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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

COW PALACE, LLC; THE DOLSEN
COMPANIES; THREE D
PROPERTIES, LLC; GEORGE &
MARGARET, L.L.C.; GEORGE
DERUYTER AND SON DAIRY,
L.L.C.; D AND J DAIRY, L.L.C. (f/k/a
D AND A DAIRY, L.L.C.); LIBERTY
DAIRY LLC; ARIZONA ACRES
LIMITED PARTNERSHIP; LIBERTY
ACRES LLC; BOSMA DAIRY
PARTNERS, LLC; BOSMA
ENTERPRISES, INC.; HENRY
BOSMA; HENRIETA BOSMA; and
KATHLEEN NICOLAUS,

Defendants.

Case No. 1:24-cv-3092

**REPLY IN SUPPORT OF
DEFENDANT DAIRIES’
MOTION TO STRIKE
PORTIONS OF UNITED STATES’
REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION OR LEAVE TO
FILE SUR-REPLY**

INTRODUCTION

1
2 Defendant Dairies pointed out major holes in EPA’s argument for a
3 preliminary injunction in their Opposition to Motion for Preliminary Injunction.
4 But that did not grant EPA an unlimited license to bring in new evidence in its
5 Reply. The only new evidence permissible in a reply is that which is responsive to
6 the opposition *and was not necessary to raise in support of arguments made or*
7 *relief sought in the initial brief.* Almost all the evidence that the Dairies moved to
8 strike (or to submit a sur-reply to address) fails to meet both elements and is
9 litigation by ambush. The solution to the problem EPA created here is
10 straightforward: The Court should strike the new evidence in EPA’s Reply or grant
11 the Dairies leave and adequate time to respond to that evidence.

12 Instead of addressing these two elements, EPA argues that there is an alleged
13 imminent and substantial endangerment, so EPA’s Reply did not need to follow the
14 rules. The Court should not buy this excuse; if EPA thought the new evidence in its
15 Reply supports a finding of endangerment, it should have introduced that evidence
16 in its original motion, which was filed on the date of EPA’s choosing after
17 seemingly preparing for months, if not years. *See* ECF No. 76 at 3 (describing EPA
18 declarations with exhibits dated before Complaint filed). EPA did not do so, and
19 the Court should not reward EPA’s failure to raise evidence at the appropriate time

1 by denying the Dairies a fair opportunity to respond to the evidence EPA chose to
2 finally present on Reply.

3 EPA supports its endangerment argument by suggesting that preliminary
4 injunctions are issued using less formal procedures and incomplete evidence. But
5 that is only true for injunctions that only maintain the status quo. Here, because
6 EPA seeks affirmative relief that goes beyond preserving the status quo, its request
7 is subject to *heightened* scrutiny. *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403
8 (9th Cir. 1993). EPA cannot meet that burden, and the Court should strike the new
9 evidence or allow a sur-reply.

10 ARGUMENT

11 EPA offers, and has, no argument as to why it should be excused from
12 impermissibly including copious new evidence and opinions that should have been
13 raised to support positions in its Motion and the relief sought in the Proposed
14 Order. EPA merely argues that the evidence is in response to arguments raised by
15 Defendants in their opposition. That is a necessary, but not sufficient, condition—
16 the evidence also must *not* have been necessary to support opening arguments. The
17 caselaw EPA cites recognizes this principle. *See* Response, ECF No. 80 at 3–4
18 (citing *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 476 (2nd Cir. 2002) (recognizing
19 that affidavits may “accompany reply because they supported reply brief, *not*
20 *original motion.*” (emphasis added) (citing *McGinnis v. Southeast Anesthesia*
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1 *Associates, P.A.*, 161 F.R.D. 41, 42, n.1 (W.D.N.C. 1995))). And it holds true in
2 the preliminary injunction context. *E.g.*, *BHI Energy I Power Servs., LLC v. KVP*
3 *Energy Servs., LLC*, No. 3:22-CV-1981-L, 2023 WL 223179, at *3-4 (N.D. Tex.
4 Jan. 17, 2023) (striking evidence submitted with preliminary injunction reply
5 where plaintiff claimed evidence supported its pleadings but did not explain why it
6 did not submit the evidence with its motion for preliminary injunction); *Paz Sys.,*
7 *Inc. v. Dakota Grp. Corp.*, CV 05-4763 (LDW) (WDW), 2006 WL 8430241, at *2-
8 4 (E.D.N.Y. June 16, 2006) (unchallenged report and recommendation) (explaining
9 “[a] reply brief should not . . . be used to cure a defective motion by providing new
10 evidence” and striking evidence withheld until preliminary injunction reply).

11 Waiting to file significant evidence until the reply brief “is akin to an unfair
12 ambush.” *BHI*, 2023 WL 223179, at *3 (striking appendix with over 330 pages of
13 new evidence and argument submitted with preliminary injunction reply). That is
14 exactly what EPA has done here—left significant portions of its Motion
15 unsupported until it filed its Reply. EPA simply ignored the general rule that “a
16 moving party must present all its evidence or raise all its legal arguments in a
17 substantive brief, rather than in reply.” *Perez-Farias v. Glob. Horizons, Inc.*, No.
18 CV-05-3061-RHW, 2009 WL 10690337, at *1 (E.D. Wash. Nov. 12, 2009).

19 EPA’s attempt to introduce new evidence in its Reply is especially egregious
20 with respect to the element of its Safe Drinking Water Act claim requiring “that
21

1 appropriate State and local authorities have not acted” to protect the health of
 2 persons subject to an alleged endangerment. 42 U.S.C. § 300i. Just as one example,
 3 instead of having submitted evidence in its Motion that purportedly demonstrates
 4 this element, EPA waited until its Reply to submit a declaration from Jeffrey
 5 KenKnight regarding EPA’s alleged efforts going back to 2022 through October
 6 2024 to discuss state and local government authorities’ response to nitrate
 7 contamination in the Yakima Valley. ECF No. 71. EPA should have submitted this
 8 evidence with its Motion since it goes to the heart of one of the elements EPA must
 9 prove, and thus it fails to meet the requirement that new evidence be responsive to
 10 an opposition *and* not necessary to support initial arguments.

11 Additional portions of EPA’s Motion or Proposed Order in support of which
 12 EPA should have submitted the evidence or opinion presented with the Reply are:

Document	Improper Portions of Reply	Corresponding Portion of Plaintiff’s Initial Motion or Proposed Order
Reply Brief, ECF No. 63	Page 6, lines 13-19 and Page 8, lines 3-5 (discussing further investigation and more source control allegedly needed)	EPA presented conclusory arguments that nitrate from the Defendants’ operations migrate to groundwater and “continue to contaminate drinking water of residents who live downgradient from the Dairies.” ECF No. 13 at 2-6.
Second Schnaar Declaration, ECF No. 64	¶¶ 43-45 (providing “additional opinion” regarding location of wells and additional groundwater parameters for which	EPA summarily concluded that the Dairies’ groundwater monitoring data is unreliable and only requests that the Dairies “resume[] collection of groundwater monitoring data consistent with EPA approved procedures.” ECF No. 13 at 11. EPA argued about hold

Document	Improper Portions of Reply	Corresponding Portion of Plaintiff’s Initial Motion or Proposed Order
	EPA alleges the Dairies should monitor)	times, but did not support the request for resumed monitoring with any evidence or opinion regarding inadequacy of the well network or that additional monitoring parameters, beyond what the Dairies are voluntarily providing. <i>See id.</i> at 8; Winiecki Decl. ¶¶ 26-37.
Krause Declaration, ECF No. 65	Entire declaration (relating to the Dairies’ current provision of alternative water supply)	EPA was required as part of its <i>prima facie</i> case to establish an imminent and substantial endangerment, and it did not present evidence of any concern with respect to RO filters. ECF No 13 at 9-10; Winiecki Decl. ¶¶ 39-42.
Montoya Declaration, ECF No. 67	Entire declaration (offering expert opinions on why Community Health Workers should be providing alternative water service)	EPA provided no argument to support the portion of the Proposed Preliminary Injunction that would require the Dairies to provide “public-health services through community-health workers.” ECF No 13-2 at 3; <i>see generally</i> ECF No. 13.
Martinez Declaration, ECF No. 68	¶¶ 3-9, 17-19, 21-28	EPA was required to present all, not just a fraction, of its evidence that the current alternative drinking water program was insufficient in its initial brief. <i>See</i> ECF No. 13 at 9-10; Winiecki Decl. ¶¶ 39-42.
Yourish Declaration, ECF No. 69	Entire declaration (offering expert opinion regarding the number of allegedly impacted residences and information involving those residences)	EPA challenged the sufficiency of the Dairies outreach and provision of alternative drinking water and the sufficiency of the State and Local authorities’ efforts to provide outreach and alterative drinking water. ECF No. 13 at 9-10, 18-19.
Phommanivong Declaration,	¶¶ 4-13 (describing review of Dairies’ annual reports from	EPA challenged the Dairies provision of alternative drinking water, which is

Document	Improper Portions of Reply	Corresponding Portion of Plaintiff’s Initial Motion or Proposed Order
ECF No. 70, 70-1	2013 and 2020-2023 and providing expert opinion that only 29 residences allegedly received consistent reverse osmosis (“RO”) filter maintenance or bottled water); ¶¶ 14-15 (describing drinking water samples taken on October 29, 2024, well after Dairies filed their opposition)	what Paragraphs 4-13 speak to. ECF No. 13 at 9-10. Paragraphs 14-15 consist of entirely new evidence to which the Dairies have had no opportunity to respond.
Second Winiecki Declaration, ECF Nos. 72, 72-1–72-12, 72-17–72-19, 72-25–72-29	¶¶ 2-14 and Exhs. A-L (relating to Liberty Dairy Entities’ lagoons); ¶¶ 19-21 and Exhs. P-R (relating to October 2024 communications about the Dairies’ provision of alternative drinking water supplies); ¶ 22 (relating to the Safe Drinking Water Initiative that started in January 2024); ¶¶ 28-32 and Exhs. X-AB (regarding DeRuyter and Liberty lagoons)	EPA presented conclusory arguments that nitrate from the Defendants’ operations migrates to groundwater and “continue[s] to contaminate drinking water of residents who live downgradient from the Dairies.” ECF No. 13 at 2-6. EPA argued that the State and Local Authorities have not acted to protect the health of residents as part of its <i>prima facie</i> case. ECF No. 13 at 18-19. Paragraphs 19-21 and Exhs. P-R consist of entirely new evidence, to which the Dairies have had no opportunity to respond.
Parshalle Declaration, ECF Nos. 73, 73-1, 73-9	¶¶ 4 and 12 and Exhs. A and I (describing and attaching communications with Clean Drinking Water Project and Yakima County regarding to	Regarding Paragraph 4, EPA challenged the sufficiency of the Dairies’ outreach and provision of alternative drinking water and the sufficiency of the State and Local Authorities’ efforts to provide outreach

Document	Improper Portions of Reply	Corresponding Portion of Plaintiff’s Initial Motion or Proposed Order
	whom they provide alternative water, which was the subject of the motion)	and alterative drinking water, ECF No. 13 at 9-10, 18-19. Regarding Paragraph 12, EPA argued that the State and Local Authorities have not protected the health of residents. ECF No. 13 at 18-19. To the extent that this information is new, and EPA could not have presented it in its initial brief, Defendants did not have an opportunity to respond.
Arnall Declaration, ECF No. 74	Entire declaration (expert opinions relating to the Dairies’ application fields)	EPA presented conclusory arguments that nitrate from the Defendants’ operations migrates to groundwater and “continue[s] to contaminate drinking water of residents who live downgradient from the Dairies.” ECF No. 13 at 2-6.
R. Larson Declaration, ECF No. 75	Improperly offers expert opinions on the Dairies’ operations and additional investigation purportedly needed related to those operations, none of which are the subject of the motion, including: ¶¶ 18-27 (cow pens); ¶¶ 28-38 (composting areas); ¶¶ 39-50 (manure processing systems); ¶¶ 51-69 (application fields); ¶¶ 70-81 (silage); ¶ 82 (conclusion regarding operations and	EPA presented conclusory arguments that nitrate from the Defendants’ operations migrate to groundwater and “continue[s] to contaminate drinking water of residents who live downgradient from the Dairies.” ECF No. 13 at 2-6.

Document	Improper Portions of Reply	Corresponding Portion of Plaintiff’s Initial Motion or Proposed Order
	additional investigation)	

With limited exceptions noted above, EPA had the evidence it now seeks to rely on and improperly held on to it until its Reply, denying Defendants an opportunity to respond. *See Joseph Paul Corp. v. Trademark Custom Homes, Inc.*, No. 3:16-CV-1651-L, 2016 WL 4944370, at *14 (N.D. Texas Sept. 16, 2016) (declining to consider arguments and evidence raised in a reply in support of a motion for preliminary injunction that “could have been presented in the first instance in support of its [m]otion”). The remaining limited new information that was not available when EPA filed its Motion should not be relied on by the Court without affording Defendants an opportunity to respond. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (explaining that new evidence in a reply should only be considered if the adverse party is given an opportunity to respond).

EPA’s reliance on *University of Texas v. Camensich*, 451 U.S. 390 (1981), is misplaced. EPA quotes the proposition that a “preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits” to support its argument that introducing new evidence in its Reply was permissible because the situation changed after it filed its Motion. But in *Camensich*, the Supreme Court warned that “the purpose of a preliminary injunction is merely to preserve the relative positions

1 of the parties until a trial on the merits can be held.” 451 U.S. at 395. Here, EPA
2 seeks affirmative relief that goes well beyond preserving the status quo.

3 *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180 (9th
4 Cir. 2024) (“*Citizen Task Force*”), is both inapposite and taken out of context. The
5 proposition that a trial court “may give even inadmissible evidence some weight,
6 when to do so serves the purpose of preventing irreparable harm before trial,” *id.* at
7 1189, does not change the fact that the Ninth Circuit recognized, in the preliminary
8 injunction context, that the non-moving party must be at least given an opportunity
9 to respond if new arguments or evidence are raised in reply, *id.* at 1187.

10 Despite EPA’s attempt to distinguish a preliminary injunction from the rest
11 of litigation, the caselaw, including cases cited by EPA, applies the same rules to
12 whether new evidence is appropriate in a reply brief at the preliminary injunction
13 stage as at the summary judgement, attorneys’ fees, or review of administrative
14 decisions stages. *See e.g., Citizen Task Force*, 98 F.4th at 1188-89 (holding that
15 district court did not abuse its discretion in considering new evidence presented in
16 the reply brief because the non-movant had an opportunity to respond); *Wisk Aero*
17 *LLC v. Archer Aviation, Inc.*, No. 3:21-cv-02450, 2021 WL 8820180, at *16 (N.D.
18 Cal. Aug. 24, 2021) (explaining the court granted leave to file a sur-reply after new
19 evidence was raised in reply in support of a motion for preliminary injunction);
20 *Joseph Paul Corp.*, 2016 WL 4944370, at *14; *TeleSign Corp. v. Twilio, Inc.*, No.

1 CV 15-3240 PSG (SSX), 2015 WL 12662344, at *1 (C.D. Cal. Oct. 9, 2015)
2 (declining to consider “those new facts or arguments” raised for the first time in
3 the reply in support of the motion for preliminary injunction).

4 Finally, EPA misconstrues Defendants’ argument concerning the Yourish
5 Declaration’s reliance on a spreadsheet for statistical analysis and opinion.
6 Defendants argued primarily that the Declaration and spreadsheet should have
7 been presented with the initial brief, and only secondarily because of its
8 evidentiary shortcomings. ECF. No 76 at 7 and n.2. Although EPA has now
9 provided a redacted version of the spreadsheet, the Yourish Declaration should still
10 be stricken because it should have been presented with the Motion, not the Reply.

11 **CONCLUSION**

12 This Court should grant Defendants’ Motion to Strike, striking the improper
13 portions of EPA’s Reply and declarations before ruling on the Preliminary
14 Injunction. In the alternative, the Court should grant Defendants a meaningful
15 opportunity to respond to the new evidence by allowing Defendants a 20-page sur-
16 reply to be filed within 90 days.

17 DATED December 4, 2024.

18 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 4, 2024, I electronically filed the
3 foregoing with the Clerk of the Court using the CM/ECF System, which in turn
4 automatically generated a Notice of Electronic Filing (NEF) to all parties in the
5 case who are registered users of the CM/ECF system. The NEF for the foregoing
6 specifically identifies recipients of electronic notice.

7 I hereby certify that on December 4, 2024, I mailed by United States Postal
8 Service the document to the following non-CM/ECF participants:

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