C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Plaintiff-Appellant-Cross Appellee,

v.

BETTER LIVING CORPORATION,

Defendant-Appellee-Cross Appellant,

-and-

FARTOWN ASSOSCIATION 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 form 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.

Brief of Appellee, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Environmental Rights Amendment (ERA):

> 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

JURISDICTIONAL STATEMENT

All members of FAWS reside in New Union. BELCO is a Delaware Corporation with its principal place of business in Centerburg, New Union. Decision and Order at 10. The United States District Court for the District of New Union exercised original jurisdiction over the CERCLA claim via 28 U.S.C. § 1331, and supplemental jurisdiction over the negligence and nuisance claims via 28 U.S.C. § 1367. The court subsequently consolidated the BELCO Action and the FAWS action at the request of all parties. *Id.*

STATEMENT OF ISSUES PRESENTED

I. Does CERCLA require the reimbursement of FAWS's incurred costs when those costs do not produce new information nor further any existing investigation of remediation?

II. Is the EPA allowed to reopen the BELCO Consent Decree (CD) and require BELCO to perform further remediation? Does the Environmental Rights Amendment (ERA) qualify as an applicable or relevant and appropriate requirement (ARAR) under CERCLA?

III. Did the EPA act arbitrarily, capriciously, or contrary to law when the agency determined that BELCO was not required to install additional filtration systems in Fartown? Was the EPA's interpretation of "clean water" in this decision contrary to law?

IV. Did the lower court have the authority to retain supplemental jurisdiction over the FAWS negligence and nuisance tort claims after resolving the federal claims?

STATEMENT OF THE CASE

The original plaintiff in this case is the Environmental Protection Agency (EPA). The original Defendant is the Better Living Company (BELCO). Upon commencement of the original action, the Fartown Association for Water Safety (FAWS) motioned to intervene. Because FAWS had an interest not previously represented, FAWS was allowed to intervene.

There are four main issues in this case: (1) are cost incurred for unnecessary testing reimbursable under CERCLA; (2) whether EPA has the authority to reopen the Consent Decree that was agreed upon with BELCO; (3) whether the EPA's decisions in the UAO were arbitrary, capricious, or contrary to law; (4) whether the lower court erred in exercising supplemental jurisdiction over FAWS's related state tort claims after resolving the federal law claims.

Every party motioned for summary judgement on each issue. The EPA respectfully requests that this Court affirm the decisions that (1) FAWS costs are not reimbursable, (2) the Consent Decree was properly reopened, and (3) retaining jurisdiction for the remaining tort claims is proper. The EPA also requests the court reverse the decision of the lower court holding that BELCO does not need to install filtration systems in Fartown.

Centerburg and Fartown are neighboring towns that sit down-underwater-river from the BELCO. Centerburg, New Union is home to around 4,500 residents. Decision and Order at 5. Fartown—a qualified environmental justice community—is home to about 500. *Id.* Both towns rely on the Sandstone Aquifer as their primary water source. *Id.* In contrast to Centerburg, Fartown does not have a central water supply and uses private wells. *Id.* Beginning in 2013, the Sandstone Aquifer became non-potable due to NAS-T concentrations. *Id.* The following factual and legal history ensued.

A. Discovering the Source of the Contamination

From 1972 to 1998, BELCO manufactured LockSeal at a BELCO factory in Centerburg, New Union. Decision and Order at 5. LockSeal is a durable sealant used to prevent industrial corrosion. *Id.* at 6. Like epoxy, LockSeal is created by combining two chemicals: an activation chemical and NAS-T. *Id.* The activation agent is non-toxic. *Id.* NAS-T is a known carcinogen—and has been since the 1980s. *Id.* NAS-T's Health Advisory Level (HAL) is 10 parts per billion (ppb). *See id.* (discussing numerous medical studies determined the HAL). The human nose, however, prefers less than five ppb due to a non-toxic sour or stale smell. *Id.*

In 2013, the human nose proved sensitive. Centerburgers complained to the Centerburg County Department of Health (DOH). Decision and Order at 6. Upon testing, the DOH found 45–60 ppb in Centerburger's tap water—almost 600% higher than the HAL. *Id.* BELCO then voluntarily provided bottled water to the residents of Centerburg. *Id.* Due to lack of resources, the New Union Department of Natural Resources (DNR) referred the investigation and remediation to the EPA in 2016.

B. Investigation, Record of Decision, Consent Decree, and Remediation

Upon investigation, BELCO and the EPA determined NAS-T was the cause of the nasty smell and taste. *Id.* at 6. BELCO concluded that NAS-T was entering the aquifer via the soil surrounding previously used unlined lagoons. *Id.* For almost 20 years, the lagoons stored BELCO's waste and storm water. *Id.* The contamination eventually seeped into the Sandstone Aquifer. *Id.*

Under the EPA's guidance, BELCO undertook a remedial investigation and feasibility study (RI/FI). *Id.* at 7. Here, BELCO monitored a total of eight wells moving from Centerburg to Fartown, finding the extent of the NAS-T plume. *Id.* At the time of testing, the five wells closest to Fartown were NAS-T negative. *Id.* Because of this, no further Fartown wells were tested. *Id.*

After the RI/FI was submitted, the EPA issued a Record of Decision (ROD) and bought action against BELCO for cost recovery. Decision and Order at 7. The EPA and BELCO then entered a Consent Decree (CD) where BELCO agreed to design and implement the EPA's selected remedy. *Id.* BELCO proposed that the contamination be minimized by removing the contaminated soil. *Id.* At the time, no citizens of either town objected to the RI/FI, the plan, or the CD. *Id.*

In compliance, BELCO: (1) installed "CleanStripping" filtration systems to remove NAS-T from Centerberg's central water supply; (2) excavated the soil around the lagoons to prevent further contamination; and (3) conducted monthly testing of the previously installed monitoring wells. *Id.* During the final months of testing, the EPA and BELCO found NAS-T at the acceptable level of 5–6 ppb in the wells closest to Fartown. Decision and Order at 8. These levels did not trigger any further action. Because BELCO completed the CD's requirements, the EPA then issued a certificate of cleanup (COC). *Id.* at 7. According to the CD, EPA could not reopen the CD unless either: "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 "where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." CD, § 13.3.

C. Contamination of Fartown's Private Water Wells

In 2016, Fartownians testified that their water smelled "off," and requested DOH sample and test their private wells. Decision and Order at 8. The DOH tested the wells and did not find NAS-T. *Id.* In response, for $21,500, FAWS hired Central Laboratories to test their private wells. Decision and Order at 8. The Lab took three samples from each of the 75 wells. *Id.* Out of 225 samples: 120 showed no detectable limits; 51 had NAS-T in the range of 1–4 ppb; and 54 had 5–8 ppb. *Id.* Notably, none of the samples exceeded the HAL of 10 ppb. *Id.*; *see also id.* at 6. Nonetheless, FAWS wrote to EPA once again asking for: the CD to be reopened, an investigation

to take place, and for remediation to be ordered. The results of the Central Laboratory's testing did not meet the standard required, so the EPA had no legal grounds to reopen the CD.

D. The Environmental Rights Amendment

Then, the citizens of New Union enacted the Environmental Rights Amendment (ERA) to the New Union Constitution. Decision and Order at 8. The amendment created a fundamental right to clean air and clean water, and a right to a healthful environment free of human caused contaminants and pollutants. N.U. CONST. art. I, § 7. Because of the amendment, the EPA wrote DNR to inquire if the ERA constituted an applicable or relevant and appropriate requirement (ARAR) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—and thus a standard that would allow the EPA to reopen the CD. *Id.* DNR responded that the ERA may be an ARAR if: (1) it was consistent with CERCLA, and (2) it was not inconsistent with state or federal regulations. *Id.*

E. Reopening the Consent Decree

Upon EPA determination that the ERA was an ARAR, a change in regulatory standards occurred. Decision and Order at 9. Furthermore, although it was a small quantity, NAS-T was found in Fartown's groundwater and Fartown was designated an environmental justice community. *Id.* After considering the ERA and risk of harm, the EPA reopened the CD in accordance with the CD's language and the EPA's legal mandate. *Id.* The EPA subsequently ordered BELCO to: (1) sample and analyze an additional 50 wells in Fartown; (2) provide bottled water to any Fartownian who's well tested between 5–10 ppb of NAS-T; and (3) install CleanStripping in wells that have NAS-T levels above 10 ppb. *Id.*

BELCO challenged the demands claiming the ERA was not an ARAR. Decision and Order at 10. In response the EPA issued a Unilateral Administrative Order (UAO) directing BELCO to

comply. *Id.* FAWS submitted a request to the EPA to take an extra step and require BELCO install CleanStripping, or take similar action, in all wells that tested positive for *any* quantity of NAS-T—regardless of concentration. *Id.* EPA expressly declined to include this requirement because such action was decided to be too excessive. *Id.*

Even after the UAO issuance, BELCO *still* refused to comply, and the following litigation began. Decision and Order at 10. In place of BELCO, the EPA supplied qualifying Fartownians with water and sampled the relevant wells. *Id.* EPA's sampling was consistent with the FAWS data with no wells testing above 8 ppb. *Id.* The EPA filed against BELCO seeking recovery for costs incurred and penalties for violation of the UAO. *Id.* BELCO answered arguing the UAO did not have a legal foundation because the CD was improperly reopened. *Id.*

F. The FAWS Action

FAWS filed, and was granted, a motion to intervene in the EPA v. BELCO action. In their intervention, FAWS challenged the UAO. Their reasoning was that the UAO failed to compel BELCO to remediate all Fartown wells FAWS claims the UAO is arbitrary and capricious and contrary to law under the Administrative Procedures Act (APA). 5 U.S.C. §706(2)(A) (2011). Additionally, FAWS, and 85 individual plaintiffs, filed an additional action against BELCO. Dkt 21-CV01776.

The FAWS suit had two main causes of action. First, under CERCLA, BELCO was liable and must reimburse FAWS $21,500 for costs paid to the Central Laboratories for testing and analyses. Second, BELCO's contamination of the Sandstone Aquifer was both negligent and a private nuisance under New Union state law. FAWS asked the court to order BELCO to: (1) Pay FAWS's response costs amounting to $21,500; (2) install CleanStripping on all NAS-T positive

wells; (3) restore the Sandstone Aquifer; (4) pay FAWS damages for the lost use, enjoyment, and value of their property; and (5) pay punitive damages.

The parties stipulate that (1) all parties have standing, (2) the CD and UAO are final agency actions, and (3) FAWS has exhausted its administrative remedies. Upon completion of discovery, all three parties moved for summary judgment. The motions were denied in part and granted in part as detailed below.

a. BELCO's Liability for FAWS Testing Costs

The district court held that, under CERCLA, FAWS's costs for sampling, testing, and analyzing private well water samples were not reimbursable. The EPA asks this court to affirm the decision of the lower court.

b. EPA's Decision to Reopen the Consent Decree Because the ERA is an ARAR

On the second issue, the district court held for the EPA and FAWS, agreeing with them that the ERA was indeed an ARAR. As a result, the court held, the consent decree could be reopened. The EPA asks this court to affirm this decision. The lower court held that the ERA met all the requirements to be considered an ARAR. This is because: (1) the ERA was properly promulgated, given the legislative history, the ERA was on its face "of general applicability;" (2) the ERA was more protective than existing federal regulations, and thus met the "stringency test;" and (3) although the ERA was not directly applicable, it was nonetheless "relevant and appropriate" since the ERA addressed issues sufficiently similar to the chemical pollutant released in the Fartown groundwater. The district court did not touch on the fourth element of timeliness because it was uncontested during trial.

c. EPA's Decision not to Order BELCO to Install Filtration Systems in Fartown

On the third issue, the district court held for FAWS's motion for summary judgement that the EPA's decision not to order BELCO to install filtration systems in Fartown was arbitrary, capricious, or contrary to law. The EPA asks this court to reverse the decision of the lower court.

d. Dismissal of the Remaining Tort Claims

On the final issue, the district court denied FAWS's motion to dismiss without prejudice for the remaining state law claims. The district court held that it had the authority to exercise supplemental jurisdiction over the remaining state tort claims. The EPA asks this court to affirm the decision of the lower court.

SUMMARY OF THE ARGUMENT

The EPA asks this court to affirm-in-part reverse-in-part the orders for summary judgment granted below.

First, the EPA requests that this court affirm the decision that FAWS's costs are not reimbursable under CERCLA. CERCLA allows the reimbursement of costs incurred by non-responsible parties in extremely narrow circumstances. Because FAWS is a non-governmental plaintiff, FAWS must show that the costs were necessary and consistent with the national contingency plan. FAWS costs were undoubtedly unnecessary because the costs did not uncover any new information. During the final months of the original CD being open, BELCO and EPA were aware that NAS-T was present in the wells closest to Fartown. The FAWS testing uncovered the same information. Because the EPA knew that trace, and scientifically non-toxic, levels were present in Fartown, the costs were incurred for unnecessary actions. CERCLA does not allow unnecessary costs to be reimbursed so the decision of the lower court was properly decided.

Second, the EPA also requests that this court affirm the lower court decision holding that the EPA had the proper authority to reopen the BELCO CD. When crafted, the parties stipulated

in the CD that the EPA could reopen the CD if new "more stringent *Regulatory Standards* are established that the clean-up plan does not satisfy." CD, § 13.3 (emphasis added). Ergo, the CD could be reopened if there was a new more stringent ARAR. The ERA satisfies the Consent Decree's requirements to reopen because it meets all the elements to be considered an ARAR. The ERA was "(1) properly promulgated; (2) more stringent than federal standards; (3) legally applicable or relevant and appropriate; and (4) timely identified." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

Third, the EPA also requests that the court reverse the decision of the lower court and conclude that BELCO does not need to install filtration systems in Fartown. The EPA's plan for measuring and remedying the NAS-T contamination was based on the record of decision. The EPA followed the record of decision to determine locations where CleanStripping filters were needed. The EPA's research and available facts determined that filtration systems were not necessary for wells with less than 10 ppb NAS-T contamination. The EPA based this decision on the safe levels of NAS-T and the need to triage the wells based on limited resources. Thus, the EPA did not act arbitrarily or capriciously in determining where filters were needed.

Further, this issue turns on the EPA's interpretation of clean water under the ERA and CERCLA. The language of the ERA and similar provisions in CERCLA do not require government actors to fully remove all contaminants and pollutants. The plain meaning of the ERA—particularly the meaning of clean water—permits some levels of pollution so long as the agency acts to remove and remedy the pollution. The structure of the ERA is vague about whether "free from contaminants and pollutants" applies to only a healthful environment or to clean air and water as well. However, applying statutory interpretation canons to the ERA indicate that the former is an appropriate interpretation of the law. Thus, the EPA's filtration system decision and

its interpretation of the ERA are grounded in fact and sound reasoning—not arbitrary and capricious, or contrary to law.

Lastly, the EPA also requests that the court affirm the lower court's decision to exercise supplemental jurisdiction over FAWS's state tort claims. The lower court had supplemental jurisdiction over the state tort cases under 28 U.S.C. § 1367(a) since the claims were related to the CERCLA issues. Federal courts have the discretion to maintain supplemental jurisdiction over state law claims that share a case or controversy as a federal law claim. The state law nuisance and negligence claims were not novel or complex claims that required remand to state courts. Further, the four factors guiding supplemental jurisdiction—judicial economy, convenience, fairness, and comity—do not support removing the case to state court. Rather these factors indicate that resolving the state tort claims here and now is more efficient—rather than start the arduous process of restarting the case in state court. Thus, the district court did not abuse its authority to exercise supplemental jurisdiction over the state tort claims when it denied FAWS's motion to dismiss.

STANDARD OF REVIEW

Motions for summary judgement are warranted if: the moving party proves there is no issue of material fact and are thus entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). All four issues in this case are interlocutory appeals from summary judgment orders. As such, the Court is limited to reviewing only the issues on appeal. To determine if a material issue of fact does exist, the Court should grant the lower court some deference and ask if a reasonable jury could find in their favor. *Rolan v. Atl. Richfield Co.*, 2019 WL 542905, at *5 (N.D. Ind. Oct. 22, 2019). To determine is the law was correctly applied, the Court's review is plenary—*de novo*. *Young v. United States*, 394 F.3d 858, 861 (10th Cir. 2005). When the issue of law involves agency interpretation, the court must ask if the interpretation is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43. Here, the court

must decide if the agency decision was based on a reasonable consideration of the relevant factors rather than a clear error of judgment. *Id.*

ARGUMENT

I. CERCLA DOES NOT REQUIRE THE REIMBURSENT OF UNECESSARY COSTS THAT DO NOT UNCOVER NEW INFORMATION OR RELATE TO THE ACTUAL CLEAN UP OR REMEDIATION.

FAWS incurred $21,500 of non-reimbursable costs by hiring Central Labs to test private wells. In narrow circumstances, CERCLA provides that potentially responsible parties may be liable to non-responsible private parties. *See* 42 U.S.C § 9607(a)(4)(B) (stating that a party may be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"). To recover, FAWS must prove that: (1) the BELCO factory is a "facility" as defined in CERCLA; (2) BELCO is responsible for NAS-T contamination; (3) NAS-T, a hazardous substance, was released; and (4) that FAWS incurred costs in response to the release. *Rolan v. Atl. Richfield Co.,* 427 F.Supp.3d 1013, 1020 (N.D. Ind. 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc*., 546 F.3d 847, 850 (7th Cir. 2008)). Additionally, because FAWS is a non-governmental plaintiff, FAWS must show an additional element: (5) that any costs incurred were "necessary" and "consistent with the national contingency plan". *Forest Park Nat. Bank & Tr. v. Ditchfield,* 881 F.Supp.2d 949, 977 (N.D. Ill. July 24, 2012) (citations omitted).

Here, the core issue is that FAWS costs were not "necessary." Necessary costs cannot be "duplicative" of an EPA or a state agency's action, and the costs must be "closely related" to the actual cleanup of NAS-T. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Ca., Oct. 28, 1997); *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005).

Duplication exists here because FAWS costs (1) don't uncover any new information beyond the findings of EPA and (2) the EPA had already conducted its own investigation. *See, e.g., La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Ca. Jan. 27,

1993) (holding that as a general-matter investigative costs incurred by a private party are duplicative unless authorized by the EPA). Although FAWS's costs did not happen at the same time as the EPA investigation, FAWS costs were not authorized and did not uncover any new information. During the final months, the EPA and BELCO found NAS-T at the acceptable level of 5–6 ppb. Decision and Order at 8. FAWS's 2019 tests found no new information beyond that. *Id.* The EPA was already aware that NAS-T was detected near Fartown in acceptable levels. *Id.* Not a single central labs sample suggested otherwise. Because FAWS costs do not uncover new information the costs are duplicative and do not meet the Louisiana test for necessary costs under CERLCA. *La.-Pac. Corp.*, 811 F. Supp. at 1425. Nor is the EPA required to investigate contamination found in an acceptable health range or in trace amounts.

Further, FAWS's costs were not closely tied to the actual cleanup of hazardous releases. *Young*, 394 F.3d at 863. For there to be a close relationship between the costs and the actual clean up there must be some evidence that the response actions were taken to assist and plan remediation. *See Wilson Rd. 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) (holding litigation costs are non-recoverable under CERCLA). In contrast, FAWS took the actions solely for the purpose of overseeing and enforcing BELCO's responsibilities to remediate the NAS-T contamination—when there were none. Decision and Order at 12; *see Wilson Rd. Dev't Corp.*, 209 F.Supp.3d at 1113 (concluding that costs incurred while "overseeing another private party's legal obligation to [remediate] a property . . . without direct involvement in the responsible party's remediation and detoxification efforts" are not required costs reimbursable under CERCLA).

Additionally, reimbursing FAWS is against public policy. Allowing private parties to undertake their own response actions would frustrate CERCLA. This is especially true in this case, where harmful levels of NAS-T were extremely unlikely and were never found by FAWS. CERCLA allows for the conclusion of objective investigations via a hazard ranking system. 42 U.S.C. § 9605 (2002). Additionally, CERCLA allows for the reopening of such investigations under extremely specific circumstances like: (1) upon new information showing the clean-up plan no longer meets the HAL; or (2) if a new, more stringent regulatory standard is established for which the plan does not satisfy. CD, § 13.3. At the time the costs where spent, the EPA had neither new information nor a new regulation. So, the EPA had no legal grounds to reopen the investigation. Because of this, the EPA requests the court affirm the decision of the lower court decision to grant the motion for summary judgment and hold that FAW's costs were not necessary and are thus non-reimbursable under CERCLA.

II. THE ERA IS UNEQUIVOCALLY AN ARAR. AND AS A RESULT, THE EPA HAD THE FULL AUTHORITY TO REOPEN THE CD.

Generally, ARARs are requirements and standards set forth under environmental laws; these "requirements" can be either "applicable" or "relevant and appropriate" in a CERCLA remedial action. Superfund Program; Interim Guidance on Compliance With Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. 32496, 32497 (Aug. 27, 1987). Under CERCLA, these environmental requirements (ARARs) must each be either "waived" or "attained" to ensure that the chosen remedial action protects human health and the environment. 42 U.S.C. § 9621(d) (1986). Proper identification of ARARs can help in determining clean up goals and what remedies are better suited for a given case.

What is the difference between the "applicable" requirements and "relevant and appropriate" requirements? They both encompass cleanup standards, standards of control, or other

substantive environmental limitations promulgated under Federal or State law. Superfund Program; Interim Guidance on Compliance With Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. at 32497. However, "applicable" requirements specifically address a hazardous substance or pollutant located at the given CERCLA site. *Id.* Meanwhile, "relevant and appropriate" requirements are more general. "Relevant and appropriate" requirements include any standards that do not specifically address a pollutant at the cite, but instead address a problem "sufficiently similar to those encountered at the CERCLA site." *Id.* For example, in a case about closing an undisturbed hazardous waste site, RCRA regulations may not be considered a fully "applicable" requirement, however, RCRA regulations for closure-by-capping may still be deemed "relevant and appropriate." *Id.*

There are important things to note within this definition, requirements deemed to be only "relevant and appropriate" must still be complied with *fully* and to the same degree as if it were an "applicable" requirement. *Id.* There is also a great deal of discretion given to an agency in their determination of whether a requirement is "relevant and appropriate." *Id.* ARARs are also not limited to only federal requirements. Remedies must also comply with state requirements (State ARARs). *Id.* State ARARs must be taken into account when the State environmental standard is more stringent than any federal standard or limit. 42 U.S.C. § 9621(d)(2)(A) (1986).

A. <u>The ERA meets all the necessary elements to be considered an ARAR</u>

Under CERCLA, a State environmental requirement constitutes an ARAR (which an agency must then attain or waive) if it meets four elements, the regulations and requirements must be: "(1) properly promulgated; (2) more stringent than federal standards; (3) legally applicable or relevant and appropriate; and (4) timely identified." *United States v. Akzo Coatings of Am., Inc.*,

949 F.2d 1409, 1440 (6th Cir. 1991). It is helpful to elaborate on these elements so it will be easier to understand how the circumstances of this case show that the ERA is an ARAR.

First, the element of promulgation. Generally, to promulgate is to impose laws or rules on all people of a particular state. *See* Superfund Program; Interim Guidance on Compliance With Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. at 32498 (noting how there are two important elements to watch out for. The law or rule must be (1) of general applicability, and (2) formally adopted.). For example, State advisories, guidance, or non-binding policies are not treated as promulgated because they are not "generally applicable."[1] *Id.* On the other hand, State statutes, goals, and regulations that have numerical standards for pollutants are generally considered to be promulgated because they have been formally adopted and are generally applicable. *Id.*

Second, potential State ARARs must be "more stringent" than federal standards. This means that State requirements or standards need to have higher criteria than a corresponding federal standard. *See, e.g., United States v. Akzo Coatings of Am.*, Inc. 949 F2d. 1409, 1443 (6th Cir. 1991). However, this does beg the question, what happens if there is no corresponding federal standard? In these instances, EPA guidance states that "where no Federal ARAR exist . . . but a State ARAR does exist, or where a State ARAR is broader in scope than a Federal ARAR, the *State ARAR* is considered *more stringent*." National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394-01, 51435 (Dec. 21, 1988) (emphasis added). For example, in the *Akzo Coatings* case, the Sixth Circuit compared a state statute to the Federal Safe Drinking Water Act. The court found that the two didn't perfectly match because the state statute was

[1] However, in some instances, Federal and State advisories may still be considered in determining appropriate remedies. Superfund Program; Interim Guidance on Compliance With Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. at 32498.

"*broader* in coverage and . . . more demanding in terms of cleanup requirements." *Akzo Coatings of Am., Inc*., 949 F.2d at 1443 (emphasis added). Ergo, there is not a strict need for a State ARAR to have a Federal "pair" with which the law can be compared. What is necessary is that the State ARAR is stricter and/or broader than existing Federal ARARs.

Third, whether the ARAR is legally applicable to the specific circumstance. *Akzo Coatings of Am., Inc.*, 949 F.2d at 1445. This element means that the ARAR addresses the hazardous substance, contaminant, or pollutant in question. *Id.* For example, in the *Akzo Coatings* case, the court found the potential State ARAR (an antidegradation statute) to be a "legally applicable" requirement. Even though the "contaminant" in question was a soil toxicant and the State standard talked about antidegradation (water pollution), the court reasoned that soil toxicants end up diffusing into groundwater, which would make the antidegradation statute very applicable. *Id.* Furthermore, the court also held that even if the antidegradation statute did not meet the standard of "applicable" requirement, it certainly met the "relevant and appropriate" requirement. *Id.* This is because factors like the groundwater, the injurious substance, and the objective of the potential ARAR were all "relevant" to the conditions of the CERCLA site. *Id.* The *Akzo Coatings* case shows that there is a low bar to achieve the denomination of a "relevant and appropriate" requirement even if a potential State ARAR cannot achieve the title of an "applicable" requirement.

And lastly, the fourth and last requirement is straightforward, it asks whether the law was timely identified. *Id.* This element will not be discussed further because it was not disputed by BELCO and was not addressed by the lower court in its decision.

Before moving on to analysis, it is important to note that an agency's ARAR determination is given deference proportional to how much consideration and reasoning the controlling agency

provided when making its decision. *United States v. Mead Corp.*, 533 U.S. 218, 219–20 (2001). In other words, if an agency thoroughly considered factors in determining if a standard fit the guidelines of a State ARAR, courts will generally give the agency more discretion. *See, e.g., id.* Thus, courts are less likely to overturn an agency's ARAR determination. *Id.*

In the case at hand, the ERA easily passes all the requirements under § 9621(d). First, the ERA was properly promulgated. As a constitutional amendment it is a law of general applicability that was formally voted on and adopted. Additionally, even though the ERA does not have any numerical standards, the statute was meant to be a self-actualizing law that did not need further statutes to help it take effect. 2022 Leg. A10377, 4 (NU 2012) (statement of Assemblymember Wright). Second, the ERA is more stringent than any existing federal standard. Although there is no exact mirroring federal statute to compare the ERA to, courts have stated that so long as the State ARAR is broader in coverage and scope, then the State ARAR should be considered "more stringent." *See Akzo Coatings of Am., Inc.*, 949 F.2d at 1443; *see also* National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394-01, 51435 (Dec. 21, 1988). Third, the ERA is legally applicable in this case. It is true that NAS-T impacts the groundwater, and the ERA does not specifically address groundwater pollution. However, the ERA is still, at the very least, a "relevant" requirement. The ERA's goal is that every person has access to a healthful environment through clean air and clean water, free from contaminants. N.U. Cont. art 1, § 7. Because the ERA touches on the topics of health, clean water, and contaminants, it therefore, addresses issues relevant to this CERCLA case and the NAS-T contamination.

And as a last issue, it is important to remember that courts have been hesitant to contradict an agency's determination of an ARAR. *Mead Corp.*, 533 U.S. at 219–20. Courts, generally, avoid imputing their own opinions in the place of an agency's determination. *Chevron, U.S.A., Inc. v.*

NRDC, 104 S.Ct. 837, 844 (1984). If the agency has considered the relevant factors and "shown their work," then the courts will give deference to their decision. *Id.* In this case, the EPA made a determination—the ERA is an ARAR. They did so by considering the four elements that constitute an ARAR. It would be unjust and a reversal of decades of precedent for this Court to reverse the EPA's well-thought-out determination.

B. As a result, because the ERA is an ARAR, the CD should be reopened.

Consent decrees often dictate when, and under what circumstances, the controlling agency is permitted to reopen the consent decree and order further remediation. *See* Superfund Program; Covenant Not To Sue, 52 Fed. Reg. 28038, 28041 (July 27, 1987) (noting how the "reopener for remedy" option should be used when "additional information [has been] received" that make the present remedy incapable of protecting public health or the environment). Additionally, even in instances where consent decrees amendments are challenged, courts merely decide whether the agency's consent decree determination met the low bar of being "fair, reasonable, and faithful to the objectives of the governing statute." *United States v. Cannon Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). For example, in *United States v. CBS Corp.*, the district court found that the EPA's proposed amendment to a consent decree was fair because the amendment's terms were reasonable and consistent with the goals of CERCLA. *United States v. CBS Corp.*, No. 1:00-CV-660RLYKPF, 2009 WL 2230889, at *7 (S.D. Ind. July 23, 2009).

In the case of this consent decree between BELCO and EPA, this consent decree had two specific grounds under which EPA could reopen the consent decree. The first ground is not disputed and inapplicable to this issue. The second ground reads "where new, more stringent *Regulatory Standards* are established that the clean-up plan does not satisfy." CD, § 13.3 (emphasis added). Additionally, CD § 1.12 defines "Regulatory Standards" to include "applicable and relevant and appropriate requirements" (ARARs). CD, § 1.12. Therefore, because the ERA is

an ARAR (as discussed thoroughly above), and the consent decree allows for reassessment after a new ARAR establishes a more stringent requirement, then the EPA had full authority to reopen the consent decree. The EPA requests the court affirm the decision of the lower court stating that (1) the ERA was an ARAR, and as a result, (2) the EPA had the authority to reopen the CD.

III. The EPA's determination that BELCO was not required to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law.

Agency decisions and their subsequent judicial review are governed by the Administrative Procedures Act (APA). The APA grants judicial review over agency actions, allowing courts to "hold unlawful and set aside agency action, findings, and conclusions [that are] found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This judicial review is available for "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C.S. § 704. Additionally, agency actions are considered final regardless of "whether or not there has been presented or determined an application for a declaratory order [or] for *any form of reconsideration*." *Id.* (emphasis added). A record of decision (ROD) agreement (which establishes the cleanup levels and adopts the final cleanup plan), made in accordance with CERCLA, is a final decision under the APA. *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wn. App. 926, 937–38 (2005).

A. The EPA's determination was not arbitrary or capricious because the *facts did not support further instillation of filtration systems.*

The circuit courts have evaluated agency actions involving ROD decisions time and time again. Many courts have found that agencies act arbitrarily, capriciously, or contrary to law when the agencies act without first checking the facts. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (ruling that the USDA's about-face on a ROD risk evaluation without a change in facts was arbitrary and capricious); *see also Alaska Dep't of Env't*

Conservation v. E.P.A., 540 U.S. 461, 496–97; *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012) (reviewing challenges made against the EPA for APA compliance using the arbitrary and capricious standard).

The EPA considered the relevant factors when it made its decision not to order BELCO to install filtration systems at wells with than 10 ppb of NAS-T contamination. The EPA's strategy after reopening the CD was to triage the contamination. The EPA devised a plan to monitor 50 private wells and to take samples each month. Decision and Order at 15. For heavily contaminated wells (wells exceeding 10 ppb of NAS-T), EPA ordered BELCO to install CleanStripping filters. *Id.* at 9. For nominally contaminated wells (wells containing 5–10 ppb of NAS-T concentrations), the EPA made monthly deliveries of bottled water to impacted households. *Id.*

The EPA had to consider the cost and resource availability while devising its triage approach. When the EPA reopened the CD, BELCO refused to comply with the UAO. Decision and Order at 10. The EPA was then required to pay for the sample testing, filter instillation, and bottled water supplies on its own. Sampling and treating the Sandstone Aquifer had the potential to cost over $45 million. *See id.* (citing the RI/FS estimate 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"). Since the EPA had limited resources, without BELCO pulling its weight to remedy the damage it caused, the EPA would not have been able to provide filters for all 50 wells without over-burdening taxpayers. Thus, EPA needed to prioritize wells that were heavily contaminated to prevent that contamination from seeping into other wells and spreading the problem to other parts of Fartown.

This triage method is effective as both a time- and resource-saving measure. The EPA prioritized the heavily contaminated wells to remove dangerous levels of NAS-T. Placing filters

at these sites helped reduce the risk of harm and the amount of time needed to remove the NAS-T contamination. However, in other places where the NAS-T concentrations were significantly lower, the EPA devised a solution to aid the community while following the most effective mode of recovery: letting nature take its course. Installing filters at these nominally contaminated sites may not guarantee an expedited clean-up of the NAS-T contamination. Installing filters does not expedite the rate at which ground water flows. Groundwater flows through porous rock, which naturally filters and absorbs additives in the water. CleanStripping filters can help bolster this process by filtering larger quantities of additives, especially in situations where large amounts of contamination need to be cleaned up. Thus, the CleanStripping filters help with larger contamination issues, but have diminishing returns as the contamination amount declines.

Therefore, the EPA took appropriate action to fulfill its duties under federal law and the ERA because it acted to remove contamination in the most effective measures available based on the severity of the contamination and resource constraints. This action was grounded in the facts and circumstances and not on the whims of agency officials. Thus, the EPA did not act arbitrarily or capriciously.

C. The EPA's UAO did not violate the ERA because the EPA's interpretation of *"clean water" was not contrary to law.*

There is no set definition for "clean water," within the US legal framework. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1276 (1972);[2] 42 U.S.C.A. § 9601. CERCLA, however, does define

[2] The Clean Water Act (CWA), while not at issue in this case, does provide some guidance due to its impact on water quality in the US. The main goal of the CWA is to restore and maintain the "chemical, physical, and biological integrity" of the Nation's waters. 33 U.S.C. § 1251(a). While the CWA's goals include eliminating the discharge of pollutants by 1985 and prohibit "the discharge of toxic pollutants *in toxic* amounts," (emphasis added) these goals are aspirations, not the legal mandate of the CWA. *Id.* § 1251(a)(1), (3). For instance, the CWA "limit[s] and monitor[s]—but does not prohibit—the addition of pollutants to our waterways from point sources." David Firestone et al., *Environmental Law for Non-Lawyers* 91 (5th ed. 2014).

several terms crucial to cleaning up pollution in water: removal and remedy. CERCLA's definition of removal states that the term means "the cleanup or removal of released hazardous substances from the environment" and directs that action be taken to "prevent, *minimize, or mitigate damage* to the public health or welfare or to the environment." 42 U.S.C.A. § 9601(23) (emphasis added). CERCLA defines remedy as:

> actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release . . . of a hazardous substance into the environment, *to prevent or minimize the release of hazardous substances* so they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C.A. § 9601(24) (emphasis added). The ERA does not define clean water either. *See* N.U. Const. art. 1, § 7.

Clean water would include water that has human caused pollution removed or remedied. Removed pollution would have to be prevented, minimized, or mitigated, based on the definitions in CERCLA. The NAS-T contamination is past the point of prevention. Thus, the Sandstone Aquifer pollution needs to be either minimized or mitigated. Minimize means "to reduce or keep to a minimum," which would not require the full elimination of pollution. *Minimize*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/minimize (last visited Nov. 21, 2022). Similarly, mitigate means "to cause to become less harsh or hostile" or "to make less severe or painful." *Mitigate*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/mitigated (last visited Nov. 21, 2022). These definitions focus on *reducing* quantity or risk, not *eliminating* the substance at issue. Thus, the plain meaning of the terms governing the clean-up of water does not support an interpretation that clean water be completely free of pollutants.

The ERA, similarly, does not define what "clean water" means. *See* N.U. Const. art. 1, § 7; 2022 Leg. A10377 at 4–5 (NU 2012) (stating that clean water under the ERA "doesn't mean that the water is free o[f] any or all substances besides H2O[;]" it merely means that the public water supply does not harm the public). The ERA's structure, however, may provide some guidance. The ERA states that each person in New Union has a fundamental right "to clean air and water and to a healthful environment free from contaminants and pollutants." N.U. CONST. art. I, § 7. The two uses of the word "to" in this amendment indicate that there are two fundamental rights guaranteed in the ERA: (1) a right "*to* clean air and clean water" and (2) a right "*to* a healthful environment free from contaminants and pollutants." *Id.* (emphases added); *see* 2022 Leg. A10377 at 5 (NU 2012) (distinguishing the clean water section of the ERA from "the later part of this amendment"). This interpretation of the ERA is supported by two factors: first, the structure of the appositives in the amendment, and second, the rule against surplusages.

First, commas are generally used to separate dependent clauses or nonrestrictive appositives. *See* Bryan Garner, *The Redbook: A Manual on Legal Style* § 1.6(c) (4th ed. 2018) (stating that restrictive appositives "add information that is essential to identify the noun it attaches to" and are not "set off with commas"). Here, the phrase "to a healthful environment free from contaminants and pollutants caused by humans" should be read as a restrictive appositive modifying "healthful environment." The modifying phrase is not set off by commas from the most recent object in the sentence. Therefore, the phrase "free from contaminants and pollutants . . ." is used in direct response to "healthful environment," and modifies the term. "Healthful environment" and its modifier are distinguished from "clean air and clean water using an "and"—which connects two distinct ideas. Since clean air and clean water are distinct from "healthful environment," in the sentence structure, they are not modified by "free from contaminants and

pollutants caused by humans." This interpretation results in clean air and clean water not having the requirement to be devoid of these additives.

Second, the rule against surplusage also supports this interpretation that "clean air and clean water" is distinct from "a healthful environment." The rule against surplusage is a statutory canon that states "the proper interpretation of a statute is one in which every word has meaning." Linda Jellum, *The Legislative Process, Statutory Interpretation, and Administrative Agencies* 295 (2016); *see, e.g.*, *Feld v. Roberts & Charles Beauty Salon*, 459 N.W.2d 279, 284 (Mich. 1990). If a "healthful environment free from contaminants and pollutants caused by humans" encompasses clean air and clean water, then these terms would be devoid of meaning. If the ERA were meant to have all three mediums—air, water, and the environment—be devoid of "contaminants and pollutants caused by humans," then the ERA should have been written as "a fundamental right to a healthful environment free from contaminants and pollutants caused by humans." Since that is not the case, the ERA should be interpreted to give distinct meaning to "clean air and clean water" and a "healthful environment."

There are no explicit definitions that require the EPA to ensure "clean water" devoid of "contaminants and pollutants caused by humans." The plain meaning and linguistic canons guiding the interpretation the ERA do not create an implicit requirement either. The EPA's interpretation of clean water and related terms in the ERA and CERCLA only required that the EPA minimize and mitigate the pollution. Thus, the EPA's interpretation of clean water was not contrary to law.

The EPA's UAO's approach towards cleaning up the NAS-T contamination in Fartown and its method of holding BELCO accountable were based on the facts and practical constraints. Thus, the EPA did not act arbitrarily or capriciously regarding the decision to install filtration systems. Additionally, the UAO is not contrary to law because the EPA relied on a reasonable

construction of the term "clean water" and the ERA. Therefore, this court should reverse the lower court's decision and uphold the entirety of the UAO.

IV. THE DISTRICT COURT DID NOT ERR IN RETAINING JURISDICTION OVER FAWS' REMAINING STATE LAW TORT CLAIMS AFTER THE FEDERAL CLAIMS WERE RESOLVED.

Courts are entities of efficiency. The U.S. judicial system utilizes twin judicial systems—state and federal—to manage cases and ensure that controversies are brought before qualified judges. Despite splitting legal issues between state claims and federal claims to manage the flow of cases, legal issues often present complicated situations that do not fit squarely within the federal–state court framework. To address interconnected legal issues or parties, federal courts developed the procedural principle of supplemental jurisdiction. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); 28 U.S.C. § 1367. This supplemental jurisdiction permits federal district courts "to hear claims that are not within their original jurisdiction." Martin H. Redish, *15A Moore's Federal Practice Civil Chapter 106*. Federal courts are given this power under 28 U.S.C. § 1367(a), which states:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have 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.

(Emphasis added).[3] However, district courts have the discretion to decline supplemental jurisdiction over legal claims under § 1367(a) when specific circumstances arise. *See id.* §§ 1367(c)(1)–(4). Courts also weigh four factors to determine supplemental jurisdiction: 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)).

[3] Further, supplemental jurisdiction under § 1367(a) applies to parties that make claims as a result of "joinder or intervention of additional parties." *Id.*

A. The District Court *has supplemental jurisdiction in this case because the state law claims arise out of the same action between the EPA and BELCO, over the contamination of the Sandstone Aquifer.*

The main case or controversy in the present case are derived from CERCLA, which gives the federal district court jurisdiction under 28 U.S.C. § 1331's federal question jurisdiction. The case was originally brought by the EPA against BELCO for BELCO's violation of the UAO. Decision and Order at 10. FAWS intervened in the case in two regards: first, in an action against the EPA and second, in a class action against BELCO. *Id.* The second intervention issue (the class action) invoked state law torts claims under nuisance and negligence theories. *Id.* While not subject to the original jurisdiction of the federal district court, the court had supplemental jurisdiction over these issues under 28 U.S.C. § 1367(a). The court has supplemental jurisdiction because the state tort claims pertain to BELCO's NAS-T spill, and the case brought by the EPA to address BELCO's violation of the UAO.

B. The District Court did not err because the state law tort claims—nuisance and negligence—are not novel or complex issues under 28 U.S.C. § 1367(c)(1).

Generally, when state claims are brought alongside federal claims, federal judges may elect not to exercise supplemental jurisdiction over a claim if the claim "raises a novel or complex issue of State law." *Id.* § 1367(c)(1). Examples of "novel or complex" issues include state environmental tort class action suits or "new state regulatory scheme[s]." *See Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152–53 (D.C. Fl. Jan 6, 2020); *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 364 (D.C. Md. Sept. 16, 2020). However, other forms of state tort cases are not "novel or complex." *See e.g., Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 744 (citing *INX Intern. Ink Co. v. Delphi Energy & Engine Management Systems*, 943 F. Supp 993, 997). Nuisance and Negligence claims are not generally complex or novel issues. *Id.*

Here, the issues at stake are state tort claims made under nuisance and negligence theories. Nuisance and negligence are not novel legal theories, the likes of which have never been seen before a federal court. These claims can be distinguished from *Miller* because the state tort claims in Miller involved "the duties Florida municipalities owe to their citizens in environmental torts spanning decades" and "issues of state-law sovereign immunity." *Miller*, 424 F.Supp.3d at 1153. FAWS's state tort claims do not seek to determine duties owed by New Union or its municipalities, or anything of the sort. Rather, the FAWS claims are about whether BELCO breached its duty of care and whether the NAS-T contamination was a nuisance. Since these factors do not raise questions about the duties or law surrounding New Union (including the ERA), these tort claims are not novel or complex exercises of state law. Therefore, the comity factor ways in favor of retaining supplemental jurisdiction over FAWS's tort claims.

The present case can also be distinguished from *MediGrow*. The court in *Medigrow* dismissed the state tort claims because the state claims concerned "the intricacies of a new state regulatory scheme." *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 376 (D.C. Md. Sept. 16, 2020). Here, however, there is no new regulatory scheme to base negligence and nuisance claims off of. These state torts claims seek to establish liability for BELCO's actions under the common law. These torts are not part of a greater regulatory—or statutory—system established by the ERA. existed long before the ERA was established. Further, these torts established liability outside of the violations of the ERA's fundamental rights. Therefore, FAWS's state tort claims do not seek to create novel or complex rulings about the ERA.

Ultimately, the FAWS state tort claims seek to establish liability for BELCO's actions using basic common law tools. Therefore, the lower court did not err in maintaining supplemental jurisdiction over the claims because the state tort claims are not "novel or complex."

C. The District Court did not err because the federal courts have continuing jurisdiction over this case since this case relates to the prior BELCO Action to enforce the CD and removing the case to state court would create inconsistent court rulings.

Generally, federal judges have the discretion to retain or decline supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). District courts also look to other factors as well, 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)).

Here, the court should exercise continuing jurisdiction over the state tort claims to ensure a systematic remedy to the NAS-T contamination and resulting remedies. One of FAWS's goals in removing the case to state court is to acquire injunctive relief against BELCO. (Problem at 18). The injunction FAWS seeks would require BELCO to remediate the aquifer and perform other actions that would conflict with the CD and UAO. *Id.* This effect would run afoul with several of the factors guiding supplemental jurisdiction.

First, this effect would run contrary to judicial economy. Judicial economy's goal is to avoid relitigating settled matters. *See* Rowe v. Fort Lauderdale, 279 F.3d 1271, 1286 (11th Cir. 2002). Here, the CD is already an established plan to remedy the NAS-T contamination in the Sandstone Aquifer. This plan was developed by the EPA and BELCO, and considered community feedback. Decision and Order at 7. Subsequent actions, such as the UAO were developed in accordance with this CD. *Id.* However, this plan would essentially be rewritten and modified by any state court injunctions. The effect would be to essentially create a new or modified CD to address the contamination. Since state court decisions would rewrite final agency actions and matters addressed in the federal court system, judicial economy favors retaining jurisdiction.

Second, the convenience factor would also weigh in favor of retaining supplemental jurisdiction. The goal of convenience is to address legal issues at one time, rather than addressing

the problem in a piecemeal fashion—bringing the same problem to the courts, time and time again. *See Ameritox, Ltd. v. Millenium Labs., Inc.*, 803 F.3d 518, 539 (11th Cir. 2015). Here, the most convenient resolution to this case would be to resolve the issues in the federal court. The key parties have already submitted briefs, made stipulations, and started discovery to address the motions for summary judgment. Rather than tear down the tent and move the circus to the state courthouse, the federal court should let the show go on. That way this litigation over the Sandstone Aquifer and NAS-T can conclude and the parties can work to remedy the harm caused to Fartown and the residents' water supply. Thus, convenience favors supplemental jurisdiction over the state tort claims.

Third, fairness favors retaining supplemental jurisdiction. Removing the state tort claims to state court would require the EPA to intervene in the case to prevent interference with the CD and UAO. BELCO would likely have to defend against another action. Further, FAWS would have the opportunity to present the same claims before a different court. *See* Decision and Order at 10; 28 U.S.C. § 1367(d) (detailing that the statute of limitations tolled when FAWS brought the state claims under supplemental jurisdiction, so FAWS would not be barred from bringing the case to state court). However, there is one benefit that FAWS would gain by removing the claims to state court: forum shopping. Forum shopping is used by parties to shop around for the most favorable outcome based on the jurisdiction. *See* Forum Shopping, Black's Law Dictionary (9th ed. 2009) (defining forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim may be heard"). The principle of fairness would not be upheld by allowing two parties to reset their legal strategies and abandon the work they have done in federal court, just for one party to gain an advantage. Thus, fairness weighs heavily in favor of retaining supplemental jurisdiction.

Finally, the comity factor does not deter supplemental jurisdiction. Comity seeks to avoid "needless decisions of state law . . . to promote justice between the parties by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Here, the federal court would have to apply state law for these state tort claims if the federal court maintains jurisdiction. However, this would not be a reworking of state law that would muddle the waters of state tort law. Instead, the federal court would be required to apply New Union negligence and nuisance law to the facts. As these are basic principles of tort law, there is unlikely to be any surer-footed area of law than negligence and nuisance. Thus, there should be an abundant source of New Union common law from which to rely on for this case. Therefore, the comity factor does not weigh against retaining supplemental jurisdiction.

The risk of creating alternate and inconsistent rulings between state and federal courts is too high for the court to remove FAWS's state tort claims to state court. The four factors—judicial economy, convenience, fairness, and comity—weigh in favor of retaining supplemental jurisdiction. Therefore, the lower court did not err in retaining jurisdiction over FAWS's state tort claims after the parent federal law claims were resolved.

The lower court's decision to retain supplemental jurisdiction should be affirmed because the state tort claims were not "novel or complex," and the harm of inconsistent rulings does not outweigh the four factors guiding supplemental jurisdiction.

CONCLUSION

For the foregoing reasons, the EPA respectfully requests that this Court affirm the decisions that (1) FAWS's costs are not reimbursable, (2) the ERA is an ARAR and thus, the Consent Decree was properly reopened, and (3) retaining jurisdiction for the remaining tort claims is proper. The EPA also requests the court reverse the decision of the lower court holding that BELCO does not need to install filtration systems in Fartown.