C.A. No. 22-000677

In the 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,

v.

FARTOWN ASSOCIATION FOR WATER SAFETY, ET AL.,

Intervenor Plaintiffs-Appellants-Cross Appellants.

On Appeal from the United States District Court
for the District of New Union
Honorable Douglas Bowman, Judge Presiding
Consolidated Cases no. 17-CV-1234 and 21-CV-1776

BRIEF OF PLAINTIFF-APPELLLANT

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JURISDICTIONAL STATEMENT

Fartown Association for Water Safety ("FAWS"), the Better Living Corporation ("BELCO"), and the U.S. Environmental Protection Agency ("EPA") each appeal from an Opinion and Order entered June 1, 2022, by the honorable Judge Douglas Bowman in the U.S. District Court for New Union, consolidated case nos. 17-CV-1234 and 21-CV-1776. The District Court had subject-matter jurisdiction through federal question jurisdiction under 28 U.S.C. § 1331 and through supplemental jurisdiction under 28 U.S.C. § 1367. EPA, BELCO, and FAWS each timely filed Notices of Appeal pursuant to Fed. R. App. P. 4. The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 29 U.S.C. § 1291, which grants this Court "jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE 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?
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?
3. Did the District Court err when it vacated EPA's determination that BLECO is not required to install filtration systems arbitrary, capricious or contrary to law despite the existence of the ERA?
4. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

Factual Background

The consolidated cases stem from Better Living Corporation's ("BELCO") unlawful contamination of the Sandstone Aquifer located within in the State of New Union, BELCO's requirements and obligations under federal law as the entity responsible for the contamination, and from the intervention of the Fartown Association for Water Safety ("FAWS") as a group of residents affected by the contamination, R. at 1.

NAS-T Contamination of the Sandstone Aquifer

Centerburg, in the State of New Union, is a small town that neighbors rural Fartown, an environmental justice community with about 500 residents. *Id.* at 1-2. Both communities receive their water from the Sandstone Aquifer, which lies beneath both communities, with water in the aquifer flowing from Centerburg to Fartown. *Id*.

For over 25 years, BELCO manufactured NAS-T, a carcinogen that is toxic at certain levels, used in one of BELCO's products, at a BELCO-owned factory in Centerburg. *Id*. at 3. NAS-T's characterization as a carcinogen, backed by numerous studies in the 1980's, led the Environmental Protection Agency ("EPA") to issue a Health Advisory Level ("HAL") for NAS-T of 10 parts per billion ("ppb") in water. *Id*. Even if NAS-T is not toxic at or below the HAL, as the parties agree, the human nose can detect it in water at concentrations as low as 5ppb, where NAS-T will produce a sour or stale smell. *Id*.

BELCO's reckless and negligent handling of NAS-T resulted in spills that ultimately caused NAS-T to leak into the Sandstone Aquifer at concentrations between 45 and 60 ppb underneath Centerburg. *Id*. Pursuant to Centerburgers' complaints and the Centerburg County

Department of Health's ("DOH") recommendation, EPA began supervising a BELCO-led investigation of the contamination on January 30, 2016. *Id*.

The investigation revealed that Fartown's water supply had not been contaminated, evidenced by multiple non-detects in Fartown monitoring wells. *Id*. at 4. Furthermore, EPA's feasibility study revealed that remedial action should not be conducted on the Aquifer because remediation would be too costly. *Id*. Instead, BELCO proposed a clean-up plan to the public, to which EPA gave comment, leading EPA to select a clean-up plan through a Record of Decision ("ROD"). *Id*.

After the investigation, EPA brought a cost recovery action against BELCO (the "BELCO Action"). *Id*. BELCO effectively accepted liability for contaminating the Sandstone Aquifer when BELCO and EPA then entered into and filed a Consent Decree ("CD") which required BELCO to design and implement the remedy selected by EPA. *Id*. The lower 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 CD. *Id*.

Pursuant to the CD, BELCO (1) installed and maintained a water filtration system to remove NAS-T at Centerburg's public water supply; (2) excavated NAS-T contaminated soils from around the Site; and (3) conducted monthly sampling of the monitoring wells around the Site installed during the investigation. *Id*. Over the next several years, BELCO's monitoring well test results were largely consistent with prior results, the few exceptions being two January 2018 detections of NAS-T in the line of wells closest to Fartown at low levels (5ppb and 6ppb). Other than those exceptions, EPA's consistent non-detects led EPA to issue BELCO a Certificate of Completion on September 2018. *Id.* at 5.

FAWS' "Investigation"

Some Fartownian's submitted complaints that the water from their private wells began to smell "off" since 2016. *Id*. Hearing about the entry of the CD, they requested DOH sample and test their water for NAS-T. *Id*. In February of 2019, DOH tested five private Fartown wells, but *again* did not detect NAS-T in any of them. *Id*. Fartownians asked EPA to order BELCO to conduct further testing in Fartown, but EPA declined because of the multiple non-detects EPA had already received from Fartown wells. *Id*.

Disagreeing with EPA's expert opinion, a group of 100 Fartownians formed FAWS and *unilaterally* retained Central Laboratories, Inc. ("Central Labs") to test their *private wells*. *Id*. There were 120 wells that *again* 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. *Id*.

The Environmental Rights Amendment and EPA's Official Investigation of Fartown

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.

R. at 5 citing N.U. CONST. art. I, § 7.

Like all New Union Constitutional Amendments, the ERA was passed by the New Union Legislature, signed by the governor, and was then included as a ballot measure in the November 3, 2020, election—passing with 71% of the vote. *Id*. In its floor debate, the New Union Legislature recognized that the term "clean" should be interpreted to mean not harmful to human health. Add. at 4-5. Following the ERA's passage, EPA wrote to the New Union Department of Natural

Resources ("DNR") seeking expert guidance on whether the ERA constitutes an applicable or relevant and appropriate requirement ("ARAR") for CERCLA purposes, to which DNR answered, "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." R. at 6.

ARAR and Reopening the CD

The CD 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 (emphasis added). Relevant to this dispute, the CD defines Regulatory Standards to include, among other things, ARARs. R. at 5 quoting CD, § 1.12.

On the grounds that the ERA is an ARAR (and therefore a change in Regulatory Standards under the CD), EPA reopened the CD and ordered BELCO to sample and analyze water from 50 private wells in Fartown. R. at 6. Before reopening the CD, EPA made sure to include its reasoning to reopen the CD in its administrative record, reasoning that includes the Central Lab results, passage of the ERA, the fact that Fartown is an environmental justice community, the possible carcinogenic effects of NAS-T, and the presence of NAS-T. *Id*.

UAO and EPA-Led Cleanup in Fartown

BELCO challenged the reopening of the CD, arguing EPA had no legal right to do so because the ERA was not an ARAR, rendering the reopening of the CD inconsistent with CERCLA. *Id*. In response to BELCO's failure to cooperate, EPA issued a Unilateral Administrative Order ("UAO"), directing BELCO to undergo these response actions:

> 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; and
>
> 3. For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install filtration on the well.

UAO § 3.2.

BELCO refused to comply with the UAO, and thus, on July 7, 2021, EPA began clean-up actions at the Site, supplying water to Fartownians whose wells tested positive for NAS-T in excess of 5 ppb and monitoring those wells through monthly sampling. R. at 7. That sampling has been consistent with FAWS' independent sampling, showing approximately 55% of samples as non-detects for NAS-T, and *as before*, no Fartown wells tested above 8 ppb. *Id*.

Procedural History

On August 2, 2021, EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and to impose penalties upon BELCO for violating the UAO. *Id*. BELCO claims that the ERA cannot be considered an ARAR, in which case EPA did not have a legal foundation to reopen the CD and issue the UAO. *Id.*

On September 24, 2021, the lower court granted FAWS' motion to intervene in the BELCO Action. *Id*. Citing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), FAWS claims EPA acted arbitrarily and capriciously in issuing the UAO because EPA did not compel BELCO to

provide FAWS' members with filtration systems for their *private* wells, which FAWS believes is required under the ERA. *Id*.

On August 30, 2021, FAWS and 85 individual plaintiffs from Fartown filed an action against BELCO in the New Union District Court (the "FAWS Action"), claiming (1) the Central Labs testing costs are recoverable under CERCLA; and (2) BELCO's contamination of the Sandstone Aquifer constituted negligence and a private nuisance under New Union state law. *Id.* FAWS sought: (1) cost-recovery from BELCO; (2) installation by BELCO of filtration systems on private wells that test positive for NAS-T; (3) remediation of the Sandstone Aquifer; (4) damages for the loss of use and enjoyment of Fartownian property and diminished property values; and (5) punitive damages. *Id*.

FAWS stated in its complaint that it intended to dismiss its state law claims once the CERCLA claims were resolved so that it can litigate those remaining state law claims in state court. *Id*. However, because BELCO already answered in the FAWS action, the lower court must give leave for dismissal, pursuant to FRCP 41(a). *Id.* at 8.

On December 30, 2021, after completing discovery on the CERCLA claims, all three parties cross-moved for summary judgment on the CERCLA claims, while FAWS additionally moved to dismiss any remaining state law claims without prejudice should the CERCLA claims be resolved by motion. *Id.* The lower court entered an Order, granting summary judgment "in favor of BELCO with respect to reimbursement of FAWS' expenses in testing; in favor of EPA with respect to its determination to reopen the CD and issue the UAO; in favor of FAWS as to vacating EPA's decision not to require installation of… [filtration] on Fartown's wells; and the Court [denied] FAWS' motion to dismiss the remaining state law claims." *Id.* at 15.

Following issuance of the lower court's Order, each party sought leave to file an interlocutory appeal from different parts of the Order. The lower court granted leave to appeal.

STANDARD OF REVIEW

The U.S. District Court for the District of New Union granted EPA's, BELCO's, and FAWS' motions for summary judgment in part and denied EPA's, BELCO's, and FAWS' motions for summary judgment in part. This Court reviews a grant of summary judgment *de novo* and views the facts in a light most favorable to the nonmovant. *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 523 (D.C. Cir. 2019). This Court reviews a District Court's retention of supplemental jurisdiction "under an abuse-of-discretion standard." *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003).

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court of New Union's holding that (1) the costs incurred by FAWS in sampling, testing, and analyzing well water samples were not recoverable as response costs under CERCLA; (2) EPA's determinations that the ERA constitutes an ARAR and EPA's decision to reopen the CD and order remedial actions in the UAO were proper; and (3) the District Court did not abuse its discretion in retaining supplemental jurisdiction over the pendant state law claims. Furthermore, this Court should reverse the District Court's holding and find that EPA's determination that the ERA does not require BELCO to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law.

FAWS is not entitled to recover its costs from BELCO because its sampling costs were not necessary or consistent with the NCP. To succeed in a cost recovery action under CERCLA, FAWS had the burden of proving that CERCLA was triggered and that its costs were necessary and consistent with the NCP. While there is no dispute as to CERCLA being triggered, FAWS

failed to establish that its incurred costs were necessary and consistent with the NCP because its actions were duplicative and it failed to allow for meaningful public participation in taking those actions.

EPA properly determined that the ERA constitutes an ARAR and appropriately reopened the CD. In order to reopen the CD, EPA had to show that there was a significant change in law or fact and that the change was unforeseeable. EPA could not have reasonably foreseen the passing of a constitutional amendment several years after the submission of the CD. The ERA is a significant change in law and constitutes an ARAR because it was properly promulgated, more stringent than federal standards, was timely filed, and is relevant and appropriate.

Furthermore, EPA's decision not to order BELCO to install filtration systems was not arbitrary, capricious, and contrary to law. To find an agency's final action unlawful under an arbitrary and capricious standard, a court must show that the agency failed to consider all relevant factors and acted outside the scope of its authority. EPA acted within the scope of its authority because CERCLA grants EPA the power to select and implement a remediation program to address hazardous waste contamination. Additionally, EPA holistically considered the relevant factors for a remediation plan under the Code of Federal Regulations when it applied expertise in interpreting the ERA.

Finally, the District Court properly retained jurisdiction over FAWS' state law claims following the resolution of the federal claims. A district court has wide discretion when determining whether to retain such jurisdiction. The reviewing court will review this decision for an abuse of discretion, which requires showing that the decision relied on an error of law, applied an incorrect legal standard, followed improper procedures, or made a finding of fact that was clearly erroneous. The appropriate legal standards required the District Court to consider issues of

judicial economy, convenience, fairness, and comity. The Court properly applied this legal standard and did not make an error of law or fact.

ARGUMENT

EPA is the utmost expert on environmental regulatory law and enforcement. Its overall goal is to protect human health and the environment. EPA is tasked with interpreting and implementing environmental laws and regulations to accomplish this goal. It is imperative that EPA can operate under this understanding, so that it is able to successfully accomplish its goal of protection. Furthermore, if EPA's ability to assess and enforce environmental standards is unduly limited by the courts or third parties, it will harm not only the regulatory process but citizens that are impacted by any environmental harm. This Court should rely on EPA's expertise and understanding of environmental laws when assessing the issues regarding environmental regulation to best protect the people and the environment.

We ask this Court to affirm the District Court of New Union's judgment in part and find that (1) the costs incurred by FAWS in sampling, testing, and analyzing well water samples were not recoverable as response costs under CERCLA; (2) EPA's determination that the ERA constitutes an ARAR and EPA's decision to reopen the CD and order remedial actions in the UAO were proper; and (3) the District Court did not abuse its discretion in retaining supplemental jurisdiction over the pendant state law claims. Additionally, we ask this Court to reverse the District Court's judgment in part and find that EPA's determination that the ERA does not require BELCO to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law.

I. The District Court Did Not Err in Ruling FAWS was Not Entitled to Recover Its Costs from BELCO.

This Court should affirm the Lower Court's decision to grant the Environmental Protection Agency's ("EPA") motion for summary judgment regarding the Fartown Association for Water Safety's ("FAWS") cost recovery claim because FAWS was not entitled to recover its sampling costs. Multiple circuits have held that to prevail in a third-party cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA") Section 107(a)(4)(B), a plaintiff has the burden of establishing that (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, ... (2) a "release" or "threatened release" of any "hazardous substance'" from the facility has occurred, ... (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and consistent with the National Oil and Hazardous Waste Contingency Plan ("NCP"); and (4) the defendant is within one of four classes of persons subject to the liability provisions. *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1003 (9th Cir. 2010); *see also U.S. v. Sterling Centrecorp Inc.*, 977 F.3d 750, 756 (9th Cir. 2020); *Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835 (8th Cir. 2000); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a)(4)(B). For the purposes of this brief, this Court should consider elements 1, 2, and 4 to be the elements necessary to establish that CERCLA is triggered so that the third-party cost recovery rule reads: a plaintiff has the burden of proving (1) CERCLA is triggered; and (2) plaintiff incurred necessary costs consistent with the NCP in response to a release or threatened release of a hazardous substance at the site.

A. BELCO Triggered CERCLA.

The parties do not dispute that Better Living Corporation's ("BELCO") contamination of the Sandstone Aquifer triggered CERCLA. CERCLA is triggered if (1) the site at which a hazardous substance is released is a "facility;" (2) a release or threat of release of a "hazardous substance" has occurred at the site; and (3) the defendant is within one of the four potentially responsible classes of parties liable under CERCLA for response costs. *See City of Colton*, 614 F.3d at 1003.

The parties do not dispute that BELCO's release of NAS-T into the Sandstone Aquifer triggered CERCLA in the BELCO Action. R. at 4. In the case of the Fartown contamination, the same three core elements are satisfied: (1) the Site has already been deemed a "facility;" (2) NAS-T is considered a "hazardous substance;" and (3) BELCO falls under a category of liability for CERCLA response costs. CERCLA having been triggered, the main dispute at bar is whether FAWS' response actions were necessary and consistent with the NCP.

B. FAWS' Actions Were Not Necessary or Consistent with the NCP.

FAWS' water sampling was duplicative and FAWS failed to provide for meaningful participation in undertaking that sampling, therefore FAWS' sampling costs were neither necessary nor consistent with the NCP. In a third-party CERCLA cost recovery action, costs are (1) "necessary" if incurred in response to an actual threat; and (2) "consistent with the NCP" if no substantial deviations from the NCP are made in incurring the costs. *City of Colton*, 614 F.3d at 1003.

1. FAWS' Actions were not Necessary Because they were Duplicative and Not Taken in Response to an Actual Threat.

FAWS' actions were not necessary because they were duplicative and not made in response to an actual threat to human health or the environment. Response costs under CERCLA are

"necessary" when there is an actual threat to human health or the environment and the response action addresses that threat. *City of Colton*, 614 F.3d at 1003; *see also City of Seattle v. Monsanto Co.*, 387 F. Supp. 3d 1141, 1158 (W.D. Wash. 2019) (holding private-party investigative costs incurred after EPA has initiated a remedial investigation are not "necessary" unless authorized by EPA because such actions are duplicative of EPA's investigation); *City of Moses Lake v. U.S.*, 458 F. Supp. 2d 1198 (E.D. Wash. 2006). In *City of Colton*, the Ninth Circuit ruled that costs are "necessary" for private-party cost recovery actions when incurred in response to an actual threat to human health or the environment. 614 F.3d at 1003. Though the Ninth Circuit reestablished this rule, it did not analyze whether the costs at bar were necessary. *Id*. at 1008.

The Court for the Eastern District Court of Washington expanded on the Ninth Circuit's *City of Colton* rule in *City of Moses*, where a city sued aircraft manufacturers to recover costs under CERCLA because the manufacturer released trichloroethylene ("TCE") into the city's drinking supply. *See* 458 F. Supp. 2d at 1205-09. The *City of Moses* Court, when analyzing whether the City's costs were recoverable under CERCLA Section 107, held, that the "necessity" of costs is contingent upon whether "there is a threat to human health or the environment and the [associated] response action addresses that threat." *Id*. at 1218. The court found that the TCE contamination did pose a threat to human health and the environment because the TCE contamination exceeded the Maximum Containment Level ("MCL") for TCE. *See Id*. at 1206, 1221. The court found that, although the TCE did pose a threat, the response costs the City incurred were not incurred in response to that threat because previous actions at the site already restored the potable drinking water lost to TCE contamination, while the City's actions at question were taken to address long-standing water shortage issues. *Id*. at 1220.

FAWS argues that there is a threat of NAS-T contamination in Fartownian wells, however, the parties agree that NAS-T is not toxic at or below the Health Advisory Level ("HAL"). R. at 3. Furthermore, no testing at Fartownian wells at any point revealed levels that reached the HAL.[1] R. at 4, 5, 7. There being no indication that NAS-T levels in any of the Fartownian wells even reached the HAL, it is safe to say that none of the trace contamination in Fartownian wells was enough to constitute an "actual threat to human health," as was present in *City of Moses*. There, TCE contamination posed a threat to human health because the MCL for TCE was exceeded. *See generally City of Moses* 458 F. Supp. 2d. An MCL is an enforceable legal threshold that EPA put in place to indicate the level at which a contaminant in drinking water will have adverse side effects on human health. *See* 40 C.F.R. § 141.2. The HAL is an unenforceable, advisory level of exposure which would not indicate the presence of a threat to human health in the same way that an MCL does, especially being that NAS-T is not even toxic at the HAL. R. at 3. In contrast to the TCE contamination in *City of Moses*, the NAS-T contamination in Fartown has not even reached the HAL, therefore, the NAS-T posed no threat which FAWS could respond to. FAWS may argue that the smell of NAS-T in its water is in and of itself a harm to them, but it is not a threat to their health, as is required in this analysis.

Moreover, FAWS' incurred its sampling costs without EPA approval after EPA had conducted its own sampling at the Site, making FAWS' sampling costs duplicative, similar to the plaintiffs' costs in *City of Seattle*. FAWS may argue that the ERA's passage necessitated further

[1] Initial EPA-approved testing of Fartown wells revealed no NAS-T contamination R. at 4. BELCO's testing was largely consistent with the first tests, showing mostly non-detects with the exception of two detections in the final line of wells at 5ppb and 6ppb. R. at 5. The Central Labs testing results revealed 120 non-detects, 51 wells with concentrations of 1 to 4 ppb, and 54 wells with concentrations of 5 to 8ppb. R. at 5. EPA's final tests of Fartown wells revealed "approximately 55% of samples [had] non-detect levels for NAS-T, 25% in the 1 to 4ppb range and 20% in the 5 to 8ppb range." R. at 7.

action at Fartownian wells, specifically installation of filtration systems or increased testing, but the ERA had not passed until after FAWS conducted its sampling, giving FAWS no legal basis from which to seek further action or to recover costs from such testing or installation. R. at 9. FAWS cannot recover these sampling costs because they were not "necessary" in the absence of a threat to human health or the environment and after EPA conducted identical sampling.

Finally, EPA, as the agency tasked with implementing CERCLA, has an interest in ensuring that clean-up efforts and investigations are orderly and of the highest quality. Allowing anyone to recover costs for investigatory or clean-up actions taken at a site would incentivize any layperson to undergo clean-up or investigatory action, without EPA approval. This would diminish the quality of the clean-up through decreased organization and lower quality remediation. CERCLA clean-ups can take quite some time, with the BELCO cleanup still ongoing at almost seven years, and muddying the waters with unnecessary additional actions will only hinder EPA's ability to remediate CERCLA sites quickly and effectively. R. at 3. Making only "necessary" costs recoverable under CERCLA Section 107(a)(4)(B) ensures CERCLA investigations and clean-ups are conducted in the most efficient way because laypersons will only be incentivized to act where actions are truly needed. In only incentivizing "necessary" costs from third parties, EPA can balance its interest in maintaining effective CERCLA clean-ups with its interest in encouraging third parties to undertake remedial actions where EPA has not acted. Here, EPA tested Fartownian wells prior to FAWS' private testing, rendering further testing by FAWS unnecessary.

2. FAWS' Actions were Materially Inconsistent with the NCP because FAWS Failed to Allow for Meaningful Public Participation in Undergoing Water Sampling.

FAWS' actions were not substantially consistent with the NCP because FAWS did not meaningfully engage the public for participation before taking its samples. Under CERCLA, for

third-party response actions to qualify for cost-recovery, those actions must be substantially consistent with the NCP, including its public participation requirements. *City of Colton*, 614 F.3d at 1003 (9th Cir. 2010); *see also Waste Mgmt. of Alameda Cnty., Inc. v. E. Bay Reg'l Park Dist.*, 135 F. Supp. 2d 1071, 1100 (N.D. Cal. 2001). In *City of Colton*, the plaintiff conceded that its costs were inconsistent with the NCP, so the court did not analyze what made those costs so inconsistent. *City of Colton* 614 F.3d at 1007. The Court for the Northern District of California utilized the "consistency with the NCP" rule from *City of Colton* in *Alameda Cnty.* 135 F. Supp. 2d at 1101. In determining whether the plaintiff's actions were consistent with the NCP, the Court found that the plaintiff's failure to provide opportunity for meaningful public participation made plaintiff's feasibility study inconsistent with the NCP, and therefore not recoverable under CERCLA. *Id*. at 1103. Specifically, the plaintiff failed to develop any community outreach plan, publish accessible public notice, or hold a public meeting with community members such that community members were unable to receive notice of the feasibility or comment on it. *Id*. at 1101. The court noted that, while immaterial and insubstantial deviations from the NCP will not defeat a cost recovery claim, allowing for meaningful public participation is an integral part of any CERCLA clean-up or investigation such that a lack thereof will defeat a cost recovery claim. *Id*. at 1100.

FAWS failed to allege its actions were in substantial compliance with the NCP, as is its burden to prove. *Id*. at 1099. FAWS makes no mention of how it engaged with the whole of Fartown in choosing to sample Fartownian wells. FAWS has not alleged that it gave public notice or that it held any community meetings, much like the plaintiffs in *Alameda Cnty.* FAWS acted unilaterally in choosing to take investigatory matters into its own hands. Yes, FAWS members may have had a say in the actions taken, but that does not necessarily indicate that all the residents of Fartown were given an opportunity to comment or give feedback. FAWS, after all, is only

comprised of approximately 100 Fartownians, whereas Fartown has a population of approximately 500. R. at 2, 5. That means that, at best, only 20% of Fartownians were a part of the choice to sample Fartownian wells for NAS-T. Although not to quite the same extent as the plaintiff in *Alameda Cnty.*, FAWS did not engage Fartown in a meaningful way before sampling Fartownian wells. Because FAWS failed to allege that it meaningfully engaged with its citizens in choosing to sample their wells, this Court should consider FAWS' actions inconsistent with the NCP, and therefore not recoverable under CERCLA Section 107.

This Court should grant EPA's motion for summary judgment regarding FAWS' cost recovery action. CERCLA was triggered by NAS-T contamination of BELCO drinking water, but FAWS' water sampling costs were neither necessary nor consistent with the NCP, leaving no room to suggest that FAWS was entitled to recover the costs associated with that unapproved sampling.

II. The District Court Did Not Err when Ruling that EPA's Determination that the ERA constitutes an ARAR and accordingly Reopened the Consent Decree.

On November 3, 2020, New Union voters approved the addition of the ERA to the New Union State Constitution. Subsequently, EPA reopened the Consent Decree ("CD") it had with BELCO for the contamination of the Sandstone Aquifer with NAS-T. EPA has the authority to modify a consent decree when there is a "significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992). The passage of the ERA constituted a significant change in law, triggering EPA's authority to reopen the CD. Subsequently, EPA classified the ERA as an Applicable or Relevant and Appropriate Requirement ("ARAR"). The EPA can determine if a state law constitutes an ARAR. *See* 40 C.F.R. § 300.430(d)(3). EPA found that the ERA was applicable, relevant, and appropriate. R. at 6. Based on EPA's determination, it was correctly and legally able to reopen and modify the CD and modify. Therefore, this Court

should affirm the District Court's decision to uphold EPA's determination that the ERA constitutes an ARAR.

A. EPA appropriately reopened the CD because the addition of the ERA to the constitution of the State of New Union constitutes a significant change in law.

The Supreme Court articulated a standard for when a consent decree may be modified. In *Rufo*, the court stated that there are two circumstances when modification is justified. The first is when there is a significant change in factual conditions. 502 U.S. 367, 384 (1992). The second is when there is a significant change in the law. *Id.* In compliance with this precedent, the CD in this case explicitly states these two circumstances for reopening. R. at 4. The focus of EPA's action is based on the amendments to New Union's Constitution. The modification would not ordinarily be allowed when the changes could be foreseen from the time a consent decree was enacted. *Id.* Because the ERA was enacted before the CD, the EPA could have not reasonably foreseen the passage of the ERA. R. at 5. Therefore, EPA satisfies the unforeseeable factor found in *Rufo*.

The Court in *Rufo* further extended the circumstances when modification is allowable by including instances "when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384-8; citing *Duran v. Elrod*, 760 F.2d 756, 759-61 (7th Cir. 1985). Modification occurred in this current case with the introduction of the ERA, which states that "every person of this State has a *fundamental right* to clean air and clean water." R. at 5 citing N.U. CONST. art 1, § 7. (emphasis added). This amendment not only establishes a significant public interest to protect human health and the environment, but it also creates a fundamental right to clean air and water. The newly formed amendment changes the state law and establishes a right to a "healthful" environment free from contaminants, which is a stronger public interest and a higher degree of protection beyond that of current federal regulatory law. *See* 42 U.S.C § 7401(b)(1) (also known as the Clean Air Act, which establishes a purpose to "enhance the quality

of the Nation's air resources so to prompt the public health and welfare"). If EPA was not allowed to modify the CD to consider the ERA, it would violate not only the new legal standard but also the newly established public interest. Therefore, EPA had the authority and ability to reopen the CD based on the passage of the ERA.

B. EPA correctly determined that the ERA constitutes an ARAR.

Under CERCLA, states have a say in determining clean-up standards when there is hazardous waste contamination. CERCLA requires EPA to consider state environmental laws when assessing clean-up standards:

> Any promulgated standard, requirement, criteria, or limitation under a State environmental law … that is more stringent than any Federal standard, … is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances, … the remedial action selected … shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement criteria or limitation.

42 U.S.C § 9621(d)(2)(A). This provision, known as the ARAR provision, allows for "state involvement in the selection and adoption of remedial actions which are federal in character." *U.S. v. State of Colorado*, 990 F.2d 1565, 1581 (10th Cir. 1993). Congress' intent was to allow the state to be a part of the regulator process and the clean-up standards of hazardous waste via the ARAR provision. *Id.*

CERCLA does not define what constitutes an ARAR. *State of Ohio v. U.S. EPA*, 997 F.2d 1520, 1526 (D.C Cir. 1993). Under the ARAR provision, EPA is required to ensure compliance with state regulatory law in the remedial action. *See Id.* The Sixth Circuit has developed a four-prong element test which includes; (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, (4) timely identified. *U.S. v. Akzo Coatings of American Inc.,* 949 F.2d 1409, 1440 (6th Cir. 1991); *see also State of Ohio* 997 F.2d at 1526, *Franklin Cnty. Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240

F.3d 534, 544 (6th Cir. 2001), *State of Colorado v. Idarado Min. Co. 916 F.2d 1486, 1494* (10th Cir. 1990). In the current case, the ERA has met the elements established in *Akzo*.

1. The ERA was Properly Promulgated

The Sixth Circuit has defined "promulgated" as "the laws imposed by state legislative bodies … that are of general applicability and are legally enforceable." *Akzo*, 949 F.2d at 1440 citing Superfund program: Interim Guidance on Compliance with Applicable or Relevant Appropriate Requirements, Notice of Guidance, 52 Fed. Reg. 32495, 325498 (Aug. 27, 1987). In *Akzo*, the court analyzed whether a state non-degradation law was too vague to be properly promulgated. *Id.* at 1441. The court found that the state law was promulgated and was not improperly vague. *Id.* at 1443. EPA, in a guidance document, stated that "general state goals that are duly promulgated … have the same weight as explicit numerical standards." *Id.* at 1441 citing Interim Guidance 52 Fed. Reg. at 32,498. Therefore, the guidance document establishes that general requirements are as properly promulgated but also as legally enforceable as numerical standards. *Id*.

The statement found in the EPA's guidance shows that a state regulation that appears vague on its face due to a lack of numerical standards will still be considered properly promulgated because general standards are enforceable. *Id*. In the current case, the ERA's goal of maintaining clean air and clean water is to be given the same regulatory weight in deciding cleanup standards as a regulation with explicit numerical standards. Further, the ERA is of general applicability. The amendment states that the citizens of New Union have a right to clean air and water, "*free from contaminants* and pollutants *caused by humans*" R. at 5 citing N.U. CONST. art 1 § 7 (emphasis added). This standard is applicable to the contamination of NAS-T in Fartownian wells. It is undisputed that NAS-T can be hazardous depending on the concentration, making NAS-T a contaminant at those certain concentrations. R. at 3. The amendment requires EPA to assess a

standard that complies with the fundamental right asserted above when selecting a clean-up standard. Because the ERA is not vague and is generally applicable, the ERA is properly promulgated.

2. The ERA is more stringent than federal standards

The second factor is whether the ERA is more stringent compared to federal standards. A state ARAR is more stringent than federal standards where "there is no *comparable* Federal requirement." *Akzo*, 949 F.2d at 1440, citing 132 Cong.Rec. S 14,915 (Oct. 3, 1986) (emphasis added). The State of New Union created a fundamental right. R. at 5. citing N.U. CONST. art 1 § 7. There are federal statutes, for example, the Clean Water Act ("CWA") and the Safe Drinking Water Act ("SDWA"), that aim to prevent pollution in water systems and have an overall goal of the protection of human health and the environment. *See* 33 U.S.C § 1251 and 42 U.S.C. § 300f. Those statutes do not establish a fundamental right to an environment free from human contaminants as the ERA establishes. In addition, the purpose of the CERCLA remedy selection process is to "select remedies that are protect[ive] [of] human health and the environment, that maintain protection over time, and that *minimize untreated waste*." 40 C.F.R. § 300.430(a)(1)(i) (emphasis added).

CERCLA establishes minimal protection against hazardous substances to protect "public health or welfare or the environment." 42 U.S.C § 9604(a)(1). Whereas the ERA establishes a fundamental right to protection against *any harmful* human-made contaminant. R. at 5 citing N.U. CONST. art 1 § 7; Add. at 4-5. New Union's State Legislature intended for "clean" to be defined as "healthful," which is further defined as "not harmful." Add. at 4-6. Standards regulating harmful contaminants offer a wide breadth of protections compared to standards that only apply to hazardous substances. Therefore, the ERA is a more stringent standard that applies to all harmful human-caused contaminants compared to just hazardous substances as found in CERCLA. There

is no comparable federal statute that protects citizens in the same way the ERA does, therefore the ERA is more stringent.

3. ERA was timely identified

The last factor to consider for applicability is whether the ERA was identified in a timely manner. To comply with the NCP regarding timely communications, the state regulatory authority should communicate with the federal agency in the early stages of the scoping process. 40 C.F.R. § 300.515(d)(2). The scoping process is when EPA analyzes the full impact of the environmental harm caused by the contamination and the project of remediation under CERCLA, and it occurs in the beginning stages of the remediation process. 40 C.F.R. § 300.430(b). This is the standard communication format for the identification and implementation of ARARs, however, in the current situation, the standard format does not work. It was impossible for New Union to identify the ARAR to EPA within the scoping process because the ERA did not get passed until after the CD was implemented. Moreover, New Union could not identify the ERA to the EPA in the early stages of the scoping process. However, the EPA was made aware of the ERA three months after its passage and therefore, it was timely identified once the ARAR was established. R. at 5-6. Even though the passage of the ERA was after the scoping stage of the clean-up process, the ERA was still timely identified within the context of this case. Therefore, because the ERA was properly promulgated, more stringent, and timely, it is applicable to the CD.

4. Relevant and Appropriate Requirements.

Lastly, the ERA is relevant and appropriate. The NCP defines "relevant and appropriate requirements" as those that "address problems or situations sufficiently similar to those encountered at a CERCLA site." 40 C.F.R. § 300.5. The ERA provides a more stringent standard than CERCLA in that all New Union citizens have a right to water and air *free from* contaminants and man-man pollutants. *See* R. at 5 citing N.U. CONST. art. 1, § 7 (emphasis added). In the

current case, NAS-T is a human-man contaminant which, based on data, is spreading into drinking water sources throughout New Union. R. at 2-3. Under this set of facts, the ERA would create a standard for cleaning up the Site. Therefore, the ERA is relevant. This application of this element is similar to what the Sixth Circuit found in *Akzo*, where the Court stated that a state law that protects against the degradation of groundwater is relevant because it pertains to the relevant element for consideration. 949 F.2d at 1446. Because the ERA pertains to preventing the spread of contaminants that harm humans through a water source, the amendment is relevant to CERCLA. Therefore, the ERA is relevant and appropriate.

ERA satisfies applicability because it is properly promulgated, more stringent, and timely. Additionally, the ERA is relevant and appropriate because it creates a standard for cleaning up the site. Therefore, the ERA IS an ARAR under CERCLA, and thus, the EPA properly and legally reopened the CD. As such, this Court Should uphold the District Court's ruling.

III. The District Court Erred in Finding that EPA's Decision Not to Order BELCO to Install Filtration Systems was Arbitrary, Capricious, and Contrary to Law.

Final agency action is subject to judicial review under the arbitrary and capricious standard. 5 U.S.C § 706(2)(A). Under this review, a court may find that an agency's action was unlawful if the agency (1) failed to consider all the relevant factors and (2) acted outside the scope of its authority. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Further, the arbitrary and capricious standard is narrow, and a court must not substitute its own judgment for that of the agency. *See U.S. Postal Service v. Gregory*, 534 U.S. 1, 7 (2001), citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

In 2021, EPA issued a Unilateral Administrative Order ("UAO") toward BELCO. R. at 6. The UAO included new requirements based on the new information used to reopen the CD. R. at 6. The UAO required the "sampling of private wells in Fartown, supplying bottled water to any

Fartownian whose well returned positive results for NAS-T, and the continuous monitoring of Fartown wells." R. at 6. Further, EPA required BELCO to install CleanStripping filtration on any well where a sample showed a concentration of NAS-T exceeding 10 ppb ("parts per billion"). UAO § 3.2 R. at 6. The EPA mandated these requirements by thoroughly looking at the record and the newly established information and testing conducted in Fartown, along with balancing the other factors required when selecting a remedy. Based on its expertise, EPA concluded that the conditions listed in the UAO would best address the contamination in Fartown. However, Fartownians disagreed. Fartownians requested a stricter clean-up standard than the previous CD dictated for their private wells. R. at 6. EPA, after consideration, declined to include filtration for non-toxic levels of NAS-T. R. at 3, 7. FAWS challenged that decision. R. at 7. The district court incorrectly ruled in favor of FAWS, stating that EPA's decision was arbitrary, capricious, and contrary to law. EPA asks this court to overturn the district court's holding and rule that EPA's decision not to require filtration was not arbitrary and capricious.

A. EPA was within the scope of its authority.

To find an agency's action was arbitrary and capricious a court must first consider if the agency was acting within the scope of its authority. *Overton Park*, 401 U.S. at 415. Under CERCLA, EPA has the authority under the NCP to establish remedies for hazardous waste sites on the National Priority List for clean-up. *See* 40 C.F.R.§ 300. The NCP applies to any release of a hazardous substance into the environment. 40 C.F.R.§ 300.3(a)(2). Further, the NCP allows for the efficient, coordinated, and effective response to all discharges of a hazardous substance, which include procedures undertaking a response action under CERCLA. 40 C.F.R.§ 300.3(b)(4). Under CERCLA, EPA has the authority to select and implement a remediation program consistent with

the purpose of "eliminat[ing], reduc[ing] and control[ling] risks toward human health and the environment" from hazardous waste contamination. 40 C.F.R.§ 300.430(a)(1).

Further, the lead agency, in this case EPA, has the authority to investigate and create a remedial plan to address hazardous waste contamination. *See generally* 40 C.F.R. § 300.430. Congress, when establishing CERCLA, provided EPA with broad discretion in what it can choose to put in a remedial action plan. See 40 C.F.R §. 300.430(a)(1)(iii) - (a)(2) (providing the EPA with the power to "generally" consider a list of expectations when creating a remedial plan while also giving the EPA the power to tailor the factors to meet the current situation). Congress' intention is highlighted by listing many different forms of remedial actions with the caption that states, "[t]his list shall not be considered inclusive of all possible methods of remedying releases and does not limit the lead agency from selecting any other actions deemed necessary in response to any situation." 40 C.F.R.§ 300 Appendix D(a). This note that Congress included shows the broad discretion that EPA has when determining what can be included in remedial action.

In this current case, EPA, under the authority of CERCLA, conducted a feasibility study and an assessment of the current situation. R. at 3. After including the new-found information gathered after the reopening of the CD, EPA adopted a new standard for remediation. R. at 6. Under the new action plan, and using expert judgment, EPA included certain action steps in the UAO to best protect human health and the environment while assessing the other factors. This decision was well within the scope of EPA's authority and therefore, EPA did not act arbitrarily nor capriciously when selecting the remedial action.

B. <u>EPA considered all the relevant factors in the decision.</u>

In addition, not only did EPA have the authority to select the remedy in the UAO, but it also considered all relevant factors. The Code of Federal Regulations ("the Code") requires EPA to consider nine factors when selecting a remedy, including overall protection of human health and

the environment, compliance with ARARs, long-term effectiveness, and cost. 40 C.F.R § 300.430 (e)(9)(iii)(A)-(I). Further, the Code requires that when the lead agency is selecting the remedy, the remedy shall "reflect the scope and purpose of the actions being undertaken and how the action relates to the long-term, comprehensive response." 40 C.F.R § 300.430(f)(1). EPA, in the CD, had gone through the factors listed above and was in compliance with the Code. For example, EPA decided not to take remedial action on the underground plume due to the action not being cost-effective. R. at 4. However, after the adoption of the ERA, which constitutes an ARAR, EPA assessed the factors to stay in compliance. After looking at the ERA and the intentions behind the statute's enactment, EPA thoroughly examined and created a response action to comply with the new ERA standard. Therefore, even after the new state statute was enacted, EPA still considered all the relevant factors when selecting a remedy.

1. EPA based its standards for the UAO on the definition that "clean" means "not harmful" because New Union's Congress has spoken directly on this definition.

The question facing the court is whether EPA thoroughly considered all relevant factors when selecting a remedy for the UAO. EPA had considered all relevant factors to create a valid CD. Since the ERA's enactment, EPA thoroughly considered the remediation plan, which included investigating and considering alternatives to clean up Fartown. EPA, in its expert opinion, found that multiple non-detects and the detection of levels below the HAL of NAS-T in Fartownian wells made clear that no further action was required. R. at 7. However, EPA was provided an opportunity to reassess the standards of remediation in 2020 when New Union approved the ERA. By determining the ERA is an ARAR, EPA was allowed to follow stricter standards in order to be in compliance with the ERA. The ERA creates a right to "clean air and clean water … free from contaminants and pollutants caused by humans." R. at 5 citing N.U. CONST. art. I § 7.

FAWS' argument would require the ERA to be read to create a standard for the environment to be free from *all* human-caused contaminants. This notion, however idealistic, is not realistic. It has been previously found that a zero-contaminant standard is scientifically implausible, therefore the definition of "clean" must be interpreted to mean "non-harmful" to avoid an absurd result. *See Griffen v. Oceanic Contractors, Inc*. 458 U.S. 564, 575 (1982) (holding that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose [of the statute] are available."); *State of Ohio*, 997 F.2d at 1530 (finding EPA has determined state laws that require a zero contaminant standard are never ARARs because a zero level standard for an ARAR will "always be unachievable"). In this case, New Union's State Legislature has directly spoken on the meaning of "clean" and a zero standard diverges from that intent. Add. at 4-5. In order to implement remedial action, EPA operated under the understanding that "clean water" does not mean water free from all human-made contaminants. The word "clean" has an ambiguous meaning in the context of contaminants in the environment. Congress discussed this ambiguity in the ERA's legislative history. Add. at 4-5. After hearing a question regarding the meaning of "clean" it was stated that "'Clean' certainly means *healthful* to human beings" and "'healthful' means that it *will do no harm* to consume that water". Add. at 4-5. (emphasis added). Congress has spoken directly about the definition of "clean" that should be used in the ERA.

EPA created a remedy that will comply with the definition of "clean" water Congress intended. Based on the adopted 1995 HAL for NAS-T, EPA found that the threshold non-harmful level of NAS-T in drinking water is 10ppb. R. at 3. This means that any consumption of water below 10ppb will not be harmful to humans. This level incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans. R. at 2. Therefore, any level of NAS-T

found in a drinking water source that is below the threshold of 10ppb will be "clean" under the ERA as intended by Congress because it will not be harmful and therefore it constitutes a healthful. This is the understanding and interpretation by which EPA has created the UAO.

This understanding can be seen in the requirements of the UAO. In the UAO, EPA has required BELCO to supply alternative water, via water bottles, for any resident where samples indicate concentrations of NAS-T are between 5ppb and 10ppb. If any well sampled shows a concentration that exceeds 10ppb, EPA would require BELCO to install the CleanStripping filtration. These requirements ensure the healthful consumption of water for the residents of Fartown because the residents will not be harmed by consuming anything below 10ppb. Based on the data collected both by Central Labs and the second investigation by EPA, no well showed a concentration higher than 8ppb therefore, the residents of Fartown are not consuming harmful water, and the filtration system is not required. However, it is important to note that EPA is also required to analyze other factors when deciding which remedy to select.

2. EPA must consider a holistic approach to the selection of a remedy, not simply rely on a single factor alone.

As mentioned above, there are nine factors EPA must consider. *See State of Ohio*, 997 F.2d at 1531. The EPA is required to consider threshold criteria which include the protection of human health and the environment and compliance with any ARARs. *Id*. However, they are also required to consider other balancing criteria which include cost-effectiveness. *Id*. EPA adopted a tiered approach to the UAO in order to ensure that the water being consumed by the residents in Fartown will not be harmful and is in compliance with the ERA. However, along with assessing if an action is compliant with the ARAR, EPA must also consider the cost involved in selecting a remedy. Fartown has roughly 500 residents and has their water supplied from the Sandstone Aquifer to private wells, unlike Centerburg which uses a public water supply. Based on the results from the

independent testing, 105 wells showed a trace of NAS-T, and no concentration was found to be past the toxic limit of 10ppb. In fact, no well was found to be above 8ppb. FAWS is asking for EPA to require a remedy that is overall costly by requiring at least 100 filtration systems to be put into place where the concentration of NAS-T is not harmful to residents. By creating a threshold of 10ppb before installing a filtration system in the private wells, EPA is balancing compliance with the ARAR and the cost of selecting a remedy. Therefore, EPA considered all relevant factors by making sure its remedy was in compliance with the ARAR as well as making sure the remedy selected considered the cost of implementation.

IV. The District Court Properly Retained Jurisdiction Over FAWS' State Law Claims Following the Resolution of the Federal Claims.

After this Court resolves the CERCLA claims in EPA's favor, this Court should affirm the District Court's decision to retain supplemental jurisdiction over pendent state law claims and decline FAWS' motion to dismiss the remaining claims to state court. A district court has discretion in deciding whether to retain supplemental jurisdiction over state law claims following the dismissal of all federal claims which serve as the basis for subject-matter jurisdiction. 28 U.S.C. § 1367(c)(3); *Osborn v. Haley*, 549 U.S. 225, 245 (2007). When exercising this discretion, courts are to consider "judicial economy, convenience, fairness, and comity..." *Carnegie-Mellon U. v. Cohill*, 484 U.S. 343, 350 (1988). A district court's decision on whether to retain such jurisdiction is reviewed "under an abuse-of-discretion standard," not *de novo*. *Valencia*, 316 F.3d at 305. In the current case, it is undisputed that the District Court had subject-matter jurisdiction over the federal CERCLA claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367(a). R. at 7. Following the dismissal of all of the CERCLA claims, the District Court resolved all matters which established the Court's subject matter

jurisdiction, leaving the Court to decide whether to retain jurisdiction over pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3). R. at 14.

A. The District Court's Decision to retain jurisdiction over the pendent state law claims following the dismissal of the CERCLA Claims was not an abuse of discretion.

If a district court dismisses all federal claims that serve as the basis for subject-matter jurisdiction, it has wide discretion to exercise supplemental jurisdiction over any related state law claims. 28 U.S.C. § 1367(c)(3); *see also Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639-40 (2009) ("A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary"); *Osborn,* 549 U.S. at 245 ("Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction"); *Enochs v. Lampasas Cnty.,* 641 F.3d 155, 161 (5th Cir. 2011) ("a district court has 'wide discretion' in deciding whether it should retain jurisdiction over state law claims once all federal claims have been eliminated"); *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996) ("a court may, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction").

When evaluating a district court's decision to retain such jurisdiction, the appellate court reviews "under an abuse-of-discretion standard." *Valencia*, 316 F.3d at 305; *see also Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518, 532 (11th Cir. 2015) ("we evaluate first whether the District Court possessed the discretion to dismiss the supplemental claims, and if it did, whether retaining jurisdiction was an abuse of discretion"); *Enochs* 641 F.3d at 158 (The district court's [decision] to remand… pendent… state law claims to… state court… is reviewed for abuse of discretion"). In examining the decision for an abuse of discretion, the Court does not

review *de novo*. That the Court's own considerations "would lead it to relinquish jurisdiction does not mean the District Court necessarily abused its discretion when it decided to retain jurisdiction." *Ameritox*, 803 F.3d at 541. Furthermore, reviewing courts should "hesitate in rejecting a district court's exercise of its discretionary authority."

1. The District Court's decision did not rest on an error of law when determining whether to retain jurisdiction over pendent state law claims

A district court abuses "the discretion accorded to it when its decision rests on an error of law." *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 124 (2d Cir. 2006). Furthermore, an abuse of discretion may be found when a court "applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Ameritox*, 803 F.3d at 532. The U.S. Supreme Court in *Cohill* requires courts to consider four factors when deciding whether to exercise supplemental jurisdiction: "judicial economy, convenience, fairness, and comity." 484 U.S. at 350.

Multiple circuits have held that the same *Cohill* factors are applied when determining whether to retain supplemental jurisdiction over pendent state law claims following the dismissal of all federal claims. *See Ameritox*, 803 F.3d at 532 ("actually determining whether to dismiss the claims calls for the court to weigh… judicial economy, convenience, fairness, and comity"); *Enochs*, 641 F.3d at 159 (In determining whether a district court improperly refused to relinquish jurisdiction over pendent state law claims, the Court of Appeals looks to… factors of judicial economy, convenience, fairness, and comity); *Nowak* 81 F.3d at 1191; *Exec. Software N.A., Inc. v. U.S. Dist. Ct. for Cent. Dist. of California*, 24 F.3d 1545, 1557 (9th Cir. 1994) ("the exercise of discretion… is informed by whether remanding the pendent state claims comports with the underlying objective of… accommodat[ing] the values of 'economy, convenience, fairness, and

comity'").

In the present case, the District Court's did a proper and thorough examination of the *Cohill* factors, despite not naming them explicitly in its holding. The retention of supplemental jurisdiction is supported when a court has expended considerable time, money, and effort. *Nowak*, 81 F.3d at 1192. The Second Circuit in *Nowak* held that a belated rejection of supplemental jurisdiction may not be fair or necessary if dismissal of the federal claims occurs "late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims..." 81 F.3d at 1192 (quoting *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir.1994). The Court's examination of the *Cohill* factors is shown throughout their holding, specifically in their statement that a "tremendous amount of work has gone into these cases in this Court and there are efficiencies to be had in trying the case here." R. at 15. The Court here is examining judicial economy, convenience, and fairness.

The District Court's reliance on these factors is consistent with precedent and not erroneous. Retention of pendent state law claims after federal claims have been dismissed is appropriate where discovery has already been completed. *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990). In the present case, the District Court had been involved with the parties since EPA and BELCO signed the CD in 2017. R. at 4. Additionally, following FAWS' action in August of 2021, the Court presided over multiple months of discovery, which lasted until December 30, 2021. R. at 8. The time, money, and experience the Court has with the facts would all be lost if the case was dismissed to state court. This would place an inconvenient and unfair burden on New Union and U.S. taxpayers in needless court and attorney costs.

Furthermore, as the district court itself pointed out, the remedies sought by FAWS, including remediation of the aquifer, "have the potential to interfere with decisions made in the

BELCO Action and EPA's continued oversight at the Site." R. at 15. Any such decision by a state court could be inconsistent with EPA's prior determinations of the proper remedies and EPA's primary jurisdiction over remediation of the site. Lastly, because the district court has jurisdiction over the BELCO Action to enforce the CD, issues of inconsistencies that could arise over proper remediation of the site prompt further fairness and convenience concerns. The Court's concerns about having the EPA and two separate and distinct courts making decisions and rulings on a single remediation site are reasonable and legitimate concerns of fairness and convenience. Therefore, the Court's ruling was consistent with the law and the facts of the case.

Conversely, FAWS' singular argument on judicial economy grounds is narrow and weak. FAWS argued that because further discovery is needed with respect to the state law claims, it would be inappropriate for the District Court to address them. R. at 15. This argument is quite lacking however, as FAWS made no claim on why this discovery needs to take place in state court, if it would be better facilitated in state court, or why it could not take place in federal court. FAWS' argument regarding judicial economy is groundless.

2. FAWS' Nuisance and Negligence Claims do not include novel or complex state law issues, nor would they mandate declining supplemental jurisdiction.

FAWS falsely asserts that its tort claims include novel and complex issues of state law as they relate to the application and interpretation of the ERA. R. at 15. In general, "state tort claims are not considered novel or complex." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). Moreover, negligence and nuisance claims, in particular, "have been held as not raising novel or complex issues of state law." *Id.* There is nothing in the language of the ERA, nor its legislative history, that explicitly or implicitly expands the applicability of nuisance or negligence claims. *See generally* Add. Furthermore, FAWS' offers no support or explanation for

how or why the ERA will fundamentally alter simple state tort claims of nuisance and negligence. R. at 15. Thus, FAWS' generic tort claims do not raise novel or complex issues of state law.

FAWS' argument here relies solely on concerns of comity. They incorrectly assert that these concerns should overtly weigh on the Court's balancing of the *Cohill* factors. R. at 15. The Second Circuit explicitly rejected this view in *Motorola Credit Corp. v. Uzan*, which held that district courts are not required to decline to exercise supplemental jurisdiction over state-law claims based on considerations of comity where the "court had… spent considerable time dealing with the legal issues and becoming fully conversant with the facts…"388 F.3d 39, 56 (2d Cir. 2004). As discussed above, the District Court has spent considerable time with the facts and legal issues of the case, going as far back as 2017 when the BELCO action and CD were first filed. R. at 4. FAWS' comity argument is unconvincing and not dispositive over other factors.

Despite the weakness of FAWS' novel and complex argument, it would posit that such a finding would require the District Court to relinquish jurisdiction. While courts tend to relinquish jurisdiction upon a finding of novel or complex state law, such a finding is not dispositive. The Fifth Circuit in *Parker & Parsley Petroleum Co. v. Dresser Industries* held that "no single factor—such as whether the case is in an 'early stage' or involves novel issues of state law—is dispositive. Rather, we look to all the factors under the specific circumstances…." 972 F.2d 580, 587 (5th Cir. 1992). As such, even if FAWS' argument was more convincing, it would not compel the court to relinquish jurisdiction over considerations of the other factors.

In closing, the District Court weighed judicial economy, convenience, and fairness and found them all to point towards a resolution in favor of retaining supplemental jurisdiction. The district court weighed the considerable time and expertise it already expended on the case, determined it would be both inconvenient and unfair to require taxpayers to cover the cost of

repeated discovery and other court costs incurred in sending the case to state courts, disagreed with FAWS' argument that the ERA raises novel or complex issues of state law, and contemplated the potential dangers of having multiple courts make separate and distinct determinations regarding remediation of the Site. These determinations show the District Court did not abuse its discretion, make an error of law, or an egregious finding of fact. Therefore, the court should affirm the district court's ruling in retaining supplemental jurisdiction over the pendent state law claims.

CONCLUSION

For these reasons, this Court should affirm the District Court of New Union's judgment in part and find that (1) the costs incurred by FAWS in sampling, testing, and analyzing well water samples are not recoverable as response costs under CERCLA; (2) EPA's determination that the ERA constitutes an ARAR and EPA's decision to reopen the CD and order remedial actions in the UAO were proper; and (3) the District Court did not abuse its discretion in retaining supplemental jurisdiction over the pendant state law claims. Additionally, this Court should reverse the District Court's judgment in part and find that EPA's determination that the ERA does not require BELCO to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law. EPA respectfully requests that the Twelfth Circuit Court of Appeals affirm the District Court's decision in part and reverse the District Court's decision in part.