Costs for Remedial Actions Not Previously Approved By EPA.

Certain of the City's claimed future damages are barred for the additional reason that the they include claims for response costs that fall outside of the permissible costs allowed to the City under CERCLA, 42 U.S.C. §§ 9601 *et seq*. These costs are either expressly omitted or not otherwise contemplated by the EPA's Selected Remedy for the LDW Superfund Site. Under federal law, EPA has complete control over the response actions for the Site that prevents any other party from taking unapproved response actions. The City is a potentially responsible party ("PRP") under CERCLA and must therefore obtain EPA's approval before taking any remedial actions within the Lower Duwamish Superfund site. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020). Because the City has not obtained prior EPA approval, Defendants are entitled to summary judgment on the City's claim for the alleged costs of these actions.

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a) CERCLA Requires EPA Approval for Any Remedial Action Taken At An Existing Superfund Site

CERCLA was enacted to address "the serious environmental and health risks posed by industrial pollution," and to ensure that the costs of hazardous waste cleanup "were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009). As part of any cleanup process, EPA first conducts "a remedial investigation and feasibility study to assess the contamination and evaluate cleanup options." *Atl. Richfield Co.*, 140 S. Ct. at 1346 (citing 40 C.F.R. § 300.430. Once EPA initiates such an investigation for any site, "no potentially responsible party may undertake any remedial action … unless such remedial action has been authorized." 42 U.S.C. § 9622(e)(6). CERCLA defines "remedial action" to include:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, *to prevent or minimize the release of hazardous substances so that they do not migrate* to cause substantial danger to present or future public health or welfare of the environment.

42 U.S.C. § 9601(24) (emphasis added).

The Supreme Court states this is a "broad" definition. *Atl. Richfield Co.*, 140 S. Ct. at 1354. It includes "actions at the location of the release" such as confinement, neutralization, "cleanup of released hazardous substances and associated contaminated materials," and "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." 42 U.S.C. § 9601(24).

The EPA's singular authority to approve response actions at a Superfund site was upheld by the U.S. Supreme Court in *Atlantic Richfield*. There, Atlantic Richfield was the owner of a copper smelter that was the subject of an EPA-approved cleanup plan for arsenic and lead under CERCLA that was deemed "protective of human health and the environment." *Atl. Richfield Co*, 140 S. Ct. at 1345-48. Nonetheless, a group of landowners sued Atlantic Richfield in state court, asserting state law claims for nuisance, trespass, and strict liability.

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Id. at 1345, 1347. The landowners sought "restoration damages" under Montana law, which are intended to provide for the rehabilitation of a contaminated property and require a demonstration that the contamination is "temporary and abatable." *Id*. at 1347. Among other claims, the landowners sought (1) "a maximum soil contamination level" lower than that set by EPA, (2) excavation of contaminated soil in amounts greater than those chosen by EPA, and (3) the creation of an underground barrier for the purpose of capturing and treating contaminated groundwater. *Id*. at 1348.

The Court held that plaintiff landowners were PRPs and therefore had to obtain EPA approval prior to carrying out any remedial actions at the Superfund site. *Id*. at 1352-55 (citing 42 U.S.C. § 9622(e)(6)). This was not a matter of claim preemption, per the Court, but rather an application of CERCLA's requirement that subsequent remedial work undertaken by a potentially responsible party at a Superfund site first obtain EPA approval. *Id*. at 1355. "[O]nce a plan is selected, the time for debate ends and the time for action begins." *Id*. at 1346. According to the Court, Congress "envisioned" that the EPA approval process "could ameliorate any conflict" between those seeking additional remedial work, and "EPA's Superfund cleanup." *Id*. at 1357.

b) *Atlantic Richfield* Entitles Defendants to Summary Judgment on the City's Claimed Future Remedial Actions within the Lower Duwamish Superfund Site

It is undisputed that City is a potentially responsible party under CERCLA for the Lower Duwamish Superfund Site. DeBord Decl., ¶ 77, Ex. 76 at 3, 36 (defining "Participating Party" as "a PRP that signs this MOA," and later identifying the City of Seattle as a Participating Party signatory); *see also* DeBord Decl., ¶ 76, Ex. 75, at 109:2–110:3. Moreover, the LDW Superfund Site—like the Atlantic Richfield Superfund Site—is the subject of an EPA cleanup plan, the Record of Decision for which also notes that EPA's "Selected Remedy is protective of human health and the environment." DeBord Decl., ¶ 79, Ex. 78, at iii. Accordingly, the City must obtain EPA approval for any remedial actions it intends to take at

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the Site. *See Atl. Richfield Co*, 140 S. Ct. at 1355.

Here, the City attempts to couch a series of obvious remedial actions as "future damages." Any such "future damage" claims must be dismissed. First, the City claims future costs "*to remediate the Lower Duwamish CERCLA site* that is attributable to discharges from the [City's] conveyance system" and "[m]easures to treat stormwater to reduce PCBs discharged to the Lower Duwamish CERCLA site through the [City's] MS4." DeBord Decl., ¶ 97, Ex. 96 (emphasis added). The City cannot recover such undefined "future costs to remediate the Lower Duwamish CERCLA site." *Id.*; 42 U.S.C. § 9622(e)(6). These are precisely the type of unauthorized remedial actions that are barred by *Atlantic Richfield*.

Second, the City seeks costs for "[m]easures to mitigate the impact of the public nuisance on people who harvest resident seafood from the Lower Duwamish." DeBord Decl., ¶ 97, Ex. 96. The City admits these are response costs for the Site. The City Fed. R. Civ. P. 30(b)(6) witness, Laura Wishik, testified that "people who are impacted by the public nuisance that is due to Monsanto's PCBs in the Lower Duwamish" must either "continue to eat resident seafood that's contaminated with PCBs," or "refrain from eating it because of contamination." DeBord Decl., ¶ 76, Ex. 75, at 113:14–114:11. When subsequently asked about the anticipated costs in connection with "any action the City considers appropriate for remediation," Ms. Wishik deferred to City experts on public nuisance mitigation measures. *Id*. at 126:5–127:17.

The City then designed Mark Buckley to provide this analysis. He testified that he could not capture "all of the costs to abate the nuisance and to mitigate the harm pending its abatement." DeBord Decl., ¶ 96, Ex. 95, at 3. One of his uncalculated additional costs was "community mitigation efforts for public health purposes," which includes "measures … to mitigate the harm from the public nuisance" on those that consume resident seafood from the LDW. *Id.*[16] As a matter of law, any such measures are response actions for the LDW and the

[16] The circular inability of the City and its experts to properly define and evaluate its "mitigation measures" is fatal to its claim.

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fish residing there and are part of EPA's remedy. The City may not interfere with its own claimed remedy.

The City relatedly claims $19,000,000 in future "cost to expand existing community programs to reach additional ethnic groups and further reduce public health risk from unsafe fish consumption in the Lower Duwamish." DeBord Decl., ¶ 96, Ex. 95, at 3. In his report, Dr. Buckley describes extensive "Community Outreach for Public Health" that discusses fishing, angler activity, and outreach programs, all of which concern "PCB-contaminated seafood from the Lower Duwamish." *Id*. at pp. 23–25. CERCLA actions, however, must be consistent with National Contingency Plan regulations, which already provides for community outreach. *See* 40 C.F.R. § 300.700(c) , 40 C.F.R. § 300.430(c)(2) ("The lead agency shall provide for the conduct of the following community relations activities … prior to commencing field work for the remedial investigation[.]"). To this end, the Record of Decision for the Lower Duwamish already "includes addressing environmental justice concerns before, during, and after implementation of the cleanup remedy." DeBord Decl., ¶ 80, Ex. 79, at 21. Section 13.2.8 of the Record of Decision explicitly identifies certain actions to be taken with respect to these community concerns, including "to learn more about the affected community … to enhance outreach efforts," consultation with affected tribes, and "reduce impacts of the cleanup on residents." *Id*. As a result, Dr. Buckley admits that the community programs he identifies "are outside the scope of the identified [Community Health Advocate] costs as well as EPA's program." DeBord Decl., ¶ 96, Ex. 95, at 25.

These are clearly "actions at the location of the release" in the Superfund site, which the City claims are needed to protect the public health. *See* 42 U.S.C. § 9601(24). They are precisely the type of actions that the Supreme Court in *Atlantic Richfield* confirmed a potentially responsible party cannot undertake without EPA approval. *Atl. Richfield Co.*, 140 S. Ct. at 1352. Defendants are entitled to summary judgment on the City's request for these items of damage.

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6. Defendants Are Entitled to Summary Judgment on the City's Damages Claims that Are Preempted by CERCLA or Would Effect an Improper Double Recovery.

This case is one of two interrelated proceedings to allocate the costs of abating the chemicals released into the LDW over the long history of its industrial use by countless parties, none of which are present in this case except for the City itself and Old Monsanto. The first is an allocation proceeding involving the 44 potentially responsible parties ("PRPs") for those response costs, where the PRPs have agreed in a joint Memorandum of Agreement ("MOA") to allocate a broad range of costs in respect of the LDW, including but not limited to response costs, with the assistance of an allocator ("Allocation Proceeding"). *See* Defendants' statement of facts, *supra*, at ¶¶ 85, 86, 87, 88, 89, 92 ; DeBord Decl., ¶ 78, Ex. 77, at ¶¶9, 11; DeBord Decl., ¶ 82, Ex. 81, at ¶3; DeBord Decl., ¶ 77, Ex.76, at 2. The second is the instant case filed by the City against Defendants, one of which manufactured some but not all of the PCBs the City alleges were released to the LDW, including by the City itself. The City attempts to circumvent the first Allocation Proceeding, asking this Court to reallocate its anticipated allocated share of the future response costs from the parallel Allocation Proceeding to New Monsanto and Solutia, where the City and Old Monsanto were also parties to the mediation and MOA, and where their shares of future LDW Remediation Costs have been allocated. See Defendants' statement of facts, *supra*, at ¶¶ 85, 87, 93, 95; DeBord Decl., ¶ 78, Ex. 77, at ¶¶9, 10, 11; DeBord Decl., ¶¶ 139, 140.

a) CERCLA Preempts the City's Attempt to Use this Nuisance Action to Shift the Response Costs Allocated to the City onto Defendants.

The law and equity do not permit the City's attempted end-run around the Allocation Proceeding. The City may not recover response costs that are allocated under CERCLA, 42 U.S.C. § 9601 *et seq.*, and that it could not recover as a PRP, by recasting those costs as a public nuisance claim in a lawsuit against Defendants. Congress provided a *comprehensive*

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scheme in CERCLA through which a responsible party may seek contribution for response costs from other responsible parties. Allowing the City to file state law claims to achieve a different allocation than that permitted under CERCLA (here, as implemented through the nine-year structured mediation through the multi-party Allocation Proceeding) would conflict with Congress' intent.

Claims arising under state law are preempted by federal law under the Supremacy Clause of the U.S. Constitution where they would "interfere[] with or [are] contrary to federal law." *Free v. Bland*, 369 U.S. 663, 666 (1962). State law claims are preempted where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

CERCLA creates a system for identifying PRPs and apportioning liability among them through a carefully crafted settlement scheme that allocates response costs among those who have a legal duty to clean-up an impacted site. *See Appleton Papers Inc. v. George A. Whiting Paper Co.*, 901 F. Supp. 2d 1113, 1117 (E.D. Wis. 2012), *aff'd sub nom. NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir 2014); *Calabrese v. McHugh*, 170 F. Supp. 2d 243, 270 (D. Conn. 2001). Allowing a party "to obtain through state law claims what they failed to achieve through CERCLA would undermine CERCLA's complex scheme for apportioning the expenses that arise from a cleanup action." *Appleton Papers Inc.*, 901 F. Supp. 2d at 1115.

Courts that have addressed such common-law claims in the context of CERCLA actions have held that where the plaintiff had a legal duty to clean-up a contaminated site, recovery based on state law claims is foreclosed. *Id.* at 1117 (denying state law counterclaims for negligence and public nuisance seeking CERCLA damages); *Calabrese*, 170 F. Supp. 2d at 270 (foreclosing state law claim for unjust enrichment). "[A] state law claim, however styled, that disturbs that statutory balance would conflict with the extensive scheme Congress has created." *Appleton Papers Inc.*, 901 F. Supp. 2d at 1117. This is because "regardless of

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how the damages arose, they are still CERCLA damages." *Id.* In other words, "[i]f the funds were expended pursuant to CERCLA, and if CERCLA itself provides a scheme for reapportioning those funds, then allowing a state law claim to essentially re-reapportion those funds in a way CERCLA did not intend would pose a conflict." *Id*. at 1115.

Thus, the City may not recover here the costs it incurred pursuant to its liability as a PRP under CERCLA; those costs were apportioned to the City based upon a determination that it had a legal duty to clean up the LDW and a holistic analysis of all the facts, discharges and conditions in the LDW. Put another way, the City cannot recover damages that fall within the definition of "Claims Addressed in the Allocation Process" under the MOA – namely the City's past and future costs for source control, its past costs for implementation of the AOC and the liability share attributed to it under the Allocation process. *See* § IV.C.6.b) below, discussing the City's claimed past and future costs that fall within the definition of "Claims Addressed in the Allocation Process."

Allowing the City to recover these allocated CERCLA costs and liabilities through a public nuisance claim would undermine Congress's intent to limit environmental cleanup liability to certain categories of persons under CERCLA and to apportion fault according to those categories. *See Members of Beede Site Grp. v. Fed. Home Loan, Mortg. Corp*., 968 F. Supp. 2d 455, 463 (D.N.H. 2013) ("Ultimately, Congress made a political determination to exclude transporters of petroleum from liability under CERCLA, and holding such entities liable under state law for costs that were incurred under CERCLA would undermine CERCLA's scheme for apportioning environmental clean-up costs."). Thus, the City's attempt to reallocate its share of LDW CERCLA liabilities to Defendants through litigation of a state law nuisance claim is preempted.

b) CERCLA Also Prohibits the Double Recovery of Costs Sought by the City in this Litigation, as Does Washington Law

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Through this lawsuit for public nuisance, the City seeks to recover CERCLA response costs for the past and future investigation and remediation of the LDW – exactly the same costs the Allocator allocated among the 44 PRPs, including Old Monsanto, in the parallel proceeding under the MOA. The City seeks to recover past and future costs for implementation of the EPA Administrative Order of Consent ("AOC") and stormwater source control. However, the City is not permitted to recover CERCLA damages because it has obtained (or will obtain) reimbursement of these costs from other PRPs and from grants, and such double recovery is prohibited. CERCLA bars a person from obtaining compensation twice for the same costs or damages:

> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter *shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law.*

42 U.S.C. § 9614(b) (emphasis added).

The City's liability for the LDW Superfund Site was allocated pursuant to CERCLA as part of the Allocation Proceeding. DeBord Decl., ¶ 140. Old Monsanto —one of the defendants in this action—is also a party to the Allocation Proceeding, and similarly was allocated some liability for the LDW Superfund Site pursuant to CERCLA. DeBord Decl., ¶ 141. To determine the amount to be allocated to each PRP in the Allocation Proceeding, the Allocator considered all legal and equitable factors under CERCLA, the state law Model Toxics Control Act and any other applicable law or legal principle that, in the judgment of the Allocator, would be considered by any court in apportioning or allocating liability and costs for the LDW Superfund Site. DeBord Decl., ¶ 77, Ex. 76, at 16. As such, the Allocator considered all relevant legal and equitable factors in allocating liability between the City and Old Monsanto [17] in relation to the LDW Superfund Site.

[17] Solutia Inc. and New Monsanto are merely indemnitors of Pharmacia, the successor to the original

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Dissatisfied with the result, the City seeks an allocation "do over." It seeks to recover costs within the province of the Allocation Proceeding in this litigation, asking this Court to condone a duplicative assessment, as the finder of fact must apply for a second time the same legal and equitable principles already considered by the Allocator.

The law does not allow the City to undo the decision of the Allocator to permit the City to have a second bite of the apple. The undisputed facts demonstrate that the costs allocated in the Allocation Proceeding are the same as the costs being sought by the City in this litigation. The City is precluded from recovering these amounts a second time in this lawsuit. *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1133 (D. Or. 1996), *aff'd in part, remanded in part*, 207 F.3d 1177 (9th Cir. 2000) ("CERCLA expressly prohibits double recovery for response costs."); *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021-22 (9th Cir. 1993) ("CERCLA further precludes a plaintiff from recovering cost of repair damages under both CERCLA and state law."); *State v. Monsanto Co*., 274 F. Supp. 3d 1125, 1133 (W.D. Wash. 2017), *aff'd*, 738 F. App'x 554 (9th Cir. 2018) ("[w]hile Washington may not recover damages under CERCLA for the same removal costs or damages sought in this state law suit, 42 U.S.C. § 9614(b), it is free to seek relief through state law rather than through CERCLA"); *K.C.1986 Ltd. P'ship v. Reade Mfg*., 472 F.3d 1009, 1017 (8th Cir. 2007) ("[i]mportantly, CERCLA articulates a policy against double recovery). *See* 42 U.S.C. § 9614(b) (prohibiting duplicate recovery for the same removal costs). Stated differently, the State "cannot make a profit on the contamination." *See Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006) (precluding party to CERCLA action from recovering previously reimbursed cleanup costs), *rev'd on other grounds sub nom.*, *Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312 (5th Cir. 2015); *Lockheed Martin Corp. v. United States*, 664 F. Supp. 2d 14, 19 (D.D.C. 2009) (examining numerous cases in which courts had applied 42 U.S.C. § 9614(b) and stating that

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Monsanto. As such, the City cannot establish any right to costs other than through Pharmacia. *See* § IV.C.4 above.

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"[i]n each instance, the court applied section 114(b) to reject the plaintiff's claim because it did not want the plaintiff to receive a windfall from its environmental cleanup") *See also United Alloys, Inc. v. Baker*, 2011 WL 2749641, at *29 (C.D. Cal. July 14, 2011) ("CERCLA preempts [plaintiff's] right to recover costs under [state law] in addition to CERCLA.")

Specifically, the City may not recover any cost that falls within the definition of "Claims Addressed in the Allocation Process", which are defined by the MOA as:

> (1) *costs to implement the AOC*; (2) costs incurred to perform *work required by EPA or Ecology in preparation for the Lower Duwamish Waterway ROD* or Consent Decree between completion of the Feasibility Study and issuance of the Consent Decree for the Site; and (3) *costs to perform actions required under the Site ROD or Consent Decree*, including costs incurred as a result of contamination spread from EAAs and including costs of monitoring to assess compliance with the ROD or Consent Decree; except that "Claims Addressed in the Allocation Process" shall not include (1) costs attributable to the cleanup or investigation of EAAs, regardless of whether such EAAs have been designated pursuant to Section 5.3.1; (2) costs for work required by NPDES permits or for compliance with regulatory programs other than CERCLA and MTCA; and (3) costs for investigations and cleanups performed under MTCA not related to implementing the Lower Duwamish Waterway AOC, ROD or Consent Decree.

DeBord Decl., ¶ 77, Ex.76, at 2 (emphasis added).

Several of the categories of costs the City now seeks fall squarely within this definition, and the City has not attempted to reduce any of these costs in light of its status as a PRP in the Allocation Proceeding. DeBord Decl., ¶ 76, Ex. 75, at 109:2–110:3. Specifically, the City seeks $9,369,816.58 in past costs relating to the implementation of the AOC. DeBord Decl., ¶ 97, Ex. 96, at 2. The City also seeks to recover the share it was attributed through the Allocation Proceeding. *Id.* at 3; DeBord Decl., ¶140. It is indisputable that these categories of costs fall within the definition of "Claims Addressed in the Allocation Process." The City's claims for these costs must fail because the City may not obtain double recovery.

The City also seeks to recover $11,625,577.57 in past source control costs for the Lower Duwamish Site, as well as more than $53 million in future costs for the continuation of

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its source control program for a 25-year period (which the City contends is necessary to prevent recontamination of the LDW), plus over a half-billion dollars to build public works projects to control stormwater to "comply with the ROD." DeBord Decl., ¶ 96, Ex. 95, at 16-19; DeBord Decl., ¶ 97, Ex. 96, at 2; DeBord Decl., ¶ 98, Ex. 97, Opinion 4, at 25. The Record of Decision issued by the EPA in relation to the LDW CERCLA site specifies that source control is necessary in order to prevent recontamination above specified sediment cleanup objectives and remedial action levels ("RALs") prior to the implementation of the Selected Remedy. DeBord Decl., ¶ 79, Ex. 78, at 12. The City admits that the goal of its source control plan is to minimize the potential for waterway sediments to exceed the RALs set by EPA. DeBord Decl., ¶ 81, Ex. 80, at 1. As such, both the past and future stormwater source control costs at issue are "Claims Addressed in the Allocation Process" because they are "costs to perform actions required under the Site ROD." As such, the City cannot attempt to recover these costs here without violating CERCLA's prohibition against double recovery.

Further, the City seeks the over $320 million in costs for the future construction, operation and maintenance costs 440 bioretention basins, and over $180 million for the future land acquisition necessary for 440 bioretention basins (which includes $5,258,462 in associated staff, property management, and transaction-related costs). *See* Table 1 at Nos. 1 & 2. The City's expert, Michael Trapp, admits that these costs are directly required to comply with the Record of Decision. DeBord Decl., ¶ 98, Ex. 97, Section 3.4; Table 3-7, at 39. Thus, but the City's own admission, these are "costs to perform actions required under the Site ROD" and fall squarely within the definition of "Claims Addressed in the Allocation Process". Thus, the CERCLA prohibition on double recovery prohibits the City from seeking to recover these costs against Defendants in this litigation.

Finally, the City claims over $5.8 million for source control and other costs it allegedly incurred in relation to the LDW for which it has admittedly received funding from the Department of Ecology. DeBord Decl., Ex. ¶ 113 and Ex. 112. Specifically, the City's Fed.

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R. Civ. P. 30(b)(6) witness, Laura Wishik, testified that the City has received $2,044,028.49 attributable to in-water investigation of the LDW, DeBord Decl., ¶ 76, Ex. 75 at 244:9–20, and $3,791,027.94 in grant funding for source control efforts, *id.* at 242:19–243:3; 245:7-12, 242:25-243:12. The City admittedly has not excluded the $5.8 million it received in State funding from its damage claims in this case. *Id.* at 242:19-243:12; 244:15-245:20. The City has not reduced its claims against Defendants in light of these grants, however, claiming—without explanation—that doing so "wouldn't be appropriate". *Id.* at 243:4 – 12; 244:15 – 245:20. Contrary to the City's contentions, courts have expressly found that adjustments for such funding are, in fact, appropriate.

Specifically, courts have precluded the recoverability of such costs in contribution actions, on the basis that permitting them would provide a financial windfall. *See Port of Ridgefield v. Union Pac. R.R.*, 2019 WL 479470, at *17 (W.D. Wash. Feb. 7, 2019) (finding that plaintiff could not recover against defendant in a MTCA contribution action, as all costs it had incurred had been funded by grants or loans from Ecology, and defendant had agreed to pay Ecology an amount that was equivalent to the only portion of that funding that had not been forgiven); s*ee also Seattle Times Co. v. LeatherCare, Inc.*, 337 F. Supp. 3d 999, 1072 n.74 (W.D. Wash. 2018) (outlining factors that courts have considered in analyzing CERCLA contribution claims, including "the potential that a plaintiff might 'make a profit on the contamination' at the expense of another PRP" (citing *Vine St., LLC*, 460 F. Supp. 2d at 765), *aff'd*, 829 F. App'x 176 (9th Cir. 2020). While the City's claims are not framed as a contribution action, the same rationale applies here—the Court cannot allow the City to profit from its alleged injuries, and thus any costs for which it received grant funding must be prohibited.

Defendants anticipate that the City will attempt to explain its refusal to reduce its claimed costs by the $5.8 million in grant funding it has received from the State by invoking the collateral source rule. Where applicable, the collateral source rule provides a bar to the

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admissibility of evidence of payments a plaintiff has received for an injury from sources independent of the tortfeasor to reduce the recoverable damages. *Stone v. City of Seattle*, 64 Wn.2d 166. 172 (1964)). The collateral source rule is not applicable to the City's receipt of state funding as a matter of law, and its invocation would be improper.

First, the collateral source rule does not permit the City to recover costs that it has never incurred. The City does not claim that it has sustained any physical property damage caused by the presence of PCBs in its conveyance systems. DeBord Decl., ¶ 76, Ex. 75 at 227:9-228:4. Instead, in opposition to Defendants' Motion to Dismiss, the City identified "costs" to investigate, remediate, and abate the alleged nuisance as its alleged injury. DeBord Decl., ¶ 85, Ex. 84, at 21-22. In ruling on Defendants' Motion to Dismiss, the Court recognized that the City's public nuisance claim is "grounded on the financial loss that Seattle has suffered (and continues to suffer) due to the costs of investigating and cleaning up PCB contamination in its waterways." DeBord Decl., ¶ 86, Ex. 85, at 7-8. As the City seeks to recover its alleged financial loss, it sustained no "loss" to the extent it has received funding from third parties to cover its costs. In other words, the City cannot recover costs for which it has not suffered out-of-pocket loss. *See, e.g., Basham v. Clark*, 115 Wn. App. 1024, 2003 WL 254309, at *11-12 (Feb. 6) (barring recovery for plaintiff's wage losses because he received his full salary during time off due to injury), *review denied*, 150 Wn.2d 1011 (2003); *Meyer v. Dempcy*, 48 Wn. App. 798, 802-03 (dismissing claim for alleged "loss" based on exposure to liability that claimant was never called on to pay because of payment by third party), *review denied*, 109 Wn.2d 1009 (1987); *Bowman v. Whitelock*, 43 Wn. App. 353, 358b (1986) (permitting offset of damage claim for lost future income based on claimant's receipt of early retirement bonus to prevent award of damages for income she had not lost).[18]

Second, the City cannot invoke the collateral source rule for the additional reason that

[18] In federal diversity actions, the collateral source rule of the state governs. *In re Air Crash Disaster Near Cerritos*, 982 F.2d 1271, 1277 (9th Cir. 1992).

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it cannot establish that it received the funds to compensate it for harm caused by Defendants. *Basham*, 2003 WL 254309, at *12 ("For the collateral source rule to apply, the plaintiff must have received the payment because of the injury for which the defendant is being held responsible."). To the contrary, the City's Fed. R. Civ. P. 30(b)(6) witness testified the City admittedly received the state funding to address constituents other than PCBs. DeBord Decl., ¶ 76, Ex. 75, at 240:6–241:4. As the City did not receive the funds because of the alleged injury for which it seeks to hold Defendants responsible, the City's claims are subject to an offset by the amounts it has received. *See, e.g., Bowman*, 43 Wn. App. at 357-58 (permitting offset of damage claim for lost future income based on claimant's receipt of early retirement bonus because she received the bonus payment, not because of her alleged injury and disability, but because she agreed to retire early.); *Basham*, 2003 WL 254309, at *12 ("Mr. Basham received his salary because of his employment with Eastern Washington University, not because of his injury. The court thus did not abuse its discretion by concluding the collateral source rule does not apply. The court properly concluded the Bashams' wage-loss claim would be offset by the amount of pay he actually received.").

Finally, the City cannot invoke the collateral source rule because it only "forbids consideration of payments received by the plaintiff from sources wholly independent of and collateral to the wrongdoer" in the lawsuit. *Meyer*, 48 Wn. App. at 802. In the State's lawsuit, which Defendants paid $95 million to settle, the State claimed that "[it] has spent and will continue to spend many millions of dollars to remediate Monsanto's PCBs, including through grants to local governments." DeBord Decl., ¶ 102, Ex. 101, at ¶20. Defendants should not be impermissibly called upon to pay twice, in whole or in part, for the City's alleged costs in this action.

7. Defendants Are Entitled to Partial Summary Judgment on the City's Claims For Damages or Abatement Costs as the City Lacks Evidence Segregating the Portion of those Damages or Costs Attributable to Defendants.

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The City's claims for its alleged costs due to PCBs in the LDW have an undisputed flaw that is fatal to its claim – there is no evidence that allows the finder of fact to segregate costs arising from the presence of PCBs that Defendants manufactured, from the costs arising from the many other chemicals of concern present in the LDW, or from the presence of PCBs manufactured by a third-party. Such segregation is required by Washington law. Further, the City has no evidence showing that its remedial efforts to date, or its proposed future abatement efforts, are directed solely to the alleged presence of the Defendants' PCBs.

a) The City Admits It Has Not Segregated the Damages or Abatement Costs Allegedly Due to Old Monsanto's PCBs as Required by Washington Law.

The City admits that it made no effort to determine or segregate its claimed damages or abatement costs alleged to be attributable to PCBs manufactured by Defendants. Instead, the City improperly claims all of its remediation and other proposed costs for the LDW, past and future, from Defendants despite the fact that PCBs are only one of forty-one EPA-identified chemicals of concern in the LDW and the EPA's response action is directed to all of these contaminants, not just the Defendants' PCBs. DeBord Decl., ¶ 79, Ex. 78, at 25. David Schuchardt, the Strategic Advisor at City Public Utilities for Seattle, admitted during his deposition that remediating the LDW involves numerous chemicals of concern and that the City's cleanup costs related to the LDW are attributable to all of the chemicals of concern within the LDW, not just PCBs. DeBord Decl., ¶ 116, Ex. 115 at 77:3-21; 119-9-24; 145:22-146:16. Similarly, Mr. Schuchardt admitted that monitoring in the upper reaches of the LDW will be required for any chemical of concern that exceeds threshold values, not just PCBs. *Id.* at 307:23-308:20. Finally, the City has not attempted to determine what portion of the cleanup costs are directly related to PCBs, as compared to the other contaminants in the waterway, nor has the City identified areas within the LDW where PCBs are the only contaminant of concern. DeBord Decl., ¶ 76, Ex. 75 at, 67:12-20; 68:7-18; DeBord Decl., ¶ 105, Ex. 104, at 145:3-9, 145:18-22, 144:23-145:2; DeBord Decl., ¶ 107, Ex. 106, at 96:18-97:17. That is exactly why

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EPA rejected attempts to classify PCBs as the primary risk driver of the clean-up of the LDW. DeBord Decl., ¶ 79, Ex. 78, at 111-112. Nonetheless, the City and its experts continue to ignore these facts and fail to distinguish and describe the costs related to remediating PCBs in the LDW from the other contaminants of concern.

The City and its experts similarly failed to distinguish between PCBs manufactured by Defendants and those manufactured by someone else. For example, the City's designated person most knowledgeable under Federal Rule of Civil Procedure 30(b)(6), and its attorney of record in this case—Laura Wishik—admitted the City has done nothing to differentiate between Old Monsanto PCBs and non-Old Monsanto PCBs in its damage models, nor has it made any effort to allocate clean-up costs according to those entities that released PCBs. DeBord Decl., ¶ 76, Ex. 75 at 67:12-20; 68:7-18.

This undisputed evidence cannot be controverted. Yet the City and its experts continue to argue that Defendants must reimburse the City for *all* of the clean-up costs for *all* of the contaminants of concern within the LDW. For example, Michael Trapp, the City's construction design, planner, and damages expert, claimed that Defendants were solely responsible for the costs of a future stormwater source-control public works project. But he was forced to admit that he made no attempt to mitigate the effects of any of the 41 other chemicals of concern in forming his opinions about what the City needs to do to clean up the LDW. DeBord Decl., ¶ 105, Ex. 104 at 145:3-9. Further, he testified that examining the effect of any other chemical other than PCBs "was beyond the scope" of his assignment. *Id*. 145:18-22. Finally, Mr. Trapp admitted that other than PCBs, he had not mapped the data for the other contaminants of concern in the LDW Record of Decision. *Id*. 144:23-145:2.

Likewise, Mark Buckley, the City's "environmental economist," admitted he simply used the cost data that was provided to him, and did not factor into his opinions whether those costs would also address the 41 other contaminants of concern in the LDW. DeBord Decl., ¶ 107, Ex. 106 at 96:18-97:17. This is because Buckley's "assignment" in this case did not

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include investigating the benefits of Mr. Trapp's best management practices, beyond PCB capture and treatment function. *Id*. 97:8-17; 97:25-98:3. Finally, Mr. Buckley admitted that he did not allocate any of the clean-up costs he estimated to contaminants other than PCBs. *Id*. 102:21-25. In short, Mr. Buckley adopts a full-throated, but faulty endorsement of the City's narrative that Defendants must pay all of the costs for the various remedial measures Mr. Trapp outlined, without accounting for how those costs could and must be apportioned.

Washington law requires entry of summary judgment in these circumstances. Under Washington law, defendants alleged to have contributed to pollution of land or a water body "cannot be held jointly liable" and plaintiff bears the burden of proving the damages caused by each individual defendant. *See, e.g., Snavely v. City of Goldendale*, 10 Wn.2d 453, 458-59 (1941) (those contributing to pollution of a stream "cannot be held jointly liable"); *Maas v. Perkins*, 42 Wn.2d 38, 43 (1953) (liability for pollution of land is several and plaintiff bears burden of segregating damages caused by each defendant). If the plaintiff lacks evidence segregating the damages caused by the individual defendant, summary judgment is required. *Maas*, 42 Wn.2d at 43 (affirming judgment for defendants alleged to have polluted plaintiff's land because plaintiff lacked evidence segregating damages caused by each defendant). Here, the City concedes that it lacks evidence segregating the damages allegedly caused by PCBs manufactured by Old Monsanto. Under Washington law, that failure of proof entitles Defendants to summary judgment. *Id.*

While Washington courts have permitted shifting the burden of segregating damages to defendants in certain contexts, the Washington Supreme Court has expressly rejected such burden-shifting where, as here, the plaintiff also bears some fault for the pollution. *Scott v. Rainbow Ambulance Serv., Inc*., 75 Wn.2d 494, 497-98 (1969) (burden of proof for segregating fault cannot be shifted to defendant(s) where plaintiff is also at fault; granting judgment for defendant where at-fault plaintiff admitted inability to segregate damages). Here there can be no genuine dispute that the City bears some fault for the presence of contaminants in the LDW.

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Indeed, it is undisputed that the City is identified as a Potentially Responsible Party by EPA for the release of contaminants into the LDW. DeBord Decl., ¶ 77, Ex. 76. Several specific examples further establish the City's role in contaminating the LDW.

First, in 1983 King County Metro Transit Department ("Metro") noted that PCBs were being discharged from the City's electrical utility (Seattle City Light's) Georgetown Steam Plant because "former drainage from the Seattle City Light Georgetown Steam Plant passed through a flume that combined with the Boeing Field runoff to enter Slip 4 in the Duwamish River." DeBord Decl., ¶¶ 117-119, Exs. 116-118. Metro included samples taken from the LDW showing the presence of PCBs. *Id*.

Second, the City improperly stored, repaired, and disposed of electrical transformers used in its electrical power system, which were maintained and stored at its South Service Center near the LDW. For example, in November 1976 Metro evaluated the City's "PCB Handling Procedures" at the South Service Center and found that "all capacitors presently in service contain PCB's." Further, Metro noted that a City Light employee, Don Sherwood, "recalled incidents three or four years ago when waste capacitor oil was drained to the steam cleaning catch basin." DeBord Decl., ¶ 120, Ex. 119.

Despite being alerted to the risk of PCB contamination, Seattle City Light's slack conduct persisted at the South Service Center for decades. For example, an October 27, 2015 "Corrective Action Required" letter from Seattle Public Utilities to Seattle City Light's South Service Center noted that PCB-contaminated transformers with visible external oil stains were located in a temporary storage area and stated, "[i]t is unclear how long these transformers are temporarily stored exposed to stormwater in this holding area." DeBord Decl., ¶ 123, Ex. 122 at page 6.

Finally, during the Arab oil embargo in the early 1970s, Seattle City Light gave away its PCB-laden waste oil to asphalt manufacturers along the LDW rather than properly disposing of the product. DeBord Decl., ¶ 124, Ex. 123. In turn, the asphalt manufacturers used the

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waste oil as fuel, receiving approximately 1000 gallons of the product each month from Seattle City Light. *Id.; see also* DeBord Decl., ¶ 125, Ex. 124; DeBord Decl., ¶ 126, Ex. 125 (admitting that the waste oil at issue contained PCBs). EPA later determined that these activities resulted in oil and PCB contamination in the LDW sediments, along the bank of the waterway, and on some of the land next to the river (upland, streets, and yards). DeBord Decl., ¶ 127, Ex. 126. When EPA confronted Seattle City Light about its role in contributing to PCBs in the LDW, Seattle City Light sought to downplay and disclaim its blame for the PCB contamination, which EPA described as "misleading." DeBord Decl., ¶ 128, Ex. 127.

Any liability of Defendants here is several only and the City bears the burden of segregating the damages allegedly caused by Old Monsanto's PCBs. The City admits it does not have the evidence necessary to carry that burden. The Court should enter summary judgment for Defendants.

b) The City's Claims For its Damages or Costs of Abatement Are Barred by the Court's Rejection of Its Equitable Indemnity Claim.

On separate and independent grounds, the City's attempt to claim all of its damages or costs of abatement from Defendants fails as a matter of law based upon this Court's prior decision dismissing the City's claim for equitable indemnity. Like its public nuisance claims, the City's equitable indemnity claim failed based upon the same equitable requirement that the City differentiate its claims to identify the portion of those claims arising from the Defendants' PCBs, and not from contaminants for which other third parties are responsible. Specifically, this Court previously held that the City did not, and could not, assert facts demonstrating Defendants were responsible for "*all* of the contamination that Seattle is obligated to remedy under its various agreements with regulatory authorities." *City of Seattle*, 237 F. Supp. 3d at 1109. The Court further held, "Monsanto may very well be responsible for some of the contamination—and Seattle may seek damages from Monsanto for its efforts to combat *that* contamination—but Monsanto's contribution to the contamination cannot give rise to a claim

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for full indemnity." *Id*. ("Indemnity requires full reimbursement and transfers liability from the one who has been compelled to pay damages to another who should bear the *entire loss*.") (emphasis added) (citing *Stevens v. Sec. Pac. Mortg. Corp*., 53 Wn. App. 507, 517 (1989)).

The City has ignored this Court's prior order; it has done nothing to identify the potential clean-up costs for the LDW related to the contaminants of concern, and it remains undeterred in its efforts to pursue all its remediation costs from Defendants in direct contravention of the Court's order. Applying the same equitable principles, the City's claims in equity for the cost of abatement should be dismissed.

8. Damages for Injuries to Tribal Treaty-Protected Fisheries Cannot Be Recovered by the City

In alleging that the LDW is "impaired" due to PCB contamination, Complaint § E, the City asserts that the LDW is part of the Muckleshoot Indian Tribe's commercial, ceremonial, and subsistence fishing area. DeBord Decl., ¶ 3, Ex. 2, ¶ 85. City expert witness David O. Carpenter, MD opined that "the issue of consumption of fish containing high concentrations of PCBs is a particular issue for some specific populations, especially many Native American tribes whose tradition is that fish are a major food source of protein. . ." DeBord Decl., ¶ 92, Ex. 91, at 8. Although the City's Complaint does not additionally identify the treaty rights of the Suquamish Tribe, but another City expert witness, Mark Chernaik, Ph.D., includes opinions regarding the Muckleshoot, and Suquamish tribal consumption of fish from the LDW and alleged injury to tribes and tribal members. DeBord Decl., ¶ 93, Ex. 92, § 5.2, at 11-13.

The damages the City seeks include the future costs to mitigate the impact of the alleged public nuisance on people who harvest resident seafood from the LDW. DeBord Decl., ¶ 97, Ex. 96, at 3. To the extent the City seeks to recover damages for harm unique to Muckleshoot or Suquamish tribal fishers, or for alleged impairment of the Muckleshoot Tribe's commercial, ceremonial, and subsistence fishing, it lacks standing to do so. Tribal fisheries in the LDW and Elliott Bay are a treaty right, and only the Muckleshoot and Suquamish Tribes

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themselves, or the United States on their behalf, can bring a claim for injury to that treaty-protected fishery. Accordingly, Defendants are entitled to partial summary judgment on the City's claims for injury to tribal members and fisheries.

a) Tribal Treaty Fisheries in the LDW and Elliott Bay

In the 1850s, Isaac Stevens, then-Governor and Superintendent of Indian Affairs of the Washington Territory, negotiated eleven treaties with Indian tribes in an area that later became part of the State of Washington. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666, *modified by* 444 U.S. 816 (1979); *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). Under the Stevens Treaties, the tribes relinquished large swaths of land west of the Cascade Mountains and north of the Columbia River drainage area, including the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas, in what is now the State of Washington. *United States v. Washington*, 827 F.3d 836, 841 (9th Cir. 2016), *opinion amended and superseded by* 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) . In exchange for their land, the tribes were guaranteed a right to off-reservation fishing, in a clause that used essentially identical language in each treaty, which guaranteed "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." *Id.*

"Usual and accustomed grounds and stations" ("U&As") are defined as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters[.]"*United States v. Washington*, 384 F. Supp. at 332. The Muckleshoot Indian Tribe's U&A was described by the court as follows:

> Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and

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> Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound.

Id. at 367.

At the time of the treaty, the White, Green, and Cedar rivers flowed into the then-existent Black River which became the Duwamish River and emptied into Elliott Bay. *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 436 (9th Cir. 2000). The court has further interpreted "the saltwater of Puget Sound" to mean Elliott Bay. *United States v. Washington*, 19 F. Supp. 3d 1252, 1311 (W.D. Wash. 1999). Thus, the Muckleshoot Tribe's U&A includes the LDW and Elliott Bay.

The Treaty of Point Elliot reserved tribal fishing rights at the Suquamish Tribe's "usual and accustomed" fishing grounds. *Ground Zero Ctr. for Nonviolent Action v. United States Dep't of Navy*, 918 F. Supp. 2d 1132, 1141 (W.D. Wash. 2013). The usual and accustomed fishing grounds of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound, and also Hood Canal. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978).

b) The City Lacks Standing to Assert Claims on Behalf of Indian Tribes

A plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The United States Supreme Court has continually upheld the Tribes' "inherent sovereign authority over their members and territories," *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

The City bears the burden of proving that it has standing to assert a claim for injury to each of the lands and natural resources at issue. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Without an interest in the treaty fishery at issue, the City could not have

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suffered an injury from the alleged contamination and impairment of the fishery and therefore lacks standing. *See id.*; *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848 (9th Cir. 2001), *aff'd sub nom.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003). The City must assert its own rights; it may not assert the rights of the tribes. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 & n.5 (1998); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (a plaintiff must show that a favorable decision "will relieve a discrete injury to himself" and not another).

The City cannot assert claims for injury to tribal resources in the absence of the tribes. *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1226-27 (10th Cir. 2010). Oklahoma brought its nuisance claims as owner of the streams and rivers of the Illinois River Watershed, as holder of all natural resources within the state's boundaries "in trust on behalf of and for the benefit of the public." *Id.* at 1226. The Tenth Circuit Court of Appeals affirmed the dismissal of the state's claims for injury to tribal resources because the state lacked standing to pursue claims for injury to natural resources belonging to the tribes. *Id*. at 1228-29, 1239.

The Muckleshoot Tribe and the Suquamish Tribe, not the City, have the right to determine whether and how to resolve any claims for injury to tribal fishers and treaty resources. The City cannot arrogate unto itself the power to assert the claims of others and to decide how the treaty rights and resources of other sovereigns will be managed. The City's damage claim arising from impacts to the tribes' commercial, ceremonial, and subsistence fishing should be dismissed.

9. The City Lacks Standing to Pursue Certain Requested Relief.

Defendants also are entitled to summary judgment on the City's requests for (1) funding to expand the existing Community Health Advocate ("CHA") outreach programs relating to the Fish Consumption Advisory (FCA), and (2) damages for harm to natural resources, because the City lacks standing to sue for these forms of relief. While the Court previously held that the City has standing to bring a public nuisance claim, *City of Seattle*, 237

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F. Supp. 3d at 1106, the Court has not evaluated standing as to these particular forms of relief. As the Supreme Court repeatedly has held, "standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotation marks and citations omitted); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) ("Plaintiffs failed to establish Article III injury with respect to their *state* taxes, and even if they did do so with respect to their *municipal* taxes, that injury does not entitled them to seek a remedy as to the state taxes."). Thus, the City must establish all three standing requirements for each claim and each form of relief it seeks.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To meet the requirements for Article III standing, the City must show, for each form of relief sought, that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Id*. at 339 (quoting *Lujan*, 504 U.S. at 560). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. (quoting *Lujan*, 504 U.S. at 560 n.1). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id*. at 340.

a) The City Lacks Standing to Sue for Harm from Fish Consumption Advisory.

According to the City's own expert, the U.S. Environmental Protection Agency and the CERCLA process currently fund a Community Health Advocate (CHA) program "to reduce consumption of PCB-contaminated seafood from the Lower Duwamish." DeBord Decl., ¶ 96, Ex. 95, at 24-25. The City of Seattle seeks $19 million to expand the CHA program and operate it for 30 years. *Id*. at 25. The City lacks standing with respect to its claims for

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expanded outreach, alternative fishing programs and other relief in relation to the Fish Consumption Advisory because it does not meet the "injury in fact" requirement.

It is a "general rule that 'standing cannot be conferred by a self-inflicted injury.'" *Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, 937 F.3d 533, 541 (5th Cir. 2019). Thus, voluntary expenditures are insufficient to confer standing. *Paws v. U.S. Dep't of Agric., Animal & Plant Health Inspection Serv.*, 1996 WL 524333, at *2 (E.D. Pa. Sept. 9, 1996) ("moreover, voluntary expenditures do not confer standing"); *Williams v. Parker*, 843 F.3d 617, 622 (5th Cir. 2016) (finding lack of standing where "HAPC made the decision, on its own, to pursue a repeal of HERO; no action of [the defendant] forced it to spend that money"); *City of Milwaukee*, 546 F.2d at 698 ("Voluntary expenditures designed to achieve full compliance with the law of the land cannot fairly be characterized as a legal wrong or injury 'likely to be redressed by a favorable decision' in the present case."); *People for Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) ("[A] plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing.") (Millett, J., dubitante). Accordingly, the City cannot manufacture standing by imposing a financial burden on itself to use City funding to provide expanded outreach services to individuals who fish in the LDW. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

The Supreme Court has directly held that voluntary funding decisions cannot form the basis of Article III standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (finding lack of standing; "The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand."). Voluntary budget decisions cannot support standing because, if it did, organizations could freely manufacture

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standing by making budget choices about public policy issues of their choosing. The City lacks standing to sue for voluntary expenditures it would like to make for expanded community outreach services.

The City's request for $19 million to fund expanded advocacy programs to reduce fish consumption from the LDW also fails because the purported injury is impermissibly conjectural, hypothetical and speculative. *Spokeo, Inc.*, 578 U.S. at 339. The City's 30(b)(6) witness admitted that the City does not know how many people harvest fish from the LDW:

Q: How many people harvest fish from the Lower Duwamish Waterway?

A: The city doesn't know.

DeBord Decl., ¶ 76, Ex. 75, at 113:14-114:23. Yet, the City's expert also testified that he does not know the extent of fish consumption: "I'm not making any estimates regarding overall population level consumption rates or patterns." DeBord Decl., ¶ 107, Ex. 106, at 178:15-17.[19] The only support Dr. Buckley provides for the purported need to expand the existing community outreach program is that "[s]taff managing the CHA program identified a need to expand it." DeBord Decl., ¶ 96, Ex. 95 at 25. He states that "[t]his information was transferred to me by City Counsel, City of Seattle, personal communication." *Id*. at 25 n. 74. The City lacks evidence necessary to support a finding that it has suffered an actual, concrete injury related to the fish consumption advisory and, thus, lacks standing to pursue its proposed $19 million remedy for expanded community outreach.

b) The City Lacks Standing to Sue for Natural Resource Damages.

The City also claims harm to the State's natural resources, including wildlife and the environment. *See, e.g*., DeBord Decl., ¶ 3, Ex. 2, at ¶3 (PCBs "were widely contaminating all natural resources and living organisms"); ¶24 ("Fish and shellfish that reside in the Lower

[19] Dr. Buckley relies on two studies purporting to assess fish consumption from the LDW, one from 2007 and the other from 2013. *See* DeBord Decl., ¶ 96, Ex. 95 at 24 n. 66 & 67]. One of those studies identified 69 people who fish for resident species in the LDW. DeBord Decl., ¶ 107, Ex. 106 at 179:16-108:8]. The other involved only 35 individuals who fished in the LDW. *Id*. at 187:16-21.

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Duwamish are contaminated with PCBs at levels that make them unfit for human consumption."); ¶122 ("it was a certainty that PCBs would become a global contaminate and contamination waterways and wildlife such as Seattle's stormwater and fish in the Duwamish River"); ¶ 90 ("PCB was also detected in almost all samples of fish, shellfish, and benthic invertebrate tissues."); ¶¶95, 99-100].[20] But the City cannot recover for natural resource damages because it does not own the wildlife and is not a designated trustee of the State's natural resources.

Under Washington law, only the attorney general, at the request of the Department of Ecology, is entitled to sue for natural resource damages. *See, e.g.*, RCW 70A.305.040(2) ("Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor."); *see also* RCW 70A.305.080 (noting that "natural resource damages [are] paid to the state under this chapter"); *Grudzinski v. Grudzinski*, 176 Wn. App. 1012, 2013 WL 4680979, at *3 (Aug. 27, 2013) ("The MTCA allows the Department of Ecology to recover 'all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances."); *cf. City of Rialto v. U.S. Dep't of Def.*, 2004 WL 7333703, at *9 (C.D. Cal. Apr. 15, 2004) ("Only the Federal government or an authorized representative of a state, however, has standing to bring an action for natural resource damages recovery under § 107(a)(4)(C)[,] 42 U.S.C. § 9607(f)(1) …."); *id.* ("district courts in other circuits 'have uniformly held that a municipality may not bring a CERCLA [claim] "as a public trustee" of a state's natural resources unless the municipality has been appointed by the governor of its respective state'").

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20 "[N]atural resources" include "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobster, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e).

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Natural resources damages are premised on the public trust doctrine that have no comparable analog in private actions at common law. *See Consol. City of Indianapolis v. Union Carbide Corp*., 2003 WL 22327832, at *3 (S.D. Ind. Oct. 8, 2003) (rejecting city's contention that it may pursue a natural resources claim under Indiana common law because there is no common law action comparable to a natural resources damages claim). Because the City has not been designated by law as a natural resources trustee and lacks authority to recover such damages, its claim for natural resource damages must be dismissed.

10. Compliance Costs Are Not Proper Items of Damage.

Defendants are entitled to summary judgment on the City's claim to recover the cost to bring the City into compliance with its existing wastewater and stormwater permits, because permit compliance costs incurred to discharge stormwater lawfully are not recoverable "damages" under public nuisance. In essence, the City would have the Court find that a third-party that is subject to no Clean Water Act discharge permit may be held liable for damages under nuisance for another permit-holder's regulatory compliance costs. No federal or state court has ever awarded Clean Water Act permit compliance costs as a form of damages in any public nuisance action. The City's unprecedented attempt to recover such costs from a non-permittee under a broad interpretation of public nuisance has no basis in law. The purpose of permit limits is to regulate the amount of lawful discharges of specific pollutants. *See, e.g*., 40 C.F.R. § 130.7(a).

Old Monsanto is not being sued for having itself discharged any PCBs into the LDW or the City's storm water conveyance system. DeBord Decl., ¶ 3, Ex. 2. Because Old Monsanto is not alleged to have discharged any PCBs into the local watershed, Old Monsanto cannot be regulated under the TMDLs directly, or held responsible for the costs to the City to implement Total Maximum Daily Load ("TMDL") requirements under a theory of public nuisance. Shifting a municipality's costs of implementing pollution controls from dischargers to product manufacturers would be a form of "back door" regulation that runs contrary to

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existing statutory and common law frameworks, and would mark an extraordinary expansion of public nuisance law. Public nuisance law aims to redress interferences with property or public rights, not to reimburse a city for its "additional costs" of complying with a permit that requires the City to reduce its discharges of PCBs. Federal court is not the proper forum for an expansion of state nuisance law to allow the City to shift the costs of restricting ***its own*** PCB discharges, in contravention of the regulatory scheme set forth under the Clean Water Act and state implementing regulations.

D. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CITY'S FOURTH PRAYER FOR RELIEF (ATTORNEY'S FEES).

Under Washington law, a party is not entitled to attorney's fees from an opposing party unless a statute or contract specifically provides otherwise. *Aldrich & Hedman, Inc. v. Blakely*, 31 Wn. App. 16, 19, *review denied*, 97 Wn.2d 1007 (1982) ("[A]ttorney's fees are generally not recoverable in the absence of contract, statute, or a recognized ground of equity."). The City has not identified any statute or agreement entitling it to attorney's fees here. The Court should enter summary judgment in favor of Defendants on the City's prayer for attorney's fees.

V. CONCLUSION

The Court should enter summary judgment for Defendants because the State of Washington released the City's claims, and res judicata also bars the City's claims. Defendants also are entitled to summary judgment because the City cannot establish the essential elements of its public nuisance claim, including conduct amounting to a nuisance, proximate causation, and intent. In the alternative, Defendants are entitled to summary judgment, in whole or in part, on the forms and categories of relief the City requested.

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DATED August 11, 2022

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I hereby certify that on August 11, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all parties who have appeared in this case.

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