

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 10, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CITY OF SPOKANE, a municipal
corporation located in the County of
Spokane, State of Washington,

Plaintiff,

v.

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

Defendants.

No. 2:15-CV-00201-SMJ

**ORDER GRANTING PLAINTIFF’S
MOTION TO DISMISS AMENDED
COUNTERCLAIMS**

I. INTRODUCTION

The City of Spokane filed this action against the Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively “Monsanto”) alleging that Monsanto is responsible for polychlorinated biphenyl (PCB) contamination in the Spokane River under several state tort-law theories of liability. ECF No. 1. Monsanto answered Spokane’s complaint and counterclaimed for cost recovery and declaratory judgment under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and Declaratory Judgment

1 Act, alleging that Spokane is liable for PCB contamination in the River. ECF No.
2 79. The Court dismissed Monsanto's counterclaims because Monsanto failed to
3 allege facts sufficient to state a plausible CERCLA cost-recovery claim, ECF No.
4 100, but the Court granted Monsanto's motion for leave to file amended
5 counterclaims.

6 In its amended counterclaims, Monsanto again alleges CERCLA and
7 declaratory relief claims, adding investigatory and analytical activities to its alleged
8 response costs. ECF No. 153 at 74–75. Monsanto also adds claims for statutory
9 violations of the Clean Water Act (CWA), regulatory violations of federal permits,
10 and several state tort claims. *Id.* at 79–87. Spokane now moves to dismiss these
11 amended counterclaims, arguing that Monsanto: does not allege a “response”
12 sufficient to state a CERCLA claim, ECF No. 156. at 5–6; lacks standing to bring a
13 CWA citizen suit, *id.* at 6–8; and fails to allege a cognizable injury sufficient to
14 support its state-law tort claims, *id.* at 8–11.

15 The Court concludes that each of Monsanto's amended counterclaims fails
16 to state a claim upon which relief may be granted. Monsanto fails to allege any new
17 facts plausibly showing that it has incurred or will incur response costs that are
18 necessary and consistent with the national contingency plan, as required to state a
19 CERCLA cost-recovery claim. Monsanto fails to allege a basis for Article III
20 standing to bring its CWA citizen-suit claim because it cannot show that its alleged

1 injury is traceable to actions by Spokane or would be redressed by the remedies
2 available under the CWA. As for Monsanto's tort claims, Monsanto fails to allege
3 any injury or potential injury caused by actions other than its own. Accordingly,
4 Spokane's motion to dismiss Monsanto's counterclaims is granted.

5 **II. BACKGROUND**

6 The Spokane River is contaminated with PCBs and listed on the Washington
7 State Water Quality Assessment list of impaired water bodies under section 303(d)
8 of the Clean Water Act (CWA). ECF No. 1 at 3. Monsanto produced PCBs in the
9 United States from 1935 until the late 1970s. ECF No. 1 at 2; ECF No. 79 at 39.
10 Spokane alleges that Monsanto was aware for decades that PCBs were toxic and
11 contaminating natural resources and living organisms. ECF No. 1 at 2, 16–25.
12 Spokane filed this action alleging that Monsanto is responsible for, and liable for
13 resulting damages from, PCB contamination in the River.¹ ECF No. 1.

14 In its amended answer, Monsanto alleges that PCBs have numerous origins
15 other than Monsanto's manufacturing, that Spokane authorized and continues to
16 authorize the use of products containing PCBs, and that Spokane is responsible for
17 discharging PCB's into the River. ECF No. 153 at 51–52. Accordingly, Monsanto
18 counterclaims that Spokane is liable under CERCLA for costs associated with

19
20 ¹ A more detailed discussion of Spokane's factual allegations and legal claims is
contained in the Court's order addressing Monsanto's motion to dismiss. ECF No.
74.

1 cleaning up PCBs and other contaminants in the Spokane River, that Spokane has
2 committed statutory and regulatory violations of CWA effluent standards, and that
3 Spokane is liable for costs incurred by Monsanto under theories of negligence,
4 equitable indemnity, contribution, and unjust enrichment. ECF. No. 153 at 73–87.
5 Monsanto alleges the following facts in support of its counterclaims:²

6 Spokane discharged untreated sewage into the Spokane River prior to the
7 construction of Spokane’s wastewater treatment system in 1958. ECF No. 153 at
8 55. Since 1958, Spokane has discharged sewage, wastewater, and storm water
9 containing contaminants, including PCBs, through its wastewater and storm water
10 systems. ECF No. 153 at 55. Spokane’s reclamation facility and combined sewer
11 overflows are regulated by an NPDES waste discharge permit. ECF No. 153 at 56.
12 During heavy rain or snowmelt events, the combined system may become
13 overwhelmed, resulting in direct discharge of untreated sewage and wastewater,
14 which includes PCBs, into the River. ECF No. 153 at 56.

15 In 1984, the Washington Supreme Court held that Spokane discharged
16 sewage into the River in a manner constituting a public nuisance, *Miotke v.*
17 *Spokane*, 678 P.2d 803, 817 (Wash. 1984), *abrogated on other grounds by Blue Sky*
18 *Advocates v. State*, 727 P.2d 644 (Wash. 1986). ECF No. 153 at 56–57.

19
20 ² The Court accepts these alleged facts as true for the purpose of considering this motion to dismiss. *See Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (citation omitted).

1 Additionally, Spokane has received notice letters on several occasions concerning
2 discharges allegedly in violation of the City's NPDES permit. ECF No. 153 at 57.
3 The combined system has experienced over 500 overflow events in the last three
4 years. ECF No. 153 at 58.

5 Spokane also has extensive, separate storm water systems, which discharge
6 untreated storm water into the Spokane River and Latah Creek at over 100 locations.
7 ECF No. 153 at 59. These systems are regulated by a municipal storm water permit
8 issued by the Washington State Department of Ecology, which, among other things,
9 requires Spokane to use "all known, available, and reasonable methods of
10 prevention, control and treatment to prevent and control pollution to the waters of
11 the State of Washington." ECF No. 153 at 60. Monitoring of three separate storm
12 water systems between 2012 and 2014 revealed PCB contamination in excess of
13 State water-quality standards. ECF No. 153 at 61.

14 Spokane continues to use, purchase, and dispose of PCB-containing products.
15 ECF No. 153 at 62. These include Freez-Gard road de-icers and Hydroseed erosion
16 control products. ECF No. 153 at 62. Sewer storm water contamination also occurs
17 from disposal of building materials that contain PCBs because Spokane does not
18 identify or remove PCB-containing materials prior to construction, renovation, or
19 demolition. ECF No. 153 at 65. Spokane also owns several sites near the "Spokane
20 River that have been identified for investigation and cleanup by EPA and/or

1 [Ecology],” and which discharge PCBs and other contaminants of concern into the
2 river. ECF No. 153 at 66.

3 Monsanto alleges that it has incurred response and defense costs, including:

4 (1) identification and analysis of historic and current sources of
5 potential contamination . . . (2) analysis of the potential impacts on the
6 Spokane River . . . (3) review and analysis of sampling and
7 investigation data . . . (4) investigation and analysis of the
8 contaminated sediments . . . (5) analysis of potential source control and
remediation options . . . (6) analysis of PCBs in the Spokane River . . .
9 (7) [Potentially Responsible Party] search activities . . . and (8)
10 numerous other activities.

11 ECF No. 153 at 70–71. Monsanto also alleges Spokane’s discharges of PCBs has
12 created “significant contingent liability” for Monsanto, which “may arise from
13 lawsuits, such as the instant one” and “potential future federal, state or local
14 regulatory actions.” ECF NO. 153 at 69.

15 **III. MOTION TO DISMISS STANDARD**

16 A claim may be dismissed pursuant to Rule 12(b)(6) either for lack of a
17 cognizable legal theory or failure to allege sufficient facts to support a cognizable
18 legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (citation omitted).
19 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
570 (2007)). A claim is plausible on its face when “the plaintiff pleads factual
content that allows the court to draw the reasonable inference that the defendant is

1 liable for the misconduct alleged.” *Id.* (citation omitted). A court must “accept all
2 factual allegations in the complaint as true and construe the pleadings in the light
3 most favorable to the nonmoving party.” *Taylor*, 780 F.3d at 935 (quoting *Rowe v.*
4 *Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009)). However,
5 “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s
6 liability, it ‘stops short of the line between possibility and plausibility of
7 entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
8 557). “[W]here the well-pleaded facts do not permit the court to infer more than the
9 mere possibility of misconduct, the complaint has alleged—but has not ‘show[n]’—
10 ‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

11 IV. DISCUSSION

12 A. Monsanto fails to state a claim under CERCLA.

13 To prevail on a claim for private cost recovery under Section 107 of
14 CERCLA,³ a plaintiff must establish that:

15 (1) the site on which the hazardous substances are contained is a
16 “facility” under CERCLA’s definition of that term, Section 101(9),
42 U.S.C. § 9601(9); (2) a “release” or “threatened release” of any
17 “hazardous substance” from the facility has occurred, 42 U.S.C. §
18 9607(a)(4); (3) such “release” or “threatened release” has caused the
plaintiff to incur response costs that were “necessary” and “consistent
with the national contingency plan,” 42 U.S.C. §§ 9607(a)(4) and

19 _____
20 ³ As discussed in the order dismissing Monsanto’s initial CERCLA counterclaim,
Monsanto has Article III standing to bring a CERCLA claim and Monsanto’s claims
fall within CERCLA’s zone of interest. ECF No. 100 at 6–12.

1 (a)(4)(B); and (4) the defendant is within one of four classes of
2 persons subject to the liability provisions of Section 107(a).

3 *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870–71 (9th Cir. 2001)
4 (quoting *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th
5 Cir. 1990)) (internal quotation marks omitted). Spokane argues that Monsanto
6 fails to adequately allege the third element—that it has incurred necessary
7 response costs caused by Spokane’s release of hazardous substances. ECF No.
8 156 at 5–6.

9 The potential to recover costs under CERCLA depends on whether the costs
10 are related to a “response,” whether those response costs are “necessary” under the
11 national contingency plan, and whether those costs are “consistent with the national
12 contingency plan.” *See Key Tronic Corp. v. United States*, 511 U.S. 809, 813 (1994)
13 (citing 42 U.S.C. § 9607(a)(4)(B)). “Response” and “respond” mean “remove,
14 removal, remedy, and remedial action” and “include enforcement activities related
15 thereto.” *Key Tronic*, 511 U.S. at 813 (quoting 42 U.S.C. § 9601(25)). “Necessary
16 costs are costs that are ‘necessary to the containment and cleanup of hazardous
17 releases.” *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1271
18 (E.D. Cal. 1997) (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir.
19 1992)). “[C]osts cannot be deemed ‘necessary’ to the containment and cleanup of
20 hazardous releases absent some nexus between the alleged response cost and an

1 actual effort to respond to environmental contamination.” *Young v. United States*,
2 394 F.3d 858, 863 (10th Cir. 2005).

3 Monsanto argues that it has adequately alleged it has incurred necessary
4 response costs and that its alleged investigative costs are recoverable even to the
5 extent the costs may be related to litigation. ECF No. 160 at 5–9. Monsanto is
6 correct that certain investigative costs may be recoverable under CERCLA. *See*
7 *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (“Section
8 107(a)(2)(B) allows recovery of ‘costs of response,’ which includes the costs of
9 ‘such actions as may be necessary to monitor, assess, and evaluate the release or
10 threat of release of hazardous substances.’”). With respect to legal costs, the rule is
11 much narrower than Monsanto suggests—the Supreme Court has approved cost
12 recovery for certain legal expenses relating to identifying other potentially
13 responsible parties. *Key Tronic*, 511 U.S. at 820. But where Monsanto’s argument
14 fails is not on whether the costs it has incurred are “necessary” under CERCLA, it
15 is on whether those costs are connected to a “response.”

16 CERCLA § 107(a) “permits a [potentially responsible party] to recover only
17 the costs it has ‘incurred’ in *cleaning up a site.*” *United States v. Atl. Research*
18 *Corp.*, 551 U.S. 128, 139 (2007) (citing 42 U.S.C. § 9607(a)(4)(B)) (emphasis
19 added). As the Supreme Court explained in *Atlantic Research*, in order to bring a
20 cost recovery action under section 107, a plaintiff must have been the party that paid

1 for the cleanup of a facility—i.e., the “response.” *Id.* at 138–139. In other words,
2 section 107 provides a mechanism for a party that has incurred costs cleaning up a
3 facility to recover those costs from other potentially responsible parties by
4 determining their respective liability for the response. *See id.* It does not provide a
5 means for a party that fears it may face liability for some potential future cleanup
6 costs to preemptively bring an action against another party it believes may be liable
7 for those costs.

8 Monsanto makes the following allegations concerning the costs it allegedly
9 has and will continue to incur:

10 Defendants/Counter-Claimants have incurred response costs that
11 would be necessary even in the absence of the present suit.
12 Incurrence of these response costs is a necessary predicate for
13 cleanup efforts, since identifying sources of PCB discharges and the
14 locations of the resulting PCB deposits are requisite first steps to any
15 cleanup.

16 Additionally, the City’s discharges and releases made incurrence of
17 response costs necessary both due to the City’s lawsuit and also to
18 address other potential sources of contingent liability created by the
19 City’s conduct.

20 Defendants/Counter-Claimants have paid and will continue to pay
necessary costs of response consistent with the National Contingency
Plan, within the meaning of CERCLA § 101(31), 42 U.S.C. §
9601(31), including response costs to assess and investigate, assess,
identify, trace, quantify and feasibly remove and/or remediate
contamination caused by the City’s releases and/or disposal of
hazardous substances to the Spokane River.

1 Additionally, if Defendants/Counter-Claimants are found liable to the
2 City for contamination of the Spokane River,
3 Defendants/Counter-Claimants will incur additional response costs
4 and damages to investigate, remove and/or remediate the hazardous
5 substances that the City has released and/or disposed of to the
6 Spokane River.

7 ECF No. 153 at 71, 74–75.

8 Monsanto’s allegations contain no facts from which the Court could
9 plausibly conclude that Monsanto’s alleged costs were necessary to actual
10 containment or cleanup of hazardous releases because there are no allegations that
11 any containment or cleanup have been undertaken by Monsanto. Further,
12 Monsanto has given no indication that it has undertaken these investigative
13 activities for any purpose other than evaluating its liability and defending against
14 legal claims. These costs are not recoverable. *See Atl. Richfield Co. v. United*
15 *States*, 181 F. Supp. 3d 898, 915 (D. N.M. 2016) (citing *United States v. Hardage*,
16 982 F.2d 1436, 1448 (10th Cir. 1992) (holding that costs of defending against
17 legal claims are not recoverable under CERCLA § 107). Accordingly, Monsanto
18 fails to plead sufficient facts plausibly showing that it has incurred or will incur
19 necessary response costs.

20 **B. Monsanto fails to state a claim for declaratory relief under CERCLA
or the Declaratory Judgment Act.**

An action for declaratory relief under Section 113 of CERCLA fails in the
“in the absence of a substantive cause of action.” *Chevron Env’tl. Mgmt. Co. v.*

1 *BKK Corp.*, 880 F. Supp. 2d 1083, 1091 (E.D. Cal. 2012) (quoting *Union Station*
2 *Assocs., LLC. v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1226, 1230 (W.D.
3 Wash. 2002)). The same rule applies to claims under the Declaratory Judgment
4 Act. See *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1007
5 (9th Cir. 2007). Accordingly, because Monsanto fails to state a claim under
6 Section 107, Monsanto has no substantive claim for relief upon which to base
7 declaratory judgment.

8 **C. Monsanto lacks Article III standing to bring a claim under the CWA’s**
9 **citizen suit provision.**

10 “The CWA’s citizen suit provision extends standing to the outer boundaries
11 set by the ‘case or controversy’ requirement of Article III of the Constitution.”

12 *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir.
13 2000) (citation omitted). Accordingly, the only standing question before the Court
14 is whether Monsanto has established Article III standing to bring its CWA claim.

15 *Id.* (“Because the statutory and constitutional standing issues . . . merge, the only
16 standing issue . . . is whether the plaintiffs have standing under Article III to
17 proceed to the merits of their lawsuit.”) “[T]o satisfy Article III’s standing
18 requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a)
19 concrete and particularized and (b) actual or imminent, not conjectural or
20 hypothetical; (2) the injury is fairly traceable to the challenged action of the
defendant; and (3) it is likely, as opposed to merely speculative, that the injury

1 will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw*
2 *Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders*
3 *of Wildlife*, 504 U.S. 555, 560–61 (1992)). Monsanto fails to allege that the
4 injuries it suffered are fairly traceable to Spokane’s conduct, or that the alleged
5 injuries will be redressed by remedies available in a CWA citizen suit.

6 1. Monsanto does not allege an adequate causal connection between its
7 injuries and Spokane’s alleged CWA violations.

8 Monsanto alleges that Spokane violates the CWA by discharging
9 contaminated sewer and storm water into the Spokane River in violation of
10 Spokane’s NPDES and Phase II permits. ECF No. 153 at 79–83. These violations
11 of the CWA have allegedly caused Monsanto harm by creating contingent liability
12 for Monsanto based on the potential outcome of this litigation and other potential
13 legal or regulatory action. ECF No. 153 at 83. Monsanto does not allege that it
14 owns any property that is affected by contamination of the Spokane River, and
15 Monsanto will have a legal obligation to respond to contamination in the Spokane
16 River only as a result of a court judgment or settlement agreement in this action.⁴

17 This alleged contingent liability is not fairly traceable to Spokane’s conduct. If
18 Monsanto is found to be liable in this case, it will be liable for its own conduct,

19 ⁴ Monsanto’s allegations that it may be obligated to respond to contamination in the
20 Spokane River based on undisclosed other potential legal or regulatory actions
against it are hypothetical and speculative, and therefore insufficient to support
standing. *See Friends of the Earth*, 528 U.S. at 181.

1 not Spokane's. *See* Wash. Rev. Code § 4.22.005 ("In an action based on fault
2 seeking to recover damages . . . , any contributory fault chargeable to the claimant
3 diminishes proportionately the amount awarded as compensatory damages for an
4 injury attributable to the claimant's contributory fault: . . .").

5 2. The remedies provided for CWA citizen suits would not redress the
6 injuries complained of by Monsanto.

7 CWA citizen suits permit injunctive relief to compel future compliance with
8 CWA requirements as well as civil penalties paid to the United States Treasury.
9 *Friends of the Earth*, 528 U.S. at 173. Despite being paid directly to the Treasury,
10 civil penalties can redress environmental injuries alleged in citizen suits by
11 encouraging defendants to end current violations and deter them from future
12 violations. *Id.* at 186. Monsanto, however, does not address how either of these
13 remedies will redress the contingent liability they complain of as an injury.
14 Monsanto's alleged economic injury cannot be redressed by remedies that merely
15 deter future violations because Monsanto's alleged injuries are based on
16 remediation of already-existing contamination.

17 **D. Monsanto fails to state a claim for negligence under Washington law.**

18 Under Washington law, "[t]he elements of negligence are duty, breach,
19 causation, and injury. Since the Washington State Legislature waived sovereign
20 immunity for municipalities in 1967, municipalities are generally held to the same
negligence standards as private parties." *Keller v. City of Spokane*, 44 P.3d 845, 848

1 (Wash. 2002) (citing *Hartley v. State*, 698 P.2d 77, 82 (Wash. 1985) (detailing the
2 elements of negligence); *Bodin v. City of Stanwood*, 927 P.2d 240, 243–44 (Wash.
3 1996) (explaining that the same negligence standards generally apply to
4 municipalities and private parties); Wash. Rev. Code § 4.96.010) (internal citations
5 omitted). Monsanto fails to state a state-law negligence claim because Monsanto
6 cannot establish that Spokane owed a duty to Monsanto, or that, if it did, breach of
7 that duty caused Monsanto’s harm.

8 1. Monsanto fails to establish Spokane owed a duty to protect Monsanto
9 from economic harm by violating water quality regulations.

10 A duty can be established by common law principles or violation of a statute.
11 *Bernethy v. Walt Failor’s, Inc.*, 653 P.2d 280, 282 (Wash. 1982). “Whether a
12 municipality owes a duty in a particular situation is a question of law.” *Keller*, 44
13 P.3d at 848 (citing *Hansen v. Friend*, 824 P.2d 483, 485 (Wash. 1992)).
14 Determining whether a duty is owed by a municipality requires the court to “decide
15 not only who owes the duty, but also to whom the duty is owed, and what is the
16 nature of the duty owed.” *Id.* (citing *Wick v. Clark Cty.*, 936 P.2d 1201, 1206 (Wash.
17 Ct. App. 1997) (Morgan, J., concurring)). The determination of whether a duty is
18 owed to a plaintiff depends on whether the harm suffered was a foreseeable result
19 of the risk of harm created by the defendant’s conduct, without regard to the
20 plaintiff’s own fault. *Id.*; see also *Rikstad v. Holmberg*, 456 P.2d 355, 358 (Wash.
1969). “[T]he question is whether the actual harm fell within a general field of

1 danger which should have been anticipated.” *Id.* (quoting *McLeod v. Grant Sch.*
2 *Dist.*, 255 P.2d 360, 363 (Wash. 1953)); *see also M.H. v. Corp. of Catholic*
3 *Archbishop of Seattle*, 252 P.3d 917, 919 (Wash. Ct. App. 2011).

4 Monsanto alleges that the duty owed by Spokane is a general duty of due care
5 in operating and maintaining its sewer, wastewater, and storm water systems based
6 on Spokane’s federal and state permits and Washington law. ECF No. 160 at 13–
7 14. However, Monsanto fails to offer any support for its position that this duty is
8 owed to Monsanto or that the nature of the duty is to protect individuals from the
9 harm Monsanto alleges—contribution costs associated with remediation of
10 contamination.

11 Pursuant to statutes and permits, Spokane has certain duties relating to
12 operating and maintaining its water treatment systems in a manner that avoids
13 unlawful release of contaminants into surface and ground water. The foreseeable
14 harm of breaching these duties is the contamination of waterways, including
15 economic, recreational, and aesthetic harms. Those duties are owed to those with
16 an economic, recreational, or aesthetic interest in foreseeable harm from the release
17 of contaminated water. Monsanto has not alleged any such interest in land or water
18 allegedly contaminated by Spokane’s negligence.

19 //

20 //

1 2. Even if Spokane owed a duty to Monsanto, Monsanto fails to allege
2 causation.

3 As discussed above, Monsanto's only alleged injury is the costs it may be
4 required to pay if it is ultimately found liable or settles this case. If that occurs,
5 Monsanto's liability will be limited to costs resulting from its own actions, not
6 Spokane's. *See* Wash. Rev. Code § 4.22.005.

7 **E. Monsanto's claim for unjust enrichment based on a possible court**
8 **judgment is absurd.**

9 A party is only liable for unjust enrichment if the party possesses the money
10 or property of another and "in equity and good conscience" should not retain it.
11 *Heaton v. Imus*, 608 P.2d 631, 632 (Wash. 1980) (internal quotation marks and
12 citation omitted). Three elements must be satisfied to make a claim for unjust
13 enrichment: "(1) the defendant receives a benefit, (2) the received benefit is at the
14 plaintiff's expense, and (3) the circumstances make it unjust for the defendant to
15 retain the benefit without payment." *Norcon Builders, LLC v. GMP Homes VG,*
16 *LLC*, 254 P.3d 835, 844 (Wash. Ct. App. 2011) (quoting *Young v. Young*, 191 P.3d
17 1258, 1262 (Wash. 2008)) (internal quotation marks omitted).

18 Monsanto argues that any amount awarded to Spokane in a court judgment
19 not directly related to cleaning up PCB contamination caused by Monsanto would
20 be inequitable and unjust. Monsanto assumes by its argument that a court judgment
on damages for Spokane would be unjust and inequitable. But Washington law

1 specifically provides, “any contributory fault chargeable to the claimant diminishes
2 proportionately the amount awarded as compensatory damages for an injury
3 attributable to the claimant’s contributory fault.” Wash. Rev. Code § 4.22.005. Any
4 contributory fault attributable to Spokane will ensure that a damages awarded would
5 not constitute unjust enrichment.

6 Monsanto characterizes the Washington case *Young v. Young* as prescribing
7 unjust enrichment as an offset to a jury award of damages. ECF No. 160 at 18. This
8 characterization is simply false. *Young* was a quiet title action in which the
9 defendants counterclaimed for improvements to the property. 191 P.3d 1258, 1260
10 (Wash. 2008). Monsanto’s claims are clearly distinguishable from the unjust
11 enrichment claims in *Young* because Monsanto is not attempting to offset
12 improvements or other costs it has incurred that Spokane will benefit from.
13 Monsanto fails to establish that the circumstances of a court judgment for Spokane
14 could constitute an unjust benefit to Spokane and therefore cannot state a claim for
15 unjust enrichment under Washington common law.

16 **F. Monsanto fails to state a contribution or equitable indemnity claim**
17 **under Washington Law.**

18 Washington law provides that “[a] right of contribution exists between or
19 among two or more persons who are jointly and severally liable upon the same
20 indivisible claim for the same injury.” Wash. Rev. Code § 4.22.040. This claim
“only exists in limited circumstances, including where the plaintiff is free of fault

1 and judgment has been entered against two or more defendants.” *Mazon v.*
2 *Krafchick*, 144 P.3d 1168, 1174 (Wash. 2006). Accordingly, there is no basis for a
3 defendant to bring a claim for contribution against the single plaintiff that may
4 secure a judgment against it. Further, as noted, any comparative liability Spokane
5 may have will be accounted for through a proportional reduction in any judgment
6 against Monsanto. *See* Wash. Rev. Code § 4.22.005.

7 A claim for equitable indemnity is available only “where a legal duty exists
8 between non-joint tortfeasors.” *Sabey v. Howard Johnson & Co.*, 5 P.3d 730, 738–
9 39 (Wash. App. 2000). Like contribution, there is no basis for a defendant to bring
10 such a claim against a plaintiff who may secure a judgment against it, as the
11 plaintiff’s proportional liability will be addressed in any such judgment.

12 Monsanto could have an equitable indemnity or contribution claim against
13 Spokane only if Spokane and Monsanto were determined to be liable to a third party
14 for the same tort. Monsanto has not alleged any such liability.

15 V. CONCLUSION

16 For the reasons discussed, Monsanto has failed to state a claim upon which
17 relief may be granted under CERCLA, the Declaratory Judgment Act, the CWA, or
18 Washington tort law. Monsanto has already amended its CERCLA counterclaims
19 once, and its current pleadings do not permit an inference that any set of facts exist
20 that would permit Monsanto to state a plausible claim under its alleged theories of

1 liability. Accordingly, the Court finds that further amendment would be futile and
2 dismisses each of Monsanto's counterclaims with prejudice.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 **1.** Plaintiff's Motion to Dismiss Monsanto's First Amended
5 Counterclaims, **ECF No. 156**, is **GRANTED**.

6 **2.** Defendant's First Counterclaim for Relief (Cost Recovery Under
7 CERCLA), ECF No. 153 at 73–75, Second Counterclaim for Relief
8 (Federal Declaratory Relief Under CERCLA and Declaratory
9 Judgment Act), ECF No. 153 at 76–79, Third Counterclaim for Relief
10 (Violations of the CWA and the City's NPDES Permits), ECF No. 153
11 at 79–83, Fourth Counterclaim for Relief (Negligence), ECF No. 153
12 at 83–85, Fifth Counterclaim for Relief (Unjust Enrichment), ECF No.
13 153 at 85–86, Sixth Counterclaim for Relief (Contribution), ECF No.
14 153 at 86–87, and Seventh Counterclaim for Relief (Equitable
15 Indemnification), ECF No. 153 at 87–88, are **DISMISSED WITH**
16 **PREJUDICE**.

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