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Via E-mail

Jennifer Thies
Arizona Department of Environmental Quality
WQARF Unit Manager
1110 West Washington Street, 4415B-1
Phoenix, Arizona 85007

Re: West Van Buren WQARF Site
Roosevelt Irrigation District Proposal for Early Response Action

Dear Ms. Thies:

Honeywell International Inc. appreciates this opportunity to comment on the Early Response Action (ERA) Work Plan and Groundwater Response Action Implementation Plan (GRA) submitted on behalf of the Roosevelt Irrigation District (RID). These documents purport to summarize an approach to groundwater contamination in the West Van Buren Area (WVBA) Water Quality Assurance Revolving Fund (WQARF) Registry Site that satisfies WQARF criteria for an ERA. After a thorough technical and legal review, we believe the Arizona Department of Environmental Quality must deny RID's request for approval of its ERA because:

- The ERA is not necessary to address a current risk to human health or the environment.
 - RID system does not currently provide water to customers for potable use.
 - There is no evidence of risk from body contact and swimming.
- The ERA is not necessary to protect or provide a source of water.
- The ERA is not necessary to address contamination sources.
- The ERA is not necessary to control or contain contamination and will not reduce the scope or cost of the remedy needed at the site.
 - Mass removal rates are exaggerated.
 - No evidence exists that RID's proposal will enhance capture.
 - The RID ERA would increase, rather than decrease, the cost and scope of the West Van Buren site remedy.
- RID has not demonstrated that the proposed ERA is otherwise reasonable, necessary, or technically feasible.
- RID's analysis of alternative remediation methods and technologies is inadequate.

- RID's ERA Work Plan fails to provide for modifications due to unanticipated or changed conditions.
- RID's Early Response Action would not be "Early".
- RID's proposal is premised on an erroneous view of its water rights.
- Exportation of drinking water resources undermines Arizona water law and policy.
- RID's pump and treat proposal is not the presumptive remedy for West Van Buren.
- The ERA could exacerbate contamination by increasing the extent of the impacted groundwater and impairing groundwater resources which are currently not impaired.
- The ERA will likely result in an increase to the scope and cost of the final remedy.
- The ERA is not a reasonable, feasible or cost-effective method of addressing contamination in West Van Buren because RID's goal is to become a potable water provider, not to address the West Van Buren groundwater plume.

These comments are provided in the context of RID's multipart scheme to win public and agency support for its proposal, which goes beyond the confines of RID's ERA Workplan and Implementation Plan. RID has presented the ERA to ADEQ as a first phase in a more comprehensive GRA to be conducted under WQARF. But RID is unwilling to undertake the work unless third parties, including Honeywell and others, pay the bill.¹

Although RID would have ADEQ believe that RID approached other parties with a reasonable solution to a regional problem, and that those parties rejected it out of hand, that is far from the case. RID first presented its proposal to a mass meeting of interested parties in the Fall of 2009. The proposal was presented as a fait accompli; none of the interested parties had input into RID's plan. RID gave attendees a few weeks to present it with individual settlement proposals through which RID planned to fund the ERA. If such proposals were not forthcoming, RID threatened litigation. This approach hardly qualifies as cooperative effort to solve a regional problem.

In that fall meeting and in various venues before and after, RID also described another facet of its proposal that the ERA workplan does not discuss. RID proposed to construct and operate a distribution system that would carry treated groundwater from its new treatment facility to West Valley cities. Although RID proposed that those cities would pay treatment operation and maintenance (O&M) costs, the proposal hinged on RID's ability to obtain funding—through settlements or litigation—for the treatment and transportation systems.

Meanwhile, RID retained a public relations firm to lobby state and local officials and the public. RID lambasted ADEQ and the Central Phoenix business community for allegedly having done nothing to address problems in West Van Buren, ignoring ADEQ's progress toward selection of a final remedy and source control projects by PRPs. RID presented itself as a proponent for the community and the environment.

¹ Montgomery and Associates, *GRA Implementation Plan*, at ES-8 (September 25, 2009) (hereinafter "*Implementation Plan*") (the ERA will not be initiated until "sufficient response action costs are available from the PRPs"); Agreement to Conduct Work between RID and ADEQ, ¶ 4 (October 8, 2009).

When third party settlements to finance RID's scheme did not materialize, RID filed a complaint in Federal District Court against over one hundred named defendants claiming unspecified damages under CERCLA and common law theories. That complaint has not yet been served, but RID is using the threat of litigation in an attempt to coerce settlements. To that end, ADEQ approval of the ERA is vital to RID because that approval advances RID's litigation position in federal court.

Looking at RID's scheme as a whole, it becomes clear that RID's proposal is an attempt to force third parties to fund a treatment and distribution system for potable water that RID believes will transform it into a municipal water provider as its current agricultural irrigation customers give way to commercial, industrial, and residential development. They are pursuing that end through threats of litigation against over a hundred entities in state and federal cleanup sites throughout the Phoenix metropolitan area. And they are seeking ERA approval primarily to advance their plans to become a potable water provider and enhance their litigation position, not because they have a reasoned approach to regional groundwater contamination.

As you know, Honeywell is not a Potentially Responsible Party for the West Van Buren site. But as a working party in the Motorola 52nd Street Site, we are interested in a regional solution to groundwater contamination in the central Phoenix area. But we fear that RID's proposal may in fact exacerbate the regional problem, increase remediation costs, and prove inconsistent with a regional approach designed to eliminate sources, contain contamination, and reduce the scope of the final remedy.

In sum, RID proposes to spend \$130 million of other people's money, jumping ahead of the normal remedy selection process with no investigation or analysis, even though groundwater contamination in West Van Buren presents no current risk to health or the environment and no impairment of the current RID use of water. The proposal lacks all but the most rudimentary analysis of the complicated hydrogeologic setting and the appropriate remedial solutions and technologies. RID has presented no evidence that its proposal will work for local areas of contamination at RID wells, much less that it is the regional remedy that we should all be working toward. And RID's phased approach is driven by the desire to implement a potable water marketing scheme (for which it has no current customers) that extracts the maximum possible volume of water and provides for treatment of all this water rather than to ensure the groundwater plume is contained and remediated. This approach would exacerbate conditions by increasing vertical and horizontal gradients in the vicinity of the plume, expanding the current size of the plume. RID has not provided any support that their proposed remedy will not expand the size of the plume.

There is an alternative. Honeywell has been working with a large group of parties from WQARF and CERCLA sites in the region to understand the problems and to propose a reasonable solution. This group already has communicated our willingness to conduct the Feasibility Study (FS) for West Van Buren that will expedite the ordinary WQARF remedy selection process and conduct the necessary investigation and analysis that RID has failed to do. In fact, given that RID's proposal will never be funded absent a lengthy court battle with dozens of Phoenix-area businesses, the working group likely could select and implement a remedy much quicker than anything RID will achieve if it pursues its current path. ADEQ should allow the

regional group to proceed in a collaborative manner to conduct the FS. If RID's proposal has merit as a final remedy, that will be proven during the FS process and RID will have lost nothing.

In the paragraphs that follow, we have laid out the numerous problems and inadequacies we have seen in RID's proposal. We want to emphasize, however, that while our comments focus on the negative aspects of RID's proposal, our goal is not to nitpick solutions proposed by others or to delay a final West Van Buren remedy. Rather, our goal is to respect the WQARF remedy selection process and to involve all stakeholders in a thorough analysis of the problem and a reasonable approach to a solution. We believe that goal can be achieved, but not in the manner RID has proposed.

Detailed criteria required for an ERA is set forth in regulation at A.A.C. § R18-16-405. In order for ADEQ to approve an ERA, the applicant must (1) meet the specific requirements of the ERA Rule; (2) satisfy community involvement requirements; (3) provide for modifications to address unknown or changed conditions; (4) demonstrate compliance with the statutory remedial action criteria; and (5) meet applicable regulatory design, O&M, and innovative technology requirements.²

An applicant for agency ERA approval must provide both a work plan and a rationale explaining how the proposed action achieves the "necessary" criteria of § R18-16-405(A) and community involvement requirements.³ Although a comprehensive remedial investigation and feasibility study is not required for an ERA, the ERA rationale must still adequately explain how the ERA achieves the "necessary" criteria and is consistent with the remedial action criteria. The applicant must identify the information used and how it was considered in ERA selection within the ERA rationale or work plan.⁴ The method for addressing contamination must be selected using professional industry standards based on the best available site characterization information and the best available scientific information on remedial methods and technologies.⁵ Finally, the work plan must discuss how the ERA will account for necessary modifications due to unknown or changed conditions.⁶

The proposed action also must (1) protect public health, welfare, and the environment; (2) to the extent practicable, provide for the control, management or cleanup of the hazardous substances in order to allow the maximum beneficial use of the waters of the state; and (3) be reasonable, necessary, cost-effective and technically feasible.⁷ These remedial action criteria must be read in conjunction with the intent of the overall WQARF remedial process, which requires flexibility in remedial action selection and site specific analysis of current and reasonably foreseeable uses. As reflected in the agency's rulemaking package preamble,

² A.A.C. § R18-16-405(H).

³ A.A.C. §§ R18-16-405(D), (H)

⁴ A.A.C. § 18-16-405(C).

⁵ A.A.C. § 18-16-405(B).

⁶ A.A.C. § R18-16-405(H).

⁷ A.R.S. § 49-282.06(A).

[t]his process for establishing remedial objectives for a site is quite different than the process that was previously used in the WQARF program and is still used by EPA at federal superfund sites. ...Remedial objectives described in this rule are based on uses determined by the community and are refined by the Department with significant community involvement. The objectives are designed to protect and provide for uses of land and water. That does not mean that the aquifer will be always be cleaned up to drinking water standards or to a level suitable for the use. Instead, the rule requires different uses to be identified and a remedy is selected which will protect and provide for the uses.⁸

RID's Proposed ERA fails to adequately address the regulatory requirements for agency ERA approval and also fails to demonstrate compliance with the requisite statutory criteria of reasonableness, necessity, cost effectiveness and technical feasibility. As a result, ADEQ should deny RID's request for approval of the ERA.

I. The Scope of RID's ERA Exceeds the Permissible Scope of a WQARF ERA.

WQARF provides a detailed process to select a final remedy for each site. The final site remedy is the culmination of a thorough, complete remedial investigation and feasibility study. This comprehensive process includes identification and discussion of current and reasonably foreseeable uses of land and water that may be impacted by the contamination, and development of remedial objectives linked to these uses.⁹ The remedial objectives then serve as the basis for the feasibility study, during which a reference remedy and alternatives are developed and evaluated.¹⁰ Possible negative effects and unintended consequences of each alternative are considered during this process. The public is involved in each step.

Departure from this process is allowed only where earlier action is "necessary" – where the action cannot wait for the ordinary remedy selection process, with all of its protections and checks and balances, to be completed. An ERA may be conducted where earlier action is *necessary* to:

- address current risk to public health, welfare, and the environment;
- protect or provide a supply of water;
- address contamination sources; or
- control or contain contamination where the action is expected to reduce the scope or cost of the remedy needed at the site.¹¹

Early action may be conducted without the benefit of all the information available during the ordinary FS process, without full community involvement, and without a complete analysis of alternatives. But there is a risk that early action could later prove to have been counterproductive. In the worst case, the early action could exacerbate contamination. For these

⁸ 8 A.A.R. at 1503.

⁹ A.A.C. § R18-16-406.

¹⁰ A.A.C. §§ R18-16-407 (A), (E).

¹¹ A.A.C § R18-16-405(A); A.R.S. § 49-282.06(A).

reasons, an ERA may be conducted only “once sufficient information is available to characterize the site and determine that the early response action is necessary.”¹²

The RID proposal is not necessary to achieve any of the four permissible ERA purposes.

A. The ERA Is Not Necessary to Address Current Risk to Public Health, Welfare, or the Environment.

Despite RID’s claims in public meetings that groundwater transported in its canals presents a risk to public health, the truth is that almost all of RID’s canals and laterals have been piped and the public is no longer exposed to RID canal water in the proximity of wells impacted by contamination. Before enclosing its canals, RID pumped and transported groundwater through its open canals to its landowners “for over 50 years.”¹³ No evidence exists in the record to indicate that these historical activities endangered anyone. Nor does any evidence exist that RID took steps to reduce the alleged risk or to warn the public or its landowners of a risk.

The West Van Buren Draft RI concluded that “the effect of RID well discharge of groundwater containing VOCs into the canal is not appreciable.”¹⁴ This is because contaminated groundwater is mixed with significant base flow from the 23rd Avenue wastewater treatment facility and RID wells pumping uncontaminated groundwater. This mixing dilutes VOC concentrations to below drinking water standards “within 125 feet of the point of discharge.”¹⁵ RID has presented no data to the contrary. So although the RID canals act as a transport mechanism for low levels of contaminants, the concentrations in the canals generally are below drinking water standards and cannot be classified as a threat to public health.

RID adopts some of the analysis and conclusions of the West Van Buren Draft RI wholesale in its ERA, having conducted no additional investigation or analysis of its own. But RID ignores ADEQ’s conclusions regarding the risk associated with RID’s canals because the proposed ERA is not necessary if no risk exists. To help justify its proposal, RID has argued that contaminants in its canals may present a risk to public health through volatilization into the air.¹⁶ But RID has presented no data to support this allegation. Maricopa County, which regulates air quality in the area, has no emissions standards for incidental volatilization from irrigation canals. Absent data to the contrary, volatilization cannot be assumed to present a risk sufficient to justify RID’s proposed ERA.

The cursory evaluation of risk in the ERA Work Plan does not fully identify alleged potential complete exposure pathways. However, RID’s allegations of a current substantial public health risk appear to be premised upon three factors. The first is the detection of volatile organic compounds, principally TCE, PCE, and 1,1-DCE at levels above drinking

¹² 8 A.A.R. at 1507.

¹³ RID Cover letter to Revised ERA Work Plan at 2 (Feb. 4, 2010).

¹⁴ Terranext, *Draft Remedial Investigation Report, West Van Buren WQARF Registry Site*, Volume 1, at 6-10 (October 2008) (“*Draft RI*”).

¹⁵ *Id.*

¹⁶ Letter of February 23, 2010 from Stanley H. Ashby, Roosevelt Irrigation District, to The Honorable Janice K. Brewer, Governor, State of Arizona, p. 2.

water standards within certain RID production wells. The second pertains to the RID canals as a source of agricultural and urban irrigation water, and the third is the potential body contact in those portions of the canal that are not covered or protected from public access.

1. *RID does not distribute water for potable use*

Certain RID wells contain volatile organic compounds at concentrations above Safe Drinking Water Act Maximum Contaminant Levels (MCL). If one of these wells were used as a direct source of public drinking water, it would require treatment. But the impacted RID wells are used only to supply irrigation water, not drinking water. The portion of the aquifer contaminated in the West Van Buren WQARF area is not currently used as a public drinking water supply. Therefore, the presence of VOCs within certain RID wells does not present a complete current ingestion exposure pathway with regard to drinking water consumption.

2. *There is No Evidence of Risk From Body Contact and Swimming.*

In meetings with State and local officials and the public in recent months, RID representatives have shown a video of children playing in an RID canal. RID has referred to this location as a “swimming hole.” The video is used to portray the alleged risk posed by contaminants in the water conveyed through the canal.

The video was taken along 27th Avenue between Buckeye Road and Durango St.¹⁷ Until recently, a 275-foot section of the lateral running along 27th Avenue had not been piped and had been in a state of severe disrepair. It appears this open lateral had not been lined with concrete. As a result, water discharged from the pipe located at the upstream end of this open lateral discharged with sufficient force to carve out a large depression in the soil that was much wider than the original lateral. When this depression filled with water, it became an attractive nuisance for children and adults to play in.¹⁸

What RID is not telling those same State and local officials and the public is that this open lateral has now been piped.¹⁹ Therefore, even if some minor risk had previously existed, which is clearly debatable in the absence of sampling from the open lateral, water in the lateral is no longer a risk to anyone. RID has continued to use this video, however, misinforming the public in an attempt to incite fear and generate support for its proposal. RID’s characterization of the risk is sensationalized and unsupported by the facts.

Furthermore, RID has portrayed the water in this section of the canal as coming from the most contaminated wells in RID’s system. That simply is not true. This open lateral was supplied by groundwater from production well RID-100, located 3,200 feet upstream and production well RID-99, located 500 feet upstream. Water samples collected in September 2008 indicated that RID-100 contained 7.8 µg/L PCE, 34 µg/L TCE, 34 µg/L 1,1,1-TCA, and 9.3 µg/L 1,1-DCE. RID-99 contained 7.9 µg/L PCE, 0.71 µg/L TCE, 0.71 µg/L 1,1,1-TCA, and 2.0 µg/L

¹⁷ Exhibit 1.

¹⁸ Exhibit 2.

¹⁹ Exhibit 3.

1,1-DCE. With the exception of 1,1-DCE in RID-100, these contaminant concentrations are lower than any applicable standards from ADEQ's 2009 ADEQ Final Surface Water, Partial Body Contact Standards;²⁰ the 1998 Arizona Department of Health Services (ADHS) Draft End Use Standards for open water conveyances; and ADHS's Health Based Guidance Levels (HBGLs) for other sites in Arizona.²¹ Therefore, no risk existed due to contact with surface water in this lateral before it was piped.

A review of RID's conveyance system indicates that the risk associated with the remainder of the system is minimal at best. RID's conveyance system includes the RID Main Canal, Main Canal laterals, and the Salt Canal. The RID Main Canal is an open canal that runs in a northwesterly direction and extends from 19th Avenue to RID's service area in western Phoenix. A total of six unnamed Main Canal laterals oriented north to south from 19th Avenue to 51st Avenue connect to the RID Main Canal. The Salt Canal runs east to west along Van Buren Street from 23rd Avenue until it meets the Main Canal at approximately 83rd Avenue.

Although the Main Canal is open along its entire length, available data do not support the conclusion that water in the Main Canal presents a risk due to bodily contact or ingestion. Of the wells sampled on the RID Main Canal in 2008, only one, RID-84, contained detectable levels of TCE (1.4 µg/l) and PCE (10.0 µg/l). Available canal sampling data show that in 2003, the last time canal water samples were taken, TCE and PCE concentrations were 1.3 µg/l and 7.6 µg/l, respectively at the upstream end of the RID Main Canal near 19th Avenue and were less than 5 µg/l in the RID Main Canal immediately downstream of well RID-84, near 67th Avenue.²² These low levels of contaminants do not present a risk from surface water contact in the Main Canal, based on ADHS guidance levels for contact with irrigation water at other sites and on ADEQ surface water quality standards.

According to the February 3, 2010 RID Work Plan and visual observations, the six Main Canal laterals between 19th Avenue and 51st Avenue are underground gravity pipelines. A single open segment still exists along the 43rd Avenue lateral that transports water from production well RID-92.²³ This section of open lateral is approximately 400 feet long, concrete-lined, less than 3 feet deep, and does not appear to have carried water for some time.²⁴ Available information indicates that this open section is no longer in use. Even if it is still used, it is likely not conducive to swimming or play because the canal is shallow and thin, concrete lined, contains sections of broken and jagged concrete,²⁵ and is located in an industrial area.²⁶

²⁰ A.A.C. Title 18, Art. 1, App. A.

²¹ Arizona Department of Health Services, *Public Health Assessment, Groundwater Contamination in West Plume B*, at 15 (October 10, 2000) (setting health-based guidance level for contact with irrigation water at 397 µg/L TCE for adults and 87 µg/L TCE for children); Arizona Department of Health Services, *Public Health Assessment, Phoenix Goodyear Airport (North)*, at 21-22 (same).

²² *Draft RI*, Figure 4-38.

²³ Exhibit 4.

²⁴ Exhibit 5. Based on the condition of this lateral, it is possible that this open section is no longer used and that a piped lateral exists below or adjacent to this area in the right-of-way. The status of this section could not be confirmed, however, based on available information.

²⁵ Exhibits 6-7.

²⁶ Exhibit 4.

The RID Salt Canal is located within the right of way south of Van Buren Street and extends from 23rd Avenue to 83rd Avenue, where it joins the RID Main Canal. According to the RID Work Plan and visual observations, the Salt Canal has been converted to an underground gravity pipeline over its entire length, except for two segments located between 75th Avenue and 83rd Avenue. One section is located west of 75th Avenue and is approximately 300 feet long.²⁷ The other section is located west of 79th Avenue and is approximately 1,100 feet long.²⁸ Although these two open segments of the Salt Canal could potentially represent an exposure pathway through dermal contact, inhalation, and incidental ingestion, several factors mitigate the risk associated with these sections.

First, the location and physical condition of these sections is not conducive to public access and use. Both of these sections are surrounded by agricultural fields, warehouses, and industrial facilities and are located at least one-half mile from residential areas.²⁹ Both sections are lined with concrete along their entire length, making them less welcoming to children and swimmers. Furthermore, the concrete is broken and jagged in numerous places along these two sections, making them even less of an attraction.³⁰

Second, available sampling data do not indicate the presence of a risk from contact with water in the Salt Canal. Groundwater sampling data from RID-105, the well immediately upstream of these two open sections, show that PCE, TCE, and 1,1-DCE concentrations all were below drinking water standards in 2008.³¹ Sampling results for surface water from the Salt Canal west of 75th Avenue taken in 2003 showed a PCE concentration of 2.1 µg/l and TCE concentration of 8.7 µg/l. These levels are well below applicable surface water quality standards for body contact or fish consumption.

Finally, any risk that might be associated with these two sections of the Salt Canal will soon be eliminated. RID has indicated that it intends to pipe these two sections within the next few months.

In sum, the alleged risks from exposure to surface water in open sections of the RID system have been greatly exaggerated in an effort to drum up public support for RID's unreasonable proposal. Any open sections that might be attractive to children or swimmers have been piped, will soon be piped, and otherwise appear to present minimal, if any, risk. There simply does not appear to be a legitimate current health concern associated with the potential exposure pathways based on the data collected to date.

²⁷ Exhibits 8-9.

²⁸ Exhibits 10-11.

²⁹ Exhibits 8 and 10.

³⁰ Exhibits 12-15.

³¹ Terranext, *Roosevelt Irrigation District Water Quality Report*, Table 3.1 (December 2008).

B. The ERA is Not Necessary to Protect or Provide a Supply of Water.

Under WQARF, the ERA may not short-cut the remedy selection process. Any decision on a final site remedy must still follow the WQARF selection process and criteria.³² Once that final remedy is selected, any ongoing ERA must adjust to accommodate the selected site remedy.³³ Examples of contemplated ERAs are provided in the regulatory preamble as “short-term actions, such as fencing or providing bottled water, or they may involve an expensive large-scale groundwater treatment system.”³⁴ But early construction of permanent or long-term remedial actions poses a special risk. It is almost impossible to adjust a permanent large-scale treatment plant to accommodate the final remedy selected for the site.

The treatment plant constructed for the Town of Payson illustrates the appropriate situation where a large-scale treatment plant may be constructed as an ERA. In that case, a current risk was posed by contamination of the Town’s sole source of drinking water. There was enough information to determine that no other source of drinking water for the Town existed. The Town could not wait for the final remedy selection process to proceed.

Although RID claims that its operations have been impacted by contaminants in groundwater, it has provided absolutely no evidence of such impacts. Data regarding contaminants in some RID wells has been available since at least 1984. Yet RID has continued to pump and deliver groundwater for irrigation to its landowners just as it always has done. Nothing in the record indicates that RID has altered its operations in any way as a result of groundwater contaminants in the West Van Buren Area. Nor is there a shred of evidence that the use of this water for agricultural irrigation has had any impact on RID’s landowners or their crops. RID has not provided any support that the ERA is required to protect current uses of their water or their distribution system.

Nevertheless, the final remedy selection process will evaluate RID’s use of this water. In selecting the final remedy, the “measures taken to address contaminated or threatened wells must be identified in consultation with water providers or well owners to ensure the action taken meets their water use needs.”³⁵ The final remedy must address any RID well impaired by the contamination, as the selected final remedy must be one that “addresses any well that either supplies water for ...irrigation or agricultural uses ...if the well would now or in the reasonably foreseeable future produce water that would not be fit for its current or reasonably foreseeable end use without treatment.”³⁶

This does not mean, however, that the well owner can choose any particular end use that they might dream up and mandate a remedial action designed upon that end use. Agency responses to comments in the WQARF rulemaking process clarify that reasonably foreseeable

³² A.A.C. § R18-16-405(F).

³³ *Id.*

³⁴ 8 A.A.R. at 1501.

³⁵ 8 A.A.R. at 1503.

³⁶ 8 A.A.R. at 1503.

end uses are those that are *reasonably probable* to occur in the future, “not one simply within the realm of possibility.”³⁷ ADEQ recognized the need to consider water providers’ plans but declined the invitation to create a presumption based upon drinking water standards. Similarly, the agency stressed that the water provider’s input was but one tool for agency consideration and recognized as well that there may be competing water use desires.³⁸ Much of RID’s proposal is not “necessary” under WQARF because its primary intent is to facilitate RID’s entry into the potable water business, not to contain or remediate groundwater. WQARF was not intended to provide parties with a basis to recover costs for improving existing facilities and infrastructure. Work that is motivated solely by business or profit motives is not “necessary” under WQARF.

The scope of RID’s ERA exceeds the permissible or intended scope of an ERA and even exceeds the scope of a reasonable final remedy. Remedial actions under WQARF, including ERAs, are not intended to encompass costs that a well owner or water provider would have incurred regardless of the release.³⁹ As explained in the agency’s rulemaking package, WQARF remedy selection addresses

only the impacts of a release or a threatened release of a hazardous substance ... [and] will not cover remedial action costs that would have been incurred if the release had not impacted the property or well. For example, a well may have high levels of trichloroethylene, arsenic, and total dissolved solids. If only the trichloroethylene was released and the other contaminants were present before the release, the well owner cannot require WQARF to clean up the remainder of the contaminants or replace the well with a more productive well.⁴⁰

This is not the first time a party has attempted to use a remediation statute in this fashion. In 1979, G.J. Leasing bought a former power plant building in Sauget, Illinois from Union Electric. Nine years later, G.J. Leasing began to remove asbestos from the building. It then sued Union Electric under CERCLA, arguing that Union Electric should be liable for the costs of asbestos removal. The trial court held that asbestos removal was not a “necessary” response within the meaning of CERCLA, because the plaintiffs failed to demonstrate any risk to human health or the environment—asbestos could have remained in the building with no harm to anyone.⁴¹ The Seventh Circuit agreed that parties could not use CERCLA as a mechanism to recover the cost of improvements to their land or facilities:

The statutory limitation to “necessary” costs of cleaning up is important. Without it there would be no check on the temptation to improve one’s property and charge the expense of improvement to someone else. Suppose a building that was being used to warehouse heavy industrial equipment were found to have very low levels of contamination by some hazardous substance and only a small expenditure would be necessary to remove enough of the substance to make the

³⁷ 8 A.A.R. at 1519, 1521.

³⁸ 8 A.A.R. at 1521, 1522.

³⁹ A.A.C. § R18-16-402(B).

⁴⁰ 8 A.A.R. at 1499.

⁴¹ *G.J. Leasing Co., Inc. v. Union Electric Co.*, 854 F. Supp. 539, 561-63 (S.D. Ill. 1994).

