UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 22-000677

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Plaintiff-Appellant-Cross Appellee,

v.

BETTER LIVING CORPORATION,

Defendant-Appellee-Cross Appellant,

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,

Intervenor Plaintiffs-Appellants-Cross Appellants.

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,

Plaintiffs-Appellants,

v.

BETTER LIVING CORPORATION,

Defendant-Appellee.

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

Brief of Appellant, FARTOWN ASSOCIATION FOR WATER SAFETY

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 2191. Orders that grant summary judgment are final decisions, and this is an appeal from an order of summary judgement disposing of all parties' claims. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

ISSUES PRESENTED FOR REVIEW

1. Is FAWS' allowed to recover investigatory costs when the EPA's prior testing of perimeter wells outside of Fartown showed some non-detects a year prior to FAWS' conducting testing?
2. Is the EPA's reopening of the Consent Decree proper when New Union enacted a self-executing fundamental right regulating human-caused, unregulated contaminants that renders water unclean and unhealthful?
3. Is the EPA's UAO arbitrary and capricious when its interpretation of the ERA does not protect against noxious odors and EPA's chosen remedial action ignores that NAS-T will migrate to Fartown wells?
4. Is it proper for the district court to retain jurisdiction over FAWS' state law tort claims when CERCLA generally does not preempt state law claims, and the New Union constitutional amendment poses a novel and complex legal issue for state courts to address?

STATEMENT OF THE CASE

I. Statement of Facts

The Sandstone Aquifer is an underground body of water that lies about 300 feet beneath both Centerburg and Fartown. Record at 5. Groundwater in the Sandstone Aquifer moves slowly

downgradient in a southerly direction. Record at 5. Groundwater underneath Centerburg eventually flows under Fartown. Record at 5. Fartownians are use private drinking water wells in each of their homes that pump directly from the Sandstone Aquifer. Record at 5.

Medical studies published in the 1980's showed that NAS-T, manufactured by Better Living Corporation ("BELCO"), is a probable human carcinogen. Record at 6. Based on these alarming studies, the EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). Record at 6. Even if NAS-T is below the HAL, the human nose can detect NAS-T in water at concentrations of 5 ppb, where it produces a sour or stale smell. Record at 6. There are no further state or federal regulations regarding NAS-T beyond the HAL. Record at 6.

In 2013, Centerburgers began complaining that their water smelled "sour" or "off." Record at 6. The department of health determined that the water in Centerburg's water supply contained between 45 to 60 ppb of NAS-T. Record at 6. The department of health immediately notified Centerburgers to cease drinking their tap water and BELCO voluntarily began supplying residents with bottled water. Record at 6. BELCO's investigation showed that the contamination migrated to the groundwater, creating a plume of NAS-T in the Sandstone Aquifer. Record at 6. From July of 2016 through January of 2017, BELCO installed three successive lines of monitoring wells progressively further from Centerburg and closer to Fartown to investigate the extent of the plume. Record at 7. The final five wells were installed half a mile north of Fartown. Record at 7. No remediation of the plume was recommended because remediation would take decades and cost over forty-five million dollars. Record at 7.

Pursuant to the Consent Decree ("CD"), BELCO agreed to design and implement the remedy selected by the EPA. Record at 7. The CD required that EPA issue BELCO a Certificate

of Completion ("Certificate") upon completion of the clean-up. Record at 7. The CD further stated that once the Certificate was issued, the EPA was not permitted to order BELCO to further remediate the site without "reopening" the CD. Record at 7. The CD could only be reopened if: (1) new information not previously available or known to EPA was revealed, showing that the clean-up plan was no longer protective of human health or the environment; or (2) where new, more stringent Regulatory Standards were established that the clean-up plan did not satisfy. Record at 7. The CD defines Regulatory Standards to include, among other things, "applicable or relevant and appropriate requirements ("ARAR") under CERCLA." Record at 7.

Pursuant to the CD, BELCO: (1) installed and maintained a water filtration system known as "CleanStripping" to remove NAS-T at the CWS public water well; (2) excavated soils contaminated with NAS-T from around the abandoned lagoon at the site; and (3) conducted monthly sampling of the monitoring wells installed during the investigation. Record at 7. The CD does not require further remediation of the plume in the Sandstone Aquifer. Record at 7. BELCO installed CleanStripping on Centerburg's public water in September 2017 and completed the soil excavation in December 2017. Record at 8. Following completion of the soil excavation, BELCO's monitoring well testing resulted in two detections of NAS-T at 5 ppb and 6 ppb. Record at 7. Despite these wells being the closest to Fartown, EPA issued the Certificate to BELCO in September 2018. Record at 8.

In 2016, Fartownians submitted sworn testimony that they noticed that the water from their private wells smelled "off." Record at 8. When they became aware of the investigation and entry of the CD, they immediately requested that department of health sample and test their drinking water for NAS-T contamination. Record at 8. In May 2019, a group of Fartownians asked EPA to order BELCO to conduct further testing in Fartown. Record at 8. EPA declined

further testing because there were non-detectable levels in sampling from the perimeter wells outside of Fartown. Record at 8.

Frustrated by the EPA decision, in December 2019, one-hundred Fartownians formed FAWS and retained Central Laboratories, Inc. ("Central Labs") to test their private wells. Record at 8. Central Labs took three samples each from seventy-five private wells in Fartown. Record at 8. Results from Central Labs' 225 samples were varied. Record at 8. About 120 samples showed no detectable levels of NAS-T, 51 showed concentrations of up to 4 ppb, and 54 had detections of NAS-T in the 5 to 8 ppb range. Record at 8. Based on these results, FAWS again wrote to EPA asking it to reopen the CD, order further investigation of their private wells, and remediation of the plume of contamination. Record at 8. Despite this threat, EPA declined to take further action. Record at 8. FAWS paid Central Labs $21,500 for the testing and analysis. Record at 8.

On November 2020, the citizens of New Union passed the Environmental Rights Amendment ("ERA") to the State of New Union Constitution. Record at 8. 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." Record at 8. The Amendment was included in the election as a ballot measure and passed with seventy-one percent voting in favor of the Amendment. Record at 8. In January 2021, EPA wrote to the New Union Department of National Resources to ask whether it believed that the ERA constituted an ARAR for CERCLA purposes. Record at 9.

In February 2021, the New Union Department of Natural Resources responded by stating that "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." Record at 9. In

March 2021, citing the 2020 Central Labs results and the passage of the ERA, EPA re-opened the CD and ordered BELCO to sample and analyze water from fifty private wells in Fartown. Record at 9. Prior to reopening the CD, EPA included in its administrative record the new information relied upon to reopen the CD, the fact that Fartown is an environmental justice community, the possible endangerment including potential carcinogenic effects, and the presence of odors from NAS-T. Record at 9. The response actions demanded by EPA consisted of sampling of private wells in Fartown, supplying bottled water to any Fartownian whose well returned positive results for NAS-T, and the continued monitoring of Fartown wells. Record at 9. BELCO challenged EPA's demand, arguing that the EPA did not have the legal right to reopen the CD. Record at 9.

Over BELCO's objection, EPA issued an order referred to as the Unilateral Administrative Order ("UAO") direction BELCO to conduct the response actions. Record at 9. The relevant directives to BELCO in the UAO were: (1) sample fifty private wells in Fartown each month; (2) supply households with wells showing NAS-T concentrations between 5 ppb and 10 ppb monthly bottled water until testing revealed levels of 4 ppb or lower; and (3) for any well where sampling showed NAS-T concentrations exceeding 10 ppb, install Cleanstripping filtration on the well. Record at 9. BELCO refused to comply with the UAO and thus EPA began supplying water to Fartownians whose wells tested positive for NAS-T in excess of 5 ppb and monitoring those wells through monthly sampling. Record at 9. Thus far, sampling has resulted in NAS-T levels between 1 ppb to 8 ppb. Record at 9.

II. Procedural History

On June 30, 2017, EPA filed a cost recovery action against BELCO. Record at 7. The district court for the District of New Union approved and entered the CD on August 28, 2017.

Record at 7. On May 2020, FAWS requested the EPA to reopen the CD to order additional investigations of Fartown's wells and remediate the contamination of Fartown's water. Record at 8. On September 24, 2021, the district court granted FAWS' motion to intervene. Record at 10. FAWS challenged the UAO as arbitrary and capricious, and contrary to law under the Administrative Procedures Act. Record at 10. On August 30, 2021, FAWS along with eighty-five individual plaintiffs from Fartown filed an action against BELCO in the District Court for the District of New Union. Record at 10. FAWS requested the district court to order BELCO to pay the $21,500, install CleanStripping on their private wells that test for NAS-T, remediate the Sandstone Aquifer, pay damages for the loss of use and enjoyment of their property, and pay punitive damages. Record at 10.

On December 30, 2021, EPA, BELCO and FAWS moved and cross-moved from summary judgement on the CERLA claims, and FAWS additionally moved to dismiss any state law claims without prejudice so they could be resolved in state court. Record at 11. On June 1, 2022, the District Court for the District of New Union granted summary judgement for: (1) BELCO regarding reimbursement for FAWS' testing expenses; (2) EPA regarding reopening the CD and the foundation of the UAO; (3) FAWS concerning vacating EPA's decision to only provide bottled water; and (4) denied FAWS' motion to dismiss the state law claims. Record at 18. Now the parties have each filed an interlocutory appeal to the United States Court of Appeals for the Twelfth Circuit. Record at 2.

SUMMARY OF THE ARGUMENT

Costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells were reimbursable as response costs under CERCLA because they were necessary and recoverable irrespective of consistency with the national

contingency plan. Moreover, FAWS' investigations were not duplicative of the EPA's prior testing because the EPA had only tested wells furthest away from Fartown and additional testing was needed to assess the extent of the contamination in Fartown. Because FAWS' investigatory costs fall under a proper removal action, they are recoverable irrespective of consistency with the NCP. Thus, preventing FAWS from recovering it's costs would undermine CERCLA's goal of encouraging parties to clean up hazardous sites.

The ERA constitutes an ARAR because it satisfies the EPA's persuasive interpretation of what constitutes an ARAR. The EPA's interpretation of what constitutes an ARAR deserves deference because these interpretations have been consistently used since the early 1990s. The ERA was "promulgated" because it provides sufficient notice and a standard for determining what conduct falls within its scope. Further, the ERA is applicable, or at least relevant and appropriate, because it regulates human-caused, unregulated contaminants in water. Addendum at 9. Lastly, although BELCO made no arguments concerning the timely identification of the ERA, the EPA timely identified the ERA within three months of being enacted. Record at 5-6, 10-11.

The EPA's interpretation of the ERA and chosen remedial action are arbitrary and capricious because its interpretation lacks power to persuade and ignores important problems. The EPA's UAO does not deserve deference because it amounts to nothing more than a litigation position. Second, the EPA's interpretation of what constitutes "clean water" and a "healthful environment" ignores that this amendment protects against odors. Addendum at 5-6. Thus, the EPA's interpretation fails to satisfy Congress' mandate to choose a remedial action that attains ARARs and ensures public health. Thus, even if this Court determines that the EPA's

interpretation is worthy of deference, the EPA acted arbitrarily and capriciously by failing to consider important aspects of the problem.

The district court erred by retaining supplemental jurisdiction of FAWS' state law claims. FAWS' state law claims are not preempted by CERCLA. CERCLA precludes recovery of compensation for the same claims under CERCLA and state or other federal law. There is no double recovery threat here since FAWS asserts different claims under each body of law. Record at 10. FAWS' state law claims pose a novel legal question of state law that is best left for New Union courts to decide. The ERA is a novel legal question of state law that will affect the outcome of FAWS' state law claims and should be addressed by New Union state courts.

STANDARD OF REVIEW

An appellate court applies a de novo standard when reviewing "a district court order granting or denying summary judgment[.]" *United States v. Colorado*, 990 F.2d 1565, 1574 (10th Cir. 1993) (citing *U.S. v. Hardage*, 985 F.2d 1427, 1432 (10th Cir. 1993)). A court may only grant summary judgment "if 'there is no genuine issue as to any material fact and … the moving party is entitled to a judgement as a matter of law.'" *Id.* (citing Fed. R. Civ. P. 56(c)). Response actions under CERCLA are subject to review of the administrative record under the arbitrary and capricious standard. *United States v. Akzo Coatings of Am., Inc*., 949 F.2d 1409, 1423 (6th Cir. 1991) (referencing 42 U.S.C. § 9612(j)). Additionally, courts of appeal review "a district court's exercise of supplemental jurisdiction for abuse of discretion." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 243 (2d Cir. 2011) (citing *Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist.*, 21 F.2d 89, 103 (2d Cir. 1994). Lastly, "[a]s numerous courts have observed, CERCLA is a remedial statute which should be construed

liberally to effectuate its goals." *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) (citing *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1197 (2nd Cir. 1992)).

ARGUMENT

I. COSTS INCURRED BY FAWS WERE REIMBURSEABLE AS RESPONSE COSTS UNDER CERCLA BECAUSE THEY WERE NECESSARY AND CONSISENT WITH THE NATIONAL CONTINGENCY PLAN.

CERCLA provides that potentially responsible parties ("PRPs") can be liable to private parties who are not PRPs for response costs incurred by those private parties. 42 U.S.C. § 9607(a)(4)(B). A non-governmental plaintiff must also show that any costs incurred in responding to the release were "necessary and consistent with the national contingency plan." *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. III. July 24, 2012). The issue here is whether FAWS' response actions were necessary and consistent with the national contingency plan ("NCP"). This Court should reverse the decision of the United States District Court for the District of New Union for three reasons. First, FAWS' investigative costs were necessary because they were directly in response to the threat of release of NAS-T and investigative costs are recoverable irrespective of consistency with the NCP. Second, preventing FAWS from recovering its costs would frustrate CERCLA's purpose by discouraging private cleanups.

A. FAWS' Response Actions were Necessary Because They Were Directly Related to the Release of NAS-T, not Duplicative of the EPA's Actions, and are Recoverable Irrespective of Consistency with the NCP.

Necessary costs are those that are required to contain and clean up hazardous releases, and include not only the costs of actual cleanup, but also include costs for investigation, planning, and remedial design. 42 U.S.C. § 9601(101). Response costs are deemed necessary when an actual and real threat to human health or the environment exists. *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1003 (9th Cir. 2010). For a response action to be

necessary, it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question. *U.S. v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1272 (E.D. Cal. 1997).

1. FAWS' investigation costs were necessary because testing results showed that the contamination was making its way from Centerburg to Fartown.

To show that response costs were necessary a plaintiff must demonstrate that it was responding to a threat to public health or the environment. *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F.Supp. 2d 1369, 1374 (Georgia N.D.). In *Southfund Partners III*, the Georgia Northern District Court held that the plaintiffs failed to show that the costs incurred to cleanse the groundwater were necessary to address threats to the public health or the environment. *Id*. at 1379. Despite the property being removed from the hazardous site inventory, Southfund Partners III initiated response actions to clean the site. *Id*. The court held that nothing in the record suggested that the contaminated groundwater posed any threat to the environment or public health. *Id*. Moreover, there was no evidence that anyone was drinking the contaminated water. *Id*.

Here, the record clearly shows that FAWS' response actions were necessary. Unlike in *Southfund Partners III*, Fartownians were consuming water directly from their private wells. Groundwater in the Sandstone Aquifer, which lies about 300 feet beneath both Centerburg and Fartown, moves slowly downgradient in a southerly direction. Record at 5. This means that groundwater underneath Centerburg will eventually flow under Fartown. Record at 5. From July of 2016 through January of 2017, BELCO installed five wells approximately half a mile north of Fartown and a mile and a half south of Centerburg. Record at 7. When sampled, these wells showed no detectable amounts of NAS-T. Record at 7.

In January 2018, these same wells showed two detections of NAS-T at 5 ppb and 6 ppb. Record at 8. When FAWS retained Central Labs to test their private wells in December 2019, one year had passed since the two detections in the wells closest to Fartown. Record at 8. The results from Central Labs showed that out of 225 samples, 105 samples showed NAS-T between 1 ppb and 8 ppb. Record at 8. This further shows that the contaminated water from Centerburg was slowly making its way to Fartown, and it was necessary to conduct investigations to assess the magnitude of the contamination. Investigative costs to determine the magnitude of a threat are reasonable and necessary. *See Forest Park Nat'l Bank & Trust v. Ditchfield*, 851 F.Supp. 2d 949.

Even if contamination levels were "low," FAWS' investigation actions were intended to mitigate and minimize the damage to public health. Courts have consistently held that these type of response actions are necessary and recoverable. See *Artesian Water Co. v. Gov't of New Castle Cnty.*, 851 F.2d 643, 648 (3rd Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887. 892 (9th Cir. 1986); *N.Y. v. Exxon Corp.*, 633 F.Supp. 609 (S.D. N.Y. 1986). Moreover, in Centerburg, residents complained that their water smelled "sour" or "off" in 2013. Record at 6. Two years later, testing showed that the water in Centerburg contained between 45 and 60 ppb of NAS-T. Record at 6. FAWS should not have to wait until their water reaches such extreme levels of contamination for a threat to be considered. The results from Central Labs showed that contaminated water from Centerburg was making its way to Fartown and it was only a matter of time before these contamination levels worsened.

In determining whether response costs are "necessary," the focus is on whether there is a threat to human health or the environment and whether the response action is addressed to that threat. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001.) In *Carson*

Harbor Vill., Ltd., the Ninth Circuit Court of Appeals declined to grant summary judgment despite evidence suggesting the cleanup may have been initiated for reasons other than the threat to the environment or a health problem. *Id*. The court held that it is unrealistic to believe that clean-up efforts are necessarily motivated by purely charitable factors. *Id*. The issue is not why the landowner decided to undertake the cleanup, but whether it was necessary. *Id*. The Ninth Circuit held that holding otherwise would result in a disincentive for cleanups. *Id*.

To the extent FAWS conducted tests to try and prove liability of BELCO and alter EPA's course of action, this does not preclude a showing that these costs were necessary. Even if proving liability of BELCO was FAWS' primary purpose, the focus is not on the "why", but rather whether the response action was necessary. *Id*. Here, the investigations were necessary to assess how far the contaminated water from Centerburg had reached Fartown.

2. FAWS' investigations were not duplicative of the EPA's prior testing because the EPA had only tested wells furthest away from Fartown and additional testing was needed to assess the extent of the contamination in Fartown.

For a response action to be "necessary," it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question. *Iron Mountain Mines, Inc.*, 987 F.Supp. at 1272. The actions may be "duplicative" if they occur at the same time as the EPA's own actions and do not seek to uncover information different than or above and beyond that of EPA. See, *e.g., Louisiana Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Cal. 1993).

Generally, investigative costs incurred by a private party after the EPA has initiated a remedial investigation are not considered necessary because they are duplicative of the work performed by the EPA. *Id.* In *Louisiana Pacific Corp.*, Louisiana-Pacific Corp. initiated an investigation despite being notified by the EPA that the EPA was conducting their own

investigation. *Id*. The Eastern District Court held that Louisiana-Pacific Corp.'s investigation was duplicative and unnecessary. *Id*.

In *U.S. v. Hardage*, the Hardage Steering Committee performed response actions solely to support its litigation position. 750 F.Supp. 1460, 1516. The studies were conducted to support Hardage Steering Committee's preferred remedy and were strictly litigation oriented. *Id*. These response actions were conducted as EPA oversight and were meant to enhance Hardage Steering Committee's litigation efforts by casting doubt on the efficiency of the EPA's efforts. *Id*. at 1517. Thus, the Western District court held that these costs for EPA oversight were duplicative and unnecessary. *Id*.

Here, FAWS' response actions are not meant as an oversight of the EPA's own investigations. The EPA initially conducted investigations half a mile from Fartown. Record at 7. FAWS' investigations were conducted on 75 private wells within the town. Record at 8. Not only were these investigations conducted in different areas, but they were conducted almost two years apart. Record at 8. Given the fact that the contaminated water was slowly moving from Centerburg to Fartown, the EPA's investigation of the perimeter wells and FAWS' investigations of the private wells in Fartown are materially different. Moreover, a plaintiff's investigations are not deemed unnecessary merely because they duplicate studies that the alleged polluter has already performed. *Vill of Milford v. K-H Holding Corp.*, 390 F.3d 926, 935 (6th Cir. 2004). The existence of an additional reason for conducting investigations does not render FAWS' response action unnecessary.

3. <u>FAWS' Response Actions are Recoverable Irrespective of Consistency with the NCP.</u>

For purposes of cost recovery under sections 107(a)(4)(B) of CERCLA, a private party response action will be considered "consistent with the NCP," if the action, when evaluated as a

whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup. *Young v. U.S.*, 394 F.3d 858, 864. "Remove" or "removal" includes such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances. *Bowen Engineering v. Estate of Reeve*, 799 F.Supp. 467, 477 (D.N.J. 1992). Accordingly, investigatory costs fall within the ambit of this provision. *Id*.

Because the detailed NCP provisions governing other response actions cannot reasonably be applied to preliminary monitoring and evaluation of a release of hazardous substances, investigatory costs are generally recoverable irrespective of their consistency with the NCP. *See Foster v. U.S.*, 926 F.Supp. 199, 203 (D.D.C. 1996); *Gache v. Town of Harrison, N.Y.*, 813 F.Supp. 1037, 1046 (S.D.N.Y. 1993); *CNH Am., LLC v. Champion Env't Servs., Inc.*, 863 F.Supp. 2d 793, 809 (E.D. Wis. 2012). Therefore, because FAWS' response actions are investigatory costs, they should be recoverable irrespective of consistency with the NCP.

B. Preventing FAWS from Recovering Costs Would Undermine CERCLA's Goal of Encouraging Private Parties to Clean Up Hazardous Sites.

Because the number of contaminated sites in the United States far exceeds the available funds, the EPA has a backlog of cases.[1]. Due to these challenges, private parties are being forced to clean up and private cost recovery action is becoming an important part of hazardous waste litigation.[2] Here, the EPA's claim that allowing FAWS' to recover costs for the response actions would frustrate CERCLA and EPA's authority under the statute is unfounded. Not only are private parties forced to pursue this route given the challenges of CERCLA, but also the high bar

[1] Arnold W. Reitze Jr., Andrew J. Harrison Jr., Monica J. Palko, *Cost Recovery by Private Parties under CERCLA: Planning a Response Action for Maximum Recovery*, 27 TUL. L. REV. 365, 367 (1992).
[2] *Id*.

of section 107 also prevents these so-called "fishing expeditions" alleged by the EPA. Preventing FAWS' from recovering its costs, would frustrate CERCLA's purpose of cleaning up hazardous sites. This would result in private parties being reluctant to proceed with this alternative due to fear that they would not recoup their costs and would ultimately add to the already high backlog of sites that need cleaning, thus harming the environment.

Holding that FAWS' cannot be reimbursed for its response actions would undermine the purpose of CERCLA's creation. Moreover, the "necessary" requirement is a stringent requirement that serves as a sufficient deterrent preventing the encouragement of fishing expeditions. The uncertainty and ambiguity surrounding CERCLA and its history should not be used as a tool to discourage private parties from initiating clean ups and recouping their costs. CERCLA is designed to achieve one key objective – to facilitate the prompt cleanup of hazardous dump sites by providing a means of financing both governmental and private response and by placing the ultimate financial burden upon those responsible for the danger.

II. NEW UNION'S ERA CONSTITUTES AN ARAR BECAUSE IT IS AN ENFORCEABLE STATE LIMITATION THAT ADDRESSES UNREGULATED, HUMAN-CAUSED CONTAMINANTS, SUCH AS NAS-T, AND IS MORE STRINGENT THAN ANY FEDERAL STANDARD.

As all parties agree, the EPA could only reopen the CD if New Union's ERA constitutes a new ARAR. Record at 10. "A state environmental standard constitutes a state [ARAR] … if it is: (1) properly promulgated; (2) more stringent than federal standards; (3) legally applicable or relevant and appropriate; and (4) timely identified." *Akzo*, 949 F.2d at 1440 (referring to 42 U.S.C. § 9621(d)). The EPA was correct in determining that New Union's ERA: (1) was promulgated as a legally enforceable and self-executing fundamental right; (2) limits NAS-T concentrations in absence of any other standard; and (3) serves as a safety net to protect citizens against unregulated, human-caused contaminants. Additionally, although BELCO did not contest

the timeliness of the identification, the ERA was timely identified within three months of being enacted. Record at 5-6, 10-11. Therefore, the EPA's decision to reopen the CD was proper because the ERA constitutes an ARAR under CERCLA.

Moreover, although Congress has required remedial actions to attain ARARs, "CERCLA does not define ARARs[.]" *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001). Since the EPA implements CERCLA, the EPA's "interpretive choices … may influence courts facing questions that the [EPA] ha[s] already answered." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Thus, this Court must give deference to the EPA's interpretations of what constitutes an ARAR based on: (1) "'the thoroughness evident in its consideration'"; (2) "'the validity of its reasoning'"; (3) "'its consistency with earlier and later pronouncements'"; and (4) "'all those factors which give it power to persuade, if lacking power to control.'" *Id.* at 228 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Therefore, this Court must accord deference to the EPA's interpretation of what constitutes an ARAR where its interpretations are persuasive.

A. A State Law is Generally Applicable and Legally Enforceable Even When it Contains no Specific Numerical Standard.

This Court should adopt the Sixth Circuit's approach to determining whether a state limitation is "promulgated" because it gives proper deference to the EPA. CERCLA requires that astate limitation be "promulgated" to constitute an ARAR but does not define "promulgated." *See Ohio v. United States Env't. Prot. Agency*, 997 F.2d 1520, 1527 (D.C. Cir. 1993). Consequently, the EPA interpreted "promulgated" to mean that the state limitation be "of general applicability and legally enforceable." 40 C.F.R. § 300.400(g)(4). The Sixth Circuit adopted the EPA's interpretation because it was thoroughly considered, logically valid, and a product of a rulemaking proceeding. *Akzo*, 949 F.2d at 1442. Thus, the court held that state limitations do not

require "objective standards … to qualify as an ARAR." *Id.* at 1442. Therefore, this Court should hold that a state limitation is properly "promulgated" if it is generally applicable and legally enforceable, despite no specific numerical standard.

In *Akzo*, the defendant's claimed that a Michigan law was not legally enforceable because it was vague and lacked an objective standard. 949 F.2d at 1441. This law prohibited discharges into state waters of any substance that could be injurious to the public health. *Id.* at 1441. The court found that this provision provided sufficient notice because it explicitly prohibited certain discharges of injurious substances. *Id.* Further, implementing guidelines for the Michigan law proscribed that such discharges would occur when groundwater was deteriorated beyond the local background groundwater quality. *Id.* After comparing standards upheld in other laws, including one regulating "odor", the court determined that the law provided a sufficient standard.[3] Thus, the law was "promulgated" because it provided notice and a standard for enforcement. *Id.* at 1441-42.

Comparably to the scope of the law in *Akzo*, the ERA seeks "to protect [] people from … unclean or unhealthful … water … due to non-natural, human-caused … contaminants." 949 F.2d at 1440-41; Addendum at 9. Although the ERA's scope is broad, its plain language specifically addresses "contaminants … caused by humans" that affect one's "fundamental right to … clean water[.]" *See* N.U. CONST. art 1, § 7. Further, the legislative history of the ERA states that the ERA applies to "regulatory gaps" in situations "where chemicals that are toxic remain unregulated." Addendum at 9. Thus, the ERA provides sufficient notice because it applies to unregulated, human-caused releases of contaminants into state waters.

[3] *Id.* at 1442-43 (analyzing *Michigan Waste Sys. v. Department of Natural Resources*, 147 Mich, App. 729, 739-40 (1985) ("[T]he term 'odor' is sufficiently broad to permit efficient administration, yet not so excessively broad that arbitrary application must result.")).

The ERA is also legally enforceable because "clean water" and a "healthful environment free from contaminants" are discernable standards. N.U. CONST art I, § 7. Like the standard at issue in *Akzo*, the ERA "provides a standard beyond which would-be polluters may not pollute." 949 F.2d at 1441. Although the EPA and FAWS disagree on what that standard specifically is, the ERA undeniably requires water to be "clean" and "healthful." *See* N.U. CONST. art 1, § 7. Additionally, the ERA was duly enacted as a self-executing, fundamental right. Record at 5. The proponents of the ERA recognized that "as with all fundamental rights, this right would be self-executing and so would not not [sic] require further definition in regulation or statute." Addendum at 6. To hold otherwise "would involve the absurdity of holding that what the people ha[ve] declared to be the law [is] not the law." *Davis v. Burke*, 179 U.S. 399, 403 (1900).

BELCO errs in arguing that further legislative or administrative action is required for the ERA to be considered "promulgated" because the ERA is self-executing, like most fundamental rights. "[O]bjective standards are not required under CERCLA for a requirement to qualify as an ARAR." *Akzo*, 949 F.2d 1409, 1442 (6th Cir. 1991) (citing 42 U.S.C. § 9621(d)). BELCO may allege that *Akzo* is distinguishable because the court relied on the accompanying implementing rules while similar guidance is not present here. 949 F.2d 1409, 1442 (6th Cir. 1991). Although the implementing rules may have supported the holding in *Akzo*, such rules are not necessary when, as here, the plain language of a law and its legislative history provide similar support.

B. The ERA is More Stringent than Federal Regulations for NAS-T Because the EPA HAL is not Enforceable.

EPA's interpretation of what limitation is most stringent deserves deference because it thoroughly considers CERCLA's legislative history, makes logical sense, and has been consistently applied. EPA regulations state that a State ARAR is more stringent when it is either: (1) "broader in scope than the Federal ARAR" or (2) exists in absence of any Federal limitation.

Akzo, 949 F.2d at 1443 (referencing *Nat'l Oil and Hazardous Substances Pollution Contingency Plan*, 53 Fed. Reg. 51394-01, 51435 (Dec. 21, 1988)). This interpretation is supported by "Senator Michell, [a] principal author of section 9621," who said that a state limitation is more stringent "where there is no comparable Federal requirement." *Id.* at 1443 (citing 132 Cong. Rec. S14915 (daily ed. Oct. 3, 1986)). Therefore, a state limitation is more stringent when it: (1) is broader in scope than any applicable Federal ARAR or (2) Federal ARARs do not exist.

In *Akzo*, the Sixth Circuit determined that a state law limitation was more stringent than federal standards because it was "broader in coverage and … as or more demanding … than the" Safe Drinking Water Act ("SDWA"). *Id.* The law was prohibited degradation of the "'local background groundwater quality.'" *Id.* at 1444 (citing Mich. Admin. Code R. 323.2202(r)). This "refer[ed] to the condition of the local groundwater '[without] influence by discharges.'" *Id.* at 1444 (citing Mich. Admin. Code R. 323.2202(r)). Since the SDWA would permit concentrations of certain pollutants with the influence by discharges, the law would often not permit any presence of a substance while the SDWA permitted some amount. *Id*. Thus, the law was more stringent than federal limitations because it was more stringent at the CERCLA site at issue. *Id.* Therefore, a state limitation only needs to be more stringent as applied to the CERCLA site.

Here, the ERA is more stringent than any standard applicable to this CERCLA site because EPA's HAL cannot constitute a federal standard. First, the EPA's HAL is not a federal standard because it lacks any force of law.[4] Moreover, the HAL is not an applicable federal standard because Congress and the EPA have not required HALs to fill the role of "Maximum Contaminant Level Goals" in their absence. *See* 42 U.S.C. § 9621(d)(2)(A). Meanwhile, the

[4] *See Questions and Answers: Drinking Water Health Advisories for PFOA, PFOS, GenX Chemicals and PFBS*, U.S. Envt'l. Prot. Agency, https://www.epa.gov/sdwa/questions-and-answers-drinking-water-health-advisories-pfoa-pfos-genx-chemicals-and-pfbs#q1 (last visited Nov. 21, 2022) ("EPA's health advisories are non-enforceable and non-regulatory).

regulations for establishing water reference levels under the Federal, Insecticide, Fungicide, and Rodenticide Act do incorporate HALs where no "Maximum Contaminant Levels" exist. *Compare* 40 C.F.R. § 159.143(b)(1); *with* 42 U.S.C. § 9621(d); *and* 55 Fed. Reg. 8666, 8750 (Mar. 8, 1990). Thus, it would be inappropriate for this Court to impute this principle into CERCLA when both Congress and EPA declined to do so.

BELCO errs in arguing that the ERA cannot be more stringent than federal standards due to the "overall protection of human health and the environment" factor in the NCP for two reasons. 40 C.F.R. § 300.430(e)(9)(iii). First, this argument should be rejected because any ARAR will inherently be protective of human health and the environment. Thus, such a holding would overhaul current CDs incorporating state ARARs and obliterate the requirements of 42 U.S.C. § 9621(d)(2)(A)(ii). Second, EPA regulations states that this factor "draws on the assessments of other evaluation criteria, especially … compliance with ARARs." 40 C.F.R. § 300.430(e)(9)(iii). Thus, ARARs serve the purpose of informing what constitutes a sufficient level of protection for human health and the environment. Therefore, ERA is the most stringent ARAR because it is the only enforceable limitation regulating NAS-T.

C. The ERA is Applicable Because it was Enacted to Address Unregulated Contaminants, Such as NAS-T.

A state limitation is (1) applicable when it addresses certain contaminants or (2) relevant and appropriate when it addresses circumstances sufficiently similar to those at the CERCLA site. A court looks to the scope of the state limitation to determine whether it is applicable or relevant and appropriate. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1445 (6th Cir. 1991). EPA regulations state that a limitation is "'applicable'" if it "'specifically address[es] a hazardous … contaminant[.]'" *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001) (citing 40 C.F.R. § 300.5). EPA

regulations also state that a state limitation is "'relevant and appropriate'" when it addresses situations sufficiently similar to those at the CERCLA site. *Id.* Since courts have accepted these interpretations and they give effect to the plain meaning of the statute, this Court should grant deference to the EPA's interpretations.[5]

In *Akzo*, a Michigan anti-degradation law was deemed legally applicable because its plain language addressed the type of contaminants discharged at the CERCLA site. 949 F.2d at 1445. Specifically, the law prohibited indirect discharging any substance that was, or could be, injurious to public health into groundwater. *Id.* at 1440. The implementing rules further defined "discharge" as the addition of materials to groundwater from any discrete source. *Id.* at 1445. Since the record indicated that cause toxic chemicals at the site would leach into, and degrade, groundwater quality, the law was legally applicable. *Id.* Therefore, a State ARAR is legally applicable when it addresses a specific group of chemicals at the CERCLA site.

BELCO errs in claiming that the ERA must name contaminants that it regulates because this would be impracticable and CERCLA does not require this. Comparably to the law in *Akzo*, the ERA prohibits releases of human-caused, unregulated contaminants from making water "unclean" or "unhealthful." *See* N.U. CONST. art 1, § 7; *see also* Addendum at 9. Further, the ERA was intended to "serve [as] a safety net" foe "chemicals that are toxic [but] remain unregulated." Addendum at 9. Moreover, New Union State Senators clarified that "[e]ven odors could be an issue if sufficiently offensive and if they impact what the community would consider 'clean[.]'" Addendum at 5-6. NAS-T is clearly within this scope because BELCO created NAS-

[5] *See e.g.*, *id.*; *Ohio v. United States EPA*, 997 F.2d 1520, 1526 (D.C. Cir. 1993); *Applicable*, Merriam-Webster, https://www.merriam-webster.com/dictionary/applicable (last visited Nov. 21, 2022) (defining "applicable" as "capable of or suitable for being applied"); Relevant, Merriam-Webster, https://www.merriam-webster.com/dictionary/relevant (last visited Nov. 21, 2022) (definitining "relevant" as "having significant and demonstrable bearing on the matter at hand").

Tand caused it to be released into water, and NAS-T was an unregulated contaminant, prior to the ERA, and produces noxious odors. Record at 2-3. Therefore, this Court should determine that the ERA is applicable because the ERA addresses a specific group of chemicals.

D. Even if this Court Determines that the ERA is not Applicable, the ERA is at Least Relevant and Appropriate Because the ERA was Enacted to Protect People from Unregulated Contaminants Rendering Water Unclean.

In determining whether a state limitation is relevant and appropriate, the EPA compares eight factors. *See* 40 C.F.R. § 300.400(g)(2)(2)(I)-(viii) (providing eight factors for relevant and appropriate state limitations). However, the relevance of these factors depends "on whether a requirement addresses a chemical, location, or action." 40 C.F.R. § 300.400(g)(2). Since these factors were promulgated in a rulemaking proceeding, the EPA's interpretation deserves deference. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

All the relevant factors indicate the ERA is relevant and appropriate to this remedial action because this remedial action invokes the ERA. First, the purpose of the ERA aligns with this CERCLA action because the ERA was enacted to provide a safety net for unregulated, human-caused contaminants that make water unclean. Addendum at 9. Second, the medium regulated by the ERA–water–is at issue here. *See* N.U. CONST. art 1, § 7; Record at 5. Third, the ERA regulates NAS-T because it is an unregulated, human-caused pollutant. *See* N.U. CONST. art. 1, § 7; *see also* Addendum at 9. Fourth, the ERA applies to releases of certain contaminants and the contemplated remedial action for the site is mitigating such releases. Record at 5. Fifth, the ERA contains no waivers or exemptions, and the EPA has not chosen to waive the ERA. *See* N.U. CONST. art 1, § 7; Record at 5. Therefore, this Court should determine that the ERA is relevant and appropriate because it addresses unregulated, human-caused pollutants that make water unclean.

II. THE EPA'S DECISION NOT TO ORDER BELCO TO INSTALL FILTRATION SYSTEMS IN FARTOWN WAS ARBITRARY AND CAPRICIOUS BECAUSE THE ERA REQUIRES "CLEAN" WATER, WHICH CANNOT MEAN WATER WITH A NOXIOUS, SOUR ODOR.

This Court should apply the arbitrary and capricious standard when determining whether the EPA's chosen remedial action is improper. CERCLA provides that the President's selection of a remedial action is reviewed based "on the administrative record" under the "arbitrary and capricious" standard. *Emhart Indus., Inc. v. New England Container Co., Inc.*, 274 F. Supp. 3d 30, 45 (D.R.I. 2017) (citing 42 U.S.C. § 9613(j)(2) (emphasis omitted)). One of the President's powers under CERCLA is to issue UAOs. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991). Further, the EPA has been delegated "the functions of the president under CERCLA[.]" *Id.* at 1423. Since the EPA has been delegated this authority, CERCLA's explicit standard of review applies. *Id.* at 1424.

A. The EPA's Decision to Deprive Fartownians of a Safe Source of Water is Arbitrary and Capricious if it Failed to Consider Relevant Factors and Congressional Mandates.

Under the arbitrary and capricious standard, a court must conduct a searching and careful inquiry to the basis of the EPA's action. First, this Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99, 97 (1977). Further, this Court must rule that the EPA was arbitrary and capricious if:

> "'the [EPA] has relied on facts which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"

Id. (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). Therefore, the EPA acted arbitrarily and capriciously if their decision did not consider Congressional mandates or ignored an important aspect of the problem.

B. The EPA's Interpretation of the ERA is Arbitrary and Capricious Because it Lacks Power to Persuade and is Inapposite with the ERA.

The EPA's interpretation of the ERA is arbitrary and capricious because it lacks power to persuade and is inapposite with the ERA. First, the EPA's UAO does not deserve deference because the UAO lacks power to persuade under both *Mead Corp.* and *Skidmore*. Second, the EPA's interpretation of what constitutes "clean water" and a "healthful environment" ignores the plain language and legislative history of the ERA. Thus, the EPA failed to satisfy two of Congress' requirements for remedial actions: (1) attainment of ARARs and (2) protection of human health and the environment. *See* 42 U.S.C. §§ 9621(d)(1)-(2)(A)(ii). Therefore, this Court should affirm the lower court's decision and hold that the ERA requires a remedial action that removes NAS-T from wells in Fartown.

1. The EPA's Interpretation of What Degree of Cleanup is Required Under the ERA Lacks any Power to Persuade.

Under the *Mead Corp.* standard, an administrative agency's interpretation that lacks the force of law receives *Skidmore* deference where applicable. An agency interpretation promulgated through a procedure lacking the force of law may only be entitled to *Skidmore* deference. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). Rather, these interpretations "are 'entitled to respect' under" *Skidmore* "only to the extent that" they are persuasive. *Id.* (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991)). Here, the EPA's UAO was neither the product of formal adjudication, nor the product of notice-and-comment

rulemaking, and thus, lacks the force of law. Therefore, EPA's UAO can only receive deference if it has the power to persuade.

Courts rely on the factors set out in *Mead Corp.* and *Skidmore* to determine the amount of deference an interpretation lacking the force of law receives. Under *Skidmore*, the level of respect depends on: (1) "'the thoroughness evident in its consideration'"; (2) "'the validity of its reasoning'"; (3) "'its consistency with earlier and later pronouncements'"; and (4) "'all those factors which give it power to persuade[.]'" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Additionally, pursuant to *Mead Corp.*, a court may consider the agency's (1) "degree of … care"; (2) "consistency"; (3) "formality"; and (4) "relative expertise" in formulating its interpterion. *Mead Corp.,* 533 U.S. at 228.

A court should not grant *Skidmore* deference to interpretations that administrative agencies have hastily created in preparation for looming litigation. In *Smith v. Aegon Companies Pension Plan*, the Sixth Circuit determined that the Secretary of Labor's position in an amicus brief was not entitled to *Skidmore* deference. 769 F.3d 922, 926-27. In analyzing the Secretary's relevant expertise, the court determined that an agency has no greater specialized expertise than courts when conducting a "bare textual analysis of [the statute], without more." *Id.* at 928-29 (citing *Skidmore*, 323 U.S. at 140). Additionally, the Sixth Circuit found that the Secretary's interpretation did not deserve deference because it had only been expressed once in another amicus brief. *Id.* at 929. Further, the Secretary's interpretation had only ever appeared in the amicus briefs themselves. *Id.* (comparing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15 (2011) (granting deference to an interpretation that was consistently applied for nearly fifty years)). This led the Sixth Circuit to characterize the agency's interpretation as the

"agency's mood[, which] is not entitled to *Skidmore* deference." *Id.* Therefore, this Court should not grant deference to an EPA interpretation that is nothing more than a litigation position.

The EPA's UAO does not deserve deference because it amounts to a litigation position. Comparably to the relevant expertise of the Secretary of Labor, the EPA's mere statutory interpretation of the ERA does not require technical or scientific expertise. Rather, this function is precisely within the expertise of a court. *See Smith*, 769 F.3d at 928-29. The EPA also hastily crafted its interpretation because of BELCO's non-compliance with the EPA's demands. Record at 6. This is distinguishable from *Kasten* because the EPA only spent six months crafting its interpretation. *Kasten*, 563 U.S. at 15 (stating that the interpretation had been consistently applied for nearly fifty years); Record at 6. Moreover, the EPA's interpretation is one of first impression because the ERA is a novel amendment. Thus, the EPA's interpretation can neither be considered consistent with prior interpretations, nor is their expertise in implementing *Federal* environmental laws relevant. Lastly, the EPA's UAO is not formal because it is not the product of a formal adjudication, which carries additional due process safeguards. Therefore, the EPA's interpretation of the ERA deserves no deference because it was hastily created for this litigation.

2. Regardless of its Power to Persuade, the EPA's UAO is Still Arbitrary and Capricious Because it is Inapposite with the ERA, and thus, Violates CERCLA Mandates for Remedial Actions.

Even if this Court accords the EPA deference under *Skidmore*, its interpretation is still arbitrary and capricious if it is contrary to the ERA, and thus, violates CERCLA requirements for remedial actions. CERCLA mandates that all remedial actions must attain ARARs and protect human health. *See* 42 U.S.C. §§ 9621(d)(1)-(2)(A). Since CERLCA imposes these requirements, they are factors which the EPA must consider when determining the requisite level of cleanup

for a CERCLA site. Therefore, the EPA's UAO is arbitrary and capricious if the UAO does not either: (1) attain the limitation set forth in the ERA or (2) protect human health.

The plain language of the ERA indicates that it prohibits NAS-T concentrations above 4 ppb. The ERA states that the fundamental right guarantees "clean water and … a healthful environment free from contaminants … caused by humans." N.U. Const art I, § 7. This indicates that the ERA prohibits introducing human-caused contaminants to water that renders it unfit for its use.[6] Fartownian wells are currently unfit for their use of providing water for basic and essential uses because of the noxious odor produced by NAS-T at concentrations of 5 ppb or higher. Record at 3. In fact, the EPA cited "the presence of odors from NAS-T" as grounds for reopening the CD. Record at 5. Thus, the ERA requires that NAS-T concentrations in Fartownian wells be a concentration of 4 ppb or lower.

This 4 ppb limitation is also supported by the legislative history because the New Union Senate indicated that the ERA is a "safety net" that provides protections against noxious odors. The ERA was explicitly intended to serve as a "safety net" protection. Addendum at 10. This supports the 4 ppb limitation because safety nets typically implement a precautionary level of protection. Additionally, the lower court correctly noted that the legislative history of the ERA specifically states that "odors could be an issue if sufficiently offensive and if they impact what the community would consider 'clean' air." Addendum at 5-6. Lastly, while the legislative history states "[t]hat [clean] doesn't mean that the water is free o[f] all substances besides H2O[,]" it also clarifies that water "should not do injury … in any way." Addendum at 4. As evidenced by this case, the smell of NAS-T is not "objective[ly] perceived as 'clean'" and harms

[6] *See Clean*, Merriam-Webster, https://www.merriam-webster.com/dictionary/clean (last visited, Nov. 21, 2022) (defining "clean" as "free from contamination"); *see also Contaminated*, Merriam-Webster, https://www.merriam-webster.com/dictionary/contaminated (last visited Nov. 21, 2022) (defining "contaminated" as "made unfit for use by the introduction of unwholesome or undesirable elements").

Fartownians health and welfare. Record at 3, 5. Thus, an interpretation that ignores the ERA's applicability to noxious odors produced by human-caused, unregulated contaminants is inapposite with the plain language and legislative history of the ERA.

Since the EPA's interpretation is inapposite with the ERA, the EPA ignored its statutory mandate to choose remedial actions that attain State ARARs and relied on a factor Congress did not intend–its HAL. Although the HAL does not carry any force of law, the EPA relied on it in crafting its UAO.[7] Specifically, the EPA erred in relying on the fact that "no wells in Fartown test[ed] above the HAL for NAS-T." Record at 6. Simply put, it does not matter what the HAL requires. Here, the ERA is the level of measure. *See* 42 U.S.C. § 9621(d)(2)(A). Moreover, the EPA cited "the presence of odors from NAS-T" as grounds for reopening the CD. Record at 5. Therefore, the EPA's UAO is arbitrary and capricious because their interpretation does not satisfy Congressional mandates.

Lastly, this Court should also reject BELCO's argument that the costs of compliance are paramount to human health and safety. While CERCLA does direct that remedial actions should be cost-efficient, it does not proclaim that money is superior to protecting human health. *See* 42 U.S.C. § 9621(b)(1). Moreover, the EPA could have selected a more cost-efficient alternative remedy that removes NAS-T from the Sandstone Aquifer.[8] However, this is just further evidence that the EPA failed to provide the requisite degree of care to this environmental justice community. Record at 2. Therefore, the costs of fulfilling CERCLA's mandates are not

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[7] Record at 6; *see also Questions and Answers: Drinking Water Health Advisories for PFOA, PFOS, GenX Chemicals and PFBS*, U.S. Envt'l. Prot. Agency, https://www.epa.gov/sdwa/questions-and-answers-drinking-water-health-advisories-pfoa-pfos-genx-chemicals-and-pfbs#q1 (last visited Nov. 21, 2022) ("EPA's health advisories are non-enforceable and non-regulatory).

[8] *See How Superfund Addresses Groundwater Contamination*, U.S. Envt'l Prot. Agency, https://www.epa.gov/superfund/how-superfund-addresses-groundwater-contamination#:~:text=Pump%20and%20treat%20is%20a,system%20that%20removes%20the%20contaminants., (last visited Nov. 21, 2022).

paramount to the purposes of CERCLA–"addressing Federal liability … [and] providing Federal funding" in disproportionately affected communities. S. REP. NO. 107-2, at 2 (2001).

IV. THE DISTRICT COURT ERRED BY RETAINING SUPPLEMENTAL JURISDICTION OVER FAWS' STATE LAW CLAIMS FOR NUISANCE AND NEGLIGENCE BECAUSE CERCLA DOES NOT PREEMPT STATE LAW CLAIMS, AND THE ERA POSES A NOVEL LEGAL QUESTION FOR STATE COURTS TO INTERPRET AND RESOLVE.

State law can be preempted by federal law if (1) Congress expressly states an intent to occupy a given field; or (2) state law is preempted to the extent that it conflicts with federal law when it is impossible to comply with both state and federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). A federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Among other factors, district courts have discretion to decline exercising supplemental jurisdiction when the state law claims raise a novel state law issue. 28 U.S.C. § 1367(c).

The district court erred by retaining FAWS' state law claims because state law claims were not intended by Congress to be preempted by CERCLA, and the ERA poses a novel legal question that affects the resolution of FAWS' state law claims. CERCLA §114(a), the savings clause, specifies that "[N]othing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). This Court should also find that FAWS' state law claims pose a novel legal question since they can only be resolved by interpretation and application of the ERA, a state constitutional amendment that has not yet been applied by New Union state courts.

A. FAWS' State Law Claims Are Not Preempted by CERCLA.

CERCLA should not be interpreted as preempting States from imposing additional liability regarding the release of toxic substances within the State. 42 U.S.C. § 9614(a). CERCLA §114(b) precludes double recovery of compensation for the same claims under both CERCLA and state or other federal laws. 42 U.S.C. § 9614(b). This Court should find that CERCLA does not preempt FAWS' state law claims and there is no double recovery threat.

1. FAWS' state law claims are not preempted by CERCLA since Congress did not intend for CERCLA to occupy the entire field of hazardous wastes.

In *Bedford Affiliates v. Sills*, the plaintiffs filed suit under CERCLA to recover remediation costs from their tenants who ran a dry-cleaning business where a hazardous chemical spill occurred. 156 F.3d at 420. The plaintiff paid for cleanup costs, was seeking recovery of those costs, and brought state law claims of indemnification and restitution. *Id.* at 422-23. The Second Circuit concluded that it was not the legislative purpose of CERCLA to be a comprehensive regulatory statute which would occupy the entire field of hazardous wastes, and the statute did not prohibit states from supplementing federal measures for hazardous waste cleanup. *Id.* at 426-27. Regardless, plaintiff's state law claims were not available because they were a PRP as they were owners of facilities accepting hazardous substances. *Id.* at 424. The Second Circuit found that the state law claims created a conflict with the settlement system for PRPs under CERCLA, which is why the statute was preempted. *Id.* at 427.

Here, FAWS claims that BELCO's contamination of the Sandstone Aquifer constituted negligence and private nuisance, which are not preempted by CERCLA and should be resolved in state court. Record at 10. CERCLA's legislative history and plain language under the savings clause demonstrates that the statute does not expressly preempt state law. *Bedford Affiliates*, 156 F.3d at 426. Congress did not intend for CERCLA to occupy the entire field of hazardous waste cleanup and States are within their rights to supplement federal measures. *Id.* The private

nuisance and negligence claims supplement the federal measures by compensating Fartown's affected property owners with damages to address the harm caused by BELCO's contamination of the aquifer.

EPA and BELCO may argue that the Second Circuit in *Bedford Affiliates* still held that state law claims were not available to plaintiffs. *Id.* at 424. This was only because the plaintiffs were found to be PRPs which created a conflict between the state law restitution and indemnification claims, and the settlement system for PRPs under CERCLA. *Id.* at 424, 427. 42 U.S.C. §9607(a) defines who is considered a PRP and FAWS does not fall under any of these definitions since it is a group of residents directly harmed by NAS-T contamination and formed an organization to address the issue. Record at 4. The conflict in *Bedford Affiliates* does not exist here, so CERCLA is not preempted. Since CERLA is not preempted for the state law claims, the state court should retain them to properly resolve the issue in accordance with New Union law.

2. CERCLA is not preempted because FAWS' state law claims pose no double recovery threat.

In *New York v. W. Side Corp.*, the Eastern District of New York denied the defendants' motion to dismiss state law claims based on preemption grounds. 790 F. Supp. 2d 13, 28 (E.D.N.Y. 2011). Defendants owned and operated a storage distribution center for chemicals where a spill occurred which contaminated drinking water supply wells. *Id.* at 17. Defendants refused to investigate the contamination and clean up the site. *Id.* The plaintiff brought state law claims of public nuisance and defendants contended that the state law claims were preempted by federal law since they "impermissibly conflict" with their CERCLA claims. *Id.* at 17, 19. The district court held that a broad application of CERCLA preempting state law claims would be inconsistent with the statute's savings clause. *Id.* at 26-27. The court held that concerns about

double recovery with regards to the nuisance claim were "illusory" since there is no bar to a nuisance action seeking monetary damages or injunctive relief. *Id.* at 27.

This Court should find there is no threat for double recovery. The inclusion of the savings clause shows that Congress intended for states to have authority to impose additional liability for release of hazardous substances. FAWS' nuisance and negligence claims impose additional liability on BELCO to compensate the citizens of Fartown who have been adversely impacted by the aquifer's contamination. Neither of FAWS' CERCLA claims address damages for monetary compensation to Fartownians experiencing the tangible harm of losing the use and enjoyment of their homes, nor their future diminishing property values. Record at 10.

This Court should find that concerns about double recovery from the state law claims are unfounded since there is no bar to a nuisance action seeking monetary or injunctive relief. FAWS is asserting state law claims of private nuisance and negligence and requested the district court to order BELCO to pay damages. Record at 10. These are different from the rest of the CERCLA claims. Record at 10. Since the claims are different, there is no risk of double recovery. Recovery for state law claims will be in monetary damages unlike the remedies for the CERCLA claims. Record at 10. There is no bar to a nuisance action seeking injunctive relief, so FAWS' injunction compelling BELCO to remediate the aquifer would be proper. Record at 18.

3. CERCLA is not preempted because the ERA is a state ARAR that sets a stricter environmental standard.

In *Akzo*, the Sixth Circuit found that CERCLA "sets only a floor, not a ceiling, for environmental protection" and does not preempt state environmental ARARs that set higher standards for cleanup than federal statutes. 949 F.2d at 1454, 1458. The Sixth Circuit indicated that Congress did not intend for state environmental laws to be ignored or preempted. *Id.* at 1455. Senator Mitchell, a key participant in drafting CERCLA, noted in the Congressional

Record that, "[C]hallenges to the selection and adequacy of remedies based on state nuisance law, or actions to abate the hazardous substances release itself independent of federal response action" were preserved in CERCLA. 132 Cong.Rec. S17, 212 (Oct. 17, 1986). This analysis prompted the Sixth Circuit to hold that more stringent state environmental standards are not preempted by CERCLA. *Akzo*, 949 F.2d 1409 at 1457.

This Court should find that state environmental ARARs that set higher standards for cleanup are not preempted by federal statutes. The district court found the ERA to constitute an ARAR. Record at 14. The ERA sets a higher standard for environmental protection because it grants a fundamental right to clean air and water. Addendum at 3. Stricter state environmental laws should not be preempted by federal statutes since the legislative history enshrines the states' ability to challenge remedies based on nuisance law, among other areas. *Akzo*, 949 F.2d at 1455. FAWS' nuisance and negligence claims are valid and impose further liability onto BELCO that should be addressed in New Union state court.

B. FAWS' State Law Claims Should be Dismissed from the District Court Since the ERA is a State Constitutional Amendment and Poses a Novel and Complex Legal Issue that State Courts Should Address.

The ERA states that each New Union resident has a "fundamental right to clean air and clean water and to a healthful environment." N.U. CONST. art. I, § 7. This language calls for a higher standard of environmental health and safety. Unnecessary decisions of state law should be avoided to promote comity and allow parties a surer footed reading of applicable law. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). When state claims concern novel or unresolved questions of state law, and those issues concern the state's interest in the administration of its government, principles of federalism, it is better left for state courts to

resolve the issues. *Seabrook v. Jacobson*, 153 F.3d at 72. This Court should find that the ERA is a novel question of state law that concerns New Union's administration of its government.

In *Seabrook* the Second Circuit held that the district court erred in exercising supplemental jurisdiction over the state law claims. *Id.* at 71. There, there was a contention between the New York City Administration Code and the New York State Civil Service Law on how long civil servants could be suspend without pay. Id. at 70. The Second Circuit held that the state law claim hinged on a novel question of interpretation of a state law and involved the state's interest in the administration of its government. *Id.* at 72. The resolution of the state law claim required balancing many critical state government policies, relationships between the state and municipalities, and the public interest. *Id.* at 73.

This Court should follow the Second Circuit in *Seabrook* and find that FAWS' state law claims present a novel legal question since the resolution of those claims depend on the interpretation and application of the ERA, which has not been interpreted before. FAWS' state law claims require balancing factors like the public's fundamental rights to clean air and water, municipality activity, agency action, and execution of the ERA. FAWS' remaining state law claims ought to be addressed by a New Union state court since these issues involve New Union's interest in the administration of its government.

The district court retaining supplemental jurisdiction of FAWS' state law claims poses a federalism concern since the role the ERA plays in resolving FAWS' state law claims is an issue for New Union state courts to decide. Needless decisions of state law should be avoided in order to promote comity, and ensure parties get a surer footed reading of applicable law. *United Mine Workers of Am.*, 383 U.S. at 726. The ERA is "part of the basic citizenship of every citizen" in New Union. Addendum at 7. The legislative history points to how pervasive the ERA is:

"[M]unicipalities also would have to really be more conscious … and aware of the expectation of their citizens for municipal activities." Addendum at 5. The legislative history shows how expansive the ERA is intended to be. New Union courts would have the ability to provide a surer footed reading of the ERA as it applies to New Union tort law.

This Court should find that it is not for federal courts to make novel and sweeping interpretations of state law. *See Support Ministries For Persons With AIDS, Inc. v. Vill of Waterford, N.Y.*, 799 F.Supp. 272, 280 (N.D.N.Y. 1992) (court held that it should not deny state courts opportunities to develop and apply state law). New Union state courts have not been given the opportunity to develop their own state law as it pertains to the ERA. While FAWS' state law claims may arise from similar facts to its CERLCA ones, this is not sufficient reasoning for federal courts to extensively interpret a state law that has not been developed first by New Union state courts. This Court should find that the interpretation of the ERA pertaining to FAWS' state law claims presents a novel question of state law and it is best for New Union state courts to decide how to resolve the claims in accordance with the ERA.

CONCLUSION

For these reasons, this Court should affirm the district court's grants of summary judgment in favor of FAWS and reverse the district court's grant of summary judgment in favor of BELCO and EPA and enter summary judgment in favor of FAWS.