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2023 Competition Problem

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 22-000677

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Plaintiff-Appellant-Cross Appellee,* v. BETTER LIVING CORPORATION, *Defendant-Appellee-Cross Appellant,* FARTOWN ASSOCIATION FOR WATER SAFETY, et al., *Intervenor Plaintiffs-Appellants-Cross Appellants.*
FARTOWN ASSOCIATION FOR WATER SAFETY, et al., *Plaintiffs-Appellants,* v. BETTER LIVING CORPORATION, *Defendant-Appellee.*

On Appeal from the United States District Court for the District of New Union in consolidated case nos. 17-CV-1234 and 21-CV-1776, Judge Douglas Bowman.

ORDER

Following the issuance of an Order of the United States District Court for the District of New Union dated June 1, 2022, in 17-CV-1234 and 21-CV-1776 (consolidated cases), Better Living Corporation ("BELCO"), the United States Environmental Protection Agency ("EPA") and Fartown Association for Water Safety ("FAWS") each sought leave to file an interlocutory appeal from different parts of the district court's order. Considering the resolution of the federal law claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the jurisdictional issues surrounding the District Court's decision to retain jurisdiction of the state law claims, this Court granted leave to appeal.

BELCO appeals from: (1) the District Court's order upholding EPA's Unilateral Administrative Order ("UAO") directing BELCO to take additional investigation and response actions, based on EPA's determination that the New Union Environmental Rights Amendment (the "ERA") constitutes a new Applicable or Relevant and Appropriate Requirement ("ARAR") under CERCLA; and (2) the District Court's order vacating as arbitrary, capricious and contrary to law EPA's determination that BELCO is not required to install filtration systems on Fartown residents' private wells.

FAWS appeals from: (1) the District Court's order that costs it incurred in sampling and analyzing residents' private drinking water wells are not reimbursable under CERCLA as a response cost; and (2) the District Court's denial of its motion to dismiss the remaining state court claims and retaining supplemental jurisdiction over those claims.

Like BELCO, EPA appeals from the District Court's order vacating EPA's determination that BELCO need not install filtration systems on contaminated wells in Fartown.

Therefore, it is hereby ordered that the parties brief the following issues:

1) Did the District Court err when it determined that costs incurred by FAWS in sampling, testing and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA? FAWS argues it did; EPA and BELCO argue it did not.

2) Did the District Court err when it upheld EPA's determination that the ERA constitutes an ARAR, and, accordingly finding that EPA's reopening the Consent Decree based on that ARAR and ordering further remedial action in the UAO was proper? BELCO argues it did; EPA and FAWS argue it did not.

3) Did the District Court err when it vacated as arbitrary, capricious or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA? EPA and BELCO argue it did; FAWS argues it did not.

4) Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims? FAWS argues it did; EPA and BELCO argue it did not.

SO ORDERED.

Entered 1st day of June 2022 [NOTE: No decisions decided or documents dated after June 1, 2022 may be cited in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW UNION

BETTER LIVING CORPORATION, *Plaintiff-Appellant-Cross Appellee,* v. UNITED STATE ENVIRONMENTAL PROTECTION AGENCY, *Defendant-Appellee-Cross Appellant.* FARTOWN ASSOCIATION FOR WATER SAFETY, et al., *Intervenor Plaintiffs-Appellants-Cross Appellees.*	17-CV-1234 (DTB)
FARTOWN ASSOCIATION FOR WATER SAFETY, et al., *Plaintiffs-Appellants,* v. BETTER LIVING CORPORATION, *Defendant-Appellee.*	21-CV-1776 (DTB)

CONSOLIDATED CASES

DECISION AND ORDER

These consolidated cases stem from contamination of an aquifer in the State of New Union. The parties have cross moved for summary judgment on several claims, mostly concerning determinations by the United States Environmental Protection Agency ("EPA") regarding the rights and obligations of the company responsible for the contamination, Better Living Corporation ("BELCO"), and a group of residents who claim to be harmed by the contamination along with an organization they formed, the Fartown Association for Water Safety (the individual plaintiffs and organization will be collectively referred to as "FAWS"). The issues relate to costs incurred and obligations associated with investigating and remediating

contamination under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, and to what extent those obligations and rights are altered in light of the recently enacted New Union Constitutional Environmental Rights Amendment ("ERA"). N.U. CONST. art. I, § 7.

At its core this case involves disagreement about how to reconcile the ERA with CERCLA's requirement that contaminated resources be remediated to meet what are known as Applicable or Relevant and Appropriate Requirements ("ARARs"). 42 U.S.C. § 9621(d). Here, the Court must decide: (1) whether FAWS' costs for monitoring groundwater contamination are reasonable and reimbursable under CERCLA; (2) whether EPA's interpretation that the ERA constitutes an ARAR under CERCLA was correct, which EPA contends allowed it to reopen the Consent Decree it has with BELCO and require BELCO to provide bottled water to Fartownians who have low levels of Nitro-Acetate Titanium ("NAS-T") in their private wells; (3) whether EPA's application of the ERA as an ARAR was arbitrary and capricious where EPA determined that the ERA did not require BELCO to install filtration systems on those same Fartown private wells; and (4) whether to retain jurisdiction of the remaining state law claims after the Court has resolved all of the federal claims in this matter.

FACTUAL AND LEGAL BACKGROUND

A. The Source and Discovery of the Contamination

Centerburg, in the State of New Union, is a town of approximately 4,500 residents that sits on County Highway 6. Fartown, a rural community of approximately 500 residents also in the State of New Union, sits on Highway 6 about 2 miles south of Centerburg. The parties agree that Fartown qualifies as an environmental justice community based on socio-economic conditions.

An underground body of water - the Sandstone Aquifer - lies about 300 feet beneath both Centerburg and Fartown. Groundwater in the Sandstone Aquifer moves slowly downgradient in a southerly direction, meaning groundwater underneath Centerburg eventually flows under Fartown.

Centerburgers receive tap water from the Centerburg Water Supply ("CWS"), a publicly owned source. CWS pumps its supply water from the Sandstone Aquifer, then treats it before distribution to Centerburgers. Fartownians, on the other hand, are not connected to the CWS and instead use private drinking water wells in each of their homes that pump directly from the Sandstone Aquifer.

In 1972, BELCO patented an inexpensive, durable sealant coating used to prevent corrosion, which it trademarked under the name "LockSeal." LockSeal is used primarily in industrial applications for metal pipes and machinery exposed to water or other corrosive liquids through outdoor use or otherwise. Lockseal is made by combining two chemicals. The first is the liquid NAS-T. The second is a powdered non-toxic "activation agent," which when combined with NAS-T produces a chemical reaction that makes a solid at room temperature, LockSeal. A company seeking to use LockSeal would contract with BELCO to deliver and apply the coating

through a spray process that combines NAS-T and the activation agent, creating the sealant coating - LockSeal - wherever it is applied.

BELCO manufactured NAS-T and its activation agent at a factory (the "Facility" or "Site") in Centerburg from 1973 through 1998, when it opened a new, more efficient factory in northern New Union and shuttered the old factory. BELCO still owns the property in Centerburg, which it uses for storage and training activities.

A variety of medical studies published in the mid-1980's showed NAS-T to be a probable human carcinogen. Based on these studies, EPA in 1995 adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"), which incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans. Even if NAS-T is not toxic at or below the HAL, the parties agree that the human nose can detect NAS-T in water at concentrations as low as 5 ppb, where it produces a sour or stale smell.

Perhaps due to its scarcity of use, there are no further state or federal regulations regarding NAS-T beyond the HAL. The chemical is not regulated under the Safe Drinking Water Act, nor is EPA monitoring it as an unregulated contaminant in drinking water.

Beginning in 2013, Centerburgers began complaining to the Centerburg County Department of Health ("DOH") that their water smelled "sour" or "off." Prompted by these complaints, in January of 2015 DOH began testing the public water supply for chemical contamination. DOH included NAS-T in its testing protocol because of the existence of the BELCO Facility in town. DOH determined that the water in the CWS contained between 45 and 60 ppb NAS-T. On September 17, 2015, DOH notified the residents of Centerburg to cease drinking their tap water. At the same time, BELCO voluntarily began supplying all Centerburgers with bottled water while the state investigated the contamination.

The New Union Department of Natural Resources ("DNR") began an investigation of the contamination at the Facility on September 22, 2015. Citing a lack of resources and expertise, however, DNR referred the investigation and remediation to EPA on January 30, 2016.

B. The Investigation, Record of Decision and Consent Decree

In March 2016, EPA and BELCO entered into an agreement where BELCO agreed to continue to provide bottled drinking water to residents of Centerburg and to investigate the cause of and extent of the NAS-T contamination. After this investigation, BELCO agreed to evaluate proposed cleanup remedies for the Site. Through this process, known as a remedial investigation and feasibility study ("RI/FS"), BELCO investigated the sources of the contamination, assessed risk to human health and the environment and evaluated remedial alternatives for the Site.

BELCO began its investigation by identifying the source of the NAS-T contamination. Through soil testing at the Site and studying records of operation at the Facility, BELCO concluded that NAS-T entered the soils from sporadic spills and from an unlined lagoon used to store wastewater and stormwater in the 1980s and early 1990s. This contamination eventually migrated to the groundwater, creating a plume of NAS-T in the Sandstone Aquifer.

Under EPA oversight, BELCO also investigated the extent of the plume. From July of 2016 through January of 2017, BELCO installed three successive lines of monitoring wells progressively further from Centerburg and closer to Fartown. The final five wells were installed approximately half a mile north of Fartown (1.5 miles south of Centerburg); when sampled, these five wells showed no detectable amounts of NAS-T. Consequently, believing that it had reached the end of the NAS-T plume, EPA did not direct BELCO to install any additional wells. Based on this investigation, BELCO's RI/FS recommended no remediation of the plume, but rather excavation of the soils at the Site to remediate the source area and the implementation of filtration of Centerburg's CWS. The RI/FS estimated that remediation of the NAS-T plume in the Sandstone Aquifer by pumping and treating the water would take decades and cost over $45 million, and was therefore not feasible.

Based on this RI/FS and the comments received by EPA after it issued a Proposed Plan to the public, in June of 2017 EPA selected a clean-up plan for the Site through what is known as a Record of Decision (the "ROD"). On June 30, 2017, EPA brought a cost recovery action against BELCO (Case No. 17-CV-1234; the "BELCO Action"), immediately after which BELCO and EPA entered into and filed a Consent Decree ("CD"). Pursuant to the CD, BELCO agreed to design and implement the remedy selected by EPA in the ROD. This Court approved and entered the CD on August 28, 2017, after taking public comment and determining it to be fair and reasonable. No citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan or the entry of the Consent Decree.

Pursuant to the CD, upon completion of the clean up, EPA would be required to issue to BELCO a Certificate of Completion (the "COC"). The Consent Decree further dictates that upon issuing the COC, EPA is not permitted to order BELCO to further remediate the Site without EPA "reopening" the CD. The CD explicitly sets forth two grounds upon which EPA can reopen it:

> 1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or
>
> 2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

CD, § 13.3. Relevant to this dispute, the Consent Decree defines Regulatory Standards to include, among other things, "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." CD, § 1.12.

C. The Remediation

Pursuant to the CD, BELCO (1) installed and maintained a water filtration system known as "CleanStripping" to remove NAS-T at the CWS public water well; (2) excavated soils contaminated with NAS-T from around the abandoned lagoon at the Site; and (3) conducted monthly sampling of the monitoring wells installed during the investigation. The Consent Decree does not require further remediation of the plume in the Sandstone Aquifer. This type of remedy is often referred to as "monitored natural attenuation."

BELCO installed CleanStripping on Centerburg's public water well in September of 2017 (which is still in operation) and completed the soil excavation in December of 2017.

Over the following several years, BELCO's monitoring well test results were largely consistent with prior results, with the notable exceptions in January 2018 of two detections of NAS-T in the final line of wells (those closest to Fartown) at low levels (5 ppb and 6 ppb, respectively). Given the multiple non-detects and the low numbers found in this final line of wells, EPA issued the COC to BELCO in September of 2018.

D. Contamination of Fartown's Private Water Wells

Some Fartownians (now members of FAWS) submitted sworn testimony that they noticed that the water from their private wells began to occasionally smell "off" since at least 2016. When they became aware of the investigation and entry of the CD, they immediately requested that DOH sample and test their drinking water for NAS-T contamination. In February of 2019, DOH tested five private drinking water wells in Fartown, but did not detect NAS-T. Not satisfied with that result, in May 2019 a group of these Fartownians then asked EPA to order BELCO conduct further testing in Fartown. Citing the non-detects in sampling from the monitoring wells to the north of Fartown, EPA declined.

Frustrated by EPA, in December of 2019 approximately 100 Fartownians formed FAWS and retained Central Laboratories, Inc. ("Central Labs") to test their private wells. Central Labs took three samples each from 75 private wells in Fartown. Results from Central Labs' 225 samples, reported in March of 2020, were varied: 120 showed no detectable levels of NAS-T; 51 showed concentrations of 1 to 4 ppb; and 54 had detections of NAS-T in the 5 to 8 ppb range. Based on those results, in May 2020 FAWS wrote to EPA again and asked it to reopen the CD and order further investigation of their wells and for remediation of the plume of contamination. On June 10, 2020, EPA declined to take further action, citing the low levels of NAS-T and the limited reopener provisions in the CD. FAWS paid Central Labs $21,500 for the testing and analysis.

E. The Environmental Rights Amendment

On November 3, 2020, the citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"). That Amendment reads:

> Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans.

N.U. CONST. art. I, § 7.

As with all Constitutional Amendments in New Union, the Amendment was passed by the New Union legislature, signed by the governor, and was then included in the November 3, 2020, election as a ballot measure. The measure passed with 71% voting in favor of the Amendment, and 29% voting against.

In January of 2021, EPA wrote to DNR to ask whether it believed that the ERA constitutes an ARAR for CERCLA purposes. On February 14, 2021, DNR responded, stating that "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." New Union does not have a State Memorandum of Agreement regarding ARARs.

F. Reopening the Consent Decree

On March 20, 2021, citing the 2020 Central Labs results and the passage of the ERA, which EPA deemed to be a change in the Regulatory Standards under the Consent Decree, EPA re-opened the Consent Decree and ordered BELCO to sample and analyze water from 50 private wells in Fartown.

Prior to reopening the Consent Decree, EPA included in its administrative record the new information relied upon to reopen the CD, the fact that Fartown is an environmental justice community, the possible endangerment including potential carcinogenic effects, and the presence of odors from NAS-T. The response actions demanded by EPA consisted of sampling of private wells in Fartown, supplying bottled water to any Fartownian whose well returned positive results for NAS-T, and the continuing monitoring of Fartown wells. EPA then held a conference with BELCO in an attempt to get BELCO's agreement to perform these tasks. BELCO challenged EPA's demand, arguing that EPA did not have the legal right to reopen the Consent Decree because the ERA did not and legally could not constitute an ARAR, and, as such, the response action ordered was inconsistent with CERCLA. On June 24, 2021, over BELCO's objection, EPA issued an order, referred to as a Unilateral Administrative Order ("UAO"), directing BELCO to conduct the response actions noted above.

In addition, prior to EPA issuing the UAO, FAWS submitted in writing a request for EPA to order BELCO to install CleanStripping at each residential well that had tested positive for NAS-T or take other remedial actions sufficient to remove NAS-T entirely from their water supply. EPA expressly declined to include this requirement in the UAO on grounds that FAWS' 2019 results and EPA's own sampling results found no wells in Fartown testing above the HAL for NAS-T. This request, and EPA's response and justifications, were similarly fully noted in EPA's administrative record.

The relevant directives to BELCO in the UAO are:

> 1. Sample 50 private wells in Fartown, selected by EPA, each month.
>
> 2. For any well where sampling shows NAS-T concentrations between 5 ppb and 10 ppb, supply such households with sufficient monthly bottled water for each resident until testing reveals levels of 4 ppb or lower.
>
> 3. For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install CleanStripping filtration on the well.

UAO, § 3.2.

BELCO refused to comply with the UAO. Thus, on July 7, 2021, EPA began supplying water to Fartownians whose wells tested positive for NAS-T in excess of 5 ppb and monitoring those wells through monthly sampling. That sampling has been largely consistent with the sampling done by FAWS, showing approximately 55% of samples having non-detect levels for NAS-T, 25% in the 1 to 4 ppb range and 20% in the 5 to 8 ppb range. As before, no Fartown wells have tested above 8 ppb.

On August 2, 2021, EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and for penalties for BELCO's violation of the UAO. BELCO answered, arguing that because the ERA cannot properly be considered an ARAR, EPA did not have the right to reopen the Consent Decree, and thus the UAO was without legal foundation.

G. The FAWS Action

FAWS filed a motion to intervene in the BELCO Action on August 30, 2021, to assert a claim against EPA. This Court granted that motion on September 24, 2021. FAWS challenges the UAO as arbitrary, capricious and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), to the extent that it failed to compel BELCO to provide CleanStripping filtration systems on FAWS' members' private wells, which FAWS argues is required under the ERA.

Separately on August 30, 2021, FAWS and 85 individual plaintiffs from Fartown filed an action against BELCO in this Court (the "FAWS Action"; Dkt 21-CV-1776). The complaint's first cause of action is a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on testing and analysis. FAWS' complaint further contends that BELCO's contamination of the Sandstone Aquifer constituted negligence and a private nuisance under New Union state law. FAWS asked that the Court order BELCO to: (1) pay its response costs; (2) install CleanStripping on their private wells that test positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay them damages for the loss of use and enjoyment of their property and diminished property values; and (5) pay punitive damages.

All members of FAWS reside in New Union. BELCO is a Delaware Corporation with a principal place of business in Centerburg, New Union. The United States District Court for the District of New Union exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. At the parties' joint request, the Court subsequently consolidated the BELCO Action and FAWS Action.

FAWS expressly stated in its complaint (and in briefing the instant motions), that it initially brought the FAWS Action in this Court due to the pendency of the BELCO Action, this Court's jurisdiction over the closely related CERCLA claims, and to avoid any contentions of "claim splitting." FAWS has also made clear that it intended to seek dismissal of its state law claims from this Court once the CERCLA claims have been resolved so that it can litigate any remaining state law claims in state court. *See* 28 U.S.C. § 1367(d) (statute of limitations tolled for state claims brought as supplemental jurisdiction claims). Because BELCO has answered in

the FAWS Action, FAWS cannot unilaterally dismiss - it must move this Court for dismissal. *See* FRCP 41(a). The parties then commenced discovery on the CERCLA claims.

On December 30, 2021, after completing discovery on the CERCLA claims, all three parties moved and cross-moved for summary judgment on the CERCLA claims, with FAWS additionally moving to dismiss any remaining state law claims without prejudice should the CERCLA claims be resolved by motion. BELCO and EPA opposed FAWS' motion to dismiss. As discussed in detail below, those motions are partially denied and partially granted. Despite the resolution of the federal issues, this Court denies Fartown's motion to dismiss its state law claims and will retain jurisdiction over those claims, as explained below.

The parties stipulate that (1) all parties have standing and that the case is not moot; (2) that the CD and UAO are final agency actions; and (3) that FAWS had exhausted its administrative remedies.

I. BELCO's Liability for FAWS' Testing Costs

The first issue is whether CERCLA entitles FAWS to recover $21,500 against BELCO as a response cost.

CERCLA provides that potentially responsible parties ("PRPs") can be liable to private parties who are not PRPs for response costs incurred by those private parties. *See* 42 U.S.C. § 9607(a)(4)(B). The plaintiff seeking recovery of those costs must prove that: "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and, (4) the plaintiff has incurred costs in response to the release or threatened release." *Rolan, et al. v. Atlantic Richfield Co., et al.*, 2019 WL 542905, at *5 (N.D. Ind. Oct. 22, 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). A non-governmental plaintiff additionally "must show that any costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan.'" *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. July 24, 2012) (citations omitted).

The issue here is whether FAWS' response actions were "necessary" and "consistent with the national contingency plan." For a response action to be "necessary," it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question. *U.S. v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1272 (E.D. Ca., Oct. 28, 1997). The actions may be "duplicative" if they occur at the same time as the EPA's own actions and do not seek to uncover information different than or above and beyond that of EPA; or if they occur after the EPA had already informed the private parties that it would be conducting its own investigation. *See, e.g., Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Ca. Jan. 27, 1993). Further, response actions are necessary if they are "closely tied to the *actual cleanup* of hazardous releases." *Young v. U.S.*, 394 F.3d 858, 863 (10th Circ. 2005) (emphasis in original) (string citations omitted). There must be some evidence that the response actions were taken to "assist with and help plan the eventual remediation and cleanup efforts." *See Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.*, 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. Sept. 16, 2016); *see also Walnut Creek Manor, LLC v. Mayhew Ctr.*, 622 F.Supp.2d 918, 929 (N.D. Ca. April 16, 2009). The actions cannot be taken solely for the

purpose of "overseeing another private party's legal obligation to [remediate] a property . . . without direct involvement in the responsible party's remediation and detoxification efforts." *Wilson Road Dev't Corp.*, 209 F.Supp.3d at 1113.

BELCO argues that the testing done by FAWS was not necessary, and thus is not subject to recovery under CERCLA. Specifically, BELCO argues that the testing of the perimeter wells that lie between Centerburg and Fartown from July 2016 through January 2017 showed no significant contamination in the Sandstone Aquifer that reached wells in Fartown, and, accordingly, there was no need for further testing.

FAWS argues that despite that testing of the perimeter wells resulted largely in non-detects, the fact that Central Labs' test results revealed that NAS-T had reached the wells in Fartown showed that the testing was, in fact, necessary. FAWS also points out that the BELCO facility is the only possible source for NAS-T (a fact that is not in dispute here), and that there had been two positive detections of NAS-T (in January 2018) in the closest monitoring wells prior to FAWS' own testing, indicating that the NAS-T was making its way to Fartown by some path out of the reach of the monitoring wells. FAWS argues that, even if EPA ultimately may not have ordered remediation prior to adoption of the ERA, its members had a right to know about exposure levels, and hence its own investigation was necessary and reasonable.

In reply, BELCO makes two arguments. First, BELCO argues that *at the time* of the Central Labs testing, there was no need because there was no scientific evidence supporting further testing. Second, BELCO contends that, even if one assumes that all parties were aware of what BELCO describes as "trace" amounts of contamination in the Fartown wells, that would not have justified further response actions, including testing, bottled water, and installation of individual, expensive filtration systems on private wells.

EPA joins BELCO's motion on this issue primarily on policy grounds. EPA argues that it would frustrate CERCLA and EPA's authority under the statute if private parties were encouraged to undertake their own response actions, and thereafter obtain relief, where objective investigations concluded it would be highly unlikely that any significant or harmful contamination would be discovered. EPA concedes that in this particular case, further testing revealed the presence of contamination, but argues nonetheless that "fishing" expeditions by untrained laypersons would hamper its ability to conduct orderly investigations and enforcement of CERCLA cleanups. Further, EPA argues, the ERA had not yet been adopted, so there was no legal basis at the time of FAWS' testing to justify it. As such, EPA argues that the "reasonableness" of response measures taken must be gauged at the time they were taken, not in hindsight, and must be based on some objective evidence that the testing could produce useful information.

Here, the question of whether FAWS' costs were "necessary" is one of timing. When the costs were incurred, there was no question that EPA was no longer investigating the spread of contamination. In addition, there was no indication that further testing was needed, given existing test results. There was no indication that any further investigation or remediation was "necessary" or warranted, and all indications are that FAWS conducted the tests *at the time* to try to prove liability of BELCO and alter EPA's decisions and course of action. As such, when

FAWS undertook the testing, it was doing so at its own expense for its own purposes, and not attempting to further any existing investigation or remediation plan. The fact that those tests ultimately showed the presence of some contamination does not change the analysis, as to do so would obviate the standard set forth by courts on this issue. The Court notes that this does not leave FAWS without a remedy, as FAWS still has common law claims against BELCO available to seek compensation for damages and expenses.

For these reasons, the Court holds that these costs are not "necessary" CERCLA response costs, and thus are not reimbursable under the statute. FAWS' motion for summary judgment on this claim is denied, and BELCO's motion is granted.

II. EPA's Decision to Reopen the Consent Decree Based on its Determination that the ERA is an ARAR

The next issue is whether EPA could reopen the CD based on its determination that the ERA constituted an ARAR. BELCO contends that it did not as the ERA was not an ARAR so could not be considered a new "Regulatory Standard," and thus no basis existed to reopen the CD. BELCO does not dispute that, if the Court finds EPA was correct that the ERA is an ARAR and a new "Regulatory Standard" under the CD, then EPA would have the authority to issue the UAO. Thus, the Court must determine whether EPA's interpretation that the ERA constitutes an ARAR was correct. The issue of whether the ERA can properly be considered an ARAR is also relevant to the FAWS Action insofar as, if the Court were to determine that the ERA cannot be an ARAR, then FAWS' claim seeking further remediation than that ordered through the UAO would also fail.

ARAR stands for "applicable or relevant and appropriate requirements," and their identification allows for the determination of cleanup goals, remedy selection and implementation. Under Section 121 of CERCLA, selected remedial actions must attain (or waive) ARARs to assure an implemented remedy is protective of human health and the environment. 42 U.S.C. § 9621(d).

A state environmental standard constitutes a state ARAR to which the remedy must comply if it is: (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *US v. Akzo Coating of Am.,* 949 F.2d 1409, 1440 (6th Cir. 1991). When examining this issue, the Court notes that EPA's interpretation of what constitutes an ARAR under CERCLA must be given deference "according to its persuasiveness." *See United States v. Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.*, 65 S.Ct. 161 (1944)). The weight accorded to an administrative determination "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead Corp.,* 533 U.S. at 219.

BELCO argues that the ERA cannot be an ARAR for multiple reasons. First, because it was not "properly promulgated." This term has been defined as a measure "imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Akzo Coating of Am.,* 949 F.2d at 1440. Second, BELCO argues

that the ERA cannot be deemed more stringent than any federal environmental standards where it essentially mirrors the first criteria to be analyzed pursuant to the NCP by a remediating party when determining viable alternatives. *See Sealy Conn. Inc. v. Litton Indus.*, 93 F.Supp.2d 177, 184 (D.C. Conn. Feb. 9, 2000) ("overall protection of human health and the environment"). Third, BELCO argues that the ERA is not applicable as it does not "specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F3d 534, 544 (6th Cir. 2001) (citing 40 C.F.R. § 300.5). Lastly, it argues that the ERA is similarly not "relevant or appropriate" because it does not "address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site." *Id*. Boiled down, BELCO's argument is that the ERA, while perhaps noble and worthwhile as a concept, absent some further legislative or regulatory action by New Union to define "clean" or "healthful," the ERA does not actually provide any "measurable" standard for any specific situation, including the remediation at issue here.

EPA and FAWS argue that the ERA is a proper ARAR in that it offers a standard that is of general applicability and is legally enforceable. *Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1527 (D.C. Cir. 1993) (citing 40 C.F.R. 300.400(g)(4)). They note that the ERA was adopted through the legislature originally, and signed by the Governor, as with statutory enactments that are deemed "properly promulgated." They also argue that the ERA further meets the "more stringent" test where it grants a "fundamental right" to clean water above and beyond any general or specific relevant federal environmental laws, and that in fact, the ERA is relevant or appropriate here because it is covering an unregulated hazardous material "caused by humans" at the Site (NAS-T). *See Akzo Coatings of Am.*, 949 F.2d at 1443 ("Where no federal applicable ARAR exists for a chemical, location, or action, but a state ARAR does exist, or where a state ARAR is broader in scope than the federal ARAR, the state ARAR is considered more stringent.").

EPA and FAWS posit that to ignore the ERA would be contrary to its passage and would defy the will of the people of New Union. They refer to multiple instances in the legislative history of the ERA demonstrating that it was enacted to cover just this sort of situation, where a contaminant that is known to be harmful is not regulated under existing laws or regulations. Both argue that EPA had the obligation to interpret and apply the ERA as an ARAR, though, as discussed below, they differ as to its proper interpretation.

The Court finds the interpretation advanced by EPA and FAWS to be persuasive given the legislative history and wording of the ERA. As both parties note, the ERA serves no purpose if it cannot be implemented when there is no regulatory standard in place. Such an interpretation would fly in the face of the legislative history and vote of the people of New Union. Indeed, the legislative history makes clear that the right was intended to be "self-executing," needing no further legislation or regulation to take effect. This self-executing provision, which it undeniably is, on its face, "of general applicability" leads this Court to find that the ERA is properly promulgated.

Moreover, the Court agrees that the ERA meets the stringency test as it expressly grants a "fundamental right" to clean water that was intended to be more protective than existing

regulations, especially where, as here, there are no more specific applicable regulations. Finally, while the parties appear to agree that the ERA is not directly "applicable," the Court agrees with EPA and FAWS that it is nevertheless "relevant and appropriate" as it does "address problems or situations sufficiently similar to those encountered at the site" by covering the type of situation we are presented here, involving a new, unregulated contaminant. *See Franklin Cnty. Convention Facilities Auth.*, 240 F3d at 544.

Indeed, the New Union legislature envisioned just such a gap-filling role; as the Senate Report explained:

> This Amendment is necessary and justified by the fact that on occasion, the existing statutes and regulations are insufficient to protect the people from exposure to unclean or unhealthful air and water. This shortfall has been evident in New Union and other states where chemicals that are toxic remain unregulated. Where those regulatory gaps exist, the Amendment will serve to create a safety net to ensure that protections of our residents do not fail, and the people of the State will be guaranteed clean air, clean water and a healthful environment, including and in particular due to non-natural, human-caused pollutants and contaminants.

Senate Report, p. 1. Moreover, the legislative history shows that the ERA was intended to be "self-executing," meaning that, contrary to BELCO's contention, no further legislation or regulation is required to make it effective.

Accordingly, to adopt BELCO's argument that the ERA cannot constitute an ARAR would be to ignore the language, purpose and intent of the ERA, and the Court declines to do so. This Court finds EPA's interpretation that the ERA constitutes an ARAR to be reasonable and persuasive.

Having affirmed EPA's use of the ERA as an ARAR, EPA had the authority to reopen the CD based on new Regulatory Standards. Accordingly, the Court grants EPA's motion for summary judgment as to its costs and penalties against BELCO for BELCO's failure to comply with the UAO, and BELCO must comply with that order going forward. BELCO's motion for summary judgment on this claim is denied.

III. EPA's Decision Not to Order BELCO to Install Filtration Systems in Fartown

Given that the EPA had determined that the ERA constitutes an ARAR, FAWS challenges EPA's determination that BELCO need not pay for or install CleanStripping on residential wells in Fartown testing below 10 ppb. Where a challenge is made to an EPA enforcement order under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004); *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012) (challenges to EPA orders of compliance fall under the APA).

FAWS contends that "clean water . . . free from contaminants and pollutants caused by humans" cannot reasonably be interpreted to mean "slightly contaminated water impacted by a human-caused chemical that occasionally makes water used in cooking, bathing, showering, cleaning and other household tasks smell bad." FAWS Mem. of Law at 14. FAWS contends that EPA's decision that filtration is not required below 10 ppb is arbitrary, capricious and contrary to law as a result. FAWS reasons that, because of the ERA, BELCO must be required to provide "clean" water for all Fartownians and for all uses, not just for drinking.

EPA and BELCO both move for summary judgment on this claim, but in slightly different ways. EPA concedes that the ERA is an ARAR, but argues that "clean water" does not necessarily mean water free from *any* contamination, notwithstanding the final clause of the ERA. Further, it argues that the provision of bottled water is sufficient to address the low amounts of contamination at issue in Fartown. EPA further reasons that requiring water *entirely* free from any contamination would result in invalidating countless permits under the Clean Air Act and Clean Water Act and other federal regulatory schemes that all allow some "safe" levels of contamination in discharges. EPA concedes that the ERA changed the regulatory landscape, but it argues that its interpretation of how to apply that amendment must be left to its discretion in the context of CERCLA, and deference requires upholding the entirety of the UAO as written.

BELCO makes two additional arguments. First, it contends, as discussed above, that the ERA cannot be an ARAR so it cannot be relied upon to require remedial measures, an argument that the Court has rejected. Additionally, BELCO points to its uncontested evidence that the CleanStripping systems for individual homes are costly - as much as $4,500 per household - and that the Court should uphold EPA's decision not to require this technology on this basis as well, given that FAWS has not introduced any evidence that these levels of contamination are harmful in drinking, let alone showering, watering plants or any of the non-drinking uses identified by FAWS.

As indicated above, as applied to CERCLA and the application of ARARs, the Court finds that EPA is entitled to deference. The question is therefore, whether EPA's refusal to require filtration is arbitrary, capricious or contrary to law. While the Court may otherwise adopt EPA's interpretation of what constitutes "clean water," which would allow some levels of contamination in permitted discharges or emissions, the Court cannot agree that this interpretation is reasonable in these circumstances. Here, the contamination does not result from a well-regulated and permitted discharge, nor does it result from natural sources that do not require a permit. Rather, here the contamination is from a human-caused chemical contamination that resulted from illegal spills or was left to soak into soils in an unlined wastewater pond. This is precisely the situation meant to be covered by the ERA, as discussed above. What "clean water" means in other contexts is best left to the State or to EPA's regulatory framework, but EPA's conclusion here that it does not mean the removal of illegally discharged chemicals that can be perceived by smell and may be toxic at higher levels is arbitrary, capricious and contrary to law.

Given this, the Court concludes that the ERA contradicts EPA's determination that installation of CleanStripping technology on Fartown's wells is not required under the state ARAR. EPA's interpretation was contrary to the language, intent and purpose of the ERA, and thus, was contrary to law. Consequently, EPA's and BELCO's motions for summary judgment are denied, and FAWS' motion is granted vacating that portion of the UAO that requires only bottled water, rather than filtration or some other remedy that removes NAS-T from Fartown's wells.

IV. Dismissal of the Remaining Tort Claims

The Court has granted summary judgment regarding the outstanding CERCLA issues - against FAWS' claim to recover response costs, in favor of EPA's use of the ERA as an ARAR supporting the UAO, and against EPA's failure to order filtration systems. This order is thus resolving all outstanding federal claims. The final issue concerns supplemental jurisdiction - that is, whether this Court should retain jurisdiction over Plaintiff's supplemental state law claims in light of the resolution of the CERCLA claims.

The Court elects to retain jurisdiction over the remaining state law claims. A federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In deciding whether to retain jurisdiction over pendent state law claims upon dismissal or resolution of federal claims over which they have original jurisdiction, district courts are further to consider factors such as "judicial economy, convenience, fairness, and comity." *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir.1994)). "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). In fact, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 35 (1988). Courts have thus readily dismissed remaining pendent state law claims concerning "novel or complex" issues of state law. *See, e.g., Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152-53 (D.C. Fl. Jan. 6, 2020) (class action suit involving state environmental tort claims); *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364 (D.C. Md. Sept. 16, 2020) (state law claims concern "the intricacies of a new state regulatory scheme").

Still, courts have found proper district courts' exercise of discretion in retaining jurisdiction over pendent state law claims after federal claims were dismissed where substantial proceedings had taken place prior to the dismissal of the federal claims and where the remaining state law claims involved no novel legal questions. *See, e.g., Nowak*, 81 F.3d at 1191-92 (upholding discretionary exercise of supplemental jurisdiction over a state contract claim where the court had expended much effort to acquaint itself with the facts and issues of the case); *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (the federal claims were dismissed after discovery was completed, the court had decided three dispositive motions and the case was ready for trial, and the state law claims involved settled municipal liability doctrine).

Moreover, "generally, state tort claims are not considered novel or complex." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006) (string citations omitted).

FAWS contends that the only issues remaining in the case are purely based on state law. It further argues that the resolution of its tort claims in nuisance and negligence involve novel and complex issues of state law, including the application and interpretation of the ERA in the context of state tort claims such as nuisance *per se*. FAWS further argues that further discovery is needed with respect to the state law claims. Indeed, FAWS points out, expert discovery on the state law claims regarding damages (including some expert discovery) has not even begun. As such, FAWS urges the Court to dismiss the state law claims so that they may be appropriately addressed by the state court.

BELCO and EPA respond that dismissal at this stage would be counterproductive and that resolution of the tort claims should remain in this Court. They point out that nuisance and negligence claims are in and of themselves not novel or complex state law claims and the determination of damages arising from these claims need not involve the admittedly novel question of whether the ERA was properly identified as an ARAR. Further, BELCO and EPA point out that FAWS has sought injunctive relief in connection with its tort claims, including an injunction compelling BELCO to remediate the aquifer. Both EPA and BELCO fear that such an order, should it be entered in state court, would be inconsistent with EPA's prior determinations of the proper remedy and EPA's arguable primary jurisdiction over remediation of the site. They point out that this Court has continuing jurisdiction over the BELCO Action to enforce the CD, so should maintain the state law claims to avoid any inconsistencies that otherwise may arise.

Here, recognizing that a tremendous amount of work has gone into these cases in this Court and that there are efficiencies to be had in trying the case here, this Court chooses to continue to exercise supplemental jurisdiction over the remaining state law claims. The Court has already been compelled to address the questions related to the ERA that fell under the umbrella of CERCLA, and as things stand the Court does not see a reasonable chance that the ERA will substantially alter the tort claims. On the other hand, FAWS and its members seek several remedies from BELCO - such as remediation of the aquifer - that have the potential to interfere with decisions made in the BELCO Action and EPA's continued oversight at the Site. Consequently, the Court denies FAWS' motion to remand the matter to state court and will set a trial date upon the completion of discovery.

CONCLUSION

For the foregoing reasons, this Court grants summary judgment in favor of BELCO with respect to reimbursement of FAWS's expenses in testing; in favor of EPA with respect to its determination to reopen the Consent Decree and issue the UAO; in favor of FAWS as to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and the Court denies FAWS' motion to dismiss the remaining state law claims.

IT IS SO ORDERED.

Dated this 1st Day of June, 2022,
T. Douglas Dolman

United States District Judge