

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

GREENACTION FOR HEALTH AND  
ENVIRONMENTAL JUSTICE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE  
NAVY,

Defendant.

Case No. 3:24-cv-3899-VC-DMR

**Memorandum and Points of Authorities  
in Support of the Navy's Motion for  
Summary Judgment and Opposition to  
Greenaction's Motion for Summary  
Judgment**

Date: December 4, 2025

Time: 10:00 a.m.

Location: Courtroom 4 – 17th Floor

Judge: Hon. Vince Chhabria

DATED: September 30, 2025

Respectfully submitted,

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## INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) provides a detailed process for environmental cleanups of sites contaminated with hazardous substances. When a cleanup leaves contamination in place, the remediation work must be reviewed every five years to assure that its implementation is protecting human health and the environment. A “five-year review” may confirm that the cleanup remedy remains protective, or it may lead to recommendations to collect more information, do additional work, or even amend the remedy. For federal facilities, the lead agency then must decide whether any additional work is necessary and report to Congress the review results and any actions taken.

In July 2024, the Navy completed its fifth five-year review for the remediation work at the former Hunters Point Naval Shipyard. That review was extensive, based on all available information, and explained in a 1,168-page report. The Navy identified a contractor’s fraudulent testing as undermining the reliability of some of the remediation work and recommended that ongoing retesting be completed. The Navy also assessed the protectiveness of the remedial goals and completed a robust climate change assessment, among many other inquiries.

The Navy’s discretionary judgments and recommendations in its five-year reviews are not subject to judicial review. Congress reserved oversight for itself. Indeed, no court has ever reviewed the substance of a five-year review. Judicial review is limited, at most, to whether the Navy’s review was completed and consistent with the general purpose of assessing the cleanup to assure its implementation is protecting health and the environment. Here, the answer is yes.

Even so, the Navy’s discretionary decisionmaking was reasonable and lawful. Yet Greenaction demands more and would require the Navy to start the cleanup process anew. To Greenaction, the five-year review is not a review; it is a do-over. That is wrong.

Equally inadequate is Greenaction's insistence that the Navy take actions already taken or planned. And Greenaction erroneously complains that the Navy has insufficient data to support its reviews while also demanding they be completed sooner. According to Greenaction, the Navy should move faster and be more thorough.

Prioritizing speed, Greenaction asks this Court to compel the Navy to perform its future nondiscretionary duty to complete the sixth five-year review in four years. But Greenaction cannot bring this claim until that duty is due. On the merits, CERCLA mandates review every five years, not four. Thus, Greenaction's nondiscretionary duty claim fails. And it is not cognizable under CERCLA as a "violations" claim or as a challenge to the Navy's five-year review policy.

### **STATEMENT OF THE ISSUES**

1. Whether judicial review of a five-year review includes review of an agency's decisionmaking or is limited to whether the review is consistent with CERCLA's goal at 42 U.S.C. § 9621(c) to assure the protectiveness of the remedial actions being implemented.
2. Whether the Navy's fifth five-year review for Hunters Point was lawful.
3. Whether CERCLA provides a nondiscretionary duty claim for a duty that is not yet due.
4. Whether CERCLA requires the Navy to complete the sixth five-year review by July 8, 2028.

### **BACKGROUND**

#### **I. Statutory and regulatory background**

##### **A. CERCLA response authority and the National Contingency Plan**

CERCLA is "a complex statutory scheme for responding to certain environmental hazards." *Guam v. United States*, 593 U.S. 310, 312 (2021). Section 9604 provides the President

authority to respond to the release or threatened release of a hazardous substance.<sup>1</sup> 42 U.S.C. § 9604(a). CERCLA provides for two types of response actions: removal actions (responses to immediate threats to human health and the environment) and remedial actions (permanent remedies for non-immediate threats). 42 U.S.C. § 9601(23)-(25); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1227–28 (9th Cir. 2005). The National Contingency Plan prescribes the process and requirements for performing CERCLA response actions. *See* 42 U.S.C. § 9605(a); 40 C.F.R. pt. 300. The National Priorities List identifies facilities of national importance requiring response actions. 42 U.S.C. § 9605(a)(8); 40 C.F.R. § 300.425.

CERCLA specifically addresses agency response actions at federal facilities. *See* 42 U.S.C. § 9620. For National Priorities List facilities, federal agencies take remedial action subject to EPA oversight under a Federal Facility Agreement. *See* 42 U.S.C. § 9620(e). The Ninth Circuit has recognized Section 9620(e) as an independent remedial action authority. *See Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 833-34 (9th Cir. 1999).

### **B. Selecting, implementing, operating, and maintaining remedial actions**

Under the National Contingency Plan, the process to select a remedial action begins with a remedial investigation to characterize the nature and extent of contamination at the site to develop and evaluate remedial alternatives (cleanup options). 40 C.F.R. § 300.430(d). Then a feasibility study is conducted to evaluate remedial options. *Id.* § 300.430(e)(1)-(2). The feasibility study sets preliminary remediation goals for the cleanup that are modified, as necessary, and finalized when the remedial action is selected. *Id.* § 300.430(e)(2)(i). Remedial alternatives are analyzed based on nine factors, including protectiveness and cost. *Id.* § 300.430(e)(9).

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<sup>1</sup> The President delegated to EPA the authority to conduct response actions not specifically delegated to other agencies and delegated to the Department of Defense authority to respond to releases at its facilities. Exec. Order No. 12580 § 2(d), (g), 52 Fed. Reg. 2923 (Jan. 23, 1987).

At National Priorities List federal facilities, the lead agency and EPA jointly select a remedial action based on the alternatives developed in the feasibility study and present a proposed plan to the public. *Id.* § 300.430(f). Remedial actions must protect health and the environment and be cost effective, among other requirements. 42 U.S.C. § 9621(a), (d)(1); 40 C.F.R. § 300.430(f)(1)(ii)(A), (D); *see City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1003 (9th Cir. 2010). The proposed plan identifies the alternative that best meets the selection criteria, describes the remedial alternatives analyzed, and proposes a preferred alternative. 40 C.F.R. § 300.430(f)(1)(ii), (f)(2). A “record of decision” documents the remedial action selected, which includes the final remedial goals (cleanup levels) and remedial action objectives (e.g., prevent exposure to contamination above the remedial goals). *Id.* § 300.430(f)(5).

Once selected, the agency must design and construct the remedial components (e.g., concrete soil cover to prevent contaminant exposure) to achieve the remedial action objectives. *Id.* § 300.435(a). After construction and achieving the remedial objectives, operation and maintenance begins. *Id.* § 300.435(f). Operation and maintenance can continue indefinitely, especially where institutional controls are selected. *See id.* § 300.430(a)(1)(iii)(D).

### **C. Conducting five-year reviews**

When the selected remedy leaves contamination at a site, the agency must review it at least every five years “after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented.” 42 U.S.C. § 9621(c). The five-year review requirement applies only if contamination remains at the site above levels that permit unlimited use and unrestricted exposure. 40 C.F.R. § 300.430(f)(4)(ii). If, based on the review, the agency determines that further response actions are appropriate, the agency “shall take or require such action” under Section 9604 (response authorities) of CERCLA. 42 U.S.C. § 9621(c). A list of the facilities subject to five-year reviews must be reported to Congress as well

as “the results of all such reviews [] and any actions taken.” *Id.* Any change to the remedial actions must be executed consistent with CERCLA requirements. *See* 40 C.F.R. § 400.435(c).

#### **D. Citizen suits under CERCLA**

CERCLA’s citizen suit provision authorizes two types of suits. First, “any person” can sue to enforce any “violation of any standard, regulation, condition, requirement, or order which has become effective [under CERCLA].” 42 U.S.C. § 9659(a)(1). Second, “any person” can sue the President or other officer “where there is alleged a failure of the President or of such other officer to perform any act or duty under [CERCLA] . . . which is not discretionary.” *Id.* § 9659(a)(2).

### **II. Factual background**

#### **A. Hunters Point and CERCLA response action parcels for redevelopment**

The Navy acquired Hunters Point during World War II from Bethlehem Steel and performed fleet maintenance there until 1974. AR\_0000030. The Naval Radiological Defense Laboratory conducted research at Hunters Point from the 1950s to 1969. *Id.* The Navy then leased Hunters Point to a private ship repair company, Triple A Machine Shop, until 1986. *Id.*

Industrial activities at Hunters Point resulted in widespread distribution of contaminants, including radiological contaminants. AR\_0000029. Investigations and response actions have been ongoing across the site since 1984. AR\_0000026, 72-73, 138-139, 204-205, 252-54. In 1989, EPA added Hunters Point to the National Priorities List. 54 Fed. Reg. 48184 (Nov. 21, 1989); AR\_0000027. In 1992, the Navy, EPA, and California entered a Federal Facility Agreement under CERCLA Section 9620 to conduct response actions at Hunters Point. AR\_0000027.

Once the cleanup is finished, the parcels will be transferred to the City and County of San Francisco’s Office of Community Investment and Infrastructure. Hunters Point is planned to be a rejuvenated community containing residential housing, businesses, research centers, educational and recreational spaces, and other outdoors spaces. AR\_0000030, 62, 0206078-180.

Hunters Point was originally divided into parcels A-F to conduct response actions. AR\_0000027. To expedite transfer and public reuse of the land, the parcels were then subdivided into fourteen parcels, A-1, A-2, B-1, B-2, C, D-1, D-2, E, E-2, F, G, UC-1, UC-2 and UC-3, and two independent installation restoration sites 7 and 18. AR\_0000027-28, 58. Parcel F covers offshore areas, the “UC” parcels are utility corridors, and the rest of the parcels are land areas, most of which include buildings and structures. AR\_0000058. Parcels A-1 and A-2 have been transferred out of federal ownership, were removed from the National Priorities List in 1999, and were released with unrestricted use and unlimited exposure. 64 Fed. Reg. 16351 (Apr. 5, 1999); AR\_0000028. Parcels D-2, UC-1 and UC-2 were transferred out of federal ownership but require radiological retesting before development. AR\_0000028, 34.

#### **B. The response actions selected and implementation**

The Navy has selected remedial actions for all parcels and installation restoration sites 7 and 18. AR\_0000040-44, 54-55. The Navy has implemented many contaminant-specific removal and remedial actions at the various parcels. *Id.* The remedial actions and cleanup objectives depend on the contamination present at each parcel, exposure pathways (how people could be exposed), and the intended use of the property when the cleanup is finished (e.g., residential use, industrial use). *See, e.g.*, AR\_0000108-111 (parcel B remedial action summary).

The remedial actions are ongoing and generally involve similar combinations of elements with site-specific variation. AR\_0000040-44. Soil contamination “hot-spots” are excavated and disposed of off-site. AR\_0000108-111, 172-175, 230-234, 292-301. Durable covers are installed throughout much of the site to prevent exposure to any contamination that remains. *Id.* These involve covering the ground surface with up to four feet of clean soil and/or installing concrete and asphalt over much of the ground surface. *Id.* Soil vapor contamination is addressed through removal systems and monitoring natural degradation. *Id.* Because groundwater is not a drinking

water source, contamination is monitored for natural degradation and treatment to remove contaminants. *Id.* Where necessary, the bay sea wall has been fortified and shorelines engineered to prevent contaminants from migrating into the bay. AR\_0000077, 80, 84, 144, 209, 260-261, 266.

The remedial actions also use several institutional controls—limitations on use or other prohibitions—to prevent exposure to contaminants that remain on site. AR\_0000054-55. Notably here, disturbing the durable covers (soils and asphalt) is prohibited unless performed under a plan approved by the Navy, EPA, and California regulators. *Id.* Site development will be subject to regulatory oversight and measures designed to prevent contamination from being excavated and spread around the site during construction. *Id.* Residents will also be prohibited from growing crops in the ground to prevent exposure to contamination through food. *Id.*

The Navy's Historical Radiological Assessment identified sites across Hunters Point where operations included radiological materials. AR\_0192468. In 2006, the Navy selected a base-wide removal action for this radiological contamination that involved excavating the sewer lines and off-site disposal of contaminated soil above "action levels," and decontaminating or demolishing structures, among other actions. AR\_0095813-95823. The remedial actions at affected parcels, B-1, B-2, C, D-1, D-2, E, G, UC-1, UC-2, and UC-3, incorporated these removal action elements to meet the remedial action goals. AR\_0000066, 110, 173-174, 230-232, 294, 301.

Radiological contamination in parcels E and E-2 required a designed cover and imposition of radiological specific institutional controls. AR\_0000258-259, 263-264. The radiological remedial actions at installation restoration sites 7 and 18 involve the same measures due to uncertainty as to the extent of contamination. AR\_0000076-79. Finally, the Navy is planning to

amend the remedy for parcel D-1 because more recent investigations determined that material used to fill and expand the shoreline likely contained contaminated objects. AR\_0000210-211.

**C. Radiological rework for sanitary sewer trenches and buildings**

After the Navy completed radiological removal action work in affected sewer trenches and buildings, evidence of radiological sampling data fraud was identified. AR\_0000034. A third-party independent assessment determined that fraud was likely. *Id.* In response, the Navy planned to conduct investigations at radiologically impacted soil and building sites at these parcels. *Id.*

The work involves resurveying sewer trenches and buildings to determine whether site conditions today are consistent with the radiological remedial action objectives. AR\_0000034-35; 0213329. Put differently, retesting will determine whether the conditions at these parcels are, in fact, protective of human health despite the fraud. *Id.* If retesting identifies radiological contamination above remedial goals, the Navy will conduct additional remediation. AR\_0213318.

The Navy has decided to demolish all but five of the radiologically impacted buildings. AR\_0000035. That work will be done as an existing option in the selected remedies. *Id.* Work plans for managing radiological materials will be subject to agency review. *Id.* Removing these buildings will meet the remedial action objective to prevent exposure.

**D. The fifth five-year review**

The Navy has completed five five-year reviews for Hunters Point, with draft reports issued for public and regulatory review, followed by final reports issued as follows: July and December 2003 (first), June and November 2008 (second), May and November 2013 (third), July 2018 and July 2019 (fourth), and November 2023 and July 2024 (fifth). Stipulations of Fact, Dkt. No. 82, Nos. 14, 16, 19, 21, 24, 25, 28, 29, 36, 37. The fifth five-year review (the “Review”) assessed the remedial actions being implemented at parcels B-1, B-2, C, D-1, D-2, E, E-2, G, UC-1, UC-2, UC-3 and installation restoration sites 7 and 18. Parcels A-1 and A-2 do not require a five-year review.

AR\_0000016. Five-year reviews had not been triggered at parcel F because the record of decision was not signed yet. AR\_0000044.

The Review was tailored to determine whether there were any issues that would prevent the remedial actions selected from performing as designed and any other issues that could affect the protectiveness of the remedies being implemented. AR\_0000016. The primary method to assess protectiveness was review of over 1.5 million pages of documents about site work (like remedial action implementation), analytical data (like monitoring reports) and findings (like reports on remedial action completion and institutional controls compliance). AR\_0000016, 68; *see generally* AR. The Navy also interviewed relevant personnel and performed a site inspection, which included visual checks of the integrity of remedial components (like the durable covers and access controls to the parcels). AR\_0000068, 79, 83, 87-88, 151-153, 211-213, 216, 267-268, 270.

For each parcel, the Navy reviewed the remedies selected, how the remedies were implemented, operation and maintenance history, and any problems encountered. AR\_0000076-88, 143-154, 208-216, 258-270. The Navy addressed each of the remedy components (e.g., excavation, durable cover integrity, institutional controls compliance), including how they were performing. *Id.* Then the Navy addressed the three core questions in EPA's comprehensive CERCLA five-year review guidance. AR\_0000088-94, 154-158, 216-221, 270-275.

First, the Navy considered, based on all available information, whether the remedy components were working as intended for those that were fully constructed. Most were, but for some it was uncertain. AR\_0000088-90, 154-155, 216-217, 270-272. Second, the Navy evaluated whether the exposure assumptions, toxicity data, cleanup levels, and remedial action objectives at remedy selection are still valid. AR\_0000090-93, 155-157, 217-219, 272-274. The Navy did find some relevant changes, but those changes did not render the selected remedies unprotective. *E.g.*,

AR\_0000217-19. Third, the Navy considered whether there was any other information that could question the protectiveness of the remedy. AR\_0000093-94, 157-158, 220, 274-275. Then, the Navy identified other relevant issues and made recommendations for follow-up actions. AR\_0000019-22. Finally, the Navy made protectiveness determinations consistent with EPA's guidance. AR\_0000022-25.

One issue the Review identified is the uncertainty of radiological site conditions where data was unreliable because of fraud. AR\_0000034-35. The Review recommended that the Navy complete radiological retesting at those locations to ensure the radiological remedial action objectives were achieved. *Id.* The Navy also reviewed the radiological remedial goals using EPA's most current risk calculator. AR\_0000092, 157, 219, 274, 570. The Navy assumed that radionuclide concentrations in soil were at the remedial goals across the entire site at the ground surface. *Id.* Based on this extremely conservative approach, the Navy determined that the radiological remedial goal risk levels are protective at Hunters Point. *Id.*

The Navy also provided substantial public participation for the Review, which is not required under CERCLA. That process included a three-month public comment period from February 7 to May 7, 2024, multiple public presentations, mailers, electronic newsletters, workshops, and public tours of Hunters Point. AR\_0000070. In the Review, the Navy thoroughly responded to the public comments, including those from Greenaction. AR\_0000984-1169. The Navy submitted the Review to EPA and California regulators for review, as required, and held meetings with the regulators. The Navy responded to agency comments and addressed all inputs. AR\_0000764-854; 912-920, 930-941, 948-973, 978-982.

### **STANDARD OF REVIEW**

For claim four, challenging the Review, the Court may reverse the Navy's action only if it was "arbitrary and capricious or otherwise not in accordance with the law" based on the

administrative record. 42 U.S.C. § 9613(j)(1)-(2). How this standard applies to a five-year review is an issue of first impression. For the reasons argued below, judicial review of a five-year review should be limited to whether the review was consistent with the goal set forth in CERCLA “to assure that human health and the environment are being protected by the remedial action being implemented.” *See infra* at 12-16. If the factors that the Navy reasonably considered are tailored to that end, the inquiry ends, and the Court should uphold the Review. *Id.* Congress did not intend for courts to review an agency’s discretionary decisionmaking in a five-year review. *Id.*

If the Court reviews the Navy’s exercise of discretion, the standard of review is narrow, and “a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391 (2024); *Path Am. KingCo LLC v. U.S. Dep’t of Homeland Sec.*, 426 F. Supp. 3d 770, 775-76 (W.D. Wash. 2019) (collecting cases and explaining administrative record review standard at summary judgment). The Court should uphold a decision when the agency considered the relevant factors and articulated a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (citation omitted). That is true even when the decision has “less than ideal clarity” if “the agency’s path may reasonably be discerned.” *Id.*

An agency’s factual findings that “require[] a high level of technical expertise” receive deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989). And an agency’s “interpretations and opinions,” on legal issues made in pursuance of official duty and based on special experience, are a “body of experience and informed judgment to which courts and litigants could properly resort for guidance.” *Loper Bright*, 603 U.S. at 388 (internal quotation omitted).

For claim two, alleging that the Navy will fail to perform the nondiscretionary duty to complete the sixth five-year review by Greenaction’s alleged deadline, summary judgment is

appropriate when the moving party “shows that 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). In considering a motion for summary judgment, courts must view the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

## ARGUMENT

### **I. The Navy’s Review was lawful because it was calculated to assure that human health and the environment were being protected at Hunters Point.**

CERCLA’s citizen suit provision authorizes suit against any person “who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective [under CERCLA].” 42 U.S.C. § 9659(a)(1). CERCLA’s five-year review provision does not contain any substantive standards, only a purpose. *See id.* § 9621(c). Insofar as there is law for the Court to apply, it is the goal of the five-year review provision. CERCLA’s text, structure, and purpose make clear that Congress did not intend for private parties to interfere with CERCLA cleanups every five years. Judicial review thus is limited to whether the Review is consistent with the purpose of the five-year review provision, not the Navy’s discretionary judgments and recommendations. For those, Congress retained direct oversight. Here, the Navy’s thorough Review followed EPA’s comprehensive five-year review guidance and was calculated to assure that the remedial actions being implemented are protecting health and the environment at Hunters Point. Thus, the Review is lawful.

#### **A. Judicial review is limited to whether the Review is consistent with CERCLA’s goal to assure the protectiveness of remedy implementation.**

Where a statute provides a right to review of agency action, that right can be overcome by “clear and convincing evidence of congressional intent to preclude judicial review.” *Bouarfa v. Mayorkas*, 604 U.S. 6, 19 (2024) (cleaned up). Ultimately, the scope of review is determined by Congressional intent as expressed through statutory text, structure, and objectives. *Block v. Cmty.*

*Nutrition Inst.*, 467 U.S. 340, 345 (1984). And judicial review of agency discretionary decisionmaking is constrained by the law Congress provided to apply. *See Jajati v. U.S. Customs & Border Prot.*, 102 F.4th 1011, 1017 (9th Cir. 2024); *Perez v. Wolf*, 943 F.3d 853, 862 (9th Cir. 2019) (collecting cases providing for limited review of discretionary standards).

CERCLA’s text, structure, and objectives evince a narrow scope of review for determining the adequacy of a five-year review: that the agency completed one consistent with the statutory goal. CERCLA’s five-year review provision provides for maximum discretion, which is ill-suited to searching judicial review. When a CERCLA remedial action leaves covered contaminants at a site: the President (or delegated agency) must review that action every five years after initiation “to assure that human health and the environment are being protected by the remedial action being implemented.” 42 U.S.C. § 9621(c). That does not provide a “standard, regulation, condition, requirement, or [CERCLA] order” to review for violations. It provides a purpose for the review. But purpose clauses do not provide substantive standards. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (opining that prefatory clauses do “not limit or expand the scope of the operative clause”); *Jajati*, 102 F.4th at 1018 (distinguishing between the “goals” of a regulation and prescriptive statutory and regulatory “requirements,” “duties,” and “criteria”).

Nor did Congress provide any criteria for an agency to consider or that a court can apply for review. 42 U.S.C. § 9621(c). The five-year review requirement is framed in the present “to assure that human health and the environment are being protected . . . .” 42 U.S.C. § 9621(c). CERCLA does not specify what present protectiveness means for a five-year review. *Id.*

CERCLA provides a detailed process for remedy selection that must balance protection of health and environment and cost-effectiveness. *See* 42 U.S.C. § 9621(a), (d); *see Carson Harbor Vill. v. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006). But the five-year review does

not incorporate the standards and process applicable to remedy selection. Current protectiveness evaluated every five years is different. Determining the present protectiveness of remedy implementation reasonably involves considering how the selected final remedy is performing, which obviously cannot occur during remedy selection. And “a court must presume that Congress intended a different meaning when it uses different words in connection with the same subject.” *Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1250 (9th Cir. 2007). Remedy implementation review is not the same as remedy selection.

Beyond review itself, CERCLA’s five-year review provision commits to the discretion of the President the decision to take any further response actions under CERCLA: “if upon such review *it is the judgment of the President* that action is appropriate [under CERCLA] the President shall take or require such action.” 42 U.S.C. § 9621(c) (emphasis added). Any further action thus depends on the President’s discretionary finding that action is needed. *See City of Los Angeles v. Dep’t of Com.*, 307 F.3d 859, 870 (9th Cir. 2002) (finding very broad discretion in similarly drafted provision in the Census Act). Any such actions then are taken under Section 9604 or ordered under Section 9606 of CERCLA, separate from the five-year review provision. *See* 42 U.S.C. § 9621(c). While judicial review would be available for any actions taken, subject to timing of review limitations, *id.* §§ 9659(a)(1), 9613(h), the citizen suit provision does not authorize review of the discretionary judgments and recommendations made in a five-year review.

When completed, five-year reviews and any subsequent actions taken are subject to Congressional oversight: “The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.” 42 U.S.C. § 9621(c). While Congressional oversight alone does not preclude judicial review, *Washington v. U.S. Dep’t of State*, 996 F.3d 552, 564 n.8 (9th Cir. 2021), CERCLA’s

Congressional reporting requirement is significant evidence of a limited scope of review here, where Congress also provided no substantive standards for review.

Taken together, the text and structure of CERCLA's five-year review provision indicate a narrow scope of judicial review of five-year reviews limited to whether the agency completed a review consistent with the statutory goal. And that conclusion finds support in Congress' timing of review limitations for response actions. Generally, challenges to CERCLA removals and remedial actions must wait until the action is completed. *See* 42 U.S.C. § 9613(h). That limitation operates as a "blunt withdrawal of federal jurisdiction" and even extends to claims brought under other laws. *McClellan Ecological Seepage Situation ("MESS") v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995). That alone would preclude judicial review of all five-year reviews based on claims that ongoing response actions are inadequate or otherwise not protective. *See id.* And it is further evidence that judicial review of challenges to five-year reviews must be narrow.

The only reason Greenaction's claim could proceed when remedial actions are ongoing is that the Ninth Circuit read into CERCLA an exception to its jurisdiction stripping provision for challenges to remedial actions (but not removals) at federal facilities.<sup>2</sup> *See Fort Ord*, 189 F.3d at 833-34; *Rio Linda Elverta Cmty. Water Dist. v. United States*, 622 F. Supp. 3d 898, 909-13 (E.D. Cal. 2022). But that early right-to-review of some remedial actions does not mean that Congress

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<sup>2</sup> In *Fort Ord*, the Ninth Circuit held that because Section 9620(e) is a separate grant of authority, CERCLA's jurisdictional bar at Section 9613(h) does not apply to challenges to remedial actions taken exclusively under the authority of Section 9620 at certain federal facilities. 189 F.3d at 833-34. The Navy believes *Fort Ord* was wrongly decided and that Section 9613(h) bars challenges to all remedial actions because remedial actions are selected under Section 9604 subject to the requirements of Section 9620. *See, e.g., Giovanni v. Dep't of the Navy*, 906 F.3d 94, 115-16 (3d Cir. 2018). It seems plainly wrong to conclude that Section 9620 is a separate response authority when the five-year review provision at Section 9621(c) references only Section 9604 as authority to take response actions after a five-year review. *See* 42 U.S.C. § 9621(c). If Section 9620 provides an independent response authority, it would be referenced in Section 9621(c).

intended to subject them to second-guessing every five years. Repeated review would be inconsistent with Congress' insulation of response actions from interference and the limited standard of review (where available). *See* 42 U.S.C. § 9613(h), (j). And it would defy common sense. *See Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring); *cf.* The Federalist No. 83, at 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The rules of legal interpretation are rules of *common sense*.”). For Congress protected remedy implementation “from lawsuits that might interfere” with CERCLA cleanups. *MESS*, 47 F.3d at 328. Thus, as this District has noted, continual judicial review of response actions every five-years would contravene “the plain meaning and spirit of [CERCLA].” *Fairchild Semiconductor Corp. v. EPA*, 769 F. Supp. 1553, 1562 (N.D. Cal. 1991), *aff'd*, 984 F.2d 283 (9th Cir. 1993).

Taking a step back, CERCLA's five-year review provision is drafted for maximum discretion, does not contain any substantive standards, specifies a purpose to assure current protectiveness of remedy implementation, and provides for direct Congressional oversight within a statutory scheme designed to insulate implementation of CERCLA response actions from judicial review. Thus, CERCLA's text, structure, and purpose make clear that judicial review of five-year reviews (where available at all) is limited to whether the agency completed one consistent with the statutory goal. There is no review of the agency's discretionary decisionmaking and certainly no review for compliance with CERCLA's discretionary standards to select remedial actions. As discussed below, a review that follows EPA's five-year review guidance is consistent with CERCLA's goal.

**B. EPA's five-year review guidance identifies the factors to address in a five-year review.**

Although CERCLA does not provide any specific factors to consider in a five-year review, EPA created guidance for an agency to consider. *See generally* AR\_0206831-207021. First, the

agency should consider whether the remedy is functioning as intended. AR\_0206871-206873. This is important because real world performance may differ from predictions when the remedy was selected. This can happen, for example, because assumptions change (e.g., how much contamination the selected technology is able to remove) or unanticipated complications arise (e.g., installing a treatment system is more expensive than expected).

Second, the agency should review whether contamination exposure assumptions, data about contamination toxicity, selected cleanup levels, and goals for the cleanup are still valid. AR\_206873-206878. This is important because what was found protective at remedy selection may change based on new information. For example, cleanup work may identify new ways people could be exposed to contamination. Or scientific advances and newly available data can show that what was once thought safe may actually be risky. *See* 73 Fed. Reg. 66964, 66975 (Nov. 12, 2008) (updating air-quality standards for lead based on new evidence of neurotoxicity at low doses).

The agency also should determine whether there is any other reasonably available information that could question the protectiveness of the remedy. AR\_0206878. This ensures that the agency does not miss information about the present protectiveness of the remedy.

Based on the review, the agency should make determinations about the protectiveness of the remedies being implemented. AR\_0206882-206891. Protectiveness determinations are driven by the stage of remedy implementation and data available at the time of the five-year review. AR\_0206826-206830. The progress of remedy implementation is relevant, for example, because the real-world performance of a remedy (e.g., the efficacy of a treatment system) cannot be assessed while the selected technology is being installed. And data availability has obvious effects. For example, the agency could find data gaps and recommend further sampling. *E.g.*,

AR\_0000019. Protectiveness determinations range from “not protective” (unacceptable risks at the site) to “protective” (future protectiveness can be determined). AR\_0206826-206830.

Additionally, the agency should make recommendations for further response actions under CERCLA Section 9604. AR\_0206879-206882. For example, data gaps could lead to a recommendation to conduct more sampling. Changes in the toxicity levels may lead to a recommendation to amend the cleanup levels and goals (e.g., excavate more soil). A remedy operating poorly may lead to recommendations to change it.

Addressing the factors from EPA’s guidance ensures a five-year review that meets CERCLA’s goal. As discussed below, the Navy did that for the Review.

**C. The Navy’s Review is lawful because it thoroughly addressed all the factors from EPA’s five-year review guidance.**

The Navy’s Review meets CERCLA’s requirement to conduct a review to assure health and the environment are being protected by the remedial actions being implemented at Hunters Point. The Navy’s process was robust, its analysis thorough, and its findings and recommendations well explained. The Court need not scrutinize the Navy’s discretionary decisionmaking because, as discussed above, the Navy’s consideration of the relevant factors from EPA’s guidance is sufficient for the Court to uphold the Review. *See supra* at 12-18.

To assess the remedial actions, the Navy considered relevant documents totaling over 1.5 million pages, conducted a visual site-inspection, and interviewed relevant personnel. For each parcel subject to review, the Navy reviewed the remedial action history and addressed the factors set forth in EPA’s five-year review guidance. *See* AR\_0000072-320.

Taking one parcel as an example: parcel G. The Review first identified the remedial components: (1) soil excavation; (2) durable covers; (3) in-place treatment and monitoring to remediate contaminants in groundwater; (4) radiological surveys and excavation of radiological

contamination; and (5) institutional controls to prevent any exposure to contamination that remains on site. AR\_0000213-14. The Review then described: (1) the asphalt durable covers; (2) repairs to building foundations; (3) actions to develop and then not need treatment for groundwater; (4) groundwater monitoring frequency and results; (5) sanitary sewer removal and excavation for radiological contamination; (6) and applicable institutional controls. AR\_0000214-216.

For components where operation and maintenance are necessary—durable covers and institutional controls—the Navy inspected their condition and compliance. AR\_0000216. There was some minor subsidence, but areas that could be inspected were generally in good condition. *Id.* And there were no issues found for the institutional-controls compliance inspections. *Id.* Based on this review, there were no issues with how the remedy was operating. AR\_0000217.

The Navy also thoroughly assessed applicable toxicity standards, which had some changes, but did not affect the protectiveness of the remedy. AR\_0000217-19. The Navy specifically evaluated the radiological goals using EPA’s most recent risk calculator and conservative assumptions and found them protective. AR\_0000219; *see infra* at 22-23. Thus, the Navy concluded that the exposure assumptions, cleanup levels, and remedial objectives were still valid.

At the same time, the Navy identified uncertainty from radiological testing fraud as an issue that could question the protectiveness of the remedy. AR\_0000220. Thus, the Navy recommended that retesting be completed. *Id.*; AR\_0000240. This led to a “short-term protectiveness” determination because access to the site, and thus exposure to any unacceptable risk there, is restricted during retesting. AR\_0000222. A “protective” determination can be confirmed only when retesting (and any further necessary radiological remediation work) is complete. *Id.*

The Review was thorough for every parcel. *See* AR\_0000072-320. At parcels where remedy performance was in question, the Navy identified the issue and made recommendations and/or noted that the Navy was already responding under CERCLA. For example, the radiological remedy for parcel D-1 will be revised to address risks from radiological objects that may be present at the site from fill used to expand the shoreline. AR\_0000210-11, 216-17. That was one reason for a “short-term protectiveness” determination there. AR\_0000221-222.

The Navy also identified two global ongoing issues being addressed under CERCLA for specific contaminants. One is the ongoing radiological retesting. AR\_0000034-35. The other is per- and polyfluoroalkyl substances contamination, which is in the early stages of the CERCLA process. AR\_0000032. And the Navy identified several other parcel-specific issues that warranted recommendations and affected the protectiveness determinations. AR\_0000019-25. And finally, the Navy completed a climate resilience assessment to assess climate-related hazards and whether potential impacts may affect remedy protectiveness. AR\_0000322-390.

The Navy submitted the Review for regulator coordination and provided for substantial public participation. The Navy responded to the public comments and addressed the issues that the regulators raised. *See* AR\_0000660-982 (regulators), 0000984-1169 (public comments).

In sum, the Navy did a robust and lawful five-year review. The Navy thoroughly considered all the factors in EPA’s five-year review guidance, addressed the issues EPA and California regulators raised, and provided for robust public participation. Thus, the Review was tailored to assure the protectiveness of the remedial actions being implemented at Hunters Point.

**II. The Navy’s discretionary findings and recommendations in the Review were reasonable and lawful.**

For reasons discussed above, the Review was lawful under the appropriate scope of judicial review. But even if the Court were to review the Navy’s discretionary findings and

recommendations, it should find the Review was reasonable and lawful. *See supra* at 18-20. And specifically, the Navy’s protectiveness determinations, radiological remedial goals review, durable cover and institutional controls inspection, and climate resilience assessment were reasonable.

Greenaction would have the Navy start from scratch in a five-year *review* and defend the remedial action selection decisionmaking. That is not a review. And Greenaction insists on testing the Navy is already doing, assigns omission for a risk-review that the Navy has completed and will complete again, belatedly challenges remedies that the Navy selected decades ago, and demands an expanded climate assessment that the Navy has committed to doing. These assignments of error cannot survive any level of scrutiny.

**A. The Navy’s protectiveness determinations are well-supported in the record and consistent with EPA guidance.**

The Navy’s parcel-specific protectiveness determinations are reasonable. As an initial matter, CERCLA and the National Contingency Plan do not require specific protectiveness determinations in a five-year review. *See* 42 U.S.C. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii). Those come from EPA’s five-year review guidance. AR\_0206826-206830, 206882-206891.

EPA provides five protectiveness determinations: “protective”; “short-term protective”; “will be protective”; “protectiveness deferred”; and “not protective.” AR\_0206826-206830. “Protective” means the remedy is operating with no unacceptable risks. *Id.* “Short-term protective” means the remedy is operating and risks are controlled in the short term, but there is information that could affect long-term protectiveness. *Id.* “Will be protective” means the remedy is under construction, there are no current unacceptable risks, and the remedy should be protective when complete. *Id.* “Protectiveness deferred” means there is insufficient data to make a protectiveness determination. *Id.* “Not protective” means there are unacceptable risks. *Id.*

The Navy's protectiveness determinations in the Review are reasonable. For example, the "short-term protective" determination for parcel G was based on uncertainty regarding radiological site conditions. AR\_0000222. The Navy needs more data to determine long-term protectiveness. *Id.*; AR\_0000034-35. Meanwhile, access controls to the site prevent exposure to unacceptable risks that may be present. AR\_0000222. Hence the "short-term protective" determination and recommendation to complete radiological retesting. *Id.* The same is true for all the parcels that are being retested because of radiological sampling fraud. AR\_0000019.

Greenaction faults the Navy for insufficient data to assure the long-term protectiveness of the radiological remedial actions. Mot. Summ. J. 12-13, Dkt. No. 85 ("Mot."). But that is what the Navy is working to obtain. AR\_0000034. Greenaction may not like how long retesting is taking. Mot. 12-13. But that does not render the five-year review findings and recommendations unreasonable or unlawful. And nothing in CERCLA requires the Navy to rush its response actions conducted under Section 9604 (here the radiological retesting) to make a "protective" determination rather than "short-term protective" in a specific five-year review. The Review identified the need for more data and recommended completing the ongoing retesting to assure the protectiveness of the radiological remedial actions. AR\_0000019. CERCLA does not require more. 42 U.S.C. § 9621(c).

**B. The Navy's review of the radiological remedial goals using EPA's most recent toxicity data and plans for a site-specific assessment was reasonable.**

Consistent with EPA's guidance, the Navy considered whether there were changes in toxicity data that would affect remedy protectiveness. AR\_0000090, 155, 217, 272. That inquiry involved a risk-calculation using EPA's current toxicity data for future residents at Hunters Point (those at highest risk) if exposed to radionuclide concentrations at the remedial goals.

AR\_0000092, 157, 219, 274, 570. The Navy conservatively assumed concentrations in soils at remedial goal levels throughout the site at ground level. AR\_0000570-572, 68279.

Radiological cancer risks were mostly well below the 1 in 10,000 ( $10^{-4}$ ) to 1 in 1,000,000 ( $10^{-6}$ ) range that is generally considered acceptable under the National Contingency Plan. AR\_0000570; 40 C.F.R. § 300.430(e)(2)(i)(A)(2). Cancer risk for thorium-232<sup>3</sup> and the sum of all radiological risks were marginally outside the generally acceptable range. AR\_0000570. Based on this information, the Navy concluded that the remedial goals were protective at the site.

The Navy's conclusion was reasonable, especially considering the Navy's conservative approach. Assuming radionuclide concentrations at remedial goal levels across the entire site at ground level significantly overestimates exposure and attendant risk. AR\_0068279. Much of the site is covered with durable covers preventing exposure, and nearly all the areas that will contain residential housing will be covered in asphalt. AR\_0000128, 130, 134, 192, 202, 246, 248, 250, 316, 318, 320 (showing location of remedy components). So residents will not be exposed to soils with residual radiological contamination. Further, the Navy will excavate and dispose of off-site any soils above the remedial goals during retesting. AR\_0213318. Thus, there will not be radionuclides under the durable covers that are above the remedial goals.

Greenaction contends that the Navy failed to show that the remedial goals and cumulative risk at Hunters Point are within the generally acceptable risk range. Mot. 14-17, 21-22. For specific radionuclides, that is only thorium-232. AR\_0000570. But Greenaction ignores the very conservative assumptions underlying the Navy's analysis. Mot. 14-22.

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<sup>3</sup> The Review mislabels thorium-232 as thallium-232. *Compare* AR\_0000570 with AR\_0068278.

More fatal though, Greenaction disregards the Navy's commitment to show that cancer risks at Hunters Point are within the generally protective range using site data (sampling results) considering all contaminants at Hunters Point before releasing the property for redevelopment. AR\_0001158-59, 1167, 68280. The Navy explained this in response to Greenaction's comment on this issue. AR\_0001158. The Navy is collecting the necessary data as part of the ongoing retesting. AR\_0213315-318. It is reasonable to show that Hunters Point is safe with real-world data after very conservative estimates were below or very close to EPA's generally safe range.

Greenaction is also wrong to assert that CERCLA requires the Navy to recommend amending the remedial goals simply because of toxicity data changes. Mot. 17-21. CERCLA requires protective and cost-effective cleanups, not ever lower remedial goals. 42 U.S.C. § 9621(a); *see City of Colton*, 614 F.3d at 1003. Again, the Review showed that the remedial goals are well within the generally protective range save one using very conservative assumptions. *See supra* at 22-23. And protectiveness is achieved through multiple measures, including near site-wide durable covers and institutional controls that prevent exposure. AR\_0000054-55, 79, 82, 87, 151, 153, 211, 213, 216, 263, 267, 270.

Greenaction would have the Navy lower the remedial goals regardless of real-world risk at Hunters Point and presumably excavate even more soil. Mot. 17-21. But there is no justification for the Navy to recommend lowering them and tearing up the soil and asphalt covers (which would have to be reconstructed) for further excavation with its massive costs. *See* 42 U.S.C. § 9621(a). The Navy reasonably reviewed the remedial goals, AR\_0000570, will confirm that site conditions are protective, AR\_0001158-59, 1167, 68280, and will do more cleanup if necessary, *see* AR\_0000210-211 (discussing further radiological response actions in parcel D-1 based on radiological objects in soils). The review of the radiological remedial goals was reasonable.

**C. The Navy’s review of durable covers and institutional controls was reasonable, and Greenaction’s challenge is a time-barred collateral attack on the selected remedies.**

The soil remedies selected at Hunters Point generally involve a three-prong strategy: (1) excavation and off-site disposal to remove contaminated soils; (2) clean soil and/or asphalt covers to prevent exposure to any lower-level contaminants that remain on site; and (3) institutional controls to prevent exposure to capped soils. AR\_0000040-44, 54-55; *e.g.*, 0000077-79 (IR07/18). Durable covers generally may not be removed or damaged. AR\_0000054. And home-grown crops in the ground are prohibited to prevent contaminant transfer through food. *Id.*

In the Review, the Navy assessed the integrity of the durable covers and compliance with institutional controls. AR\_0000079-80, 83, 87-88, 151-154, 211-213, 216, 270. The covers were generally in good condition with some minor disturbances noted. *Id.* The Navy did not identify any institutional controls compliance issues. *Id.* These remedy components were performing as intended in the remedial actions selected. *Id.* Thus, the Navy’s review of them was reasonable.

Greenaction complains that the Navy has not “adequately justified caps and institutional controls” because the caps will be removed for construction and the homegrown crop prohibition will not be adequately enforced. Mot. 22-24. But nothing has changed about the durable covers and institutional controls remedy components since they were selected, and the Review reasonably found they are operating properly. AR\_0000079-80, 83, 87-88, 151-154, 211-213, 216, 270.

In essence, Greenaction argues that these remedy components are not sufficiently protective as designed. But the Navy was not required to start anew and “justify” the selection of these remedy components; it was required to reasonably review them. 42 U.S.C. § 9621(c). The Navy did that. Greenaction attempts to challenge the remedial actions selected, but that claim is not pleaded in the second amended complaint because it was already dismissed as time-barred

under the six-year statute-of-limitations. Order, Dkt. No. 44 at 4 (citing 28 U.S.C. § 2401(a)); *see* AR\_0000072-73, 139, 205, 254 (providing the parcel records of decision dates).

Regardless, Greenaction ignores the institutional controls components designed to address the very concerns it raises here: (1) Construction activities are subject to regulatory oversight and must comply with institutional controls restrictions; and (2) The homegrown produce ban will be enforced through deed restrictions, covenants to restrict the use of property, and compliance inspections. AR\_0000054, 79. So even if this challenge were not time-barred, the Navy's (and EPA's) determinations when remedies were selected that the durable covers and institutional controls are protective were reasonable. Clearly, Greenaction would prefer the most protective remedies. But the Navy had to pick protective and cost-effective remedies, not the most protective remedy feasible. *See* 42 U.S.C. § 9621(a); *Frey v. EPA*, 751 F.3d 461, 471 (7th Cir. 2014).

**D. The Navy's analysis of possible climate-related impacts and plans for further review was reasonable.**

The Review included a climate resilience assessment that evaluated climate-related risks from coastal flooding, extreme weather events, drought, wildfire, riverine flooding, extreme temperature, energy demand, and land degradation. AR\_0000322-390. The Navy assessed climate impacts that may arise in 2035 and 2065. AR\_0000334. Risks evaluated for these years would provide information for planning work that may be needed now. *Id.*

The Navy used the 2021 Department of Defense Regional Sea Level database that contains installation-specific predictions for sea-level rise and applied the highest rise scenario predicted, one foot for 2035 and 3.2 feet for 2065. *Id.* These estimates are consistent with State of California Ocean Protection Council's Sea-Level Rise Guidance Document 2018 Update and the 2024 California Ocean Protection Council update, and above the most recent Council predictions. *Id.*

The Navy's careful assessment found that there could be increased risks to human health in 2035 from groundwater rising above the ground surface (groundwater emergence) in parcels D-1 and E-2. AR\_0000331. In 2065, groundwater emergence may increase risks to health and the San Francisco Bay in parcels B-1, B-2, C, D-1, E, E-2 and IR-07 and 18. *Id.* Thus, the Navy recommended doing parcel-specific studies at Hunters Point to determine whether possible climate-related impacts are likely to increase risks to health and the environment. *Id.*

Greenaction does not challenge the Navy's analysis, findings, or recommendations on this issue. Mot. 24-25. Instead, Greenaction argues the Navy should have predicted possible climate impacts and attendant risks out to 2100 instead of 2065. *Id.* But the Navy will do that during the parcel-specific assessments. AR\_0000335. Those assessments will include more data and site-specific information and thus better predict potential climate risks. AR\_0000348-349. It is reasonable to do the year 2100 analysis later for a more reliable assessment with better data.

None of Greenaction's assigned errors comes close to proving its claim. The Review was reasonable and lawful.

**III. Claim Two is not cognizable as a CERCLA citizen suit; CERCLA mandates review every five years; and the Court otherwise should not issue an order now.**

As Greenaction (wrongly) demands more from the Review, it also wants the Navy to move faster and complete the sixth five-year review in about four years instead of five. In doing so, Greenaction renews its claim that the Navy "failed to perform a non-discretionary act required by CERCLA and the [National Contingency Plan] by failing to issue its *Fifth [Five-Year Review]* in a timely manner." Mot. 6. The Court already dismissed that claim as moot. Dkt. No. 44 at 2-3. And Greenaction's claim about the timing of the sixth five-year review is not cognizable as a CERCLA citizen suit, even if packaged as an illegal policy. *See* Mot. at 8. On the merits, the claim fails because CERCLA mandates review every five years.

Greenaction pleaded claim two as a nondiscretionary duty claim under 42 U.S.C. § 9659(a)(2). The Navy maintains that the plain language of Section 9659(a)(2) allows citizen suits only when there is a *present* failure to perform a nondiscretionary act or duty. *See* Mem. P. & A., Dkt. No. 61-1 at 10-11; *Frey*, 751 F.3d at 469 (emphasis added). The relief Greenaction seeks shows that the sixth five-year review deadline is years from now. Thus, the Navy has not failed to perform a duty that is due. Even so, the Navy may meet Greenaction’s alleged deadline. Declaration of Danielle Janda ¶ 14. That means the alleged injury may not arise and the claim is not ripe. *See Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08 (2003).

Further, CERCLA does not clearly mandate that the Navy complete the sixth five-year review by July 2028, as Greenaction alleges. Mot. 6-9. CERCLA requires five-year reviews every five years. 42 U.S.C. § 9621(c). It is ambiguous what CERCLA requires if a prior review is late. When a mandatory duty is ambiguous, it must be resolved in favor of the agency. *See Citizens for Pa’s Future v. Wheeler*, 469 F. Supp. 3d 920, 926-27 (N.D. Cal. 2020). The Navy clearly must do a review no later than July 2029, five years from the Review, not four. 42 U.S.C. § 9621(c). Greenaction demands that the Navy “catch-up” such that a review completed three years late would make the next review due in two years. That is not clearly mandated by CERCLA and does not serve the purpose of the five-year review provision.

Claim two also is not cognizable as a CERCLA “violations” claim under Section 9659(a)(1). That is because Greenaction’s contention that the Navy will fail to complete the sixth five-year review is so clearly an alleged failure to complete a nondiscretionary duty. And therein lies Greenaction’s problem: “Violations” under citizen-suit provisions like CERCLA do not include failures to perform nondiscretionary duties. *Bennett v. Spear*, 520 U.S. 154, 173 (1997); *City & County of San Francisco v. U.S. Dep’t of Transp.*, 796 F.3d 993, 999 (9th Cir. 2015).

For allowing nondiscretionary claims to proceed as “violations” claims would render nondiscretionary duty claims redundant. Every alleged nondiscretionary duty could be pleaded as a “violation” of an agency’s nondiscretionary duties under CERCLA. Congress chose separate provisions for “violations” claims and “nondiscretionary duty” claims. Courts must give meaning to both. *See Saldana v. Bronitsky*, 122 F.4th 333, 342 (9th Cir. 2024).

The Navy recognizes that this Court’s Order on the Navy’s motion for partial dismissal of the second amended complaint allowed Greenaction’s claim to proceed on allegations that “the Navy has a current policy of shirking a nondiscretionary duty.” Order, Dkt. No. 77 at 2. Greenaction now argues that the Navy has a policy “tying the trigger date to the [] signature date [of the prior five-year review]” and that “policy is inconsistent with [CERCLA].” Mot. 8.

But Greenaction cannot use Section 9659(a)(1) to bring a broad, programmatic challenge to the Navy’s administration of its duty to complete five-year reviews. *Cf. Battaglia v. Browner*, 963 F. Supp. 689, 691 (N.D. Ill. 1997) (finding plaintiff could not bring a claim under Section 9659(a)(1) to challenge an agency’s “maladministration of CERCLA”).<sup>4</sup> Greenaction challenges how the Navy has administered its obligations to complete five-year reviews, and specifically that the Navy *failed* to complete them on time. That is a nondiscretionary duty claim. *If* the Navy does not complete the sixth five-year review by Greenaction’s asserted due date, Greenaction need only

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<sup>4</sup> In its Order, the Court stated that the Navy conceded that a challenge to any agency’s administration of CERCLA could be brought under Section 9659(a)(1). Dkt. No. 44 at 6 n.3. The Navy conceded that review of its discretionary decisionmaking selecting remedial actions is available under Section 9659(a)(1) based on CERCLA’s reference to “violations” citizen suits challenging response actions in the timing of review provision at 42 U.S.C. § 9613(h)(4). *See* Dkt. No. 30 at 4; *see also* Dkt. No. 36 at 5-7. But the Navy did not concede that a claim alleging a failure to perform a nondiscretionary duty to complete a five-year review is cognizable as a “violations” claim under Section 9659(a)(1). *Id.* Nondiscretionary duty claims must be brought under Section 9659(a)(2) and are not available under Section 9659(a)(1).

provide the required 60-day pre-suit notice and then file a citizen suit to compel the required action. *See* 42 U.S.C. § 9659(a)(1), (e). This is not a situation where the Navy can evade judicial review.

Still, even if the Court were to find the Navy liable for claim two, the Court should not issue an order now. Hunters Point is a large, complicated CERCLA cleanup. Janda Declaration ¶ 5-6. There are multiple remedial components at the various parcels that differ based on the kind of contamination present and its distribution in the environment (soils, soil vapor, groundwater etc.). *Id.* The five-year reviews at Hunters Point must evaluate all the remedial components at every applicable parcel. *See id.*; 42 U.S.C. § 9621(c). That is a substantial, time-consuming project as is clear from the work the Navy did for the Review. Janda Declaration ¶ 10, 11, 13.

The Navy wants to do a thorough review that provides for meaningful public participation and coordination with EPA and California regulators to address any issues. *Id.* ¶ 8, 10, 12. Indeed, the Navy spent about 13 months on these important elements for the fourth five-year review and about nine months for the Review. *Id.* ¶ 11. If ordered to meet the July 2028 date, the Navy will likely truncate or eliminate public participation and prioritize completing the final report over fuller collaboration with EPA and California regulators. *Id.* ¶ 12. And practically, staffing limitations constrain the Navy because five-year reviews are time intensive. *Id.* ¶ 13. Prioritizing the sixth five-year review results in less time to execute the remedial actions at Hunters Point. *Id.* Even so, the Navy may finish the sixth five-year review before July 2028. *Id.* ¶ 14. Therefore, the Court should not issue an order directing the timing of the sixth five-year review now.

### CONCLUSION

For these reasons, the Court should grant the Navy's motion, deny Greenaction's motion, and enter summary judgment for the Navy.