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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

MICHAEL PEARSON, JAMES SUTER, SILVIA SUTER, and JEANNIE STRANGE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PORT OF MORROW, LAMB WESTON HOLDINGS, INC., MADISON RANCHES, INC., THREEMILE CANYON FARMS, LLC, BEEF NORTHWEST FEEDERS, LLC, and JOHN DOES 1-10,

Defendants.

Case No. 2:24-cv-00362-HL

PLAINTIFFS' OMNIBUS RESPONSE TO DEFENDANTS' OBJECTIONS TO FINDINGS AND RECOMMENDATION

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Pursuant to Federal Rule of Civil Procedure 72(b)(2), Plaintiffs file this response to Defendant Beef Northwest Feeders, LLC's Objections to Findings and Recommendation ("BNW Objs."), ECF No. 103; Defendant Lamb Weston Holdings, Inc.'s Objections to Magistrate Judge's Findings and Recommendation [Doc. 98] ("Lamb Weston Objs."), ECF No. 104; Defendant Port of Morrow and Threemile Canyon Farms, LLC's Objections to Findings and Recommendation ("Port & Threemile Objs."), ECF No. 107; and Defendant Madison Ranches, Inc.'s Objections to the Findings and Recommendation (Doc. 98) ("Madison Ranches Objs."), ECF No. 109 (collectively, "Defs' Objs.").

I. INTRODUCTION

Every day, people who drink water drawn from the Lower Umatilla Basin Groundwater Management Area ("LUBGWMA") are putting their health at risk. Groundwater in the LUBGWMA is so heavily contaminated with nitrates that drinking it can cause cancer, kidney disorders, cyanosis, and even death. *See* Plaintiffs' Amended Class Action Complaint, ECF No. 17 ("Compl.") ¶¶ 43-44. The groundwater quality has deteriorated to the point that in 2022, the Morrow County Commission declared a local state of emergency over nitrate pollution. *Id*. ¶ 14.

Defendants in this case—the Port of Morrow (the "Port"), Lamb Weston Holdings, Inc. ("Lamb Weston"), Madison Ranches, Inc. ("Madison Ranches"), Threemile Canyon Farms, LLC ("Threemile"), and Beef Northwest Feeders, LLC ("Beef Northwest")—are responsible for much of this nitrate contamination. *Id*. ¶ 2. The Oregon Department of Environmental Quality ("DEQ") is ostensibly meant to oversee remediation of the LUBGWMA groundwater. But over the last 30 years of DEQ oversight, nitrate levels in the area have gone *up*, not down. *Id*. ¶¶ 48, 50. DEQ has failed for decades to resolve the nitrate contamination problem it has been charged with addressing. *Id.*

In the face of this crisis, which state agencies have proven themselves incapable of or unwilling to adequately address, Plaintiffs now seek relief from this Court. Plaintiffs bring claims against all Defendants under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) ("RCRA"). Compl. ¶¶ 111-120. They also bring state law tort claims against all Defendants, *id.* ¶¶ 121-150, and an inverse condemnation claim against the Port. *Id.* ¶¶ 151-156.

Each Defendant has moved to dismiss Plaintiffs' Complaint. ECF Nos. 51, 54, 56, 59. After extensive briefing and argument on the motions—240 pages from Defendants, 82 pages from Plaintiffs, and hours of in-person oral argument—Magistrate Judge Hallman issued his Findings and Recommendation ("F&R") on Defendants' motions to dismiss on February 24, 2025. ECF No. 98. The F&R, a carefully considered, 80-page opinion that analyzes each party's position on more than a dozen issues, ultimately recommends that Defendants' motions should be granted in part and denied in part. *Id.*

Despite the exhaustive briefing on the underlying motions and the thoroughness of Magistrate Judge Hallman's opinion, Defendants object to nearly every aspect of the F&R. Specifically, Defendants find fault with the F&R's conclusions that in this case: (1) the primary jurisdiction doctrine should not be applied; (2) the *Burford* abstention doctrine should not be applied; (3) Plaintiffs have adequately pleaded their claims under RCRA; (4) Plaintiffs have adequately pleaded causation; (5) Plaintiffs have, with only a few exceptions, adequately pleaded their claims under state law; (6) Plaintiffs' Complaint is not an impermissible shotgun pleading; and (7) Plaintiffs have satisfied the requirements of the Oregon Tort Claims Act. In addition to these substantive objections, Defendants also complain that the procedure Magistrate Judge Hallman suggests is improper, and that rather than denying Defendants' motions to dismiss and granting Plaintiffs leave to amend, the Court should grant Defendants' motions before granting

leave to amend. Alternatively, Madison Ranches asks that the Court order Plaintiffs to provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

For the reasons articulated below, none of these objections has any merit. The F&R should be adopted in its entirety with respect to Defendants' motions to dismiss.

II. BACKGROUND

A. Nitrates threaten human health.

Water is unsafe for humans to drink when it contains nitrates at a concentration of more than 10 mg/L. Compl. ¶ 42. High levels of nitrates can interfere with red blood cells' ability to carry oxygen through the body, resulting in cyanosis and asphyxia. *Id.* ¶ 43. Infants who are bottle-fed with formula made with high-nitrate water are at risk of developing "Blue Baby Syndrome," or infant methemoglobinemia, which can be fatal. *Id.* Excessive nitrate exposure is also dangerous to children and adults. Nitrates can cause miscarriages and birth defects, and nitrate exposure has been linked to cancer, kidney and spleen disorders, and respiratory diseases. *Id.* ¶ 44.

B. Defendants discharge nitrates in the LUBGWMA, contaminating water throughout the region.

In 1990, the State of Oregon declared the Lower Umatilla Basin a Groundwater Management Area because groundwater in the area contained unsafe levels of nitrates. *Id.* ¶ 3. The LUBGWMA covers northern Morrow and Umatilla Counties and encompasses the cities of Boardman, Hermiston, Irrigon, Stanfield, and Echo. *Id.* More than 45,000 people, including more than 10,000 children, live in the LUBGWMA. *Id*.

The hydrogeology of the LUBGWMA makes it vulnerable to nitrate pollution. Nitrogen in soil converts to nitrates, which percolate rapidly through the LUBGWMA's permeable, coarse-grained soil and into the water table. *Id.* ¶¶ 2, 61, 63–64. Widespread irrigation in the area keeps

the soil's moisture content high and promotes rapid water movement. *Id.* ¶ 64. Under these conditions, excess nitrates reach the water table within days. *Id.*

Each of the five Defendants in this case has discharged nitrates into the soil of the LUBGWMA. Defendant Port of Morrow operates an industrial wastewater treatment and disposal system in Boardman, and it owns three farms in the surrounding area. *Id.* ¶ 34. The Port's corporate tenants (many of them food processors) generate high volumes of high-nitrogen wastewater. *Id.* ¶ 69. Rather than treat that wastewater to fully remove nitrogen, the Port pumps millions of gallons of high-nitrogen wastewater to surrounding land to dispose of it. *Id.* The Port dumps wastewater on its own farms and on land that Defendant Madison Ranches allows it to use for that purpose. *Id.* ¶¶ 69–70.

Defendant Lamb Weston owns a farm and operates a food processing facility in the LUBGWMA, which it uses to produce potatoes for commercial use. *Id.* ¶ 35. Lamb Weston, like the Port of Morrow, disposes of high-nitrogen industrial wastewater by applying it to fields in the LUBGWMA. *Id.* ¶¶ 69, 71–73. It dumps wastewater on its own land and on Madison Ranches's land. *Id.*

Defendant Madison Ranches owns more than 20,000 acres of farmland in Umatilla County. *Id.* ¶ 36. Madison Ranches allows the Port and Lamb Weston to use its fields as a dumping ground for high-nitrogen industrial wastewater and over-applies fertilizer to its crops. *Id.* ¶¶ 69–70, 76 & n.3.

Defendant Threemile operates a sprawling dairy operation in Morrow County, which includes 88,000 acres of land and multiple concentrated animal feeding operations ("CAFOs"). *Id.* ¶ 37. Threemile over-applies high-nitrogen fertilizer to its farmland. *Id.* ¶¶ 60–63.

Defendant Beef Northwest operates a CAFO, and it stores high-nitrogen animal manure in lagoons that allow nitrogen to leach into the surrounding soil. *Id.* ¶¶ 38, 67–68.

Each of the defendants has caused nitrates to reach the soil, where it subsequently leaches into the groundwater of the LUBGWMA, contaminating the alluvial aquifer that area residents rely on for their water. *Id.* ¶¶ 2, 6, 64–65, 73, 93. This poses dangers for all residents of the LUBGWMA, *id.* ¶ 57, including especially those who rely on private wells for drinking water. Hundreds of private residential wells in the LUBGWMA have nitrate levels above 10 mg/L. *Id.* ¶ 52. Water from these wells is not safe to drink. Residents must use filtration systems or, when the contamination is so high that filtration systems are insufficient, rely exclusively on bottled water for drinking and cooking. *Id.* ¶ 53.

C. Government involvement has not stopped nitrate contamination in the LUBGWMA from worsening.

Oregon's DEQ declared the Umatilla Basin a Groundwater Management Area in 1990. DEQ has therefore had primary responsibility for addressing nitrate contamination in the area for more than 30 years. *Id.* ¶ 47. But in that time, nitrate levels in the LUBGWMA have gone up, not down. *Id.* ¶¶ 49–50. The DEQ, the LUBGWMA Advisory Committee it formed,[1] and other agencies have failed to actually slow, let alone stop, the rising nitrate levels in the area. *Id.*

DEQ's limited enforcement efforts have been ineffective. Both Lamb Weston and the Port are subject to DEQ-issued permits that are supposed to limit the amount of high-nitrogen

[1] The LUBGWMA Advisory Committee is comprised of representatives of various "stakeholders" in the region, including the public, the government, the Oregon Environmental Council, "Science and Research," "Irrigated Agriculture," "Livestock/Dairy/CAFO," and "Industry and Business." An executive of Defendant Madison Farms represents Irrigated Agriculture on the Advisory Committee, an executive of Defendant Threemile Canyon Farms represents Livestock/Dairy/CAFO, and an executive of Lamb Weston represents Industry & Business. *See* LUBGWMA.Org, LUBGWMA Advisory Committee https://lubgwma.org/advisorycommittee (last visited April 7, 2025).

wastewater they can dump in the LUBGWMA. *Id.* ¶¶ 74–76. But both Defendants have violated those permits repeatedly. Lamb Weston violated its DEQ permit at least 90 times between 2015 and 2021. *Id.* ¶¶ 76–77. The Port has violated its permit thousands of times in a variety of ways, including by dumping high-nitrogen wastewater in excess of the agronomic rate, allowing wastewater to leak from pipelines, and failing to report leaks as required by its permit. *Id.* ¶¶ 78–91.

For more than a decade, DEQ has expressly warned the Port that its conduct is dangerous. In 2011, DEQ issued a notice to the Port that said its violations were "of particular concern to the Department" because the Port was dumping wastewater in "the Lower Umatilla Basin Groundwater Management Area, which was established because of the nitrate-nitrogen pollution." *Id.* ¶ 78. In 2015, DEQ told the Port that it was "discharging more nitrogen than allowed by your permit," which posed a risk to groundwater, and "groundwater with high nitrogen concentration is a human health concern when used as drinking water." *Id.* ¶ 80. DEQ has also imposed several fines on the Port. *Id.* ¶¶ 80–86. None of this has had any effect on the Port's behavior. It has continued dumping wastewater in excess of its permit, and the Port's executive director has openly stated that it will continue to do so. *Id.* ¶ 92. Even DEQ admits that it "expects the port will commit more violations." *Id.*

On September 20, 2024—seven months after Plaintiffs filed their initial Complaint in this case, and just a week before Defendants' reply briefs in support of their motions to dismiss were due—the state of Oregon released the "Oregon Nitrate Reduction Plan." ECF No. 83-1. Defendants seized on the Nitrate Reduction Plan, using the fact of its release to argue that state agencies were taking action to address nitrate contamination in the LUBGWMA. But a close read of the Nitrate Reduction Plan makes clear that it is just "a plan to make a plan." ECF No. 91 at 2. The Plan urges

various stakeholders to "gather new data," produce "annual report[s]" and "identify funding sources," but it does not lay out steps for actually requiring polluters to stop dumping nitrogen in the LUBGWMA or to remediate current nitrate contamination. ECF No. 83-1 at 9–10. Further, it will rely on "voluntary measures," allowing Defendants themselves to advise state agencies regarding "environmental aspects of groundwater quality." *Id.* at 24, 31. And it proposes a timeline that extends into 2031 and "[b]eyond." *Id.* at 10.

D. Residents of the LUBGWMA seek to vindicate their rights in court.

After it became clear that state agencies could not or would not act to ameliorate the nitrate contamination crisis, residents of the LUBGWMA filed a putative class action in the District of Oregon on February 28, 2024. ECF No. 1.

The plaintiffs are Michael Pearson, James Suter, Silvia Suter, and Jeannie Strange. Mr. Pearson, Mr. Suter, and Ms. Suter own homes in Morrow County and depend on domestic wells for drinking water, cooking, and other domestic purposes. Compl. ¶¶ 12–13, 20–21. After the Morrow County Commission declared a state of emergency over nitrate pollution, Mr. Pearson had his well tested and learned that it has nitrate levels of 46.8 mg/L—more than four times the Environmental Protection Agency's ("EPA") safety threshold of 10 mg/L. *Id.* ¶¶ 14–15. The Suters's well tested at 37.5 mg/L—more than four times higher than nitrate levels were when they purchased their home in 1999. *Id.* ¶¶ 22–23. Mr. Pearson and the Suters cannot turn on the tap in their homes and get clean water. *Id.* ¶¶ 18, 25. To protect their health, they must use bottled water for drinking and cooking, which is cumbersome and inconvenient. *Id.*

Jeannie Strange rents a home in Hermiston that receives water from the Hermiston Water Department. *Id.* ¶ 27. Although "city water" is supposed to be treated, Ms. Strange tested her water in November 2022 and found that it contained dangerously high levels of nitrates. *Id.* ¶¶ 28–29.

She has resorted to spending at least $100 per month on bottled water to protect herself, her husband, and their three children from unsafe drinking water. *Id.* ¶¶ 30–32.

Plaintiffs' Amended Complaint asserted a claim against all Defendants under RCRA's citizen-suit provision, claims for negligence and negligence per se against all Defendants on behalf of themselves and a proposed class of LUBGWMA residents, claims for trespass, private nuisance, and public nuisance against all Defendants on behalf of a proposed subclass of people who rent or own property in the LUBGWMA, and a claim for inverse condemnation against the Port of Morrow on behalf of a proposed subclass of people who rent or own property in the LUBGWMA. ECF No. 17.

Defendants moved to dismiss Plaintiffs' Amended Complaint on June 24, 2024. ECF Nos. 51, 54, 56, 59. Magistrate Judge Andrew Hallman heard oral arguments on Defendants' motions to dismiss on October 29, 2024. ECF No. 95.

Judge Hallman issued his F&R on February 24, 2025, in which he largely rejected Defendants' arguments. ECF No. 98. Judge Hallman recommended dismissing without prejudice Plaintiffs' RCRA citizen suit against Threemile and Madison Ranches, Plaintiffs' negligence per se claim, and Plaintiff Strange's public nuisance claim. F&R at 7. But he recommended allowing Plaintiffs' RCRA claims against the Port of Morrow, Lamb Weston, and Beef Northwest; Plaintiffs' claims for negligence, trespass, and private nuisance against all Defendants; and Plaintiffs' inverse condemnation claim against the Port to proceed, noting that there is an "immediate and serious need to address nitrate contamination in LUBGWMA." F&R at 7, 21.

III. LEGAL STANDARD

Under the Federal Magistrates Act (the "Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C). If a party files objections to a magistrate's findings and recommendations, the court

makes "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

IV. ARGUMENT

A. The Court should not defer to administrative processes under the primary jurisdiction doctrine.

This Court has jurisdiction to hear Plaintiffs' case. No Defendant contends otherwise. BNW Objs. at 15 ("RCRA grants the Court jurisdiction over citizen suits."); *see also generally* Defs' Objs. Nevertheless, all Defendants argue that the F&R incorrectly recommended that the case should proceed before this Court under the primary jurisdiction doctrine. Port & Threemile Objs. at 8-21; BNW Objs. at 15-24; Lamb Weston Objs. at 14-26; Madison Ranches Objs. at 6. Defendants take this position even though invoking the doctrine of primary jurisdiction is the exception, not the rule, and applies in only "limited circumstances." *Reid v. Johnson & Johnson*, 780 F.3d 952, 966 (9th Cir. 2015); *see also Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015). None of the reasons Defendants give for invoking the doctrine is sufficient to deny Plaintiffs the right to have their case heard by this Court.

As the F&R noted, and as no party disputes, there is no "fixed formula" for applying the doctrine of primary jurisdiction. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Instead, deciding whether to invoke the primary jurisdiction doctrine is left to the "discretion of the district court." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1091 (9th Cir. 2006); *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) ("[T]he doctrine of primary jurisdiction is committed to the sound discretion of the court.").

However, the Ninth Circuit has offered some guidance to district courts considering the primary jurisdiction doctrine: four factors "uniformly present" in cases where the doctrine is properly invoked. These factors are: "(1) the need to resolve an issue that (2) has been placed by

Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987). The Ninth Circuit has further stated that "efficiency is the deciding factor in determining whether to invoke primary jurisdiction." *Astiana*, 783 F.3d at 760. "At the motion-to-dismiss stage, 'the question is whether *any* set of facts could be proved which would avoid application of the doctrine.'" *Eagle Star Rock Prods. LLC v. PCC Structurals, Inc.*, 2024 WL 4751519, at *4 (D. Or. Nov. 11, 2024) (emphasis added) (quoting *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1088 (9th Cir. 2006)).

After carefully analyzing these factors as they apply to each Defendant, the F&R concluded that although the first factor was met, the remaining factors were not, and so this Court "cannot decline to exercise jurisdiction in this case." F&R at 21. The F&R's analysis was sound, and this Court should reach the same conclusion.

1. There is a need to resolve issues related to nitrate contamination in the LUBGWMA.

No party disputes that there is a need to address nitrate contamination in the LUBGWMA. *See* BNW Objs. at 16 (noting high nitrate levels in the LUBGMWA "require a resolution"); Lamb Weston Objs. at 15 (explicitly stating that "[t]he first primary-jurisdiction factor is [] met"); Port & Threemile Objs. at 4 ("[G]roundwater in the LUBGWMA has had elevated nitrates since at least the mid-1990s."). This factor is met.

2. Congress placed resolution of the nitrate contamination issue with both the EPA and private citizens under the RCRA regulatory scheme.

As the F&R properly concluded, neither the second nor the third *General Dynamics* factors are met. F&R at 24-25. When Congress enacted RCRA, it envisioned a dual enforcement regime: enforcement through the EPA (and through state agencies, like DEQ, to which EPA delegates

authority), and enforcement by individual plaintiffs pursuant to the RCRA citizen suit provision. *See* 42 U.S.C. § 6928(a)(1); 42 U.S.C. § 6972(a)(1)(B). Thus, when Defendants argue that "there can be no question that administration and enforcement of RCRA has been placed with EPA," BNW Objs. at 16; *see also* Lamb Weston Objs. at 15-16, this statement, while true, ignores half the congressionally established RCRA framework. Said differently, although the EPA—and by extension DEQ, to which EPA has delegated authority—is charged with administering and enforcing RCRA, the EPA does not have *exclusive* authority to enforce the statute. As the F&R appropriately points out, RCRA explicitly "provides for private enforcement via citizen suit." F&R at 22 (quoting *Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1089 (9th Cir. 2017)). Congress's purpose in enacting RCRA was to "minimize the present and future threats that wastes pose to human health and the environment." 42 U.S.C. § 6902(b). To achieve this end, it vested enforcement authority in the public as well as the EPA. Thus, it is entirely consistent with Congress's intent and the language of the statutes for this Court to hear a case brought under RCRA's citizen suit provision. *See* F&R at 23-24.

Multiple Defendants argue that the F&R erred because, according to them, it effectively establishes a new rule that "Congress intended to mandate a court's exercise of jurisdiction unless a statutory bar to a citizen suit exists." BNW Objs. at 16; *see also id.* at 17 ("Applying this rationale, a court could only decline to exercise jurisdiction under the primary jurisdiction doctrine if the court did not have jurisdiction in the first place."); *id.* at 18 (the F&R's conclusion "leaves no room for primary jurisdiction *ever* to apply in a RCRA case"); Port & Threemile Objs. at 21 (insisting the F&R "conflates the 'diligent prosecution bar' in the statute with the primary jurisdiction doctrine developed by courts"); Lamb Weston Objs. at 17 (arguing that the F&R "create[ed] a new rule that primary jurisdiction can *never* be applied in RCRA cases"). But these arguments

misinterpret the F&R's reasoning. The F&R simply explains that application of the *General Dynamics* factors in this particular case counsels against deference under the primary jurisdiction doctrine. It does not, contrary to Defendants' claims, establish any bright-line rule about when a court "must" apply or not apply that doctrine. If each of the other *General Dynamics* factors warranted application of the primary jurisdiction doctrine, the Court could, in its discretion, defer to DEQ under the primary jurisdiction doctrine. *See* F&R at 24 ("*[T]his factor* does not warrant application of the primary jurisdiction doctrine.") (emphasis added).[2]

By contrast, if, as Defendants suggest, DEQ's "comprehensive authority to regulate groundwater contamination" was enough to require application of the primary jurisdiction doctrine, Lamb Weston Objs. at 15, the exact opposite would be true: no case could ever be brought under the RCRA citizen suit provision. Such an outcome would contravene Congress's intent in establishing a citizen suit provision. *See* H.R. Rep. No. 98-198, pt. 1, at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (noting that citizen suits under RCRA "complement" agency enforcement). Courts have declined to establish such a rule. *See, e.g.*, *Eagle Star Rock Prods. LLC*, 2024 WL 4751519 (concluding it is consistent with RCRA's statutory scheme for the court to retain jurisdiction rather than defer to state agency); *Wilson v. Amoco Corp.*, 989 F.Supp. 1159, 1170 (D. Wyo. 1998) ("This Court could not in good faith unilaterally strip United States citizens of rights given them by their government [by declining to exercise jurisdiction a citizen suit case]."). The mere fact that state agencies have authority to regulate the treatment, storage, and

[2] The Port's attempt to use *Gwaltney* to argue that the primary jurisdiction doctrine is distinct from the diligent prosecution bar—and thus that the F&R erred in recommending Plaintiffs' case move forward—also fails. *See* Port & Threemile Objs. at 10. The *Gwaltney* court said RCRA citizen suits are intended to "supplement rather than to supplant government action" when discussing the diligent prosecution bar. *Id.* at 60. The F&R's recommendation that the Court exercise its jurisdiction in this case, where the diligent prosecution bar does not apply, is consistent with the Supreme Court's holding in *Gwaltney*. *See* F&R at 24.

disposal of solid and hazardous waste does not automatically mean that citizen suits, like the one at bar, can never be heard in federal court. *See also, e.g.*, *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31–32 (1st Cir. 2011) ("While we are not prepared to rule out categorically the possibility of abstention in a RCRA citizen suit, we believe that the circumstances justifying abstention will be exceedingly rare.").

Further, as the F&R noted, "the particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that *it would be inconsistent with the statutory scheme* to deny the agency's power to resolve the issues in question." F&R at 21-22 (emphasis added) (quoting *Gen. Dynamics Corp.*, 828 F.2d at 1363). That is not the scenario presented here. Rather, RCRA's citizen suit provision establishes that it is appropriate for this Court to hear environmental cases, like the one at issue, and it need not always refer the case to a state agency. 42 U.S.C. § 6972(a) ("[A]ny person may commence a *civil action* on his own behalf. . . .") (emphasis added).

Lamb Weston relies on an example from *General Dynamics* itself to try to bolster its argument that, because DEQ has statutory authority to implement RCRA, deference to the agency under the primary jurisdiction doctrine is required. Lamb Weston Objs. at 16-17 (quoting *Gen. Dynamics Corp.*, 828 F.2d at 1363 n.13). This reliance is misplaced. In fact, the Ninth Circuit intended its example—a footnote hypothetical regarding asparagus size guidelines—to reinforce that because primary jurisdiction is a "power-allocating mechanism," courts "must not employ the doctrine unless the particular division of power was intended by Congress." *Gen. Dynamics Corp.*, 828 F.2d at 1363 n.13. And here, as already described, Congress intended to vest power to bring RCRA suits in both the EPA and in private citizens; allowing this citizen suit to move forward is

thus precisely in line with Congressional intent. The F&R did not err in its analysis and application of this factor.

3. Neither expertise nor uniformity concerns justify deferring to agencies to resolve the nitrate contamination issues in the LUBGWMA.

a. *No expertise concerns justify application of the primary jurisdiction doctrine.*

As the F&R correctly notes, "virtually every RCRA case will involve 'technical matters' . . . that fall within the purview of an expert agency." F&R at 25 (quoting *Eagle Star Rock Prods. LLC*, 2024 WL 4751519, at *5). Merely establishing that an agency has expertise "does not suffice to apply the doctrine" of primary jurisdiction. *City of W. Sacramento v. R & L Bus. Mgmt.*, 2020 WL 4042942, at *3 (E.D. Cal. July 17, 2020). Indeed, federal courts are often "called upon to make evaluative judgments in highly technical areas." *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 293–94 (1st Cir. 2006); *see also id.* ("[F]ederal courts have proven, over time, that they are equipped to adjudicate individual cases, regardless of the complexity of the issues involved."). To succeed on this expertise point, Defendants must show that "courts in general *lack* the competence to efficiently and effectively resolve the issue." *Wilson,* 989 F.Supp. at 1170 (emphasis added); *see also Astiana*, 783 F.3d at 760 (emphasizing court competence). Were it otherwise, courts would be hard pressed to find any cases to adjudicate at all: "[i]t will almost always be the case that the agency will have more experience" on the relevant issues than the court. *City of W. Sacramento,* 2020 WL 4042942, at *3.

Here, Defendants have not made the requisite showing that this Court is incompetent to hear Plaintiffs' case. For some of Plaintiffs' claims, no expertise is required at all: for example, ample evidence shows that the Port and Lamb Weston have violated permits issued by DEQ. Compl. ¶¶ 74-93. The Court need not understand the science of groundwater contamination to decide whether, by violating their permits, these Defendants are liable under RCRA.

Even on other claims where some expertise may be required, this Court does not "lack [] competence." *Mallinckrodt*, 471 F.3d at 293. Multiple courts have concluded that cases brought under RCRA and other environmental claims "are not so esoteric or complex as to foreclose their consideration by the judiciary." *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, 239 F.Supp.2d 1322, 1328 (N.D. Ga. 2002); *Wilson*, 989 F.Supp. at 1170; *Merry v. Westinghouse Elec. Corp.*, 697 F.Supp. 180, 183 (M.D. Pa. 1988). Congress itself clearly contemplated that the environmental issues raised in conjunction with RCRA are within the competency of the courts when it created a citizen suit provision. *See Interfaith Cmty. Org. Inc. v. PPG Indus., Inc.*, 702 F.Supp.2d 295, 311 (D.N.J. 2010); *Williams v. Alabama Dep't of Transp.*, 119 F.Supp.2d 1249, 1257 (M.D. Ala. 2000) (rejecting defendant's argument that RCRA claims required special expertise beyond the court's grasp); *Wilson*, 989 F.Supp. at 1170 ("This Court could not in good faith unilaterally strip United States citizens of rights given them by their government [by declining to exercise jurisdiction in a citizen suit case]."); *Ca. Sportfishing Prot. All. v. City of W. Sacramento*, 905 F.Supp. 792, 807 n.21 (E.D. Cal. 1995); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F.Supp. 476, 483 (D. Minn. 1995); *Merry*, 697 F.Supp. at 182.

Defendants argue that the geographic scope of the contamination here differentiates this case from other RCRA suits where courts have declined to apply the primary jurisdiction doctrine. BNW Objs. at 19-21; Port & Threemile Objs. at 16 (noting that the groundwater management issues in the case are "geographically and technically complex"). But courts have previously allowed RCRA claims to proceed past the motion to dismiss stage in cases with expansive geographic scopes. For example, in *Wilson*, plaintiffs were allowed to proceed with RCRA claims relating to contamination that affected a "1500 acre Refinery and Tank Farm," a lake several miles north of the property, part of the North Platte River, and other property adjacent to the defendant's

land. 989 F. Supp. at 1162-64, 1176. Although the total geographic area affected in *Wilson* was less than that in the instant case, it was nevertheless substantial and varied; Defendants offer no reason why the current case is different in kind from *Wilson* such that this Court should defer to agency expertise.

Further, if Defendants were correct that courts should defer to agencies in cases where pollution is particularly widespread, this would paradoxically mean that individual citizens lose court protection as contamination worsens. That cannot be the result Congress intended when it created the RCRA citizen suit provision. The Court should adopt the F&R's conclusion that "the technical aspects of this action do not favor application of the primary jurisdiction doctrine." F&R at 26.

b. *No uniformity concerns justify application of the primary jurisdiction doctrine.*

In addition to raising expertise concerns, Defendants also argue that uniformity concerns warrant application of the primary jurisdiction doctrine. BNW Objs. at 19-23; Lamb Weston Objs. at 20-22; Port & Threemile Objs. at 15-18. Here too, the F&R's conclusion that "potential for conflict or lack of uniformity does not warrant application of the primary jurisdiction doctrine" was correct. F&R at 26.

Uniformity concerns are particularly ill-founded as to Madison Ranches, Threemile, and Beef Northwest because those Defendants are not current targets of agency action concerning nitrate contamination in the LUBGWMA. Because no agency action exists, there is correspondingly no "danger of inconsistent rulings." *Ellis v. Trib. Television Co.*, 443 F.3d 71, 83 (2d Cir. 2006). The Court should not decline to hear the case against these Defendants merely because an Oregon agency might, at some indeterminate future time, decide to commence an as-yet unforeseen action against them. *See Easterday Dairy, LLC v. Fall Line Cap., LLC*, 2022 WL

17104572, at *7 (D. Or. Nov. 22, 2022) ("[P]rimary jurisdiction is not a doctrine of futility.") (citing *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 786 (8th Cir. 1999), for the proposition that a court could not continue refusing to hear a case because the agency had not brought an initial enforcement action). Were that the standard, no defendant subject to agency regulation or oversight could ever be properly sued in court. That is not the intended consequence of the primary jurisdiction doctrine.

Beef Northwest nevertheless argues that uniformity concerns are pervasive here, claiming that "[t]he F&R fails to confront the literal impossibility of engineering a remediation where innumerable sources of nitrate contamination fall outside the Court's jurisdiction and would be uncontrolled." BNW Objs. at 19; *see also id.* at 22 ("An order granting the requested relief would necessarily require BNW to implement an undefined remedial action plan over a sizeable geographic area, much of which is not under its control."). In the first instance, Plaintiffs disagree that remediating the LUBGWMA is a "literal impossibility." At the very least, this is a factual question that cannot be resolved on a motion to dismiss.

Beef Northwest's additional contention that many "sources of nitrate contamination fall outside the Court's jurisdiction" may be accurate. *Id.* at 19; *see also id.* at 23 (there are "innumerable other parties over whom the Court does not have jurisdiction—because they are not named or parties to this action—that can and will continue to contribute nitrates to the LUBGWMA."). But the fact that other entities also contribute to contamination in the LUBGWMA does not excuse Beef Northwest's own contributions to that problem. Further, Beef Northwest and the other Defendants are free to implead additional parties they believe are responsible for the contamination under Federal Rule of Civil Procedure 14. This is not a reason to defer jurisdiction to state agencies.

Even for Defendants Port of Morrow and Lamb Weston, against whom DEQ has issued various directives, conflict concerns are not dispositive, despite arguments from these Defendants that court proceedings "could result in a conflicting liability finding" and could impose "inconsistent obligations" on Defendants. Lamb Weston Objs. at 21; *see also, e.g.*, Port & Threemile Objs. at 19 (proceeding with the case "will create untenable confusion"). According to the Port, because "DEQ has already ordered much of [the] same relief" Plaintiffs request in their Complaint, "it is practically impossible for this Court to take any action that will *not* conflict with agency action and directive." Port & Threemile Objs. at 13, 17.

But the very chart that the Port includes in its Objections—which can be readily adapted to address Lamb Weston's similar concerns—shows that this fear is overblown. It is eminently possible for this Court to fashion remedies that will not conflict with any agency order. In fact, despite Defendants' protests, the remedies Plaintiffs seek are demonstrably different from the remedies DEQ has thus far ordered in its Mutual Agreement and Order with the Port ("Port MAO"), as set out in the following table:

Relief Plaintiffs Seek Against Port	**Remedy in Port MAO**	**Non-Conflicting Outcome**
Declaratory judgment that the Port has violated RCRA. Compl., Prayer for Relief, A.	Declaration that the Port has violated DEQ Water Pollution Control Facilities Permits. ECF No. 57-1 ¶¶ 2, 4, 7-10; Port & Threemile Objs. at 15.	The Court determines that the Port has violated RCRA and issues a declaratory judgment to that effect. Because a RCRA violation is not coextensive with a DEQ permit violation, such a declaration would not conflict with DEQ's MAO remedy.
Court order compelling the Port to "conduct any assessment and remedial action activities necessary to eliminate the endangerment," including by "remediating the	The Port is required to stop violating its DEQ permits and to engage in a crop management program, a soil sampling program, and an	The Court orders that the Port must work to remediate the water in the LUBGWMA.

soil and ground water" to meet Oregon state law standards. Compl., Prayer for Relief, B.	infrastructure repair program. Port & Threemile Objs. at 13.	This remedy is not mentioned anywhere in the MAO and thus runs no risk of conflict.
Court order compelling the Port to pay "for the construction of wells deep enough to provide clean, potable water" or to "connect[]" Class members' property to the nearest clean water pipe system. Compl., Prayer for Relief, C.	The Port is required to pay for "domestic well screening and testing." Port & Threemile Objs. at 13.	The Court orders that the Port must pay for deep well construction or connection to clean water pipe systems. This remedy is different from, and thus would not conflict with, the requirement from DEQ that the Port pay to test and screen domestic wells for nitrate contamination.
Court order compelling the Port to "conduct and pay for medical monitoring to address [] public health concerns." Compl., Prayer for Relief, D.	The Port has no obligation to fund a medical monitoring program. *See generally* ECF No. 57-1.	The Court orders that the Port must conduct and pay for a medical monitoring program. This remedy is not mentioned anywhere in the MAO and thus runs no risk of conflict.

Thus, despite the Port's allegations that Plaintiffs "seek[] to duplicate the same proceedings that are already pending," Port & Threemile Objs. at 12, and that "[a]ny outcome in this case promises to either duplicate or undermine the DEQ's enforcement action," *id.* at 20, a side-by-side comparison of the remedies Plaintiffs request and the remedies state agencies are pursuing show that there is little risk of duplication or conflict.[3] Plaintiffs are thus not asking the Court to

[3] The Port notes that Plaintiffs further request litigation costs in their Prayer for Relief. Port & Threemile Objs. at 20. But the Port itself acknowledges that the DEQ MAO, unsurprisingly, does not address this issue (the DEQ remedy is listed in the Port's table as "N/A"). *Id.* It is therefore irrelevant to this Court's consideration of uniformity concerns.

The Port also included the argument that awarding litigation costs in the case will "remove[] resources from [the] community that could have gone to economic development or environmental remediation" to call into question the wisdom of bringing this suit. *Id.* Plaintiffs respond that, if the Port had not violated its wastewater discharge permits thousands of times over the last few years and had not poisoned the water in the LUBGWMA in the first place, there would be no need for environmental remediation now. It is the Port's poor judgment and unlawful behavior, not Plaintiffs' decision to stand up for themselves and their families, that has drained resources from the community that the Port is meant to serve.

"interfere with and effectively override decades of effort by the expert agencies." BNW Objs. at 21.

The same exercise can be applied to the Mutual Agreement and Order that Lamb Weston entered into with DEQ in February 2024 (the "Lamb Weston MAO"). According to Lamb Weston, "Oregon DEQ's remedial efforts are already full steam ahead, especially as to Lamb Weston." *Id.* at 22. But the table below shows that, "full steam ahead" or not, the Lamb Weston MAO will not achieve the remedies Plaintiffs seek:

Relief Plaintiffs Seek Against Lamb Weston	Remedy in Lamb Weston MAO	Non-Conflicting Outcome
Declaratory judgment that Lamb Weston has violated RCRA. *See* Compl., Prayer for Relief, A.	Lamb Weston does not admit liability. Lamb Weston Objs. at 7.	The Court determines that Lamb Weston has violated RCRA and issues a declaratory judgment to that effect. Because DEQ's MAO neither confirms nor denies Lamb Weston's liability, such a declaration would not conflict with DEQ's MAO remedy.
Court order compelling Lamb Weston to "conduct any assessment and remedial action activities necessary to eliminate the endangerment," including by "remediating the soil and ground water" to meet Oregon state law standards. *See* Compl., Prayer for Relief, B.	Lamb Weston is required to "achiev[e] consistent compliance" with its DEQ-issued permit and to evaluate potential "remedial action options to address any human exposure to nitrates in drinking water supplies in the area around the land application sites." Lamb Weston Objs. at 7-8.	The Court orders that Lamb Weston must remediate the water in the LUBGWMA itself, rather than simply address human exposure to those nitrates. Such a remedy is not mentioned anywhere in the MAO and thus runs no risk of conflict.
Court order compelling Lamb Weston to pay "for the construction of wells deep enough to provide clean, potable water" or to "connect[]" Class members' property to the nearest clean	Lamb Weston is required to evaluate potential "remedial action options to address any human exposure to nitrates in drinking water supplies in the area around the land application sites." Lamb Weston Objs. at 8.	The Court orders that Lamb Weston must pay for deep well construction or connection to clean water pipe systems. If the eventual "remedial action" ordered by DEQ

water pipe system. *See* Compl., Prayer for Relief, C.		encompasses this remedy, there will be no conflict between the Court's order and DEQ's actions because they will order the same remedy. If the eventual "remedial action" does not include deep well construction, there will be no conflict.
Court order compelling Lamb Weston to "conduct and pay for medical monitoring to address [] public health concerns." *See* Compl., Prayer for Relief, D.	Lamb Weston has no obligation to fund a medical monitoring program.	The Court orders that Lamb Weston must conduct and pay for a medical monitoring program—a remedy that is not mentioned anywhere in the MAO and thus runs no risk of conflict.

As with the Port's MAO, no conflict arises between Lamb Weston's MAO and the relief Plaintiffs request in this case that would justify the application of the primary jurisdiction doctrine. Relatedly, Lamb Weston accuses the F&R of ignoring the Lamb Weston MAO when it concluded that "neither federal nor state authorities have commenced an action to abate the acts or conditions at issue." Lamb Weston Objs. at 24. But even the new "Compliance Plan" component of the Lamb Weston MAO of which Lamb Weston now seeks judicial notice—and which was not before the Magistrate—indicates that DEQ is not requiring Lamb Weston to remediate the contamination it has caused. The "Compliance Plan" describes measures that are intended to "improve compliance" with Lamb Weston's permit in the future, not to provide Plaintiffs with the remedial measures they seek. ECF No. 106-5, Ex. E at 5–6.

The Port's additional argument that allowing Plaintiffs to pursue their case would "effectively undermine[] the discretion of the agency to enter into any voluntary agreement with a regulated party" has no basis in the caselaw. Port & Threemile Objs. at 20-21. While the Supreme Court has held that "[p]ermitting citizen suits for *wholly past* violations of the Act could undermine

the supplementary role envisioned for the citizen suit," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), it has made no such pronouncement regarding ongoing violations. If this Court adopted the standard the Port urges here, it would undermine the entire purpose of the RCRA citizen suit provision, which seeks to empower private citizens to bring suit where "Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.*

Finally, as the F&R noted, "courts have recognized that, *if* there is a conflict between [the court's] ultimate disposition of the case and an agency's conclusion," then the court "may resolve that conflict by considering the agency orders and permitting the agencies to comment before ordering relief." F&R at 26 (quoting *Eagle Star Rock Prods. LLC.*, 2024 WL 4751519, at *6); *see also Radiant Servs. Corp. v. Allegheny Techs. Inc.*, 2013 WL 12377686, at *3 (C.D. Cal. Mar. 19, 2013) (concluding that parties can prevent conflicts by "present[ing] evidence to the Court as to any prior or pending" rulings from the relevant agencies, and courts can rely on this evidence to "determine whether any requested . . . relief would impede the regulatory process or have the potential to subject any party to conflicting orders"); *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 659 (E.D. Pa. 1981) (soliciting the views of the EPA prior to ordering remedial actions under RCRA). This Court could do the same if any conflict were to arise, further alleviating any residual uniformity concerns.

This Court should adopt the F&R's conclusion that "the potential for conflict or lack of uniformity does not warrant application of the primary jurisdiction doctrine" in this case. F&R at 26-27.

4. Efficiency considerations counsel against applying the primary jurisdiction doctrine.

In addition to the four *General Dynamics* factors, Ninth Circuit precedent requires courts to consider whether invoking primary jurisdiction would "needlessly delay the resolution of []

claims." *Astiana*, 783 F.3d at 760 (citing *Reid*, 780 F.3d at 967–68). This final consideration—efficiency—is "the 'deciding factor' in whether to invoke primary jurisdiction." *Id.* (quoting *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007)); *see also Reiter v. Cooper*, 507 U.S. 258, 270 (1993) (expressing concern that invoking primary jurisdiction "could produce substantial delay"); *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) ("[Primary jurisdiction] does not require resort to an expensive and merely delaying administrative proceeding."). Notably, courts should not invoke primary jurisdiction when a plaintiff seeks a remedy beyond that contemplated in the agency's action. *See McCormick v. Halliburton Co.*, 2012 WL 1119493, at *2 (W.D. Okla. Apr. 3, 2012).

Lamb Weston asserts that the F&R "largely neglected" an analysis of efficiency concerns. Lamb Weston Objs. at 22. But the F&R did address this issue, concluding that efficiency considerations do not warrant application of the primary jurisdiction doctrine because DEQ has "no current proceeding or enforcement action that would allow Plaintiffs to seek the relief that they could seek under RCRA." F&R at 27. Plaintiffs here seek a remedy beyond that DEQ is currently contemplating, as explained in detail above. *See supra*, Section IV(A)(3)(b).

The Court should adopt the F&R's conclusion even as to the Port and Lamb Weston, the only Defendants against whom DEQ has initiated any proceedings at all. As to the Port, that Defendant does not deny that the MAO is silent regarding the Port's responsibility to remediate the contamination it has caused. *See generally* Port & Threemile Objs. And as to Lamb Weston, although it claims "remediation efforts" are already underway and before the agency, Lamb Weston Objs. at 26, it has failed to articulate exactly what those remediation efforts are, and nothing in the scope of work indicates that any remediation efforts are ongoing. That is, although Lamb Weston has agreed to "track[]" its nitrogen use, "sample" its soil, drill "monitoring wells,"

"test" the aquifer, and "calculat[e] and review" its nitrogen balance, *see* Lamb Weston Objs. at 25, Lamb Weston has not agreed to—and its scope of work agreement with DEQ does not require—actual *remediation* efforts. As such, the F&R was correct in its assessment that DEQ has "no current proceeding or enforcement action that would allow Plaintiffs to seek the relief that they could seek under RCRA." F&R at 27.

The Port nevertheless urges this Court to refer Plaintiffs' claims to DEQ, suggesting Plaintiffs could simply "refile their claim" at some later date if DEQ "leave[s] unaddressed some of the [groundwater management] issues that plaintiffs have identified in this case." Port & Threemile Objs. at 18 (quoting *Wai Ola All. v. United States Dep't of the Navy*, 734 F. Supp. 3d 1034, 1047 (D. Haw. 2024)). But again, none of the actions DEQ is currently taking are sufficient to address the issue Plaintiffs raise in this case, and DEQ has not indicated any intention to begin additional actions that would address Plaintiffs' concerns. *See supra*, Section IV(A)(3)(b). Because there is currently no possibility of Plaintiffs' claims being fully addressed by DEQ, Defendants' suggested approach would do nothing more than "needlessly delay the resolution of [Plaintiffs'] claims." *Astiana*, 783 F.3d at 760 (citing *Reid*, 780 F.3d at 967–68).

Finally, Defendants raise the argument that proceeding before this Court would be inefficient because litigation "serves only to increase costs with no progress towards the ultimate goal of remediating nitrates in the LUBGWMA." BNW Objs. at 23. This is a foundationless argument. If Plaintiffs win their case and the Court orders the relief Plaintiffs request, including actual remediation of the LUBGWMA, litigation will have succeeded where 30 years of agency oversight have failed. Efficiency considerations thus do not warrant application of the primary jurisdiction doctrine.

B. The Court should not defer to administrative processes under the *Burford* abstention doctrine.

Burford abstention is an "extraordinary and narrow exception to the general rule that a federal court should adjudicate cases otherwise properly before it." *Blumenkron v. Multnomah Cnty.*, 91 F.4th 1303, 1312-13 (9th Cir. 2024). Abstention from a RCRA citizen suit under *Burford* is almost always "improper" and "the circumstances justifying abstention [are] exceedingly rare." *Chico Serv. Station*, 633 F.3d at 30, 32. That is because abstention, at its core, is meant to "allow[] federal courts to take note of and weigh significant and potentially conflicting interests that were not—or could not have been—foreseen by Congress at the time that it granted jurisdiction for a given class of cases to the courts." *Id*. at 31. In enacting RCRA, however, Congress already weighed in on the proper balance "by carefully delineating (via the diligent prosecution bar) the situations in which a state or federal agency's enforcement efforts will foreclose review of a citizen suit in federal court." *Id.* Abstaining under these circumstances for reasons other than those specifically identified in the statute thus threatens "an end run around RCRA," and would risk impermissibly substituting the court's judgment for that of Congress about "the correct balance between respect for state administrative processes and the need for consistent and timely enforcement of RCRA." *Id.* (citations omitted).

Given these background principles, the F&R correctly concluded that this Court should hear Plaintiffs' claims. F&R at 29-33. Plaintiffs' case is not the "extraordinary and narrow exception" where *Burford* abstention is appropriate. Only the Port and Threemile, writing together, offer any argument to the contrary,[4] but none of these arguments offer any reason to deviate from the carefully reasoned conclusion in the F&R.

[4] Lamb Weston and Beef Northwest joined the Port and Threemile's objections, *see* Lamb Weston Objs. at 2; BNW Objs. at 1, but neither of these Defendants wrote separately to address

The Port and Threemile do not dispute that the test in the Ninth Circuit for *Burford* abstention is whether: "(1) the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court, (2) federal issues cannot be separated easily from complicated state law issues with respect to which the state courts might have special competence, and (3) federal review might disrupt state efforts to establish a coherent policy." F&R at 28 (quoting *Blumenkron*, 91 F.4th at 1312); *see also* Port & Threemile Objs. at 21. Because none of these factors is met here, as the F&R correctly reasons, *Burford* abstention is not appropriate.

1. The first *Burford* factor is not met because Plaintiffs are not challenging any agency action, and because the state has not concentrated this type of suit in a particular court.

The first *Burford* factor can be further subdivided into two parts: (1) the suit at issue must "challeng[e] the actions" of an agency, *Blumenkron*, 91 F.4th at 1312; and (2) the state must have "concentrate[d] suits" challenging the actions of that agency in a "particular court." *Id.* The Defendants' arguments fail on both counts.

First, Plaintiffs are not challenging any agency action. No state agency—not DEQ, ODA, OHA, or any other agency—is named as a defendant in this case. As the F&R explains, although Plaintiffs consider Oregon agencies' actions addressing groundwater contamination in the LUBGWMA to be insufficient, they "are not seeking to change a state-issued determination." F&R at 31. Instead, they are using RCRA's citizen suit provision to pursue enforcement of a federal claim against Defendants directly. *Id.*

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the *Burford* abstention issue. And while Madison Ranches noted that it "objects to the Findings and Recommendation (Doc. 98) to the extent it recommends denying the Motion on . . . *Burford* abstention grounds," Madison Ranches Objs. at 6, it did not provide any analysis to support its objection beyond "incorporate[ing] by reference" the arguments in the Port and Threemile's brief. *Id*. at 11.

The Port and Threemile object that the F&R "fails to even acknowledge" that DEQ has taken actions against the Port for its contributions to contamination in the LUBGWMA. Port & Threemile Objs. at 21-22. But mere overlap between the facts underlying Plaintiffs' federal complaint and the facts leading to certain agency action does not mean that Plaintiffs are necessarily challenging that action, or that they are using the federal courts as an end-run around state procedures. Rather, as the F&R correctly recognized, Plaintiffs "are seeking to use RCRA's citizen suit provision as it was designed." *Id.* The question of "[w]hether Plaintiffs could challenge agency actions or inaction is separate from the federal claim that Plaintiffs bring against Defendants." *Id.*

This *Burford* factor also requires a showing that suits of the type Plaintiffs are bringing are concentrated by the state in a particular court. The Port and Threemile cite to "Oregon law," "Oregon agency standards," and "DEQ . . . enforcement action" to allege that Oregon has concentrated suits of the kind Plaintiffs bring here, Port & Threemile Objs. at 21, but nowhere do they state in which court these claims are supposedly "concentrated." That is because no such court exists. For this reason, too, the first *Burford* factor is not met.

2. The second *Burford* factor is not met because the federal issues are easily separated from the state law issues in this case.

The Port and Threemile object to the F&R's conclusion that the federal issues here are separable from state law issues. Port & Threemile Objs. at 22 (citing F&R at 32). Although a purely federal law—RCRA—is at the center of this case, Defendants insist that Plaintiffs' complaint is nevertheless "intertwined with state law claims" because "it seeks exactly the same relief as a state proceeding." *Id*. (citing *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1195 (6th Cir. 1995)). This argument is flawed for multiple reasons.

In the first place, the caselaw that Defendants cite for support, *Coalition for Health Concern*, is a 30-year-old, out-of-circuit case whose holding does not reflect current law in the Ninth Circuit. When considering the interplay between federal and state issues in a *Burford* analysis, the Ninth Circuit asks whether "the federal questions . . . can readily be identified and reserved without colliding with what are essentially state claims." *Blumenkron*, 91 F.4th at 1314. And here, as the F&R correctly noted, federal RCRA claims are "the crux of the suit and the basis for this Court's jurisdiction," and the "focus [of the complaint] is on Defendants' actions and whether they violated RCRA." F&R at 32. Although Plaintiffs do allege state law violations, these claims are based in tort—a separate area of law that is easily distinguished from the federal RCRA claims—and are secondary to Plaintiffs' federal RCRA allegations. As such, the federal questions in Plaintiffs' complaint "can readily be identified and reserved," as required by *Blumenkron*.

Furthermore, even if *Coalition for Health Concern* were the law in the Ninth Circuit, it is readily distinguishable. In *Coalition for Health Concern*, the plaintiffs sought "declaratory and injunctive relief," including against the Secretary of Kentucky's Cabinet for Natural Resources and Environmental Protection in his official capacity, "for alleged violations of *state* and federal RCRA requirements." *Id*. at 1194 (emphasis in original). The plaintiffs' complaint in *Coalition for Health Concern* was thus plagued by two problems that do not impact Plaintiffs here. First, the plaintiffs' allegations challenged agency action by asserting that the Secretary had "failed to apply or misapplied his lawful authority," *id*. at 1195, thereby running afoul of the first *Burford* factor. Second, the plaintiffs' complaint raised state RCRA claims which could not be analyzed and decided independently of the federal RCRA claims, thereby running afoul of the second *Burford* factor. Neither of these issues affect Plaintiffs in this case, who have not challenged an agency order and whose federal RCRA claims and state tort law claims can be readily separated.

Finally, contrary to Defendants' claims, Plaintiffs here are *not* seeking "exactly the same relief as a state proceeding." Port & Threemile Objs. at 22. Plaintiffs are seeking a declaration that Defendants have violated RCRA and an injunction requiring Defendants to work to remediate the contamination they have caused. *See supra*, Section IV(A)(3)(b). No state proceeding is pursuing these goals.

3. The third *Burford* factor is not met because federal review will not disrupt state efforts to establish a coherent policy.

As the F&R correctly pointed out, the "mere potential for conflict" with state regulatory law or policy is not enough to warrant *Burford* abstention. F&R at 32-33 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989)). Similarly, abstention is not required "merely because resolution of a federal question may result in the overturning of a state policy." *Id*. (citing *Zablocki v. Redhail*, 434 U.S. 374, 379 n.9 (1978)). Rather, this factor is met only if federal adjudication of the claim would "unduly intrude into state governmental processes or undermine the State's ability to maintain desired uniformity in the treatment of essentially local problems." *Id*. (citing *New Orleans Pub. Serv.*, 491 U.S. at 351).

Here, none of the relief that Plaintiffs request requires overturning any DEQ decision or otherwise undermining work the agency has done to date. Plaintiffs seek an order requiring Defendants to remediate the nitrate contamination they have caused in the LUBGWMA. *See* Compl., Prayer for Relief. Plaintiffs are not aware of any state agency having issued an order requiring any party, named Defendants in this case or otherwise, to remediate the contamination at issue here. Federal review will consequently not disrupt the state's regulatory efforts. Further, as the F&R noted in the primary jurisdiction context but which applies equally here, "this Court could resolve or avoid conflict *if* they are to arise." F&R at 27; *see also Chico Serv. Station*, 633 F.3d at 34 (structuring relief "to avoid interference with the [agency] proceeding").

Even if the Court disagrees with the F&R and accepts the Port and Threemile's arguments on this point, *Burford* abstention is still inappropriate. The Ninth Circuit uses the conjunctive "and," not the disjunctive "or," when discussing the *Burford* abstention factors. *Blumenkron*, 91 F.4th at 1312. Thus, unless all three factors are met—which is not the case here, for the reasons described above—the Court should proceed to adjudicate this case and should not abstain under *Burford*.

C. Plaintiffs have adequately pleaded their claims under RCRA.

Defendants urge this Court to depart from the F&R and dismiss Plaintiffs' Complaint for failing to state a claim under RCRA. Port & Threemile Objs. at 23-31; BNW Objs. at 24-30; Lamb Weston Objs. at 26-32; Madison Ranches Objs. at 7 n.3. In addition to general causation arguments, addressed below in Section D, Defendants object to the F&R as it relates to Plaintiffs' RCRA claims on four grounds: (1) Plaintiffs have ostensibly failed to allege imminent and substantial engenderment, Port & Threemile Objs. at 23-25, BNW Objs. at 24-27; (2) the nitrate-containing substances at issue are not "solid waste" within the meaning of RCRA, BNW Objs. at 27-28, Lamb Weston Objs. at 26-32; (3) the nitrogen-containing substances were not "discarded" within the meaning of RCRA, BNW Objs. at 29-30; Lamb Weston Objs. at 28-32; and (4) the discharges at issue are exempt from RCRA under the "returned to the soil as fertilizer" exception. Lamb Weston Objs. at 28, 31. None of these objections offers any reason to depart from the F&R.

1. The Complaint alleges an imminent and substantial endangerment to human health and the environment.

a. *The Complaint alleges imminent and substantial endangerment to human health.*

The Port, Threemile, and Beef Northwest argue that Plaintiffs have failed to plead an imminent and substantial endangerment, either because they have not adequately alleged "at what nitrate levels those risks present," Port & Threemile Objs. at 25-26, because they have not pleaded

any reasonable "pathway of exposure," *id.*, or because "any risk to health is already mitigated." BNW Objs. at 24. Each of these objections is meritless.

The first of these objections—that Plaintiffs have not adequately alleged the nitrate exposure levels that risk an imminent and substantial endangerment, Port & Threemile Objs. at 25—is particularly absurd. Plaintiffs' Complaint explains multiple times the exact nitrate level at which health risks arise: 10 mg/L of nitrate or higher. *See* Compl. ¶¶ 4, 15, 42 ("[W]ater is unsafe for human consumption when it contains nitrates at a concentration of 10 mg/L or greater."). The risks of ingesting water with nitrate concentrations of 10 mg/L or more are significant, and include cancer, miscarriages, birth defects, and infant methemoglobinemia, or "Blue Baby Syndrome," which can rapidly cause coma or death in infants. *Id.* ¶¶ 2, 44.

The cases the Port and Threemile cite on this point, including *City of Fresno v. United States*, 709 F.Supp.2d 934, 938 (E.D. Cal. 2010), and *Foster v. United States*, 922 F.Supp. 642, 646 (D.D.C. 1996), are inapposite. Neither case speaks to the RCRA pleading standard; they are decisions on summary judgment. *See* Port & Threemile Objs. at 26 (citing *Foster*, 922 F.Supp. 642, 646 (summary judgment); *City of Fresno*, 709 F.Supp.2d at 938 (same)). Further, the underlying facts in these cases are not analogous to the facts here. In *City of Fresno*, which involved the contaminant TCP, the court granted summary judgment to the defendants on endangerment because the plaintiffs failed to "provide any evidence that anyone was subject to long-term exposure to TCP contamination" and so had failed to raise a genuine dispute of fact as to the seriousness of the risk. 709 F.Supp.2d at 941. Similarly, in *Foster*, the contaminant at issue would only pose a risk if it migrated into groundwater, but the plaintiffs' own consultants concluded that "there is no evidence [that] the contamination is migrating and percolating through the soil" into the groundwater. 922 F.Supp. at 662.

Conversely, here, Plaintiffs allege that the LUBGWMA groundwater is highly contaminated. Compl. ¶¶ 46–52, 55. They also allege that people rely on groundwater from the LUBGWMA for their drinking water. *Id.* ¶¶ 1-2, 13, 21, 27. And far from ensuring that the contamination has been "satisfactorily remedied," the government agencies involved have failed to stop the contamination of the LUBGWMA. *Id.* ¶¶ 46–52. Plaintiffs thus adequately allege that nitrate contamination continues to pose a threat to thousands of people's health, meeting the "imminent and substantial" bar.

As to alleging a reasonable "pathway of exposure," the Complaint states that "[a]nyone who has ingested unsafe levels of nitrates in water is at risk for potential adverse health effects," *id.* ¶ 44, and that water throughout the LUBGWMA, including the water in many residents' homes, has already tested higher than 10 mg/L. *Id.* ¶¶ 15, 23, 29, 46-55, 96 n.6. The pathway of exposure here is clear: anyone who relies or has relied on LUBGMWA water for their daily water needs is at risk.

The existence of a clear pathway by which nitrates in the LUBGWMA can cause harm differentiates Plaintiffs' Complaint from the caselaw the Port cites. For instance, in *Eagle Star Rock Prods.*, the court dismissed the plaintiffs' action because the contamination at issue had been entirely covered by a protective barrier, and so there was no "viable pathway" for the contamination to affect people's health. 2024 WL 4751519 at *8. By contrast, Plaintiffs here allege that the nitrate contamination in the LUBGWMA makes its way into residents' daily water supply, so anyone who consumes this water is at risk. *See* Compl. ¶¶ 15, 23, 29, 46-55, 96 n.6. In *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), the Court dismissed the plaintiffs' RCRA citizen suit after concluding RCRA "is not directed at providing compensation for past cleanup efforts" and can

only be used to address present contamination. *Id.* at 484.[5] Here, by contrast, the LUBGWMA remains contaminated with dangerous levels of nitrates; Plaintiffs' prayer for relief includes a request for remediation of that current contamination. Compl., Prayer for Relief, B. The Port and Threemile's cite to *Scotchtown Holdings LLC v. Town of Goshen*, 2009 WL 27445 (S.D.N.Y. Jan. 5, 2009), fares no better: the court dismissed that case after concluding that the plaintiffs had not pled that the contaminated groundwater would ever be used for human consumption. *Id*. at *3. Here, by contrast, Plaintiffs allege that individuals across the LUBGWMA currently rely on contaminated water for their daily needs. *See, e.g.*, Compl. ¶¶ 1-4, 13, 21, 27, 50.

The Port and Threemile insinuate that, because the Oregon agencies "in charge of regulating nitrate discharges and protecting human health from those discharges" have not "ordered the relief that Plaintiffs seek," Plaintiffs must be wrong that they are exposed to any imminent and substantial endangerment. Port & Threemile Objs. at 25, *see also id.* at 27-28 (highlighting that "a committee of government actors" has not suggested that "wells exceeding [10 mg/L of nitrate] should not be used for drinking water"). This argument is disingenuous. Not even the other Defendants deny that ingesting excess nitrates is dangerous. It is also factually incorrect. The Oregon state government *has* indicated that people whose water is contaminated with high levels of nitrogen should not drink that water, and it has started providing bottled water to certain homes with high nitrate levels in their water. Compl. ¶ 53.

[5] The Port and Threemile cite to the Ninth Circuit's *KFC* opinion rather than to the Supreme Court's opinion, *see* Port & Threemile Objs. at 26, but in fact the Ninth Circuit's holding was precisely the opposite of what the Port and Threemile contend. That is, the Ninth Circuit concluded that RCRA *authorizes* citizen suits with respect to contamination that in the past had posed an imminent and substantial danger, even if that danger is no longer present. *KFC W., Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), *rev'd*, 516 U.S. 479 (1996). While the Supreme Court reversed this holding and concluded that RCRA does not authorize citizen suits to recover prior cost of cleaning up toxic waste, this ruling is still inapposite for the reasons described above.

The Port and Threemile's insinuation also ignores the underlying rationale for including the RCRA citizen suit provision: to offer an avenue for individual people, like Plaintiffs, to bring suit when the state agencies that are meant to protect them from environmental harms have failed to do so. *See* 42 U.S.C. § 6972(a)(1)(B). The current situation Plaintiffs face in the LUBGWMA, where Oregon agencies have failed *for more than 30 years* to adequately protect human health and the environment from nitrate contamination, Compl. ¶¶ 48-52, is precisely the situation RCRA citizen suits are meant to address. Rather than undermine Plaintiffs' claims, the state agency's inaction increases the urgency of Plaintiffs' Complaint.

Beef Northwest's claim that no substantial and imminent risk exists because "any risk to health is already mitigated," BNW Objs. at 24, is similarly unavailing. According to Beef Northwest, nitrate contamination in the LUBGWMA is not an endangerment to health because Plaintiffs are aware of the danger posed by their water and can mitigate it by using bottled water. BNW Objs. at 24-25 (citing *Davies v. National Co-op Refinery Assoc.*, 963 F.Supp. 990 (D. Kan. 1997)). But like the cases cited by the Port and Threemile, *Davies* is another summary judgment opinion; it was decided after the plaintiffs had taken discovery and developed evidence regarding water contamination in the relevant area. *See* 963 F.Supp. at 991–92. Perhaps more importantly, *Davies* did not involve residential properties and was not a class action. Rather, the plaintiffs in that case brought suit on behalf of themselves and limited their complaint to contaminated groundwater that sat below their radio station (not their home). *Id.* at 993. The court concluded that there was no imminent danger to health because the plaintiffs had not "shown that any other persons might be exposed to or ingest the contaminated groundwater." *Id.* at 999.

The facts here are different. The named Plaintiffs seek to represent tens of thousands of people who rely on the alluvial aquifer underlying the LUBGWMA for their drinking water.

Compl. ¶¶ 1–3, 46–57. Plaintiffs further plead that only half of private wells in the area have been tested. *Id.* ¶ 52. That means hundreds, if not thousands, of people are drinking nitrate-contaminated water on a daily basis. Further, at least ten public water systems in the LUBGWMA, which together supply tens of thousands of people with drinking water, have been deemed "at substantial nitrate" risk by DEQ. *Id.* ¶ 55 & Table 1. Many of those systems' water has tested above the 10 mg/L maximum contamination limit for nitrate at least once, and several have done so repeatedly. *Id.* ¶ 56 & Table 2.

Plaintiffs further allege that excessive nitrate exposure through groundwater poses several health risks, including preventing red blood cells from carrying adequate levels of oxygen, causing reproductive complications, and increasing risk of cancers, kidney and spleen disorders, and respiratory diseases. *Id.* ¶¶ 43–44. Plaintiffs allege that they will continue to be exposed to health risks from nitrates unless remedial action is taken. *See id.* ¶¶ 95–97 (specifying requested remedial actions). Finally, Plaintiffs allege that their water supplies are presently affected, *id.* ¶¶ 18, 22, 29.

The Port and Threemile's related argument, that Plaintiff Strange cannot bring a RCRA claim against Defendants because she relies on treated water from public water systems, Port & Threemile Objs. at 25 n.9, fails for similar reasons. That is, the Port and Threemile ignore that Plaintiffs specifically plead in their Complaint that many public water systems, including those in Boardman, Irrigon, and Hermiston, "have tested above the 10 mg/L maximum contamination limit" at least once, and most have done so repeatedly. Compl. ¶ 56. Table 2 of Plaintiffs' Complaint shows at least 13 public water systems have exceeded the 10 mg/L limit, and that most of these have tested above 10 mg/L of nitrates multiple times. *Id.* at Table 2. Public water systems that do not consistently deliver potable water (water not contaminated with more than 10 mg/L of

nitrates) logically pose an imminent and substantial danger to people who rely on those public water systems for daily use.

Recognizing that the requirement of "imminent and substantial endangerment" is to be broadly construed, and that allegations are to be viewed in the light most favorable to Plaintiffs at this stage, the F&R correctly recommended this Court find that Plaintiffs' Complaint sufficiently pleads an imminent and substantial endangerment to health. F&R at 53-54.

b. *The Complaint alleges an imminent and substantial endangerment to the environment.*

Beef Northwest says Plaintiffs have not alleged an imminent and substantial endangerment to the environment, arguing that "Plaintiffs have not alleged facts to show that action by this Court is necessary to prevent impacts outside the Groundwater Management Area." BNW Objs. at 26. But there is no reason Plaintiffs have to plead facts about impacts *outside* the Umatilla GMA. They plead that nitrate contamination in the groundwater inside the LUBGWMA is bad, and getting worse, due to Defendants' activities. *See, e.g.*, Compl. ¶¶ 46–50, 59–93.

Beef Northwest's argument seems to be that because the LUBGWMA has already been designated a groundwater management area, there is no need for action by the Court. BNW Objs. at 26. Or, put another way, that nitrates pose no threat to the environment in the LUBGWMA because the alluvial aquifer is already contaminated. That argument assumes that once nitrate levels in an aquifer reach a certain point, the addition of more nitrates does not harm the environment, a factual premise that is inappropriate for consideration on a motion to dismiss. Worse, it would give polluters a free pass to keep polluting as long as they had already damaged the environment in an area. Such a principle is incompatible with Congress's intent in passing RCRA, which was to "ensure the proper treatment, storage, and disposal" of hazardous waste "so

as to minimize the *present and future* threat to human health and the environment." *Meghrig,* 516 U.S. at 483 (quoting 42 U.S.C. § 6902(b)) (emphasis added).

2. The nitrate-containing substances at issue are "solid waste" within the meaning of RCRA.

a. *Defendants' discharges are not exempt from RCRA's definition of "solid waste" because they are discharges to groundwater, not navigable water.*

Beef Northwest contends that this Court should reject the F&R because Beef Northwest's discharges do not qualify as "solid waste," and therefore should be definitionally excluded from RCRA liability. BNW Objs. at 27-28 (citing 42 U.S.C. § 6903(27)).[6] According to Beef Northwest, RCRA's definition of "solid waste" excludes "any industrial discharge that is a point source subject to" National Pollutant Discharge Elimination System ("NPDES") permits under the Clean Water Act. *Id*. at 27 (citing 42 U.S.C. § 6903(27)). Because CAFOs like Beef Northwest are point sources under the Clean Water Act, 33 U.S.C. § 1362(14), Beef Northwest argues that its waste is necessarily excluded from RCRA liability. BNW Objs. at 27-28.

But Beef Northwest ignores that the Clean Water Act regulates *only* discharges into the "navigable waters" of the United States. 33 U.S.C. § 1251(a)(1). The Clean Water Act does not regulate groundwater. *Id.* And Plaintiffs here have alleged that Beef Northwest discharges into the "groundwater"—they do not allege that Beef Northwest discharges into "navigable waters." *See* Compl. ¶¶ 66-68. As such, the F&R correctly reasoned that Beef Northwest's discharges are not definitionally excluded from RCRA liability. F&R at 42.

In arriving at this conclusion, the F&R did not, as Beef Northwest contends, "rewrite the statutory definition." BNW Objs. at 27. Instead, the F&R carefully applied RCRA in accordance

[6] Lamb Weston also contends that its discharges do not qualify as "solid waste," but it does so on the basis that its discharges are not "discarded." Lamb Weston Objs. at 28-30. An analysis of whether Lamb Weston's discharges are "discarded" within the meaning of RCRA is presented in Section IV.C.3.

with the statutory language. The F&R's conclusions on this point are consistent with a host of other cases where the courts reached similar conclusions. *See* F&R at 40 (quoting *Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1423 (7th Cir. 1990) (a party is "not automatically exempt from RCRA liability simply by having an NPDES permit for certain discharges; '[t]hey must be *required* by the [CWA] to have a permit for the discharges at issue'"); *see also San Diego Coastkeeper v. Pick-Your-Part Auto Wrecking*, 2023 WL 4879832, at *16 (S.D. Cal. July 31, 2023) (finding discharges fell within the definition of "solid waste" given plaintiffs' allegations of discharge to various land areas rather than navigable waters); *Cmty. Ass'n for Restoration of Env't Inc. v. Wash. Dairy Holdings LLC*, 2019 WL 13117758, at *7 (E.D. Wash. Oct. 24, 2019) ("Since NPDES authorizes discharges to surface water but not to groundwater, the alleged groundwater discharges at issue in this case are not necessarily excluded from RCRA liability."); *Humboldt Baykeeper v. Union Pac. R.R. Co.*, 2006 WL 3411877, at *6 (N.D. Cal. Nov. 27, 2006) (denying motion to dismiss RCRA claim on the basis of the point-source-discharge exception because plaintiff alleged non-point-source discharges, i.e., that substances had "been allowed to leak, spill, or be poured into the ground, contaminating the soil, groundwater, and surface waters throughout the site").

Notably, in the face of this litany of cases, Beef Northwest offers no case law in support of its position that all CAFO discharges, including discharges to groundwater, "are excluded from RCRA." *See* BNW Objs. at 28. The F&R did not err in concluding Beef Northwest's discharges to groundwater are solid wastes within the meaning of that statute. F&R at 40-42.

b. *This Court cannot conclude at the motion to dismiss stage that Defendants' discharges to groundwater are the "functional equivalent" of discharges to surface waters.*

Beef Northwest next argues that this Court should nevertheless find that the groundwater discharges at issue here are "the functional equivalent of discharges to surface waters" and so find its discharges are exempted from RCRA. BNW Objs. at 28. According to Beef Northwest, the fact

that Plaintiffs allege that the LUBGWMA soil "facilitate[es] rapid percolation to the water table" is sufficient to conclude that these same discharges must also "impact surface waters." *Id*. at 28-29 (citing Compl. ¶ 64). But this argument ignores that water tables are part of the groundwater system, not the surface water system; the water table in an area may be contaminated even if surface waters are not contaminated. Contrary to Beef Northwest's argument, there is no "[i]nternal consistency" problem with finding that certain discharges to groundwater invade Plaintiffs' interests while also finding that these discharges are not equivalent to discharges to surface or navigable waters. *Cf.* BNW Objs. at 29.

More importantly, Beef Northwest's argument ignores the actual test, articulated by the Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020), for determining whether a discharge to groundwater is the "functional equivalent of a direct discharge" to navigable waters. Under *County of Maui*, determining functional equivalence requires a seven-factor analysis: (1) transit time from the groundwater to the navigable water; (2) distance traveled between the groundwater and navigable water; (3) the nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemically changed as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (6) the manner and area in which the pollutant enters the navigable waters; and (7) whether the pollution remains recognizable. *Id.* at 183-84. As the F&R properly concluded, given the limited information provided in the pleadings, these seven factors cannot be properly analyzed without further factual development. This issue "cannot be resolved on these motions to dismiss." F&R at 42.

3. The nitrogen-containing substances were "discarded" within the meaning of RCRA.

Both Beef Northwest and Lamb Weston argue that the F&R was flawed because their respective discharges were not "discarded," as that term is defined under RCRA. BNW Objs. at 29-30; Lamb Weston Objs. at 28. But neither of their arguments changes the analysis and conclusion of the F&R.

According to Beef Northwest, because animal waste storage lagoons "leak[] by design," such disposal must be considered a "natural, expected consequence of [the animal waste's] intended use." *Id*. at 29. But the F&R correctly rejected this "intended use" argument: the "intended use" of animal waste is to use it as fertilizer, not to store it in lagoons. Leakage from storage lagoons is therefore not a "natural consequence" of its intended use.

The F&R's citation to *Cmty. Ass'n for Restoration of the Env't, Inc. v. D & A Dairy*, 2013 WL 3188846, at *4 (E.D. Wash. June 21, 2013), is precisely on point. In that case, the court recognized that manure could be a "solid waste" when it leaked from a CAFO's lagoons. Further, the court determined that making a factual determination as to whether the defendant allowed manure to leak from its lagoons, thereby "discarding" it and qualifying it as solid waste, could not be resolved at the motion to dismiss stage. *Id*. at *5. As the F&R again correctly noted, the same analysis applies here: Plaintiffs allege that Beef Northwest is a CAFO that stores animal waste in lagoons, Compl. ¶ 67, and that nitrates leach directly from CAFO manure lagoons into the groundwater. *Id.* Because this Court must make all inferences in Plaintiffs' favor at this stage of the litigation, the question of whether these alleged actions constitute discarding or disposing of nitrogen-laden material cannot be resolved as part of a motion to dismiss.

Lamb Weston similarly contends that none of the nitrogen-containing process water from its wastewater management facility is "discarded" because it applies the wastewater to cropland,

which is an intended "beneficial use." Lamb Weston Objs. at 28. While it may be that some nitrogen-heavy wastewater that Lamb Weston applies to crops is used for a beneficial purpose, this does not describe all of Lamb Weston's wastewater dumping. Lamb Weston entirely ignores the allegations in Plaintiffs' Complaint that "[s]ince 2015, Lamb Weston has violated its permit at least 90 times: 11 times in 2015, 20 times in 2016, 6 times in 2017, 14 times in 2018, 18 times in 2019, 18 times in 2020, and 3 times in 2021." Compl. ¶ 77.

Wastewater application in excess of permitted amounts is neither "natural" nor "expected." *Cf. Ecological Rts. Found.*, 874 F.3d at 1089 (noting a product was not solid waste because its release into the environment was a "natural, expected consequence" of its intended use). Just the opposite. For a company to repeatedly violate its wastewater dumping permit, particularly when it knows the likely consequences of violating that permit will be to contaminate an aquifer upon which thousands of people rely for drinking water, is decidedly *un*natural and *un*expected—it is not even lawful.

Lamb Weston's consistent permit violations distinguish its dumping of wastewater from its use of nitrogen fertilizer. Although overuse of nitrogen fertilizer causes negative environmental consequences, it is nevertheless a regular practice designed to maximize crop yield. By contrast, dumping wastewater above and beyond the quantities permitted by DEQ is not lawful, and as such is neither natural nor expected. *See id.* at 516.

In addition to this key difference, Plaintiffs also alleged in their Complaint that Lamb Weston dumps its wastewater "year-round, including during the winter" when "no crops benefit from the nitrogen." Compl. ¶ 71. Because there is no benefit to crops from dumping wastewater during the winter, the "beneficial use" exception to RCRA cannot apply. Lamb Weston's citation to its DEQ permit does not change this analysis. Nothing in the permit explicitly authorizes Lamb

Weston to dump wastewater during the winter when no crops will benefit. Instead, it limits wastewater application to "the agronomic rates necessary for the receiving crops." ECF No. 55-2 at 6. At the very least, the question of whether such dumping has a "beneficial use" is a question of fact not appropriate for resolution at the motion to dismiss stage.

Given these distinguishing features, it was proper for the F&R to treat Lamb Weston's application of nitrogen fertilizer differently from its wastewater dumping. The F&R was correct in its conclusion that Lamb Weston, in its capacity as a Wastewater Treatment Facility, disposed of "solid waste" under RCRA. *See* F&R at 51-52.

4. Lamb Weston's wastewater is not exempt from RCRA under the "returned to the soil as fertilizer" exception.

Finally, Lamb Weston argues that its wastewater should be exempt from RCRA because it is "returned to the soil as [a] fertilizer[]," Lamb Weston Objs. at 28, and "was used as an intended 'recycled' material for the purposes of crop growth." *Id.* at 31. But this exception does not apply because Plaintiffs allege that Lamb Weston applies *industrial* wastewater to LUBGWMA land. Compl. ¶¶ 69–70. The exception Lamb Weston points to here is limited to "agricultural wastes," and so does not exonerate Lamb Weston for dumping nitrogen-heavy industrial wastewater in excess of permitted quantities. *See* H.R. Rep. No. 94–1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6239–41.

D. Plaintiffs have adequately pleaded causation.

Defendants next take issue with the F&R's conclusion that "Plaintiffs have alleged sufficient facts to demonstrate that each Defendant caused at least some of [Plaintiffs'] harm." F&R at 58; *see* BNW Objs. at 30 ("[T]he F&R err[ed] by finding Plaintiffs' general allegations regarding BNW sufficient to show a causal connection between BNW's alleged conduct and any impact on or harm to Plaintiffs."); Lamb Weston Objs. at 32 ("Plaintiffs' Complaint lacks any

factual support for the assertion that the alleged nitrate contamination affecting their properties was caused by Lamb Weston's activities"); Port & Threemile Objs. at 28 (arguing the F&R's conclusion "excuses Plaintiffs from the requirement to show a causal or 'direct connection to the waste' at issue").

Defendants object to the F&R's causation conclusion on the ground that Plaintiffs' hydrogeological allegations are factually inaccurate. Beef Northwest asserts that because Plaintiffs live in Boardman and Hermiston, which are "far from BNW's CAFO," it is "improbab[le]" that "BNW's activities impacted Plaintiffs." BNW Objs. at 31. Lamb Weston emphasizes that its land application sites are "approximately 16 miles from the nearest Plaintiffs' drinking water well." Lamb Weston Objs. at 32. And Threemile similarly claims it is "implausible" that any nitrate it discharges "could make its way to the alleged compromised water source" because Threemile is located eight miles from any documented nitrate exceedance. Port & Threemile Objs. at 30.

These arguments, which amount to nothing more than disagreements with Plaintiffs' allegations that the nitrates Defendants discharge in one part of the LUBGWMA percolate into groundwater and contaminate groundwater "throughout" the LUBGWMA, Compl. ¶ 73, are not a reason to dismiss Plaintiffs' Complaint. When ruling on a motion to dismiss, the plaintiffs' allegations must be taken as true. *Wilson v. Hewlett–Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). And here, Plaintiffs have specifically alleged how Defendants have caused contamination of their properties: Defendants discharge nitrogen into the soil of the LUBGWMA, Compl. ¶¶ 5, 66–68; that discharged nitrogen then converts to nitrates, *id.* ¶¶ 2, 61; the hydrogeology of the LUBGWMA causes nitrates to move quickly from the soil into the aquifer, *id.* ¶¶ 64–65; these nitrates percolate throughout the aquifer underlying the LUBGWMA, *id.* ¶¶ 2, 4, 64, 73; and Plaintiffs' properties derive their water from that aquifer. *Id.* ¶¶ 2, 13, 21, 23, 27. Defendants are

free to disagree with Plaintiffs' allegations, but such disagreement is not a reason for Defendants to object to the F&R or for this Court to dismiss Plaintiffs' claims.

Finally, Defendants contend that Plaintiffs have not adequately alleged that "they were personally injured by nitrates specifically from" each Defendant's property. Lamb Weston Objs. at 33; *see also* Port & Threemile Objs. at 28 ("Plaintiffs do not plausibly allege that the Port or Threemile" were responsible for Plaintiffs' harm); BNW Objs. at 31 (claiming Plaintiffs fail to "make a plausible allegation of a causal connection between BNW's conduct and each Plaintiff's claimed harm"). But as the F&R properly concluded, Plaintiffs have, contrary to these assertions, alleged that each individual Defendant took specific actions that harmed each individual Plaintiff. F&R at 58.

As to the Port, the Complaint alleges that it dumps millions of gallons of high-nitrogen wastewater on LUBGWMA land, in violation of its permits. Compl. ¶¶ 69–70, 74-92. The nitrogen in this wastewater percolates down to the water table and spreads rapidly through the aquifer, contaminating groundwater "throughout" the LUBGWMA. *Id.* ¶¶ 64, 73. Because each Plaintiff derives water from groundwater in the LUBGWMA, *id.* ¶¶ 13, 21, 27, 46, each Plaintiff has been individually harmed by nitrogen dumped by the Port.

As to Lamb Weston, the Complaint alleges that it, like the Port, dumps high-nitrogen industrial wastewater on fields in the LUBGWMA, often in violation of its permits. *Id.* ¶¶ 69, 71–73, 77. The nitrogen in this wastewater percolates down to the water table and spreads rapidly through the aquifer, contaminating groundwater "throughout" the LUBGWMA. *Id.* ¶¶ 64, 73. Because each Plaintiff derives water from groundwater in the LUBGWMA, *id.* ¶¶ 13, 21, 27, 46, each Plaintiff has been individually harmed by nitrogen dumped by Lamb Weston.

As to Madison Ranches, the Complaint alleges that it allows the Port and Lamb Weston to use its fields as a dumping ground for high-nitrogen industrial wastewater and over-applies fertilizer to its crops. *Id.* ¶¶ 69–70, 76 & n.3. The nitrogen in this wastewater and excess fertilizer percolates down to the water table and spreads rapidly through the aquifer, contaminating groundwater "throughout" the LUBGWMA. *Id.* ¶¶ 64, 73. Because each Plaintiff derives water from groundwater in the LUBGWMA, *id.* ¶¶ 13, 21, 27, 46, each Plaintiff has been individually harmed by nitrogen Madison Ranches allowed to be dumped on its fields and by Madison Ranches's over-application of fertilizer.

As to Threemile, the Complaint alleges that it operates multiple CAFOs that leak by design. *Id.* ¶¶ 37, 66-67. This nitrogen percolates down to the water table and spreads rapidly through the aquifer, contaminating groundwater "throughout" the LUBGWMA. *Id.* ¶¶ 64, 73. Because each Plaintiff derives water from groundwater in the LUBGWMA, *id.* ¶¶ 13, 21, 27, 46, each Plaintiff has been individually harmed by Threemile's operations.

Lastly, as to Beef Northwest, the Complaint alleges that it generates "nitrogen-laden animal waste" that is applied to nearby land and leaches directly from storage lagoons into the groundwater. *Id.* ¶¶ 38, 66–68. Nitrogen in the contaminated groundwater disperses "throughout" the LUBGWMA. *Id.* ¶¶ 64, 73. Because each Plaintiff derives water from groundwater in the LUBGWMA, *id.* ¶¶ 13, 21, 27, 46, each Plaintiff has been individually harmed by nitrogen Beef Northwest applies to land and allows to leach from storage lagoons.

In sum, then, Plaintiffs have pleaded their claims with enough specificity as to each Defendant to justify the F&R's conclusion that "Plaintiffs have adequately pleaded causation." F&R at 59; *see also* Lamb Weston Objs. at 7 (acknowledging that "disputed causation issue[s] may be for a different motion at a different time"). Plaintiffs' allegations are more than enough to

"plausibly suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011). Plaintiffs' Complaint should not be dismissed for failure to adequately plead causation.

E. Plaintiffs have stated claims for negligence, trespass, and nuisance against Beef Northwest.

1. Plaintiffs have stated a claim for negligence.

To state a claim for negligence, a complaint must allege that the defendant's conduct "created a foreseeable and unreasonable risk of legally cognizable harm to the plaintiff and that the conduct in fact caused that kind of harm to the plaintiff." *Sloan ex rel. Estate of Sloan v. Providence Health Sys. Or.*, 437 P.3d 1097, 1102 (Or. 2019). A defendant "need not have been able to precisely forecast a specific harm to a particular person to be held liable" for negligence under Oregon law. *Piazza v. Kellim*, 360 Or. 58, 80 (2016).

Beef Northwest does not object to the conclusion that Plaintiffs adequately pleaded that Beef Northwest's conduct created a foreseeable and unreasonable risk of harm; it objects only to the F&R's causation analysis. BNW Objs. at 30–31. But as already explained in Section D, Plaintiffs have pleaded allegations specific to Beef Northwest that "plausibly suggest an entitlement to relief." *Starr*, 652 F.3d at 1216-17.

2. Plaintiffs have stated a claim for trespass.

Beef Northwest asserts that the F&R was wrong for "accept[ing] that allegations of contribution to" regional groundwater contamination is "sufficient to state a claim for trespass." BNW Objs. at 31. But the F&R reached this conclusion only after carefully considering specific allegations in the Complaint that Beef Northwest has discharged nitrogen into the soil of the LUBGWMA, Compl. ¶¶ 5, 66–68, that nitrogen converts to nitrates, *id.* ¶¶ 2, 61, that the hydrogeology of the LUBGWMA causes nitrates to move quickly from the soil into the aquifer, *id.* ¶¶ 64–65, and that nitrates have contaminated the aquifer throughout the LUBGWMA. *Id.* ¶¶

64, 73. The Complaint also alleges that each Plaintiff owns or rents property in the LUBGWMA, *id.* ¶¶ 3, 13, 21, 27, and that their properties derive their water from the alluvial aquifer underlying the LUBGWMA. *Id.* ¶¶ 2, 13, 21, 23, 27.

These allegations support an inference that Beef Northwest discharged nitrogen that converted into nitrates, percolated into groundwater, migrated throughout the aquifer underlying the LUBGWMA, and contaminated Plaintiffs' properties. An allegation that particles from a defendant's business operation contaminated a plaintiff's land and drinking water is a classic trespass allegation. *See Martin v. Reynolds Metals Co.*, 342 P.2d 790, 791, 797–98 (Or. 1959) (en banc) (holding that a defendant's emission of fluoride compounds that settled on plaintiffs' land and rendered "land and the drinking water on the land unfit for consumption by livestock" constituted trespass).

Beef Northwest is essentially attempting to impose a proximity requirement for a trespass action, asserting again that its distance from Plaintiffs' houses make it "improbab[le]" that its discharges have affected Plaintiffs' properties. BNW Objs. at 31. But stating a claim for trespass does not require that the plaintiff and defendant be neighbors, it only requires that the plaintiff allege "an intrusion" that invaded an "interest in the exclusive possession of [] land." *Martin v. Union Pac. R.R. Co.*, 474 P.2d 739, 740 (Or. 1970). Plaintiffs have done that here.

3. Plaintiffs have stated a claim for nuisance.

Beef Northwest objects to the recommendation on Plaintiffs' nuisance claim for the same reason it objects to the trespass recommendation. BNW Objs. at 32. Its objection likewise fails for the same reason.

Beef Northwest asserts that for it to be liable for nuisance, "Plaintiffs must allege . . . that BNW interfered with their properties." *Id.* Plaintiffs did exactly that, alleging that Beef Northwest discharged nitrogen that converted to nitrates, percolated into groundwater, and spread throughout

the aquifer, contaminating Plaintiffs' drinking water. Compl. ¶¶ 5, 64–68, 73. Beef Northwest is essentially arguing that Plaintiffs will not be able to prove these allegations because Plaintiffs' homes are simply too far away from Beef Northwest's discharges to affect them. BNW Objs. at 32. But such factual disputes should be the subject of discovery, not a basis for dismissing the Complaint.

Beef Northwest also argues that the F&R erred by "accept[ing] that alleged contribution to a regional scale groundwater problem demonstrates substantial and unreasonable interference." BNW Objs. at 32 (citing F&R at 67). But the F&R correctly accepted as true Plaintiffs' allegations about Beef Northwest, the mechanism by which nitrogen converts to nitrate and contaminates groundwater in the LUBGWMA, and Plaintiffs' reliance on water from the LUBGWMA's alluvial aquifer. Compl. ¶¶ 2, 64–65, 73. It concluded that Plaintiffs "have alleged at least negligent conduct on the part of Defendants that resulted in harm to [Plaintiffs'] properties." F&R at 67. It then analyzed whether that conduct constitutes "substantial and unreasonable" interference with the use and enjoyment of property, given the location of the nuisance, the character of the neighborhood, the nature of the conduct, the frequency of the intrusion, and "the effect upon the enjoyment of life, health, and property." F&R at 66–68 (quoting *Mark v. State ex rel. Dep't of Fish & Wildlife*, 191 Or. App. 563, 573, 161 (2004)). It correctly concluded that Plaintiffs' allegations that Defendants' conduct made the water at their residential properties undrinkable constituted a "substantial and unreasonable" interference. F&R at 67–68.

F. Plaintiffs' Complaint is not an impermissible "shotgun pleading."

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A "shotgun pleading" is one that "overwhelm[s] defendants with an unclear mass of allegations and make[s] it difficult or impossible for defendants

to make informed responses to the plaintiff's allegations." *Autobidmaster, LLC v. Alpine Auto Gallery, LLC*, 2015 WL 2381611 (D. Or. May 19, 2015).

Madison Ranches argues that this Court should dismiss Plaintiffs' Complaint in its entirety on the basis that it is an impermissible shotgun pleading. Madison Ranches Objs. at 6. But there was no error in the F&R's analysis. The F&R did acknowledge that parts of the Complaint "lack[ed] clarity as to the role of each Defendant," and that "many of Plaintiffs' claims generally reference 'Defendants' actions.'" Madison Ranches Objs. at 6–7 (quoting F&R at 33–35). However, the F&R also determined that the Complaint makes "distinct factual allegations regarding Defendants' farming practices, CAFO operations, and wastewater treatment operations," and, in the factual background section, "specified which Defendants are involved in which activities." F&R at 35. It correctly noted that when Plaintiffs' claims for relief "are read in conjunction with the detailed factual background, it is generally apparent which Defendants are involved in which actions." *Id.*

This conclusion is amply supported by the Complaint, which includes a thorough "Factual Allegations" section encompassing nearly 100 detailed paragraphs. The Complaint uses the defined term "Defendant Farms" and is specific about the fact that Madison Ranches is a "Defendant Farm." Compl. ¶ 5. It describes common conduct by Defendant Farms, such as "regularly and intentionally over-using nitrogen" fertilizer, *id.* ¶¶ 60–65, and it makes specific allegations about Madison Ranches's conduct, including that it "stor[es] millions of gallons of industrial wastewater" at its facilities and cooperates with Lamb Weston and the Port of Morrow in allowing the dumping of industrial wastewater on its land. *Id.* ¶¶ 70 & Fig. 5, 75–76 & n.3, 85, 89.

Plaintiffs' Complaint is specific enough that "[t]here is no danger that [Madison Ranches] lacks adequate notice of the allegations it faces," *Shumlich v. U.S. Bank, N.A.,* 2025 WL 19871, at *2 (W.D. Wa. Jan. 2, 2025), as evidenced by the fact that Madison Ranches (and the other Defendants) filed coherent motions to dismiss. *See SEC v. Aequitas Mgm't, LLC*, 2017 WL 1206691, at *8 (D. Or. Jan. 9, 2017) (holding that a complaint was not an impermissible shotgun pleading where the defendant's "own filings in support of his motion to dismiss tend to establish clearly that [he] had no substantial difficulty in understanding the gravamen of the complaint's averments of fraud"). Madison Ranches understood the claims against it well enough to attack those claims. *See* ECF No. 59. Plaintiffs' Complaint should not be dismissed as a shotgun pleading.

G. The Court should disregard Defendants' improperly raised substantive objections.

In addition to the objections outlined and refuted above, Defendants raise three additional substantive objections that are improper and that the Court should disregard. The first two objections (one regarding the Oregon Tort Claims Act and one regarding supposed pleading deficiencies), both raised by the Port, are improper because they are arguments not previously raised before the Magistrate Judge. *See* Port & Threemile Objs. at 29, 31. The third objection, raised by Madison Ranches, is improper because it is a vague objection to the F&R based on the entirety of its motion to dismiss briefing. Madison Ranches Objs. at 11. All three arguments impermissibly risk wasting judicial resources and should be disregarded. What's more, even if the Court decided to overlook the procedural irregularities of these arguments, all three fail on the merits.

1. The Court should disregard the Port's improper argument regarding Plaintiffs' evidentiary obligations pursuant to the Oregon Tort Claims Act.

The Port's objection to the F&R as it pertains to Plaintiffs' compliance with the Oregon Tort Claims Act ("OTCA") is improper. In raising this objection, the Port abandons the argument

it made in its motion to dismiss briefing that Plaintiffs should have discovered the Port's pollution sooner than they did. In place of this argument, the Port takes an entirely different approach, questioning the evidentiary adequacy of Plaintiffs' notice under the OTCA. Port & Threemile Objs. at 31, 33 (arguing Plaintiffs "did not even plead facts sufficient to make [a] showing" that they provided adequate tort claim notice). The Port's new evidentiary argument—presented now for the first time at the objections stage—is untimely, and the Court should not consider it.

It is well established that district courts are not required to consider "new arguments raised for the first time in an objection to a magistrate judge's findings and recommendation." *Brown v. Roe*, 279 F.3d 742, 745-46 (9th Cir. 2002). The Ninth Circuit has held "categorically that an unsuccessful party is not entitled as of right to *de novo* review by the judge of an argument never seasonably raised before the magistrate." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir 2000) (citation omitted). Were the district court required to consider new arguments not presented to the magistrate judge, the magistrate's consideration of the matter would be "effectively nullif[ied]" and there would be no reduction in the district court's workload. *Id.* at 622.

The Port tries to claim that it had previously raised the evidentiary issue in its briefing before Magistrate Judge Hallman. Port & Threemile Objs. at 31 (citing to pages 34-35 of its Motion to Dismiss, ECF No. 56, and pages 32-34 of its Reply in Support of its Motion to Dismiss, ECF No. 81). But with the exception of a footnote in the Port's Reply in Support of its Motion to Dismiss, which states simply that "the Court *may* consider evidence outside the pleadings when evaluating compliance with the OTCA," ECF No. 81 at 33 n.18 (emphasis added), the Port's prior arguments are entirely silent as to its new claim that Plaintiffs *must* present evidence of their tort claims notice at the pleadings stage. *See generally id.*; ECF No. 56. Magistrate Judge Hallman

expressly noted the Port's omission of any argument pertaining to Plaintiffs' pleading of OTCA notice and "decline[d] to address it *sua sponte*." F&R at 75, n.18.

No mitigating factors excuse the Port's failure to raise this evidentiary argument in its briefing before the Magistrate Judge. The Port is not a *pro se* litigant; it is represented by at least four attorneys in this matter. *See Brown*, 279 F.3d at 745. It is not raising a novel legal claim. *See id*. And there is no question that the Port's new arguments in its objections to the F&R were available to the Port before proceedings ever began before Magistrate Judge Hallman. *See Howell*, 231 F.3d at 623. In fact, the Port's decision to raise this argument now is particularly ironic given that the Port itself previously asked Magistrate Judge Hallman to take judicial notice of Plaintiffs' first tort claims notice, which Plaintiffs served on the Port on December 8, 2022. ECF No. 56 at 35 (citing Isaak Decl. ¶ 9, Ex. 8).

Even if the Court decides to indulge the Port and allow it to raise this new argument, despite having failed initially to raise it before the Magistrate Judge, the argument fails on the merits. The Port argues that "Plaintiffs were required to introduce evidence showing that they timely complied with the OTCA." Port & Threemile Objs. at 33. However, the Port cites no authority supporting its proposition that such "evidence" must be provided in the Complaint or attached thereto. The only cases the Port cites regarding evidence at the pleading stage give the district court discretion to consider such evidence (or not). *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (noting the court "*may* review evidence beyond the complaint") (emphasis added); *Gay v. Cable Shopping Network*, 2009 WL 4639631, at *1 (D. Or. Nov. 30, 2009) (noting the court "*may* rely on any evidence") (emphasis added).

Moreover, in the specific context of the OTCA, the Port's emphasis on evidence of Plaintiffs' tort claim notice is doubly misguided. "It is not proof of notice which confers

jurisdiction upon a court to consider a claim against the state" under the OTCA, it is the "allegation" that "notice has been afforded the state pursuant to the requirements of that Act which confers jurisdiction on the court." *Johnson v. Smith*, 24 Or. App. 621, 625–626 (1976).

If the Court nevertheless considers the Port's new arguments, and if the Court agrees with the Port's position, Plaintiffs at the very least respectfully request leave to amend their Complaint to plead additional facts regarding their OTCA notice. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

2. The Court should disregard the Port's improper argument regarding supposed deficiencies in Plaintiffs' pleadings.

The Port and Threemile also object that Plaintiffs' Complaint is deficient because it "provide[s] no sampling results for" public water systems in the LUBGWMA and because Plaintiffs have not "provide[d] the geographic location of those systems." Port & Threemile Objs. at 29. But as with the Port and Threemile's objection regarding the OTCA, this is a new evidentiary argument, presented for the first time at the objections stage, and is therefore untimely. The Court should not consider it.

If the Court did consider this objection on the merits, doing so would not change the analysis in the F&R. In the first instance, sampling results are not required at this stage of the proceedings. What's more, Plaintiffs have provided the sampling results the Port and Threemile insist are missing: Table 2 on pages 17-18 of the Complaint lists sampling results for 20 public water systems in the LUBGWMA, showing the highest nitrate concentration recorded for each system. Figure 3, on page 18 of the Complaint, is a map that shows the geographic location of the public water systems with documented nitrate exceedances in the LUBGWMA. This is certainly sufficient at the pleading stage to put Defendants on notice of the harm alleged.

3. The Court should disregard Madison Ranches's general objection recapitulating its entire motion to dismiss.

When reviewing a magistrate's findings and recommendations, courts should ignore general references made to defendants' legal memoranda from the underlying motions to dismiss. "[G]eneral objections or summaries of arguments previously presented have the same effect as no objection at all since they do not focus the Court's attention on any specific issues for review." *Wilhite v. Expensify Inc.*, 2025 WL 892774, at *1 (D. Or. Mar. 24, 2025) (citation omitted). Objections purporting to cover arguments made in the underlying motion are disallowed because "consideration of such 'objections' would entail *de novo* review of the entire report, rendering the referral to the magistrate judge useless and causing a duplication of time and effort that wastes judicial resources and contradicts the purposes of the Magistrates Act." *Beadle v. Smolich*, 2023 WL 5460144, at *1 (W.D. Wash. Aug. 24, 2023).

Ignoring this caselaw, Madison Ranches objects generally to the F&R based on all "the reasons stated . . . in Madison Ranches' Motion to Dismiss." Madison Ranches Objs. at 11. This general objection does not focus the Court's attention on any specific issues with the F&R, and it appears in fact to request a fully *de novo* review of Madison Ranches's underlying briefing. The objection is therefore inappropriate, and the Court should disregard it.

H. Madison Ranches's procedural objections to the F&R are unfounded and do not warrant dismissal of Plaintiffs' Complaint.

Beyond the myriad substantive objections discussed above, Madison Ranches also complains that the procedure Magistrate Judge Hallman suggests is improper. Madison Ranches requests that, rather than denying Defendants' motions to dismiss and granting Plaintiffs leave to amend, the Court should grant Defendants' motions before granting leave to amend. Alternatively, Madison Ranches asks that the Court order Plaintiffs to provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). Neither request should be granted.

1. Plaintiffs' intent to file a Second Amended Complaint does not require dismissal of the First Amended Complaint.

Madison Ranches argues that the F&R erred in denying Defendants' motions to dismiss while acknowledging that Plaintiffs' Complaint could have been drafted with more specificity and noting that Plaintiffs intend to file a Second Amended Complaint. Madison Ranches Objs. at 7–9. Madison Ranches insists that, rather than recommending denial of the motions to dismiss, the F&R should have recommended granting the motions to dismiss, but with leave for Plaintiffs to amend. *Id.* at 6.

While acknowledging that either course of action "may result in the same thing—a second amended complaint," Madison Ranches Objs. at 9, Madison Ranches insists that granting the motions to dismiss is the only "proper course of action." *Id.* at 6. According to Madison Ranches, by denying the motions to dismiss but encouraging Plaintiffs to be more specific in their amended complaint, the Magistrate Judge has relegated his "admonishments about the need for further clarity to mere aspirational statements, not binding instructions." Madison Ranches Objs. at 9. This argument is wrong for the simple reason that the operative Complaint already states valid claims against Defendants. *See* Section IV, *supra*. Although Plaintiffs do intend to amend their Complaint to, for example, add several new parties, amendment is not required for their claims to survive Defendants' motions.

Madison Ranches further argues that denying its motion to dismiss will unfairly prevent it from challenging a subsequent amended complaint because defendants in the Ninth Circuit cannot move to dismiss an amended complaint "where the allegations of the amended complaint are substantially the same as the allegations of the prior complaint." Madison Ranches Objs. at 9. Not so. Defendants cannot raise arguments in motions to dismiss amended complaints that they have *previously waived*, either by failing to raise them in earlier motions to dismiss, or by answering

the complaint. *Niantic, Inc. v. Global++*, 2020 WL 8620002, at *3 (N.D. Cal. Sept. 2, 2020); *Brooks v. Caswell*, 2016 WL 866303, at *3 (D. Or. Mar. 2, 2016). But defendants can—and do—make arguments in motions to dismiss amended complaints that they made in previous motions to dismiss. *See, e.g.*, *Blocker v. Black Ent't Telev., LLC*, 2019 WL 1416471, at *3 (D. Or. Mar. 6, 2019) ("Defendants move to dismiss the Amended Complaint on the bas[i]s that . . . Plaintiff again fails to state a claim upon which relief can be granted."); *Howard v. Maximums, Inc.*, 2014 WL 3859973, at *7 (D. Or. May 6, 2014) ("Maximums again seeks dismissal under FRCP 12(b)(7) for failure to join . . . required parties"). They can also make arguments that were not available in previous motions to dismiss, either because the amended complaint adds new claims, *Brooks*, 2016 WL 866303, at *2, or because the facts have changed. *Appel v. Boston Nat'l Title Agency*, 2019 WL 3858888, at *3 (S.D. Cal. Aug. 15, 2019)).

Indeed, each of the cases Madison Ranches cites involved defendants that waived their right to move to dismiss, either by not making previously available arguments in their initial 12(b) motions (as was the case in *Niantic*, 2020 WL 8620002, at *3–4) or by answering the complaint (as was the case in *Appel*, 2019 WL 3858888, at *7). In *Brooks*, for example, the defendants had answered a complaint *three times* before moving to dismiss an amended complaint that merely "correct[ed] insufficient allegations and flesh[ed] out arguments that were previously bare." 2016 WL 866303, at *3. The court held that the defendants' motion was untimely under Federal Rule of Civil Procedure 12(b), which requires motions asserting Rule 12(b) defenses to be filed before filing an answer. *Id.* at *2, *5.

None of the cases on which Madison Ranches relies supports the proposition that a defendant cannot challenge an amended complaint *using arguments it raised in a previous motion to dismiss*. Madison Ranches's fear that it will be "left with no recourse if/when it is confronted

with another deficient complaint," Madison Ranches Objs. at 9, is therefore unfounded. If, after Plaintiffs file their Second Amended Complaint, Madison Ranches believes that Complaint constitutes a shotgun pleading or otherwise fails to state a claim, it will be free to make those arguments in a subsequent motion to dismiss.

Moreover, after the F&R was issued, Plaintiffs reached out to Defendants and proposed that, for the sake of efficiency, the parties forego objecting to the F&R so Plaintiffs could file their amended complaint and begin briefing on what would likely be a second round of motions to dismiss. Declaration of Steve W. Berman in Support of Plaintiffs' Opposition to Objections, Ex. A. Plaintiffs noted that Defendants "could appeal all of the issues then." *Id.* Defendants rejected Plaintiffs' proposal. *Id.*

2. Madison Ranches has not articulated a basis on which the Court could grant its request for a more definite statement.

Madison Ranches also objects to the F&R on the basis that, rather than ruling on Defendants' motions to dismiss, the Court should require Plaintiffs to provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). But a motion for a more definite statement "is disfavored and is proper only if the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted, meaning the complaint is so vague that the defendant cannot begin to frame a response." *Stevens v. Stevens,* 2024 WL 4785339, at *2 (D. Or. Nov. 14, 2024) (internal citations omitted). Rule 12(e) is intended "to strike at unintelligibility, rather than want of detail," and motions for a more definite statement "are properly denied where the complaint notifies the defendant of the substance of the claims asserted." *Id.* (citations omitted).

Madison Ranches's motion should be denied because Plaintiffs' Complaint sufficiently "notifies" all Defendants of the substance of their claims. *Id.* As already explained, the F&R carefully considered Plaintiffs' Complaint and determined it was not a shotgun pleading because

it put Defendants, including Madison Ranches, on notice of the claims against them. *Supra* Section F (quoting F&R at 33–34). And Madison Ranches has failed to state what part of Plaintiffs' Complaint is so unintelligible that a more definite statement is warranted. *See* Madison Ranches Objs. at 6. There is therefore no basis for this Court to grant Madison Ranches's motion for a more definite statement.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt Magistrate Judge Hallman's Findings and Recommendation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under the Court's March 27, 2025 Order (ECF No. 111) because it contains 18,789 words, including headings, footnotes, quotations, and words manually counted in any visual images, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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