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14  
15 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

16 UNITED STATES OF AMERICA,

17 Plaintiff,

Civil No. 24-cv-3092-TOR

18 v.

19 COW PALACE, LLC, *et al.*,

UNITED STATES' REPLY IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION

20 Defendants.

**INTRODUCTION**

1  
2 The United States demonstrated in its opening brief that nitrate  
3 contamination in an underground source of drinking water downgradient from the  
4 Defendants’ dairy facilities constitutes an imminent and substantial endangerment  
5 to residents of the Lower Yakima Valley under Section 1431 of the Safe Drinking  
6 Water Act (“SDWA”), 42 U.S.C. § 300i(a), and that, absent an injunction, nitrate  
7 contamination from Defendants’ properties will continue to cause or contribute to  
8 the endangerment to human health. The United States further established that it is  
9 entitled to injunctive relief because the four *Winter* factors to award an injunction  
10 weigh decisively in its favor.

11 In their Response, Defendants<sup>1</sup> do not meaningfully dispute that nitrate  
12 contamination in an underground source of drinking water beneath and directly  
13 downgradient from their properties exceeds the maximum contaminant level  
14 (“MCL”) for nitrate of 10 mg/L. Instead, Defendants argue that no further action is  
15 warranted to address the nitrate contamination because (1) efforts by the  
16 Defendants, the Clean Drinking Water Project, and State and local government  
17 entities negate any imminent and substantial endangerment near their properties;  
18 (2) such efforts by the State and local governments displace EPA’s emergency

19 \_\_\_\_\_  
20 <sup>1</sup> Defendants’ Response is on behalf of the corporate defendants; individual  
defendants Henry Bosma, Henrietta Bosma, and Kathleen Nicolaus have failed to  
appear.

1 authority under SDWA Section 1431; and (3) the downgradient area in which the  
2 United States requests additional community outreach and provision of alternative  
3 water is improperly broad. Defendants’ arguments misconstrue SDWA’s  
4 emergency provision, which empowers EPA to act when contaminated drinking  
5 water may threaten human health and State and local government actions are  
6 insufficient to abate the threat. Such is the case here, where over a decade of efforts  
7 by the dairies named as defendants in this case (the “Dairies”) has failed to reduce  
8 nitrate levels to below the MCL, and hundreds of residents who live downgradient  
9 of the Defendants’ properties still lack access to regular, reliable well testing; safe,  
10 alternative water in their homes; or both. Accordingly, this Court should grant the  
11 United States’ Motion for Preliminary Injunction.

12 **ARGUMENT**

13 **I. The United States Has Shown Probable Success on the Merits.**

14 **A. An Imminent and Substantial Endangerment Exists Irrespective of Past**  
15 **or Current Efforts to Reduce Nitrate Contamination and Provide**  
16 **Alternative Water.**

17 The Defendants contend that no imminent and substantial endangerment  
18 exists because they have “made great strides under the Consent Order and RCRA  
19 Consent Decrees to implement source control measures” and “are already funding  
20 two programs that test and provide bottled water or filters to residents . . . .” ECF  
No. 49 at 24. Relying on two out-of-circuit cases under RCRA, the Defendants

1 argue that their actions to date “nullify” a finding of imminent and substantial  
2 endangerment. *Id.* at 26. Yet SDWA imposes no such limitation on EPA’s  
3 emergency authority. Upon a finding that contaminants in an underground source  
4 of drinking water may present an imminent and substantial endangerment, SDWA  
5 Section 1431 authorizes EPA to take such actions as it may deem necessary to  
6 protect the health of persons, including commencing a civil action for appropriate  
7 relief. 42 U.S.C. § 300i(a).

8 i. Source Control Efforts to Date Have Not Abated the Imminent and  
9 Substantial Endangerment.

10 Irrespective of the Dairies’ source control measures to date, current data  
11 from the Dairies’ groundwater monitoring wells demonstrates that further efforts  
12 are necessary to protect downgradient residents. It is undisputed that several nitrate  
13 hot spots—where nitrate levels in groundwater remain above 50 mg/L—persist as  
14 of the Dairies’ recent quarterly report from August 2024: YVD-11 (260 mg/L),  
15 DC-03 (138 mg/L), YVD-14R (107 J mg/L), YVD-08 (68.4 J mg/L), and YVD-09  
16 (66.9 mg/L). ECF No. 59-19 at 9. Likewise, many more wells remain above the  
17 MCL, ranging from levels just below 50 mg/L to just above the 10 mg/L standard:  
18 DC-05 (49.2 J mg/L), YVD-10 (44.9 mg/L), YVD-13 (38.7 J mg/L), DC-14 (36.3  
19 J mg/L), YVD-16 (28.0 J mg/L), DC-04 (25.3 J mg/L), YVD-12 (15.3 J mg/L),  
20 and YVD-15 (12.3 J mg/L). *Id.* And several wells show increasing nitrate levels

1 since 2022, including YVD-11, YVD-16, DC-05, and YVD-13. Schnaar Rebuttal  
2 Decl. at ¶¶ 19, 32.

3 The sudden spike in nitrate at YVD-11, “approximately 3-fold higher than  
4 any previous testing results,” occurred in June 2024 but the Dairies did not notify  
5 the United States of this spike until late August, after the United States filed its  
6 Complaint and preliminary injunction motion. ECF No. 59-19 at 10. The persistent  
7 hot spots, numerous monitoring wells testing above the MCL, increasing nitrate  
8 levels at several wells, and recent spike at YVD-11 negate the Dairies’ claim that  
9 the status quo poses no imminent and substantial endangerment and dismantle any  
10 illusion that the Dairies have nitrate sources under control.

11 All of these alarming trends in the groundwater monitoring wells at and  
12 downgradient of Defendants’ properties are precisely why the United States seeks  
13 immediate relief regarding collection of monitoring well data. The parties agree  
14 that the 8-year requirement for groundwater monitoring under the Consent Order  
15 expired in July 2021, and that the Dairies rejected EPA’s request that they continue  
16 collecting data under the requirements of the expired monitoring provision. ECF  
17 No. 49 at 14–15. As Defendants acknowledge in their Response, they insisted on  
18 “step-down protocols,” which included monitoring for only nitrate, for only two  
19 additional years, and only on the condition that EPA “agree that no additional  
20 source control actions are required under Consent Order.” ECF No. 51 at 183–84.

1 While EPA emphasized that an imminent and substantial endangerment remained,  
2 the Dairies asserted—as they do now—that their provision of alternative water  
3 “negate[d] any such purported endangerment.” *Id.* at 192.

4 Collection of reliable monitoring data is crucial to track the changing nitrate  
5 plume and its radius of impact on downgradient homes. ECF No. 15 at ¶ 52. While  
6 Defendants reference their “voluntary” efforts to continue monitoring, the United  
7 States’ proposed relief requires the Dairies to continue collecting groundwater  
8 monitoring data from its existing well network subject to the same quality  
9 assurance procedures under the Consent Order, and to monitor all parameters  
10 necessary to analyze nitrate movement through groundwater, including other forms  
11 of nitrogen: nitrite, ammonia, and Total Kjeldaal Nitrogen. Schnaar Rebuttal Decl.  
12 at ¶¶ 44–45.

13 While the groundwater monitoring well data alone demonstrates that further  
14 investigation is needed to determine which areas of the Defendants’ facilities and  
15 application fields remain ongoing sources of nitrate to groundwater, significant  
16 concerns also remain as to the Dairies’ source control efforts. Specifically, nitrate  
17 leaching from cow pens, compost areas, and land application fields remain  
18 potential sources, while silage storage requires further assessment to determine  
19 whether it poses an ongoing risk. Larson Decl. at ¶ 82; Arnall Decl. at ¶¶ 22–28.  
20 Although Bosma/Liberty Dairy sold its herd on October 18, 2024, and intends to

1 cease operating as a Dairy, Lagoons 1-3 will continue to act as a potential source  
2 of nitrate contamination to groundwater until they are fully abandoned. Larson  
3 Decl. at ¶¶ 72–81. Nitrogen in the soil underlying the other former lagoons, cow  
4 pens, compost areas, silage storage, and land application fields at Bosma/Liberty  
5 Dairy also poses a risk of contaminating the underlying aquifer depending on how  
6 the property is used going forward. *Id.* at ¶ 17. For example, conversion of the land  
7 application fields to irrigated agriculture would pose a significant risk of nitrate  
8 leaching downward through the vadose zone. Arnall Decl. at ¶ 28.

9       Additionally, the status of leakage from Cow Palace Lagoon 1 remains  
10 uncertain. Defendants insist that any leakage through the primary liner would  
11 result in changing sump levels, but this ignores the possibility that a leak in the  
12 primary liner could flow through a tear or hole in the secondary liner instead of to  
13 the sump. Clabaugh Decl. at ¶¶ 8–10. Considering the damage to the secondary  
14 liner from the November 2019 wind event, the integrity of the secondary liner  
15 remains questionable—at best—such that leak testing is appropriate. *Id.* at ¶¶ 11–  
16 16. Nitrate levels at groundwater monitoring well DC-14, albeit decreasing, remain  
17 at 36.3 mg/L-N—nine times higher than 2017-18 baseline levels before the spike.  
18 *Id.* at ¶¶ 17–18; *see also* Schnaar Rebuttal Decl. at ¶¶ 36–38. Rather than wait to  
19 see whether nitrate levels at DC-14 decrease in the coming months or years, the  
20 public health threat warrants immediate testing so that any leak(s) can be repaired

1 or, if no leaks are detected, the parties can promptly investigate other potential  
2 sources of the elevated nitrate levels at DC-14.

3 Thus, while the Dairies have made progress on source control under the  
4 Consent Order and RCRA Consent Decrees, more source control work remains to  
5 protect downgradient residents.

6 ii. Current Provision of Safe, Alternative Water Provides Some Relief  
7 But is Not Sufficient.

8 Turning to the provision of alternative water, Defendants argue that the  
9 checkerboard of efforts between (1) the Dairies within 1 mile downgradient of  
10 their facilities under the Consent Order; (2) the Clean Drinking Water Project  
11 within 3 miles downgradient of the Dairies under the RCRA Consent Decrees; and  
12 (3) the Washington State Department of Health, Yakima County Public Services,  
13 and Yakima Health District across the Lower Yakima Valley via the Safe Drinking  
14 Water Initiative abate the imminent and substantial endangerment. ECF No. 49 at  
15 12–13. Recognizing that multiple entities are operating in the Lower Yakima  
16 Valley to provide alternative water, the United States does not seek an entirely new  
17 program but rather to fill remaining gaps in existing efforts to ensure residents  
18 affected by the Dairies’ nitrate plume have consistent access to safe, alternative  
19 water immediately and for the pendency of this action. The United States has no  
20 opposition to the Dairies partnering with the Safe Drinking Water Initiative or any  
other entities with the requisite experience and resources to ensure the timely and



1 consistent provision of alternative water to all homes within the Affected and  
2 Potentially Affected Areas where nitrate levels exceed the MCL. *See* ECF No. 13-  
3 2 at § 1(A)(ii). The relief sought here would require the Defendants to ensure that  
4 no homes affected by the Dairies’ nitrate plume are left behind by existing efforts.

5       Crucial gaps remain in current outreach and provision-of-water efforts.

6 Approximately 140 of 465 homes in the Affected and Potentially Affected Areas  
7 likely have not received any recent outreach offering a free well test or alternative  
8 water. Yourish Decl. at ¶¶ 13–14. More importantly, an estimated 369 homes in the  
9 Affected and Potentially Affected Areas are not currently receiving alternative  
10 water from any of the existing efforts, including 316 homes that have never  
11 received alternative water. *Id.* at ¶¶ 8–10, 12. Fifty-three homes had a reverse  
12 osmosis water treatment system (“RO filter”) installed at some point in the past, or  
13 bottled water service, but neither the Dairies, nor the Clean Drinking Water  
14 Project, nor the Safe Drinking Water Initiative have provided RO filter  
15 maintenance or bottled water to those homes since January 2023. *Id.* at ¶¶ 11–12.<sup>2</sup>

16       For RO filters to reliably protect residents, RO filters must be maintained at  
17 least annually according to manufacturer specifications and must not be used to

18 \_\_\_\_\_  
19 <sup>2</sup> The United States anticipates that not all 369 homes without access to alternative  
20 water will exceed the nitrate MCL, but, given that nearly 40% of wells sampled by  
the Safe Drinking Water Initiative this year have tested above the MCL, Parshalle  
Decl., Ex. G (indicating 188 out of 473 results above MCL), lab testing throughout  
the Affected and Potentially Affected Areas is warranted.

1 treat water that overloads the filters’ capacity to reduce nitrate below the MCL.  
2 Krause Decl. at ¶¶ 18–19. Maintenance records shared by the Dairies indicate that  
3 many residents are not receiving even annual RO filter maintenance.  
4 Phommanivong Decl. at ¶¶ 7–13. Available information also indicates that the  
5 Dairies are relying on RO filters to treat water that contains nitrate levels above the  
6 filters’ capacity (i.e., nitrate above 27 mg/L). Krause Decl. at ¶ 23; Second  
7 Winiecki Decl., Ex. Q.

8 Current efforts also fall short because: (1) they do not include annual well  
9 sampling to confirm whether nitrate levels have exceeded the threshold where RO  
10 filters can reduce nitrate below the MCL, such that bottled water is necessary; and  
11 (2) they do not include critical testing of the RO filters’ efficacy as part of any  
12 maintenance. Krause Decl. at ¶¶ 21–22. Finally, current efforts also do not address  
13 “borderline” homes: those with nitrate levels in their wells between 5 and 10 mg/L,  
14 which could exceed the MCL due to seasonal fluctuations. ECF No. 16 at ¶ 45.  
15 Quarterly testing is necessary to protect “borderline” homes from the foreseeable  
16 risk of increasing nitrate levels—a precaution that the State and local governments  
17 agree with but do not currently offer for free. KenKnight Decl., Ex. J at  
18 WA\_0000109.

19 Defendants rely on *Tilot Oil* and *Leister* for the proposition that provision of  
20 alternative water to downgradient homes negates any imminent and substantial

1 endangerment. Both cases are inapposite here. In *Leister*, the defendant provided  
2 charcoal filtering water treatment for the plaintiffs’ wells supplying water to their  
3 dairy barn—after which sampling results showed levels of organic compounds  
4 below detectable levels. *Leister v. Black & Decker (U.S.), Inc.*, 117 F.3d 1414 (4th  
5 Cir. 1997). Similarly, in *Tilot Oil*, the court found that no health standards for  
6 benzene were exceeded while defendants operated a ventilation fan, among other  
7 remedies. *Tilot Oil, LLC v. BP Prods. N. Am., Inc.*, 907 F. Supp. 2d 955, 964–65  
8 (E.D. Wis. 2012). In both cases, the courts concluded that during the operation of  
9 remedial measures, contamination remained within safe exposure limits. Here, in  
10 contrast, hundreds of homes do not currently have appropriately maintained RO  
11 filters or bottled water service and thus remain unprotected from any nitrate  
12 contamination in their wells. Yourish Decl. at ¶¶ 8–10. Likewise, quarterly testing  
13 is necessary at “borderline” homes to protect against changing nitrate levels while  
14 at least annual testing of RO filters and annual well sampling are needed to ensure  
15 RO filters are working as intended.

16 In addition to these current gaps in protection, Defendants’ Response ignores  
17 the practical reality that provision of alternative water is not a long-term solution.  
18 Abatement of the imminent and substantial endangerment to downgradient  
19 residents requires effective source control at the Defendants’ properties. While RO  
20 filters offer important temporary protection for some downgradient residents

1 whose nitrate levels fall within the range that can be treated by an RO filter, they  
2 require at least annual maintenance, are subject to mechanical failure, and depend  
3 on residents accepting installation, consistently using the filtered water for drinking  
4 and cooking, and scheduling repeated maintenance. Krause Decl. at ¶¶ 5–11.  
5 Outreach must occur on an ongoing basis as the nitrate plume changes, new  
6 residents move into the community, and existing residents change their preferences  
7 regarding provision of alternative water due to pregnancy, caring for an infant,  
8 health issues, or other life changes. Montoya Decl. at ¶ 37.

9 B. The Defendants Misinterpret the “State/Local Authorities Have Not  
10 Acted” Element Under 42 U.S.C. § 300i(b).

11 The Defendants contend that EPA’s emergency authority is displaced here  
12 because State and local authorities have taken some action towards providing  
13 residential well testing and alternative water to homes downgradient of the  
14 Defendants’ properties. ECF No. 49 at 14–15. This is not the standard under  
15 SDWA Section 1431, which contemplates the *sufficiency* of state or local action—  
16 not whether *any* action has been taken. Crucially, this determination “involve[s] an  
17 element of choice and judgment” that is reserved for EPA. *Burgess v. United*  
18 *States*, 375 F. Supp. 3d 796, 813 (E.D. Mich. 2019); *In re Flint Water Cases*, 482  
19 F. Supp. 3d 601, 627 (E.D. Mich. 2020) (“facially apparent discretion given to the  
20 EPA in Section 1431” to act if state action is “insufficient”); *see also* H.R. Rep.  
No. 93-1185, at 35 (1974) (Congress authorizing EPA’s “prompt enforcement” of

1 Section 1431 if state or local efforts are “not forthcoming in timely fashion or are  
2 not effective to prevent or treat the hazardous condition”). Accordingly, where  
3 EPA has made an imminent and substantial endangerment determination under its  
4 emergency authority, courts must consider “whether EPA could reasonably  
5 conclude that [State and local] efforts . . . [are] not sufficiently effective to protect  
6 the public health.” *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 398 (4th Cir. 1998).  
7 EPA has made that showing here.

8 As explained above, existing efforts to protect residents against the risk of  
9 drinking nitrate contaminated water fall short. *Supra* at 8–10. In addition to  
10 remedying the current gaps in protection, the United States also seeks timely  
11 completion of outreach and provision of alternative water. The Safe Drinking  
12 Water Initiative’s outreach efforts have been underway since January 2024, with  
13 test packets mailed to hundreds of homes. However, as of October 18, 2024, when  
14 the United States last received an update from the Safe Drinking Water Initiative  
15 on its work, it had installed no RO filters in the Affected and Potentially Affected  
16 Areas and was providing bottled water to only 4 homes in those Areas, despite  
17 nitrate test results indicating MCL exceedances at 27 homes. Yourish Decl. at ¶¶  
18 15–17; Parshalle Decl., Ex. J. Notwithstanding the Safe Drinking Water Initiative’s  
19 plans to reach more residences, the United States seeks provision of alternative  
20 water on a faster time frame. *See* ECF No. 13-2 at § 1(G). The relief requested in

1 the proposed order would both fill remaining gaps in protection and expedite this  
2 critical work by directing more resources to mitigating the public health threat.

3       Furthermore, as the State and Yakima Health District have identified,  
4 deployment of community health workers—frontline public health workers with  
5 strong connections to and knowledge of the community served—would amplify  
6 the success of outreach efforts both in terms of homes reached and the percentage  
7 that accept alternative water and ongoing maintenance. KenKnight Decl. at ¶ 8;  
8 Montoya Decl. at ¶¶ 16–37; Martinez Decl. at ¶ 19. Indeed, the State and Yakima  
9 Health District applied for and were granted funding from EPA to hire community  
10 health workers to assist with outreach, but as of late October 2024, was still  
11 working to complete the hiring process. KenKnight Decl. at ¶¶ 8, 12, 14. The  
12 Dairies do not currently employ community health workers as part of their efforts  
13 to provide alternative water. Montoya Decl. at ¶¶ 28–34. The United States’  
14 proposed relief requires any third party working with Defendants to employ  
15 community health workers. ECF No. 13-2 at § 1(A)(ii). Thus, to the extent the  
16 Defendants choose to partner with the State or County for outreach, hiring  
17 community health workers will improve the efficacy of the outreach program in a  
18 way that is not currently being addressed.

19       Finally, to the extent the Safe Drinking Water Initiative is working to contact  
20 homes, provide well testing, and install RO filters, its current funding deadline is

1 June 30, 2025, and it only has funding to provide one year of free maintenance for  
2 any RO filters installed. Parshalle Decl., Ex. D at SDWI\_0000053; Ex. F at  
3 SDWI\_0000015. The County initiated a similar outreach effort in 2011, through  
4 which it installed RO filters in 161 homes across the Lower Yakima Valley,  
5 including 22 in the Affected and Potentially Affected Areas, but only provided a  
6 limited form of maintenance for one year. KenKnight Decl. at ¶ 6; Yourish Decl. at  
7 ¶ 9; Krause Decl. at ¶ 12. This discontinuation of service likely exposed homes to  
8 unsafe levels of nitrate because families were unable or unwilling to bear the cost  
9 of continued maintenance and perhaps were unaware their filter was no longer  
10 protecting them. Parshalle Decl., Ex. H at YC\_0000088; Krause Decl. at ¶¶ 6–10,  
11 12; Montoya Decl. at ¶ 13.

12 The same concern applies here, where the Safe Drinking Water Initiative has  
13 secured \$2.3 million in funding to provide bottled water and RO filters to 520  
14 homes by June 30, 2025, but it is uncertain (1) whether additional funding will be  
15 secured to provide the required, at least annual maintenance beyond one year; and  
16 (2) whether the approximately 465 homes in the Affected and Potentially Affected  
17 Areas will be prioritized over the estimated 8,100 homes across the Lower Yakima  
18 Valley with potentially contaminated wells. KenKnight Decl., Ex. J at  
19 WA\_0000105; WA\_0000110; Parshalle Decl., Ex. C; Yourish Decl. at ¶¶ 5–7. The  
20 Safe Drinking Water Initiative is providing RO filters on a first come, first served

1 basis. Parshalle Decl., Ex. D at SDWI\_0000063. Consequently, the relief sought  
2 here ensures that alternative water is immediately provided to residences testing  
3 above the MCL within the Affected and Potentially Affected Areas and that any  
4 RO filters installed by the Safe Drinking Water Initiative in the Affected and  
5 Potentially Affected Areas will continue to receive the requisite maintenance and  
6 testing to ensure their effectiveness. *See* ECF 13-2 at § 1(F).

7 C. The Statutory Language and Current Groundwater Data Supports  
8 Protecting Homes in the Affected and Potentially Affected Areas.

9 The United States’ request for preliminary relief in the Affected and  
10 Potentially Affected Areas is consistent with both SDWA’s statutory mandate and  
11 the extensive groundwater monitoring data relied upon in Dr. Schnaar’s model.  
12 Defendants misconstrue the estimated area in which Defendants contribute  
13 between 1 and 10 mg/L nitrate as EPA “effectively trying to change . . . regulatory  
14 SDWA standards through this litigation.” ECF No. 49 at 46. Yet SDWA Section  
15 1431 expressly requires provision of alternative water by persons who “caused *or*  
16 *contributed* to the endangerment.” 42 U.S.C. § 300i(a) (emphasis added). To  
17 “contribute” to an exceedance of the nitrate MCL, Defendants need not be the sole  
18 cause of the exceedance. *Cf. City of Taunton v. EPA*, 895 F. 3d 120, 136 (1st Cir.  
19 2018) (“contribute to” in Clean Water Act indicates that the discharge need not be  
20 the “sole cause” of an exceedance); *Ohio Valley Env’t Coal. v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 684 (S.D.W.Va. 2015) (“material contribution” under



1 state regulation only requires proving it is more probable than not that the  
2 discharge is “among some collection of material contributors.”).

3 Consistent with the statutory language, the Affected and Potentially Affected  
4 Areas delineate areas where Defendants are estimated to contribute more than 10  
5 mg/L, such that their nitrate discharge alone results in an MCL exceedance, and  
6 areas where Defendants are estimated to contribute between 1 and 10 mg/L. *See*  
7 ECF No. 13 at 18. Crucially, current residential well monitoring data confirms  
8 nitrate exceedances at homes across the Areas, including where Defendants are  
9 contributing 10 mg/L or less. Parshalle Decl. at ¶ 14 (GG-074 at 35.9; GG-179 at  
10 16.6; GG-165 at 11.7). The United States’ requested relief first requires outreach  
11 and testing to determine if raw well water exceeds the MCL, and only requires  
12 provision of alternative water to those homes testing above the MCL. ECF No. 13-  
13 2. The United States’ estimated area for preliminary relief is thus consistent with  
14 the statutory language and corroborated by current well data.

15 Defendants also dispute Dr. Schnaar’s modeling with respect to the size and  
16 shape of the estimated groundwater plumes. ECF No. 49 at 30–36. The model Dr.  
17 Schnaar developed for purposes of this preliminary injunction motion—to identify  
18 an appropriate radius for initial outreach and testing—is sufficiently supported by  
19 the data. Schnaar Rebuttal Decl. at ¶¶ 6–26. While Defendants challenge the model  
20 as “calculated to achieve the longest possible plume lengths,” ECF No. 49 at 33,

1 Dr. Schnaar used data and flow assumptions provided by the Dairies' consultants.  
2 *Id.* Furthermore, he conducted several runs with varying aquifer parameter values  
3 and groundwater velocity, with Run A—the one selected and relied upon by the  
4 United States for purposes of this motion—using figures in the middle of the range  
5 of values reported by the Dairies' consultant. *Id.*; *see also* ECF No. 15 at ¶ 36.

6 Defendants similarly challenge Dr. Schnaar's conclusions for failing to  
7 consider decreasing nitrate trends at certain monitoring wells. ECF No. 49 at 31–  
8 32. Yet Dr. Schnaar conducted this exact exercise—ultimately concluding that  
9 some areas at the Dairies' properties showed decreasing trends while nitrate levels  
10 were either stable or increasing at other areas—thus indicating that the Dairies are  
11 an ongoing source of nitrate to groundwater. ECF No. 15 at ¶¶ 42–50; *see also*  
12 Schnaar Rebuttal Decl. at ¶¶ 28–34. Finally, Defendants' critiques of Dr. Schnaar's  
13 model only impact the United States' requested relief insofar as they challenge the  
14 3.5-mile radius for outreach and provision of alternative water. Nothing in  
15 Defendants' Response meaningfully disputes the fact that the Dairies' groundwater  
16 monitoring wells indicate that high levels of nitrate continue to be released to  
17 groundwater at certain locations on Defendants' properties.

18 **II. The United States Demonstrated Irreparable Harm Absent**  
19 **Injunctive Relief.**

20 As explained in the United States' opening brief, the Court can presume  
irreparable harm here because the United States is bringing a statutory enforcement

1 action that authorizes injunctive relief. *See FTC v. Consumer Def., LLC*, 926 F.3d  
2 1208, 1213 (9th Cir. 2019). The United States did not rest on this presumption in  
3 seeking preliminary relief, however, and demonstrated that one-time exposure to  
4 nitrate above 10 mg/L can cause irreparable harm to babies due to Blue Baby  
5 Syndrome, while chronic exposure can result in reproductive problems (such as  
6 spontaneous abortion, intrauterine growth restriction, and birth defects), and  
7 certain cancers. ECF No. 13 at 3–4.

8 In their Response, Defendants do not dispute health risks to residents nor the  
9 fact that homes downgradient of their properties exceed the nitrate MCL. Instead,  
10 they argue that current efforts to provide alternative water and conduct  
11 groundwater monitoring are sufficient to prevent irreparable harm to residents. *See*  
12 ECF No. 49 at 47–51. As identified above, *supra* at 9, hundreds of homes remain  
13 unprotected due to gaps in outreach, testing, and provision and maintenance of RO  
14 filters or bottled water. Likewise, the recent spike at YVD-11 highlights the need  
15 for continued monitoring and assessment of contaminant levels. Thus, timely and  
16 accurate collection of monitoring well data must now be required rather than being  
17 contingent on the Defendants’ willingness to conduct a “voluntary” groundwater  
18 monitoring program.

19 Defendants also contend that the United States “ignores” the state and local  
20 authorities’ monitoring effort through the Groundwater Management Area

1 (“GWMA”). ECF No. 49 at 50. However, the GWMA network excludes the area  
2 covered by the Dairies—precisely because this area was already covered by the  
3 Dairies’ monitoring well network installed under the Consent Order. Schnaar  
4 Rebuttal Decl. at ¶ 43. The wells in the Dairies’ network, in contrast, are located to  
5 track nitrate from Defendants’ properties. *Id.* In sum, maintaining a timely and  
6 accurate picture of the nitrate plume from Defendants’ properties depends on  
7 Defendants’ collection of groundwater monitoring data from their well network.  
8 This burden cannot, and should not, be shifted onto state or local authorities.

9 **III. The Balance of Equities and Public Interest Favors an Injunction.**

10 Where the United States has demonstrated likely success on the merits and  
11 irreparable harm, an injunction altering the status quo is appropriate. Here,  
12 Defendants reject any change to the status quo because—in their view—they have  
13 taken enough actions and spent enough money to address the nitrate contamination  
14 from their operations. *See* ECF No. 49 at 23. Yet the law is clear: “[I]f the  
15 currently existing status quo itself is causing one of the parties irreparable injury, *it*  
16 *is necessary to alter the situation* so as to prevent the injury.” *Or. State Pub. Int.*  
17 *Rsch. Grp. v. Pac. Coast Seafoods Co.* 374 F. Supp. 2d 902, 907 (D. Or. 2005)  
18 (emphasis added) (quoting *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th  
19 Cir. 1974)). “[T]he focus always must be on prevention of injury by a proper order,  
20 not merely on preservation of the status quo.” *Id.* (quoting *Canal Auth. of Fla.*, 489



1 Respectfully submitted this 14th day of November, 2024.

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UNITED STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION - 22

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the foregoing to counsel of record for Cow Palace, LLC; the Dolsen Companies; Three D Properties, LLC; George & Margaret, L.L.C.; George DeRuyter and Son Dairy, L.L.C., D and J Dairy, L.L.C. (f/k/a D and A Dairy, L.L.C.); Liberty Dairy, LLC; Arizona Acres Limited Partnership; Liberty Acres LLC; Bosma Dairy Partners, LLC; and Bosma Enterprises, Inc.

I hereby certify that I will mail by Federal Express the document to the following defendants, who are not currently represented by counsel:

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