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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

v.

MONSANTO COMPANY, *et al.*,

Defendants.

Case No. C16-107-RAJ-MLP

ORDER

I. INTRODUCTION

This matter is before the Court on: (1) Plaintiff City of Seattle’s (“City”) “Motion to Exclude Proposed Expert Testimony by Michael Kavanaugh, Scott Recker, and Robert Karls” (Pl.’s Mot. (dkt. # 599)); (2) Defendants Monsanto Company, Solutia Inc., and Pharmacia LLC’s (“Defendants” or “Monsanto”) “*Daubert* Motion to Exclude Testimony (First, Second, Third Opinions) of Plaintiff Expert Mark Velleux” (Defs.’ Velleux Mot. (dkt. # 629)); and (3) Defendants’ “*Daubert* Motion to Exclude the Opinions and Testimony of Daniel Apt” (Defs.’ Apt Mot. (dkt. # 644)). The parties have filed responses (Defs.’ Resp. (dkt. # 680); Pl.’s Velleux Resp. (dkt. # 650); Pl.’s Apt Resp. (dkt. # 660)) and replies (Pl.’s Reply (dkt. # 701); Defs.’

1 Velleux Reply (dkt. # 728); Defs.’ Apt Reply (dkt. # 719)) on the respective motions. The Court
2 heard oral argument from the parties on July 27, 2023. (Dkt. # 765.)

3 Having considered the parties’ submissions, oral argument, the balance of the record, and
4 the governing law: (1) the City’s Motion (dkt. # 599) is GRANTED in part and DENIED in part;
5 (2) Defendants’ Velleux Motion (dkt. # 629) is GRANTED in part and DENIED in part; and (3)
6 Defendants’ Apt Motion (dkt. # 644) is GRANTED, as further explained below.

7 II. BACKGROUND

8 This case arises out of Defendants’ manufacture and sale of polychlorinated biphenyls
9 (“PCBs”). Through this lawsuit, the City seeks to hold Defendants liable for PCBs that have
10 escaped from their use in industrial and commercial applications into the Lower Duwamish
11 Waterway (“LDW”) and the City’s stormwater and drainage systems. (*See* Second Am. Compl.
12 (dkt. # 267) at ¶¶ 5-15.) The City’s sole remaining cause of action alleges Defendants
13 intentionally manufactured, distributed, marketed, and promoted PCBs in a manner that created a
14 public nuisance harmful to the health and free use of the LDW and the City’s stormwater and
15 drainage systems. (*Id.* at ¶¶ 91-108.) Defendant Pharmacia LLC (a/k/a “Old Monsanto”) was the
16 sole producer of PCBs in the United States from the 1930s until they were banned by Congress
17 in 1977. (*Id.* at ¶ 38.)

18 The City’s complaint alleges Old Monsanto knew its PCBs would get into the
19 environment and waterbodies, such as the LDW, through their ordinary use, and that Old
20 Monsanto’s knowledge was based in part on its sales of PCBs to businesses near the LDW and
21 its own use of PCBs at its vanillin plant that operated adjacent to the LDW. (Second Am. Compl.
22 at ¶¶ 61-79.) The City alleges it has incurred past costs, and will incur future costs, for
23 investigation and remediation of the LDW, its source control efforts in the LDW, and for the

1 design and construction of a stormwater treatment plant to reduce PCBs from one drainage basin
2 adjacent to the LDW. (*Id.* at ¶¶ 8, 10, 15, 104-05.)

3 In 2001, the EPA listed the LDW as a Superfund Site. Relevant to the parties' motions,
4 the U.S. Environmental Protection Agency ("EPA") issued a Record of Decision ("ROD") in
5 2014 for the remediation of the LDW Superfund Site, which references 43 chemicals that have
6 accumulated in the LDW due to assorted industrial and municipal practices. (*See* Howard Decl.,
7 Ex. 1 (dkt. # 681-1).) The ROD contains a human health risk assessment prepared by the EPA,
8 which determined that four of the contaminants in the LDW presented unacceptable risks to
9 human health: PCBs, arsenic, dioxins/furans, and carcinogenic polycyclic aromatic hydrocarbons
10 ("cPAHs"). (*See id.* at 37-39.)

11 For the cleanup of the LDW, the EPA estimated a total cost of \$342 million in the ROD.
12 (Howard Decl., Ex. 1 at 91.) In 2014, the LDW Allocation Proceedings followed to resolve
13 shares of liability for past and future costs to implement the ROD, ultimately involving 44
14 potentially responsible parties, including the City and Defendant Pharmacia. (*See* DeBord Decl.
15 (dkt. # 327) at ¶ 82, Ex. 81 (dkt. # 331-6) at ¶ 3.)

16 Based on this background and the City's allegations, Dr. Kavanaugh, Mr. Karls, Mr.
17 Recker, Dr. Velleux, and Mr. Apt have each been set forth by the parties to testify regarding
18 sources of PCB contamination in the LDW and remediation costs:

19 **A. Dr. Kavanaugh, Mr. Karls, and Mr. Recker**

20 Dr. Kavanaugh, Mr. Karls, and Mr. Recker are each environmental consultants retained
21 by Defendants to opine on the LDW, the sources of its contamination, the effect of PCBs, and
22 costs of remediation.¹ (*See* First Wishik Decl., Ex. A (dkt. # 600-1) at 3; *id.*, Ex. B (dkt. # 600-2)

23 _____
¹ Mr. Karls and Mr. Recker co-authored an expert report. (*See* First Wishik Decl., Ex. B (dkt. # 600-2).)

1 at 3.) Based on their knowledge, experience, and site observations, Defendants' experts opined
2 that the City's drainage infrastructure contributed a significant source of the pollutants in the
3 LDW. (*See id.*, Ex. A at 3, 5-15, 21-22, 27-29; *id.*, Ex. B at 3, 11-17.)

4 Specifically, the opinions at issue identified by the City are:

5 [Dr. Kavanaugh] Opinion 1: The City is responsible for developing the LDW into
6 a heavily industrialized waterway which would have required the same level of
environmental investigation had PCBs never existed.

7 [Dr. Kavanaugh] Opinion 2: The City's waste management practices at the SCL
8 [Seattle City Light] South Service Center and Georgetown Steam Plant resulted in
discharges of Several Constituents, including PCBs, to the LDW that could have
been prevented.

9 . . .

10 [Mr. Karls and Mr. Recker] Opinion 2: Sources of constituents found in the LDW
11 include: (a) industrial waste disposal; (b) industrial releases; (c) combined sewer
overflows; and (d) stormwater discharges.

12 [Mr. Karls and Mr. Recker] Opinion 4: The City of Seattle has substantially
13 contributed to the presence of constituents in the LDW through its facilities and its
combined, separated, and partially separated sewer systems.

14 [Mr. Karls and Mr. Recker] Opinion 5: Landfills are not sources of PCBs to the
15 LDW.

16 (First Wishik Decl., Ex. A at 3, Ex. B at 3.)

17 Per Dr. Kavanaugh's first opinion, he opines the City has a near 80-year history of
18 permitting discharges of raw and partially treated sewage and industrial waste into the LDW
19 from the 1890s to the 1970s. (First Wishik Decl., Ex. A at 5-15.) Dr. Kavanaugh opines the
20 City's channelization of the Duwamish River, and the historical industrialization of the LDW
21 banks and use as an extension of the City's municipal and industrial waste management
22 practices, led to the current condition of the LDW. (*Id.* at 8.) In Part 2.1 of his first opinion, Dr.
23 Kavanaugh specifically points to the City's choice to use a combined sewer system in the 1890s
to convey blended stormwater and sewage and the historic lack of adequate treatment plants

1 contributed to the LDW's contamination. (*Id.* at 9-13.) Dr. Kavanaugh further opines this,
2 combined with the City's continued discharges from combined sewer overflow events, are the
3 predominant causes of the environmental impacts to the LDW sediment. (*Id.* at 5, 13-15.)

4 Per Dr. Kavanaugh's second opinion, he opines the City's historical waste management
5 practices at the SCL South Service Center and Georgetown Steam Plant, and current waste
6 management practices at the SCL South Service Center, allowed for off-site discharge of
7 constituents into the LDW. (First Wishik Decl., Ex. A at 21-22, 27-29.) As to the SCL South
8 Service Center, Dr. Kavanaugh notes discharges of PCBs from PCB-containing transformer and
9 capacitor oil, and discharges containing other constituents, at the Center were within the City's
10 ability to control. (*Id.* at 21-22.) As to the Georgetown Steam Plant, Dr. Kavanaugh finds the
11 City's operation of the plant, fuel storage practices, permit to allow fire training, and dumping
12 practices also contributed PCBs and other constituents to the LDW. (*Id.* at 27-29.)

13 As to Mr. Karls and Mr. Recker, their second opinion opines that the LDW's
14 contamination is due to certain industrial waste disposal practices along the LDW that generated
15 unpermitted wastewater to discharge into the LDW (First Wishik Decl., Ex. B at 11-13),
16 industrial releases from upland source properties (*id.* at 14-17), and combined sewer overflow
17 events (*id.* at 17).²

18 **B. Dr. Velleux**

19 Dr. Velleux was retained by the City to rebut Defendants' experts Dr. Kavanaugh, Mr.
20 Recker, and Mr. Karls. (*See* Brunton Decl., Ex. C (dkt. # 630-3) at 1.) Dr. Velleux is a
21 professional engineer and hydrologist with 32 years of experience, specializing in watershed and
22

23 ² Absent identifying Mr. Karls and Mr. Recker's summaries of their fourth and fifth opinions, the City did not provide any excerpts from their opinions that it sought to be excluded. (*See* First Wishik Decl., Ex. B at 3, 11-13.)

1 river sediment and contaminant transport. (*Id.* at 1, 24-29.) Dr. Velleux’s experience includes
2 environmental consulting work on contaminated sediment cleanup efforts on Superfund Sites at
3 several locations across the United States, as well as source attribution and cost allocation
4 support for the Portland Harbor Superfund Site in Oregon and the LDW. (*Id.*)

5 Based on his experience, background, and review of documents prepared by others
6 concerning the LDW and its surrounding watershed, including the EPA’s ROD, Dr. Velleux’s
7 first, second, and third opinions in his rebuttal report provide:

8 Opinion 1. The LDW ROD remedy, and its projected future costs, is fundamentally
9 driven by human health risks caused by PCB concentrations in river sediments.

10 Opinion 2. Benthic Contaminants of Concern (“COCs”) are small contributors to
LDW site risk.

11 Opinion 3. At least 80% of projected future costs for the LDW remediation are
12 attributable to the presence of PCBs in site sediment.

(Brunton Decl., Ex. C at 1.)

13 Per his first opinion, Dr. Velleux rebuts Dr. Kavanaugh’s opinion that less than 4% of
14 projected future costs for LDW remediation are attributable to PCBs alone, with most costs
15 attributed to contaminants that pose potential risks to sediment-dwelling (benthic) organisms.

16 (Brunton Decl., Ex. C at 7.) Conversely, Dr. Velleux opines most human health risks are
17 attributable to PCBs and that individual benthic COCs contribute little to the risks addressed by
18 the ROD. (*Id.* at 7-10.) Dr. Velleux provides: (1) Dr. Kavanaugh ignored the LDW sediment
19 remedy was primarily designed by the EPA to manage human health risks; (2) PCBs were the
20 primary driver for the risk management actions required by the ROD; (3) PCBs have a
21 predominant influence on any risk-based assessment for remedial action levels; and (4) that
22 PCBs and other human health COCs take priority over individual benthic COCs. (*Id.*)
23

1 In addressing that PCBs and other human health COCs take priority over individual
2 benthic COCs for the remedies provided for in the ROD, Dr. Velleux states that “[t]he LDW
3 ROD risk management paradigm *lends itself to a hierarchy for assessing COCs in descending*
4 *order of risk*: PCBs, then other human health COCs, and then individual benthic COCs.”
5 (Brunton Decl., Ex. C at 9 (emphasis added).) Based on this hierarchy, Dr. Velleux mapped
6 PCB, other human health, and benthic COCs measured exceedance locations; active remediation
7 areas; and areas where PCB calculated sediment concentrations exceeded remedial action levels.
8 (*Id.* at 9-10.) Dr. Velleux provided figures displaying locations of remedial action level
9 exceedances for individual COCs. (*Id.* at 9-10, 30-73.) Based on his analysis, Dr. Velleux opines
10 that in contrast to PCBs, locations with exceedances for only individual benthic COCs “(*i.e.*,
11 locations where one or more COCs other than PCBs, arsenic, cPAHs, or dioxins/furans
12 exceedances occur), are few in number and tend to occur either immediately adjacent to
13 locations with human health COC exceedances or in isolated locations.” (*Id.* at 9-10.)

14 Per his second opinion, Dr. Velleux rebuts Dr. Kavanaugh’s opinion that the ROD
15 remedy and associated implementation costs would be essentially the same regardless of the
16 presence of PCBs because of the presence of other COCs. (Brunton Decl., Ex. C at 11-12.) Dr.
17 Velleux opines Dr. Kavanaugh erred in his analysis because the ROD manages benthic COCs
18 exceedances differently than human health exceedances. (*Id.* at 11.) Dr. Velleux provides there is
19 no basis to assume that benthic COCs would become determinants of LDW remedial actions,
20 unlike PCBs, which represent a higher risk to human health. (*Id.* at 11-12.)

21 Per his third opinion, Dr. Velleux counters Dr. Kavanaugh’s opinion that less than 4% of
22 projected future remediation costs for the LDW are attributable to PCBs, opining to the contrary
23 that the ROD substantially considers risks from PCBs and projected costs given PCB risks.

1 (Brunton Decl., Ex. C at 13.) Dr. Velleux notes the ROD identifies 128 active remediation areas
2 across an area of roughly 175 acres, with each area being associated with one of four remediation
3 technologies: (1) dredging; (2) partial dredging and capping; (3) capping; or (4) adding clean
4 material to dilute contaminants, *i.e.*, “Enhanced Natural Recovery.” (*Id.* at 13-17.)

5 Dr. Velleux opines PCB exceedances were associated with approximately 83% of the
6 active remediation areas considered in the ROD, resulting in at least 82 percent of the costs of
7 remediation being attributable to PCBs for the ROD’s selected remedies. (Brunton Decl., Ex. C
8 at 17-19.) In providing his third opinion, Dr. Velleux identifies that the “the ROD COC risk
9 hierarchy was used.” (*Id.* at 13.)

10 **C. Mr. Apt**

11 Mr. Apt was retained by the City to rebut Defendants’ experts Dr. Kavanaugh, Mr.
12 Recker, Mr. Karls, and Paul D. Boehm, Ph.D.³ (*See* McMahan Decl., Ex. A (dkt. # 645-1) at 2.)
13 Mr. Apt is a stormwater quality and water resources environmental consultant, with over 26
14 years of experience, and a former regulator for the Florida Department of Environmental
15 Protection and the California Coastal Commission Water Quality Unit. (*Id.* at 2-3.) Mr. Apt
16 specializes in municipal stormwater management, including program area development,
17 guidance, and training. (*Id.*) He has worked with both state and federal stormwater, water
18 resources, and environmental regulatory agencies, and has provided trainings, taught, and been
19 published regarding stormwater practices. (*Id.*)

20 Based on his experience, background, and training, Mr. Apt opines Defendants’ experts
21 Dr. Boehm, Dr. Kavanaugh, Mr. Karls, and Mr. Recker employed 11 erroneous facts, distortions,
22 omissions, and/or provided a lack of context to support their opinions that the City’s drainage
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³ Dr. Boehm’s expert opinions were not challenged by the City.

1 infrastructure contributed a significant source of the pollutants in the LDW. (McMahan Decl.,
2 Ex. A at 2, 19.) Mr. Apt provides in sum:

3 Erroneous Fact No. 1: The Kavanaugh report Section 2.1 (page 9) claims that the
4 Waring Report of 1889 called for separate pipes for sewage and stormwater. That
5 is inaccurate. The Waring Report did not recommend separate pipes for sewage and
stormwater, but rather recommended that the system should only be constructed for
sewage

6 Erroneous Fact No. 2: The Boehm report in Section 8.3.1. (page 38) says that with
7 the construction of the first municipal sewer system in 1892, an outfall was
constructed that discharged to the Duwamish River, citing Klingle. Klingle,
8 however, does not state this

9 Erroneous Fact No. 3: The Boehm report in Section 8.3.1. (page 38) says that
10 sewage and industrial pollution were affecting salmon in the Duwamish River by
1917, citing Klingle again. However, Klingle actually says that the dredging that
11 created the Duwamish Waterway prior to its opening in 1917, caused significant
degradation of salmon habitat . . .

12 Erroneous Fact No. 4: The Kavanaugh report Section 2.1 (pages 9-10) says that in
1922 the State Department of Health ordered that that no more untreated sewage
13 could be discharged into Lake Washington or into the Duwamish River. However,
the 1922 letter from the State Department of Health actually refers only to Lake
14 Washington and does not mention the Duwamish River

15 Erroneous Fact No. 5: The Kavanaugh report Section 2.1 (page 10) says the
Diagonal Avenue Sewage Treatment Plant only served approximately one-sixth of
16 the area connected to combined sewers and that sewage from the remainder of the
combined sewer system was discharged directly to the LDW without treatment.
17 This is a mischaracterization of the 1958 Brown and Caldwell report

18 Erroneous Fact No. 6: Boehm (page 39) says that at times the dissolved oxygen
(DO) was so depleted in the LDW that fish could not survive, citing the Brown and
19 Caldwell 1958 report. In fact, the Brown and Caldwell report says that at some of
the monitoring locations, DO was at 5.0 PPM, the minimum prescribed by the
20 Pollution Control Commission for fish life

21 Erroneous Fact No. 7: The Boehm report in Section 8.3.1. (page 39) says that
biochemical oxygen demand (BOD) associated with organic matter and ammonia
22 in sewage can lead to oxygen depletion and severe ecological harm. However, it
takes a large amount of BOD in sewage to lead to oxygen depletion

23 Erroneous Fact No. 8: Kavanaugh (page 11) claims that 34 million gallons of
untreated industrial wastewater were discharged to the LDW each day. The Brown

1 and Caldwell 1958 report says that 34 million gallons was a maximum discharge,
2 not an average daily discharge, as claimed by Kavanaugh

3 Erroneous Fact No. 9: Boehm (page 39) says the Diagonal Avenue Sewage
4 Treatment Plant discharged primary-treated sewage and industrial waste to the
5 LDW from 1940 to 1970. Boehm fails to say that the Washington Pollution Control
6 Commission required pre-treatment of certain types of hazardous wastes prior to
7 discharge to the sanitary sewer

8 Erroneous Fact No. 10: Karls and Recker (pages 22-23) state in their report that
9 “over 53 million gallons of untreated sewage and stormwater” was discharged from
10 CSO [combined sewer overflow] #111 from 1978 to 2020. They fail to provide
11 context for the volume of the CSO discharges

12 Erroneous Fact No. 11: Boehm (page 40) says that raw sewage releases into the
13 Duwamish Waterway remain an episodic problem due to combined sewer
14 overflows (CSOs). Karls and Recker (page 17) says that CSOs are a source of
15 contaminants in the LDW. They all omit key information regarding CSO
16 discharges

17 (*Id.* at 6-19.)

18 Relevant to aspects of Defendants’ challenges, Mr. Apt’s rebuttal opinion provides:
19 “[H]istoric actions taken by the City with regard to its sanitary sewer and stormwater systems,
20 including those discharging to the [LDW], were more comprehensive than comparable cities’
21 actions and implemented in most cases prior to, and in some instances decades ahead, of
22 comparable cities.” (McMahan Decl., Ex. A at 6.) To support this conclusion, Mr. Apt supplies
23 in his Erroneous Fact No. 1 that the “City [] was proactive in protecting the health of its growing
population” based on the date of implementation of combined stormwater and sewer systems as
compared to “comparable cities” in the United States. (*Id.* at 7.)

Mr. Apt further provides in Erroneous Fact No. 11 that the City’s stormwater programs
with respect to business inspections were performed at a higher rate than that of “comparable
cities,” such as Portland, and the City’s implementation of source control best management
practices (“BMPs”) exceeded those of “comparable cities” such as Portland, Tacoma, San

1 Francisco, and Spokane. (McMahan Decl., Ex. A at 17-18.) Mr. Apt notes the City and Portland
2 were the earliest implementers of green stormwater infrastructure (“GSI”) retrofit projects and
3 that both have set more ambitious goals to manage runoff using GSI than other “comparable
4 cities.” (*Id.* at 18.) Mr. Apt submits similar efforts in Tacoma, San Francisco, and Spokane were
5 initiated later in time than by the City. (*Id.*)

6 Last, Mr. Apt provides in Erroneous Fact No. 10 that Mr. Karls and Mr. Recker failed to
7 provide volume context for their opinion that “over 53 million gallons of untreated sewage and
8 stormwater” was discharged from CSO #111 from 1978 to 2020 into the LDW. (McMahan
9 Decl., Ex. A at 15.) Using the “long-term mean flow rate in the LDW of 1,340 cubic feet per
10 second,” Mr. Apt calculated approximately 13.277 trillion gallons of water flowed through the
11 LDW during that time period. (*Id.* at 15, n.12.) Mr. Apt calculated that 53 million gallons over
12 22 years was therefore “0.00040393% of the total volume flowing through the LDW during the
13 same time period.” (*Id.* at 15, n.13.) Mr. Apt noted the subject CSO discharges “would be the
14 equivalent of adding 0.019 drops into one 8 oz. cup.” (*Id.*)

15 III. DISCUSSION

16 A. Legal Standards

17 Federal Rule of Evidence 702 provides in relevant part:

18 A witness who is qualified as an expert by knowledge, skill, experience, training,
19 or education may testify in the form of an opinion or otherwise if: (a) the expert’s
20 scientific, technical, or other specialized knowledge will help the trier of fact to
21 understand the evidence or to determine a fact in issue; (b) the testimony is based
22 on sufficient facts or data; (c) the testimony is the product of reliable principles and
23 methods; and (d) the expert has reliably applied the principles and methods to the
facts of the case.

22 Fed. R. Evid. 702. For expert testimony to be admissible under Rule 702, it must satisfy three
23 requirements: (1) the expert witness must be qualified; (2) the testimony must be reliable; and (3)

1 the testimony must be relevant. *See Daubert v. Merrell Dow Pharms., Inc.* (“*Daubert I*”), 509
2 U.S. 579, 589-91 (1993). The proponent of expert testimony has the burden of establishing that
3 the admissibility requirements are met by a preponderance of the evidence. *Id.* at 592 n.10; *see*
4 *also Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

5 Before admitting expert testimony into evidence, the Court acts as a “gatekeeper” in
6 determining its admissibility under Rule 702 by ensuring the testimony is both “relevant” and
7 “reliable.” *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (citing
8 *Daubert I*, 509 U.S. at 597). Expert testimony is relevant where “the evidence logically
9 advance[s] a material aspect of the party’s case.” *Estate of Barabin v. AstenJohnson, Inc.*, 740
10 F.3d 457, 463 (9th Cir. 2014) (internal quotations and citation omitted), *overruled on other*
11 *grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc). Testimony is reliable
12 where it has “a reliable basis in the knowledge and experience of the relevant discipline.” *Id.*
13 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)).

14 The Supreme Court has noted the reliability inquiry is a “flexible one,” and while the
15 Supreme Court has suggested several factors helpful in determining reliability, trial courts are
16 generally given “broad latitude in determining the appropriate form of the inquiry.”⁴ *United*
17 *States v. Wells*, 879 F.3d 900, 934 (9th Cir. 2018) (quoting *Kumho Tire*, 526 U.S. at 150); *see*
18 *also Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (finding Rule 702
19 should be applied with a “liberal thrust” favoring admission) (quoting *Daubert I*, 509 U.S. at
20

21 _____
22 ⁴ In relevant part, *Daubert I* suggested several reliability factors a trial court may examine to determine
23 the reliability of expert testimony, including: (1) whether a theory or technique can be tested; (2) whether
it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or
technique; (4) the existence and maintenance of standards and controls; and (5) whether the theory or
technique enjoys general acceptance within the relevant scientific community. *Daubert I*, 509 U.S. at
592-94; *see also Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002).

1 588); *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000) (Rule 702 is “construed liberally”
2 in considering admissibility of testimony based on specialized knowledge).

3 Furthermore, the reliability inquiry favors admission of testimony as “[s]haky but
4 admissible evidence is to be attacked by cross examination, contrary evidence, and attention to
5 the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citing
6 *Daubert I*, 509 U.S. at 596). The reliability inquiry test does not seek to measure “the correctness
7 of the expert’s conclusions but the soundness of [his or her] methodology,” and therefore, when
8 an expert meets the standards established by Rule 702, “the expert may testify[,] and the fact
9 finder decides how much weight to give that testimony.” *Pyramid Techs., Inc. v. Hartford Cas.*
10 *Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (quoting *Primiano*, 598 F.3d at 564-65).

11 **B. Dr. Kavanaugh, Mr. Karls, and Mr. Recker**

12 First, the City seeks exclusion of parts of Dr. Kavanaugh’s first and second opinions, and
13 the entirety of Mr. Karls and Mr. Recker’s second, fourth, and fifth opinions, as not relevant to
14 the City’s public nuisance claim or to Defendants’ defenses. (Pl.’s Mot. at 1, 4.) The City argues
15 that their opinions will also confuse the jury and may result in unfair prejudice against the City.
16 (*Id.*) In addition, the City claims Part 2.1 of Dr. Kavanaugh’s opinion should be excluded as
17 unreliable because it is based on factual errors the City contends cannot effectively be addressed
18 on cross-examination. (*Id.* at 4.)

19 Defendants respond that the City’s own conduct and historical discharges into the LDW,
20 as well as the presence of other chemicals in the LDW, are all relevant to the causation element
21 of the City’s public nuisance claim, the City’s alleged damages, and to several of Defendants’
22
23

1 affirmative defenses to the City’s public nuisance claim.⁵ (Defs.’ Resp. at 1-2, 5-9.) Defendants
2 further contend the City’s challenges to the admissibility of Dr. Kavanaugh’s opinion, and its
3 lack of page citation and alleged factual errors, are cross-examination material. (*Id.* at 10-11.)
4 Last, Defendants claim Mr. Karls and Mr. Recker’s fifth opinion (“Landfills are not a source of
5 PCBs to the LDW”) is relevant because the City’s operative complaint alleges PCB-related
6 contamination from landfills. (*Id.* at 12.)

7 Here, as an initial matter, this Court has already determined that opinions regarding
8 landfills, as a source of PCBs, are irrelevant in this case. As noted previously in considering the
9 motion to exclude Dr. Marc Rogoff (dkt. # 750 at 11), landfills as a source of PCBs is not an
10 issue at dispute at this case and otherwise runs the risk of confusing issues before the jury.⁶
11 Therefore, Mr. Karls and Mr. Recker’s fifth opinion is excluded as irrelevant. *See Daubert I*, 509
12 U.S. at 591 (“Expert testimony which does not relate to any issue in the case is not relevant and,
13 ergo, non-helpful.”).

14 However, on the central relevancy issue addressed by the parties, the remaining identified
15 testimony of Dr. Kavanaugh, Mr. Karls, and Mr. Recker is clearly relevant to addressing the
16 City’s public nuisance claim. As noted above, expert testimony is relevant if it “logically
17 advance[s] a material aspect of the party’s case.” *Estate of Barabin*, 740 F.3d at 463; *see also*
18 *Daubert v. Merrell Dow Pharms., Inc.* (“*Daubert II*”), 43 F.3d 1311, 1315 (9th Cir. 1995).

21 ⁵ In addition, Defendants claim the City’s efforts to impose a narrow view of this case solely to PCBs and
22 no other contaminants has twice been rejected by both the Honorable Robert S. Lasnik and the Discovery
Master who served in this case. (Defs.’ Resp. at 9-10 (citing *City of Seattle v. Monsanto Company*, 237 F.
Supp. 3d 1096, 1108 (W.D. Wash. 2017); Howard Decl., Ex. 2 (dkt. # 681-2)).)

23 ⁶ Defendants also conceded at oral argument Mr. Karls and Mr. Recker’s fifth opinion was irrelevant.
(*See* dkt. # 767 at 15:15-23 (“We concede that this is not relevant to a dispute that is live, and . . . should
be excluded based on relevance.”).)

1 Expert testimony is not excluded for relevancy where “it speaks clearly and directly to an issue
2 in dispute in the case, and . . . it will not mislead the jury.” *Daubert II*, 43 F.3d at 1321 n.17.

3 For a public nuisance claim, the City must establish conduct constituting a nuisance. *See*
4 *Miotke v. City of Spokane*, 101 Wn.2d 307, 309, 331 (Wash. 1984), *abrogated on other grounds*
5 *by Blue Sky Advocs. v. State*, 107 Wn.2d 112 (Wash. 1986). As such, the City bears the burden of
6 proving the unreasonableness of Monsanto’s conduct. *See Lakey v. Puget Sound Energy, Inc.*,
7 176 Wn.2d 909, 923 (Wash. 2013) (citations omitted) (noting that the reasonableness of a
8 defendant’s conduct in a nuisance action is determined by “weighing the harm to the aggrieved
9 party against the social utility of the activity”); *see also* Wash. Civil Pattern Jury Instruction
10 380.03.

11 Here, the identified testimony of Dr. Kavanaugh, Mr. Karls, and Mr. Recker addresses
12 the City’s and other industrial historical practices surrounding the LDW in explaining the
13 contamination, conditions, and sources of constituents found in the LDW. (*See* First Wishik
14 Decl., Ex. A at 3, 5-15, 21-22, 27-29; *id.*, Ex. B at 3, 11-17.) Each of the identified opinions
15 opine on contributions to the LDW’s contamination from the City or other parties, which touches
16 on issues of causation and damages to be considered in this case. Consequently, these expert
17 opinions are relevant to addressing whether Defendants’ conduct constituted a public nuisance
18 and how liability should be apportioned. *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*,
19 709 F.3d 872, 883 (9th Cir. 2013) (“The district court is not tasked with deciding whether the
20 expert is right or wrong, just whether his testimony has substance such that it would be helpful to
21 a jury.”). At a minimum, Dr. Kavanaugh, Mr. Karls, and Mr. Recker’s testimony is relevant to
22 several of Defendants’ affirmative defenses, *i.e.*, causation, comparative fault, allocation of
23

1 liability, and/or apportionment of damages. (*See Answer* (dkt. # 270) at 28-49; *see also Order*
2 (*dkt. # 581*) at 5.)

3 As to Part 2.1 of Dr. Kavanaugh’s opinion, any factual errors claimed by the City in his
4 analysis of the historical documents considered, and his lack of specific citation, are subjects
5 properly addressed on cross-examination. *See Primiano*, 598 F.3d at 564 (citing *Daubert I*, 509
6 U.S. at 596); *United States v. Sanft*, 2021 WL 5278766, at *2 (W.D. Wash. Nov. 13, 2021)
7 (“Defendants may disagree with [an expert’s] opinions and challenge the accuracy of the
8 evidence supporting his conclusions, [but] their challenge goes to the weight of his testimony,
9 not its admissibility.”).

10 Consequently, the City’s Motion is granted in part and denied in part. Mr. Karls and Mr.
11 Recker’s fifth opinion concerning landfills as a source of PCBs is excluded. Dr. Kavanaugh, Mr.
12 Karls, and Mr. Recker will otherwise be permitted to testify as to the remainder of the identified
13 opinions in their reports.

14 C. Dr. Velleux

15 Next, Defendants move to strike Dr. Velleux’s declarations and to exclude his first,
16 second, and third opinions.⁷ The Court will address each of Defendants’ contentions in turn:

20 ⁷ The City moves to strike Defendants’ Velleux Motion to the extent it exceeds the 12-page limit
21 established by the Court’s Local Civil Rules. (Pl.’s Velleux Resp. at 1; Local Civil Rule 7(e)(4).) The
22 City notes Defendants incorporate by reference material from another motion. (*Id.* (citing Defs.’ Velleux
23 Mot. at 3).)

The incorporated material by Defendants was the legal standard provided in its previous *Daubert* motion
to exclude the expert testimony of Dr. Mark Buckley. (*See Defs.’ Velleux Mot.* at 3.) The Court
admonishes Defendants for circumventing the Court’s established page limits in this fashion, but declines
to strike Defendants’ Velleux Motion due to its incorporation of a legal standard.

1 *i. Dr. Velleux's Declaration*

2 As an initial matter, Defendants argue on reply that the City submitted belated
3 declarations from Dr. Velleux that should be stricken pursuant to Fed. R. Civ. P. 26. (Defs.'
4 Velleux Reply at 6 (citing First Velleux Decl. (dkt. # 352), Second Velleux Decl. (dkt. # 652)).)
5 Defendants note Dr. Velleux offered recanted and modified testimony in his first declaration
6 submitted in response to Defendants' previous motion to clarify the protective order and offered
7 several paragraphs of altered and supplemental opinions in his second declaration. (*Id.*) The City
8 did not file a response or surreply to Defendants' motion to strike.⁸

9 Rule 26(a)(2)(B)(i) provides that a written expert report must contain "a complete
10 statement of all opinions the witness will express and the basis and reasons for them." An expert
11 witness has a duty to supplement his or her report "in a timely manner if the party learns that in
12 some material respect the disclosure or response is incomplete or incorrect, and if the additional
13 or corrective information has not otherwise been made known to the other parties during the
14 discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). When a party fails to comply
15 with Rule 26, the sanction of exclusion is automatic and mandatory unless the sanctioned party
16 can show that its violation was either substantially justified or harmless. *See* Fed. R. Civ. P.
17 37(c)(1). Therefore, Rule 26(e) "permits supplemental reports only for the narrow purpose of
18 correcting inaccuracies or adding information that was not available at the time of the initial
19 report." *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 6 (D.D.C. 2005) (citation omitted); *see also*
20 *Lo v. United States*, 2021 WL 5121745, at *2 (W.D. Wash. Nov. 3, 2021) ("The rule for
21 supplementation does not give license to sandbag one's opponent with claims and issues which
22

23 ⁸ This Court's Local Rules require requests to strike material attached to submissions of opposing parties
not be presented in a separate motion, but instead be included in the responsive brief to be considered
with the underlying motion. *See* Local Civil Rule 7(g).

1 should have been included in the original witness report.”(citation and internal quotations
2 omitted)).

3 Given the City’s Response relies only on Dr. Velleux’s second declaration submission
4 (*see* Pl.’s Velleux Resp. at 3-4, 7-9), the Court will consider only that challenge. Here, Dr.
5 Velleux’s second declaration submission improperly attempts to offer opinions not previously
6 provided in his report. Dr. Velleux’s declaration offers opinions explaining his use of the
7 “descending order of risk” hierarchy, bolstering previous opinions offered as to the defectiveness
8 of Dr. Kavanaugh’s report, and/or otherwise responding to Defendants’ criticisms expressed in
9 their motion. (*See* Second Velleux Decl. at ¶¶ 3-14.) For example, as noted by Defendants, Dr.
10 Velleux’s declaration provides the EPA assumed PCB concentrations would decrease by 50%
11 upon completion of early action areas addressing hotspots and that this assumption “was built
12 into” the EPA’s ROD and its corresponding cost estimate. (*Id.* at ¶ 12.) This opinion is not
13 expressed in his report. (*See* Brunton Decl., Ex. C at 7, 9-10.) Furthermore, Dr. Velleux’s
14 declaration was not submitted because his filed report was incomplete or incorrect, but only upon
15 filing of Defendants’ motion. The expert discovery cutoff in this matter was June 1, 2022 (*see*
16 dkt. # 229), but Dr. Velleux’s declaration was submitted on August 17, 2022 (*see* Second
17 Velleux Decl.).

18 In fact, the situation presented by the City’s submission of Dr. Velleux’s declaration
19 mirrors that previously presented in this case in the Court’s adjudication of Defendants’ motion
20 to exclude the City’s expert Dr. Michael Trapp. (*See* Order (dkt. # 761) at 12-15.) As with Dr.
21 Trapp’s declaration, Dr. Velleux’s declaration here “is in all practical effect a supplemental
22 expert report aimed at remedying the deficiencies in [his] report” and therefore, “little more than
23 a back-door effort around the Court’s discovery deadlines.” *See Bell v. Boeing Co.*, 2022 WL

1 1206728, at *3 (W.D. Wash. Apr. 22, 2022) (citing *Eno v. Forest River Inc.*, 2021 WL 6428636,
2 at *2 (W.D. Wash. July 1, 2021) (finding expert declaration submitted after expert report
3 deadline, and in response to motion to exclude, untimely and that it “d[id] not excuse Plaintiff’s
4 non-compliance with Rule 26(a)”). Moreover, the City has failed to argue or make any
5 demonstration its submission of Dr. Velleux’s declaration was substantially justified or harmless.
6 *See* Fed. R. Civ. P. 37(c)(1). Dr. Velleux’s second declaration (dkt. # 652) is therefore stricken.⁹

7 *ii. Qualifications*

8 Next, Defendants argue Dr. Velleux is not qualified to provide his opinions because he is
9 not a toxicologist and because his “descending order of risk” hierarchy is premised on principles
10 of toxicology and risk assessment outside of his area of expertise. (Defs.’ Velleux Mot. at 4-6.)
11 Defendants level that Dr. Velleux is a civil engineer by training and that the majority of his
12 experience is in the fate and transport of chemicals. (*Id.*) The City responds that Dr. Velleux
13 applied the EPA’s risk assessment from the ROD and that he need not be qualified as a
14 toxicologist to provide such opinions. (Pl.’s Velleux Resp. at 8.)

15 An expert is considered qualified to testify if the expert has “sufficient specialized
16 knowledge to assist the jurors in deciding the particular issues in the case.” *Kumho Tire*, 526
17 U.S. at 156. Because Rule 702 “contemplates a *broad conception* of expert qualifications,” only
18 a “*minimal foundation* of knowledge, skill, and experience” is required. *Hangarter v. Provident*
19 *Life & Accident Ins. Co.*, 373 F.3d 998, 1015-16 (9th Cir. 2004) (internal quotations and citation
20 omitted, emphasis in original).

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22
23 ⁹ At oral argument, Defendants requested the Court deem any of the City’s arguments relying on Dr. Velleux’s declaration waived. (*See* dkt. # 767 at 26:7-11.) This request was raised for the first time at oral argument, and therefore, will not be considered. (*See* Defs.’ Velleux Reply at 6.)

1 Here, the Court finds Dr. Velleux is sufficiently qualified to provide his opinions. As
2 previously outlined above, Dr. Velleux has several decades of experience working and
3 consulting on Superfund Sites, source attribution, and allocating remediation costs for such sites.
4 (*See Brunton Decl., Ex. C at 1, 24-29.*) Dr. Velleux’s opinions do not engage in assessing
5 toxicological risks being greater from PCBs than other contaminants present in the LDW, but in
6 allocating costs based on recognition of the EPA’s toxicological risk determination. Dr.
7 Velleux’s cites to aspects of the ROD, based on his knowledge and experience, as evincing that
8 PCBs present the highest human health risk of the contaminants present in the LDW based on the
9 EPA’s analysis in the ROD. (*See Brunton Decl., Ex. C at 6-11.*) Dr. Velleux need not conduct his
10 own toxicological assessment or risk assessment to cite to the EPA’s in his report. *See Daubert*,
11 509 U.S. at 592 (“An expert is permitted wide latitude to offer opinions, including those that are
12 not based on firsthand knowledge or observation.”).

13 Defendants fail to convince this Court why specialized toxicology knowledge is
14 necessary to support Dr. Velleux’s citations to the ROD as demonstrating PCBs are the primary
15 cost driver of remediating the LDW due to their impact on human health. *See Cypress Ins. Co. v.*
16 *SK Hynix Am., Inc.*, 2019 WL 634684, *3 (W.D. Wash. Feb. 14, 2019) (“[T]he fact that [his]
17 opinions are based only on his knowledge or experience is not enough to disqualify him as an
18 expert.”). Dr. Velleux’s opinions are therefore not inadmissible merely because he lacks specific
19 expertise in toxicology or risk assessment. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226,
20 1230-31 (9th Cir. 1998) (citation omitted) (“Disputes as to the strength of [an expert’s]
21 credentials, faults in his use of [a particular] methodology, or lack of textual authority for his
22 opinion, go to the weight, not the admissibility, of [his] testimony”)); *Bluetooth SIG, Inc. v. FCA*

1 *US LLC*, 468 F. Supp. 3d 1342, 1349 (W.D. Wash. 2020) (finding expert had “no obligation to
2 conduct a survey of [their] own”) (citations omitted).

3 *iii. Methodology and Reliability*

4 Next, Defendants argue that Dr. Velleux’s methodology is not reliable. (Defs.’ Velleux
5 Mot. at 6-11.) Specifically, Defendants identify Dr. Velleux’s references to the EPA employing a
6 “descending order of risk” hierarchy in its evaluation of the LDW in the ROD as excludable
7 because his opinions have none of the indicia of reliability provided for under *Daubert*, his
8 opinions arrive at a conclusion expressly rejected by the EPA, he fails to consider the impact of
9 dioxins and furans, and because he relies on biased and outdated LDW sediment data. (*Id.*) The
10 City responds that Dr. Velleux reliably applied all of the EPA’s ROD in engaging in his analysis
11 of costs due to the contaminants present in the LDW for his opinions, unlike Dr. Kavanaugh,
12 presenting the Court with a typical “battle of the experts” that should be left for the jury. (Pl.’s
13 Velleux Resp. at 1, 5-10.)

14 Based on the Court’s review of Dr. Velleux’s opinions, Dr. Velleux draws upon his
15 experience and expertise in examining EPA documents and consulting on Superfund Sites to
16 opine that a hierarchy exists as to the risks presented by the different COCs in the LDW
17 requiring remedial action as addressed in the ROD. (*See* Brunton Decl., Ex. C at 6 (“The premise
18 of COC equality is inconsistent with the risk management framework the EPA outlined in the
19 LDW ROD, wherein human health risks, particularly those posed by PCBs, played the
20 predominant role in defining the scope and extent of remediation.”), 9 (“The LDW ROD risk
21 management paradigm lends itself to a hierarchy for assessing COCs in descending order of risk:
22 PCBs, then other human health COCs, and then individual benthic COCs.”).) Based on
23 information contained in the ROD and its structure, Dr. Velleux therefore opines the EPA

1 positions PCBs as the primary human health risk. (*See id.* at 9 (“The remedy described in the
2 ROD emphasizes reduction of human health risks . . . PCBs have the highest priority in the
3 analysis of exceedances and remedy development because they are the largest contributor to
4 human health risk.”).) Dr. Velleux’s citations in his report to the ROD provide adequate support
5 for such opinions. (*See e.g.*, Brunton Decl., Ex. C at 7 (“The ROD and its subsequent
6 Explanation of Significant Differences [] state that the selected remedy in sequence with cleanup
7 of Early Action Areas [] and source control efforts, addresses risks to human health), 8
8 (“PCBs comprise nearly 60% of the cumulative excess cancer risk and roughly 90% of the
9 non-cancer risk to human health at the site.”).)

10 Defendants claim throughout their motion that the EPA has already rejected Dr.
11 Velleux’s methodology and assumptions because the EPA’s responsiveness summary included in
12 its 2014 ROD explicitly rejected a comment suggesting PCBs are the primary risk driver for
13 LDW remediation, clarifying that PCBs “are not the only contributor of risk.” (*See* Defs.’
14 Velleux Mot. at 7-8, 11-12 (quoting Brunton Decl., Ex. D (dkt. # 630-4) at 111-12).) But as the
15 City notes, the EPA revised the ROD with an Explanation of Significant Differences in 2021 to
16 find “PCBs are the main source of risk to people’s health from the [LDW] Superfund site” after
17 cPAHS were determined to be less carcinogenic than previously found. (*See* Second Wishik
18 Decl., Ex. A (dkt. # 651-1) at 2.) Defendants’ criticisms for how Dr. Velleux arrived at his
19 understanding of the ROD to set forth his opinion that PCBs are the ultimate contributor to the
20 LDW’s contamination ultimately goes to the weight, and not the admissibility, of his testimony.
21 *See Primiano*, 598 F.3d at 564 (citing *Daubert I*, 509 U.S. at 596); *Sanft*, 2021 WL 5278766 at
22 *2. Defendants may make such challenges in the course of Dr. Velleux’s cross-examination.
23

1 Though testimony may be excluded where there is “too great an analytical gap between
2 the data and the opinion proffered,” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), Dr.
3 Velleux’s alleged lack of consideration of the impacts of other contaminants, such as
4 dioxins/furans, also does not render his opinions unsupported. Countervailing considerations
5 concerning the materials relied on for an opinion are not a basis for exclusion. *See City of*
6 *Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1053 (9th Cir. 2014) (“Facts casting doubt on the
7 credibility of an expert witness and contested facts regarding the strength of a particular
8 scientific method are questions reserved for the fact finder.”).

9 Defendants’ arguments that the data employed by Dr. Velleux for his opinions render his
10 opinions unreliable are similarly unavailing. Pursuant to Rule 702(b), the requirement that expert
11 testimony be based on “sufficient facts or data” only requires the Court to engage in “an analysis
12 of the sufficiency of underlying facts or data that is quantitative rather than qualitative.” *United*
13 *States v. W.R. Grace*, 455 F. Supp. 2d 1148, 1152 (D. Mont. 2006); *see also* Fed. R. Evid. 702
14 Advisory Committee’s Note to 2000 Amendments. Here, Dr. Velleux used the data available to
15 the EPA when it issued the ROD in 2014. (*See* Brunton Decl., Ex. C.) Though more recent and
16 additional data has been collected since the issuance of the ROD, any faults in Dr. Velleux’s use
17 of the EPA’s data employed for his opinion goes to the weight and not the admissibility of his
18 testimony. *See Kennedy*, 161 F.3d at 1230-31; *Sanft*, 2021 WL 5278766 at *2.

19 However, Defendants’ issues with how Dr. Velleux articulated his approach are
20 well-taken. Nowhere in the ROD does the EPA explicitly identify a “descending order of risk”
21 hierarchy was employed in the EPA’s analysis of the LDW. (*See* Howard Decl., Ex. 1.) It instead
22 appears Dr. Velleux identified such hierarchy as a “paradigm” the EPA engaged in to structure
23 its determinations based on the EPA’s prioritization of PCBs in the ROD compared to its

1 consideration of other contaminants. (*See* Brunton Decl., Ex. C at 7-13.) Though “descending
2 order of risk” hierarchy appears to be descriptive of the work the EPA did when constructing the
3 ROD (*see* Pl.’s Velleux Resp. at 7-8), this Court remains uneasy about allowing Dr. Velleux to
4 reference a “risk management paradigm” or “descending order of risk” hierarchy that the EPA
5 does not itself reference in the ROD. Moreover, there is no support in the record for a “risk
6 management paradigm” or “descending order of risk” hierarchy in the relevant scientific
7 community and it appears to have been created solely for this case.

8 *iv. Legal Opinions*

9 Defendants argue Dr. Velleux also provides improper legal conclusions as to what the
10 EPA’s ROD demonstrates. (Defs.’ Velleux Mot. at 11-12.) Defendants contend the ROD is a
11 legal document governing the remediation of the LDW and that Dr. Velleux’s opinions based on
12 his interpretation of the ROD are not useful because they directly conflict with the ROD and the
13 EPA’s explanation of it. (*Id.*) The City responds the ROD is a lengthy, technical document that
14 the jury will require expert assistance to understand. (Pl.’s Velleux Resp. at 5-7.) The City
15 further responds Dr. Velleux’s opinions merely applied the EPA’s determinations from the ROD.
16 (*Id.*)

17 The Court agrees with the City. It is clear from the record Dr. Velleux reviewed the
18 EPA’s ROD, the entirety of which totals nearly 400 pages (*see* Howard Decl., Ex. 1; Brunton
19 Decl., Ex. D), and provided his understanding of the EPA’s conclusions with regard to the LDW
20 remediation and what costs should be attributable to PCBs to rebut Dr. Kavanaugh’s opinion (*see*
21 Brunton Decl., Ex. C). This is not dissimilar from the process engaged in by Defendants’ own
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1 experts, such as Dr. Kavanaugh.¹⁰ Though the parties' experts disagree as to what remediation
2 costs are attributable to PCBs based on their understanding of the ROD, Dr. Velleux has not
3 provided an opinion on a question of law reserved for the Court. Defendants' cited authority on
4 this issue is inapposite as each addresses expert opinions provided on the interpretation of
5 contract terms or its enforceability.¹¹

6 Defendants' Velleux Motion is therefore granted in part and denied in part. Dr. Velleux is
7 permitted to testify as to his first, second, and third opinions challenged by Defendants.
8 Specifically, Dr. Velleux is permitted to testify and provide his opinions that the ROD's remedy
9 for the LDW, and its projected future costs, are driven by human health risks caused by PCB
10 concentrations in river sediments, benthic COCs are small contributors to LDW site risk, and at
11 least 80% of projected future costs for the LDW remediation are attributable to PCBs in the
12 LDW site sediment. However, Dr. Velleux must testify to such opinions without reference to a
13 "risk management paradigm" or "descending order of risk" hierarchy having been employed by
14 the EPA in its ROD.

15 **D. Mr. Apt**

16 Finally, Defendants argue Mr. Apt's rebuttal testimony should be excluded because: (1)
17 he performed a "cite-checking function" targeting 11 factual statements without explaining how
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19 ¹⁰ Dr. Kavanaugh consulted the ROD for the EPA's decision criteria presented regarding remedial action
20 selection, and provided his opinion as to what costs should be attributable to the presence of PCBs based
21 on his understanding. (*See* Second Wishik Decl., Ex. B (dkt. # 651-2) at iii ("Less than 4% of projected
22 future costs for the LDW remediation are attributable to the presence of PCBs alone."), 50-51.)

23 ¹¹ *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (rejecting expert testimony on
interpretation of "lottery" in Tribal-State compact); *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*,
966 F.2d 443, 447 (9th Cir. 1992) (rejecting expert testimony on enforceability of a contract on a
promissory estoppel theory); *Trident Seafoods Corp. v. Commonwealth Ins. Co.*, 850 F. Supp. 2d 1189,
1196 (W.D. Wash. 2012) (rejecting expert testimony providing interpretations of meaning of insurance
policy language); *Cypress Ins. Co.*, 2019 WL 634684 at *1-2 (rejecting expert testimony finding party's
conduct was unreasonable in light of the contract language).

1 the alleged errors rebutted the opinions or methodologies set forth by Dr. Boehm, Dr.
2 Kavanaugh, Mr. Recker, and Mr. Karls in their reports; and (2) to the extent Mr. Apt's rebuttal
3 could be construed to offer an opinion that the City's stormwater management was progressive
4 compared to "comparable cities," he failed to articulate a methodology to support the reliability
5 of such opinion. (Defs.' Apt Mot. at 1-2, 7-12.)

6 The City responds Mr. Apt's rebuttal testimony is improperly characterized as
7 "cite-checking" because he utilized the same approach Dr. Kavanaugh and Mr. Boehm used for
8 their opinions regarding the City's drainage system; identifying and reviewing historical
9 documents. (Pl.'s Apt Resp. at 1-4, 7.) The City further provides Mr. Apt's opinions are
10 necessary to rebut the omission of page citations by Defendants' experts in their reports. (*Id.* at
11 4-5, 8.) The City additionally argues Mr. Apt provides substantive opinions in finding the City's
12 drainage infrastructure was not a significant source of pollutants to the LDW and because he
13 conducted independent research to opine that the City was progressive in installing its sewer
14 systems to replace failing septic systems. (*Id.* at 6-8.)

15 Here, Mr. Apt's work is accurately characterized as fact checking.¹² (*See* McMahan
16 Decl., Ex. A at 6-19.) Though Mr. Apt has significant experience and expertise in stormwater
17 management practices (*see id.* at 2-3), he does not clearly rely upon such experience or expertise
18 in identifying several of the alleged errors in Defendants' expert reports. Mr. Apt identifies
19 documents supporting his alleged errors, but fails to explain how any of the alleged errors or
20 countervailing facts make Defendants' experts' opinions unreliable or not credible. (*See*
21 McMahan Decl., Ex. A at 6-19.) Identifying alleged errors without providing any explanation
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23 ¹² At his deposition, Mr. Apt also described his work as a "cite check" of Defendants' experts' reports to
"check those reports for validity based on information provided by the City." (*See* McMahan Decl., Ex. B
(Apt. Dep. (dkt. 645-2) at 225:24-226:9).)

1 about why such errors matter fails to assist the trier of fact in determining issues in this case.
2 *See Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009) (“[E]xpert testimony is helpful to the jury
3 if it concerns matters beyond the common knowledge of the average layperson and is not
4 misleading.”). The Court agrees with Defendants that the information provided by Mr. Apt is
5 analogous to that which would be provided by a research assistant preparing counsel for a
6 deposition or trial (*see* Defs.’ Apt Mot. at 9), and not that which would be helpful to the jury in
7 this case. *See Alaska Rent-A-Car, Inc.*, 709 F.3d at 883 (“The district court is not tasked with
8 deciding whether the expert is right or wrong, just whether his testimony has substance such that
9 it would be helpful to a jury.”)

10 To the extent the City argues that some of Mr. Apt’s alleged errors do provide an opinion,
11 Mr. Apt fails to support such opinions with identifiable data, methodology, or fails to actually
12 rebut Defendants’ experts. First, though the City contends Mr. Apt’s report opines the City was
13 progressive in developing its municipal storm and wastewater management infrastructure with
14 regard to “comparable cities,” (*see* McMahan Decl., Ex. A at 7, 17-19), his report fails to identify
15 what data served as the foundation for his selected cities to serve as comparable municipalities.
16 *See* Fed. R. Evid. 702(b).

17 Nor did Mr. Apt supply an identifiable methodology for why the selected cities cited are
18 indeed comparable for addressing the City’s drainage infrastructure, such as whether the
19 comparisons were made based on similar time periods, populations, topography, or wastewater
20 management procedures. *See City of Pomona*, 750 F.3d at 1049 (“It is where expert opinion
21 is ‘connected to the existing data only by the *ipse dixit* of the expert’ that there may be ‘too great
22 an analytical gap between the data and the opinion proffered’ to support inclusion of the
23 testimony.”) (internal citation and quotations omitted). The City has also not set forth any

1 specific methodology for Mr. Apt.’s “comparable cities” and conceded at oral argument that Mr.
2 Apt failed provide a basis for choosing them as comparable.¹³ (See dkt. # 767 at 61:1-3; Pl.’s
3 Apt. Resp. at 6, 8.)

4 Moreover, Mr. Apt’s calculation in Erroneous Fact No. 10 to show the amount of sewage
5 and wastewater discharge from one of City’s outfalls in the LDW fails to provide a rebuttal
6 opinion. At his deposition, Mr. Apt testified he performed the calculation to “provide context” to
7 Defendants’ expert’s discharge figures. (McMahan Decl., Ex. B (Apt. Dep. at 198:22-199:2); see
8 McMahan Decl., Ex. A at 15 (“The CSO discharges would be the equivalent of adding 0.019
9 drops into one 8 oz cup.”).) The City reads Mr. Apt’s report to have opined that “the volume of
10 combined sewage that [Mr. Karls and Mr. Recker] attributed to a City outfall was negligible
11 compared to the flow in the [LDW].” (Pl.’s Apt Resp. at 1; see also *id.* at 6.) Mr. Apt’s report
12 itself does not make this conclusion. (See McMahan Decl., Ex. A at 15.) Mr. Apt testified at his
13 deposition this calculation was done only to provide context as he was uncertain of the impact
14 such discharge had on the LDW, admitting it was beyond his expertise. (See Second McMahan
15 Decl., Ex. 2 (Apt Dep. (dkt. # 720-2) at 199:22-201:20).) In any case, Mr. Apt’s calculation is
16 subject to exclusion because his report itself fails to identify the source for the variables he used
17 to render the calculation. (See McMahan Decl. at 15 at n.12; see also Second McMahan Decl.,
18 Ex. 2 (Apt. Dep. at 195:24-196:7, 198:6-21).)

19 The alleged factual errors in the expert reports of Dr. Boehm, Dr. Kavanaugh, Mr. Recker
20 and Mr. Karls provided by Mr. Apt’s rebuttal report—and the alleged omission of page citations
21 in those opinions—are best addressed on cross-examination of Defendants’ expert witnesses at
22 trial. See *Primiano*, 598 F.3d at 564 (citing *Daubert I*, 509 U.S. at 596); *Sanft*, 2021 WL

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¹³ Likewise, Mr. Apt failed to identify during his deposition what specific methodology he employed for
his “comparable cities” opinion. (See McMahan Decl., Ex. B (Apt. Dep. at 110:21-113:4).)

1 5278766 at *2. Addressing these alleged errors on cross-examination of Defendants’ experts will
2 also save the additional time and resources at trial of having Mr. Apt testify. Defendants’ Apt
3 Motion is therefore granted.

4 **IV. CONCLUSION**

5 For the foregoing reasons: (1) the City’s Motion (dkt. # 599) is GRANTED in part and
6 DENIED in part; (2) Defendants’ Velleux Motion (dkt. # 629) is GRANTED in part and
7 DENIED in part; and (3) Defendants’ Apt Motion (dkt. # 644) is GRANTED.

8 The City’s Motion is granted in part as to Mr. Karls and Mr. Recker’s fifth opinion that
9 landfills are not a source of PCBs to the LDW, but otherwise denied. Defendants’ Velleux
10 Motion is granted as to excluding Dr. Velleux’s specific reference to a “risk management
11 paradigm” or a “descending order of risk” hierarchy, but otherwise denied. Dr. Velleux’s
12 declaration (dkt. # 652) is STRICKEN pursuant to Fed. R. Civ. P. 37(c)(1).

13 The Clerk is directed to send copies of this Order to the parties and to the Honorable
14 Richard A. Jones.

15 Dated this 18th day of August, 2023.

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17 MICHELLE L. PETERSON
18 United States Magistrate Judge
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