C.A. No. 22-00067

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BETTER LIVING CORPORATION,
Plaintiff-Appellant-Cross Appellee

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee-Cross Appellant

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,
Intervenor Plaintiffs-Appellants-Cross Appellees

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,
Plaintiffs-Appellants

v.

BETTER LIVING CORPORATION,
Defendant-Appellee

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

Brief of Intervenor Plaintiffs-Appellants-Cross Appellants
FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules of Procedure

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Fartown Association for Water Safety (FAWS) appeals from an order entered in the United States District Court for the District of New Union (1) granting summary judgment to the Better Living Corporation (BELCO), the Environmental Protection Agency (EPA), and FAWS on claims brought by FAWS and EPA under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and (2) denying FAWS' motion to dismiss its own related state law claims. The district court had jurisdiction of the CERCLA claims under 28 U.S.C. § 1331, and of FAWS' state law claims under 28 U.S.C. § 1367 because they arise from the same set of facts as the CERCLA claims. *See, e.g.*, *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 (1st Cir. 1996). Each party sought leave to file an interlocutory appeal from the district court's order. Fed. R. App. P. 5. This Court granted leave to appeal, with no objection from the district court, R. at 1-3, and thus has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?
2. 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?
3. Did the district court properly uphold EPA's determination that a new state constitutional provision guaranteeing a right to a clean environment constitutes an applicable or relevant and appropriate requirement and accordingly finding that EPA's reopening a consent decree based on that requirement was proper?

4. Did the district court properly vacate as arbitrary, capricious, or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of a new state constitutional provision guaranteeing a right to a clean environment?

STATEMENT OF THE CASE

I. Legal Background

The laws governing this case share one aim: eliminating toxic environmental pollution.

A. CERCLA

Congress passed CERCLA to provide expeditious cleanup of hazardous pollution and to ensure that the parties responsible for that pollution pay for the response. *E.g.*, *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998). The Act accomplishes these goals through an expansive strict, joint and several, and retroactive liability scheme. Kate R. Bowers, Cong. Rsch. Serv., *Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (2021); *see generally* 42 U.S.C. §§ 9601 *et seq.* The broad remedial and liability scheme is based on a fundamental principle to protect public health. *See* 126 Cong. Rec. S14,642 (daily ed. Nov. 18, 1980) (statement of Sen. Robert Stafford) (noting the "urgent need for remedial legislation to respond to the problems caused by the release of chemical poisons into our environment"). To this end, courts consistently construe CERCLA's provisions liberally. *E.g.*, *Dedham Water Co. v. Cumberland Farms Daily, Inc.*, 851 F.2d 643, 648 (3d Cir. 1988).

To effectuate timely cleanups, section 104(a) authorizes EPA to respond to the "release" of "any hazardous substance . . . or . . . pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604(a)(1). The Act also creates multiple structures for cleanup and cost recovery. Relevant here, EPA may enter a

voluntary settlement with a potentially responsible party (PRP)[1] to enforce the cleanup. If a PRP refuses to enter such an agreement, EPA may issue a unilateral administrative order (UAO) under section 106 requiring the PRP to undertake the cleanup, *id.* § 9606, or undertake the cleanup itself and seek cost recovery from the PRP, *id.* § 9607(a). Alternatively, any private party may undertake a cleanup, and seek cost recovery from a PRP. *Id.* However, only "necessary" expenses incurred "consistent with the National Contingency Plan" (NCP) can be recovered.[2] *Id.* § 9607(a)(4)(A).

To ensure that cleanups "protect human health and the environment," CERCLA remedial actions must comply with all "applicable or relevant and appropriate requirements" (ARARs) of state environmental law that are "more stringent than any Federal standard, . . . [have] been identified . . . in a timely manner, . . . [and are] legally applicable to the hazardous substance or pollutant concerned or . . . relevant and appropriate under the circumstances" of the site. 42 U.S.C. § 9621(d)(2)(A)(ii).

B. The New Union Environmental Rights Amendment

The New Union Environmental Rights Amendment (ERA) provides that:

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

N.U. Const. art. 1, § 7. The New Union Assembly first passed the ERA to fill "regulatory gaps" where "existing statutes and regulations are insufficient to protect the people from exposure to unclean or unhealthful air and water." R. Addendum at 9 [hereinafter Add.]; R. at 8. The

[1] BELCO is a PRP in this action as a former owner of the facility when the NAS-T release first occurred. 42 U.S.C. § 9607(a)(2).

[2] The NCP is "a federal regulation that establishes standards and obligations for remediation and cleanup efforts." *Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 770 (7th Cir. 2021).

amendment was intended to address all environmental circumstances, with particular focus on "non-natural, human-caused pollutants and contaminants." Add. at 9.

New Union citizens approved the ERA by a 71% majority vote, cementing a fundamental right to a clean and healthful environment. R. at 8.

II. Factual Background

Fartown is an environmental justice (EJ) community on the verge of catastrophe. R. at 5. This quiet rural town of about five hundred people sits two miles south of Centerburg in New Union. R. at 5. Fartownians and Centerburgers alike draw water from the Sandstone Aquifer, which flows slowly in a southerly direction from Centerburg to Fartown. *Id.* While Centerburgers get water from a public treatment facility, Fartownians must use private wells. *Id.*

In 2016, Fartownians began noticing problems with their water. R. at 8. Unbeknownst to them, a plume of the toxic chemical NAS-T was flowing through the Sandstone Aquifer from Centerburg to Fartown. R. at 5-7. NAS-T, which EPA identified as a probable carcinogen in the 1980s, gives off a sour or stale odor when mixed with water at concentrations as low as 5 parts per billion (ppb). R. at 6. Recognizing NAS-T's adverse health effects, EPA established a Health Advisory Level (HAL) of 10 ppb for NAS-T in drinking water. *Id.* Due to its scarcity, EPA does not otherwise regulate NAS-T. *Id.*

BELCO developed and used NAS-T as an industrial sealant from 1973 to 1998 at its facility in Centerburg (the BELCO Facility). *Id.* In that time, BELCO regularly spilled NAS-T into the soil at the Facility and disposed of it in an unlined lagoon. *Id.* Through gradual leaching, the contaminant infiltrated the Sandstone Aquifer. *Id.* As this litigation awaits resolution, the NAS-T plume continues to flow through the Sandstone Aquifer from Centerburg into Fartown, and the pollutant has recently been detected in Fartown wells. R. at 10.

A. NAS-T is first identified in the Sandstone Aquifer.

In 2013, Centerburgers began reporting a stale odor in their water, leading to the first discovery of NAS-T in the Sandstone Aquifer. R. at 6. The New Union Department of Health (DOH) began testing the Centerburg water supply in 2015, revealing concentrations of NAS-T between 45 and 60 ppb, well above the HAL. *Id.* DOH notified Centerburgers of these results and instructed them to cease drinking tap water; BELCO began providing bottled water to Centerburgers. *Id.* Despite the fact that they draw water directly from the contaminated Sandstone Aquifer, no testing was done to investigate NAS-T in Fartown's wells. *Id.*

B. EPA compels BELCO to investigate the NAS-T plume in the Sandstone Aquifer.

EPA began investigating the NAS-T contamination in the Sandstone Aquifer in 2016. *Id.* Pursuant to a voluntary agreement with EPA, BELCO conducted a remedial investigation and feasibility study (RI/FS) to evaluate cleanup alternatives for the Facility. *Id.* As part of this study, BELCO installed three lines of monitoring wells extending from the BELCO Facility toward Fartown. R. at 7. The final line of wells, installed a half mile north of Fartown, did not initially detect any NAS-T. *Id.* No wells were installed in Fartown, even though Fartownians had already noticed strange odors in their water by the conclusion of the study. R. at 7-8.

Based on its limited study, BELCO recommended excavation of contaminated soil at the Facility and installation of filtration systems in Centerburg's water supply. R. at 7. Citing time and cost infeasibility, BELCO rejected pump-and-treat of the aquifer, which would have cost over $45 million. *Id.* BELCO recommended no action to protect Fartown wells. *Id.*

C. EPA and BELCO enter a consent decree and begin remediation.

Following the RI/FS and a public comment period, EPA selected a "monitored natural attenuation" cleanup plan for the site, requiring BELCO to (1) install and maintain a filtration

system known as "CleanStripping" to remove NAS-T from the Centerburg water supply, (2) excavate soils contaminated with NAS-T from around the lagoon at the BELCO Facility, and (3) conduct monthly sampling of the monitoring wells installed during the investigation. R. at 7-8. Again, no action was proposed to remediate contamination in Fartown. *Id.*

EPA then brought a cost recovery action against BELCO, and the parties executed a consent decree (CD) for BELCO to undertake the selected cleanup. R. at 7. The district court approved the plan after public comment. *Id.* No Fartown or Centerburg citizens objected, though the court did not detail steps taken to solicit public comment from either community.[3] *Id.*

EPA may reopen the CD when one of the following conditions is met:

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.

Id. The CD defines "Regulatory Standards" to include ARARs. *Id.* After completing the actions required by the CD, BELCO detected NAS-T in the final line of wells near the Fartown border in January 2018. R. at 8.

D. FAWS takes matters into its own hands.

In February 2019, six years after the first detection of NAS-T and at the request of concerned citizens, DOH tested Fartownian wells for the first time. *Id*. However, DOH tested only five wells and detected no NAS-T. *Id.* Unsatisfied with this cursory investigation, Fartownians asked EPA to compel further sampling. *Id.* EPA refused. *Id.*

[3] Fartown is an EJ community, R. at 5, but it is unclear whether the parties conducted outreach directed at Fartownians. *See* U.S. EPA, Compilation of EPA's Activities Encouraging Community Engagement in Superfund Enforcement 13-14 (2014) ("Especially for EJ communities, EPA should consider how best to alert the public" to proposed settlements.).

Tired of their concerns falling on deaf ears, a group of Fartownians formed FAWS in December 2019 to force EPA to act. *Id.* The group hired and paid Central Labs $21,500 to test and analyze 75 private wells in Fartown. *Id.* Central Labs took 3 samples from each well and found that nearly half of the 225 samples had traceable amounts of NAS-T: 51 with concentrations between 1 and 4 ppb and 54 with concentrations between 5 and 8 ppb. *Id.*

After reviewing Central Labs' test results, FAWS requested that EPA reopen the CD and order further investigation and remediation. *Id.* As before, EPA refused. *Id.*

E. EPA reopens the CD and BELCO refuses to comply.

New Union voters approved the ERA in November 2020, guaranteeing Fartownians the right to a clean environment, free from human-made toxic chemicals like NAS-T. R. at 8. After consulting with the New Union Department of Natural Resources, EPA designated the ERA an ARAR for the BELCO cleanup. R. at 9. Accordingly, citing the existence of a new Regulatory Standard, Fartown's status as an environmental justice community, NAS-T's odors and carcinogenic potential, and Central Labs' test results indicating "that the clean-up plan is no longer protective of human health or the environment," EPA reopened the CD. *Id.*

EPA proposed that BELCO sample private wells in Fartown, provide bottled water to any affected household, and continue monitoring. *Id.* BELCO objected to the plan, prompting EPA to issue a UAO requiring BELCO to (1) sample 50 private wells in Fartown identified by EPA every month, (2) provide bottled water to any household with concentrations of NAS-T between 5 and 10 ppb, and (3) install CleanStripping wherever NAS-T concentrations exceed 10 ppb. *Id.*

BECLO refused to comply with the UAO, and EPA began, at its own expense, to conduct monthly testing and provide water where concentrations were between 5 and 10 ppb. R. at 10.

EPA's testing has largely confirmed the results of the Central Labs testing; about 25% of wells had concentrations of NAS-T between 1 and 4 ppb and 20% in the 5-8 ppb range. *Id.*

III. Procedural History

On August 2, 2021, EPA filed a motion against BELCO to recover costs incurred in Fartown and penalties for noncompliance with the UAO. *Id.* BELCO responded, arguing that the ERA did not constitute an ARAR. *Id.*

FAWS and eighty-five individual Fartownians filed an action against BELCO seeking cost recovery for Central Labs' testing. *Id.* FAWS and the Fartown plaintiffs also argued that BELCO's contamination of the Sandstone Aquifer constituted negligence and a private nuisance under New Union state law. They sought damages for the loss of use and enjoyment of property; punitive damages; and an injunction requiring BELCO to pay its response costs, install CleanStripping on wells that test positive for NAS-T, and remediate contamination of the Sandstone Aquifer. *Id.* FAWS and the Fartownian plaintiffs asserted the state law claims to avoid the specter of "claim-splitting," given the pendency of the CERCLA claims. *Id.* The district court consolidated FAWS' action and EPA's cost recovery action, asserting supplemental jurisdiction over the state law claims. 28 U.S.C. § 1367; R. at 10-11. After discovery related to the CERCLA claims, all parties filed motions and cross-motions for summary judgment. R. at 11. The district court denied FAWS' cost recovery claim, and upheld EPA's decisions to reopen the CD and not require CleanStripping on all Fartown wells. R. at 11-17.

FAWS also moved to dismiss its state law claims without prejudice. R. at 11, 17-18. The district court denied FAWS' motion, despite having disposed of all the federal claims that gave rise to supplemental jurisdiction over the state law claims. R at 17-18. All parties requested and were granted leave to appeal the district court's order on an interlocutory basis. R. at 1-3.

SUMMARY OF THE ARGUMENT

This Court should order the district court to dismiss FAWS' state law claims. The district court abused its discretion by retaining jurisdiction over the state law claims after dismissing the federal claims because FAWS' state law claims involve novel questions about the interaction between state tort law and the ERA. Consistent with principles of comity and federalism, these issues are best decided by state, rather than federal, courts.

Furthermore, this Court should grant summary judgment to FAWS on the CERCLA claims. First, FAWS is entitled to recover its water testing costs from BELCO under section 107(a), which provides that a private party may recover costs that are necessary, consistent with the NCP, and incurred in response to a release or threatened release of a hazardous substance. The testing costs incurred by FAWS in response to BELCO's discharge of NAS-T, a probable carcinogen with reactive properties, were necessary because FAWS reasonably believed that contamination of Fartown wells was imminent, and were consistent with the NCP because they resulted in further remediation of the NAS-T spill.

Second, EPA properly determined that the ERA constitutes an ARAR triggering the reopening provision of the CD. The ERA was timely identified (as it was incorporated into the CD as a new Regulatory Standard), properly promulgated, more stringent than federal standards, and applicable or relevant and appropriate for the BELCO site. The ERA is a properly promulgated state environmental law because it applies to all environmental activities, not just CERCLA cleanups, and is sufficiently directive to set forth an unacceptable standard of pollution. The ERA is more stringent than federal standards because there are no comparable federal standards. And the ERA is relevant and appropriate to the BELCO cleanup: it addresses contamination of water supplies by human-made hazardous substances and the text and

legislative history of the amendment unambiguously show that the amendment is appropriate for application as a cleanup standard at the BELCO site. The amendment is well-suited to the BELCO site to ensure that Fartown, an EJ community, has equitable access to clean water.

Finally, EPA's decision not to require BELCO to install filters on Fartown wells was arbitrary, capricious, and not in accordance with law. Because the remedy ordered by EPA fails to meet the required level of cleanup under the controlling ARAR, the UAO is contrary to law. Even if the ERA does not govern the action, the failure to provide filtration for Fartown's private wells is arbitrary and capricious because it disparately denies Fartownians access to clean water.

ARGUMENT

I. Standards of Review

Federal courts of appeal review the denials of Rule 41 motions to dismiss for abuse of discretion. *Paulucci v. City of Duluth*, 826 F.2d 780, 782–83 (8th Cir. 1987). *See generally* Fed. R. Civ. P. 41. Grants of summary judgment are reviewed *de novo*, viewing each parties' cross motion "separately, in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in that party's favor." *OneBeacon Am. Ins. Co. v. Com. Union Assur. Co. of Canada*, 684 F.3d 237, 241 (1st Cir. 2012). Courts may grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

II. The district court abused its discretion when it retained jurisdiction over FAWS' remaining state law tort claims after resolving the CERCLA claims.

A district court abuses its discretion when it makes "plain error," *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005), or if its decision is "manifestly unreasonable," *SEC v. GenAudio Inc.*, 32 F.4th 902, 937 (10th Cir. 2022). Here, the district court

abused its discretion when it denied FAWS' motion to dismiss because it was manifestly unreasonable to retain state law claims after the CERCLA law claims had been resolved.

A court need not exercise supplemental jurisdiction where a claim raises a novel or complex issue of state law or the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(a), (c). When making this determination, federal courts should "consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Considerations of judicial economy cannot alone justify a decision to retain jurisdiction. *Shaffer v. Bd. of Sch. Dirs.*, 730 F.2d 910, 912 (3d Cir. 1984). Generally, the court should avoid "needless decisions of state law" in order to "promote justice between the parties, by procuring for them a surer footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). If the court resolves the federal law claims before trial, "the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims."[4] *Cohill*, 484 U.S. at 350. This prevents federal courts from providing a "tentative answer" to state law questions that could be "displaced tomorrow by a state adjudication." *R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496, 500 (1941).

In this case, retention of the state law claims was manifestly unreasonable because the state law claims, interpreted for the first time against the backdrop of the ERA, are plainly novel and complex and any potential judicial economy gained from retaining federal jurisdiction is outweighed by considerations of federalism and comity.

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[4] Some courts presume that if all federal claims have been resolved the supplemental state law claims will be dismissed. *See Al's Serv. Ctr. v. BP Prods. N. Am., Inc.*, 599 F.3d 720, 727 (7th Cir. 2010). The presumption is rebuttable but should not be "lightly abandoned." *RWJ Mgmt. Co. v. BP Prods. N. Am. Inc.*, 672 F.3d 476, 479 (7th Cir. 2012).

A. The ERA renders FAWS' state tort claims novel and complex.

An issue may be novel if it is an "unresolved" question of state law. *Seabrook v. Jacobson*, 153 F.3d 70, 72 (2d Cir. 1998); *see Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir. 2003). While state tort claims alone are not generally considered novel or complex, *see Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006), questions which require consideration of multi-faceted local policies may be complex, *Seabrook*, 153 F.3d at 71-73 (holding that the district court abused its discretion in retaining jurisdiction when the state law question "require[d] a balancing of numerous important policies of state government").[5]

FAWS' claims, properly considered against the backdrop of New Union's new constitutional provision, are clearly novel and complex. While New Union's nuisance and negligence common law may be well-settled in isolation, the ERA likely alters the landscape of these doctrines: the amendment could heighten the standard of care and lower the threshold harm required to find a breach of duty in negligence actions or expand the plausible facts that rise to nuisance *per se*. But a federal court should not resolve these questions. As in *Seabrook*, this Court would have to make policy judgments—here, related to liability thresholds for environmental harms to interpret and apply the amendment to state law. The district court therefore plainly erred when it dismissed FAWS' motion and retained jurisdiction over the state law tort claims because they are novel questions and the inquiry would undoubtedly be complex.

[5] Outside the context of supplemental jurisdiction, state courts have acknowledged that provisions like the ERA complicate state tort law. *See Pennsylvania v. Monsanto Co.*, 269 A.2d 623, 679 (Pa. 2021) (Brobson, J., concurring) (specifically referring to the matter as "novel" and "complex"). Moreover, state courts have altogether invalidated state law based on environmental rights amendments. *See Robinson Twp., Washington Cnty. v. Pennsylvania*, 83 A.3d 901, 985 (Pa. 2013) (holding that two provisions of the state's oil and gas statute violated its ERA).

In any case, courts do not typically conduct this analysis in isolation before resorting to federalism balancing. *See, e.g.*, *id.* at 72 (explaining that federalism principles dictate that novel or unresolved questions are best left to state courts).

B. Federalism and comity compel dismissal of the outstanding state law claims and outweigh the judicial economy of retaining jurisdiction over those claims.

"Judicial economy, convenience, fairness, and comity" are the central considerations to a supplemental jurisdiction analysis. *Cohill*, 484 U.S. at 350. Judicial economy is served where "issues of state law are resolved by state courts." *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1288 (11th Cir. 2002). Where, as here, novel questions of law are involved, judicial economy is even less of a concern. *Fin. Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982). Further, avoiding state constitutional questions of first impression is a compelling reason to decline jurisdiction. *See Castellano v. Bd. of Trs. of Police Officers' Variable Supplements Fund*, 937 F.2d 752, 758 (2d Cir. 1991).

Even when venue preferences or litigation expenses suggest retaining jurisdiction, judicial economy and convenience do not necessarily outweigh federalism concerns. *Seabrook*, 153 F.3d at 71 (holding that the district court abused its discretion in exercising supplemental jurisdiction over the state law claim even though the parties conditioned dismissal of the related federal claims on the court retaining jurisdiction and the court had already tried the case).

Here, the modest judicial efficiency gained by retaining jurisdiction is significantly outweighed by federalism and comity concerns. As explained above, because this case involves novel issues of law, the district court overemphasized judicial economy. The court reasoned in part that the parties had already invested significant resources in the litigation. R. at 18. However, this disregards the fact that the parties have not completed discovery on the state tort law claims. R. at 11. This is the opportune stage for the court to remand.

Because the state law claims viewed under the lens of the ERA—which has not yet been interpreted by the state court—present novel and complex questions, and because judicial economy is not furthered by retaining jurisdiction, the court abused its discretion. This Court should reverse the district court and remand with instructions to grant FAWS' motion.

III. BELCO is liable for testing costs incurred by FAWS.

Under section 107(a), parties responsible for the release of hazardous substances "shall be liable for 'any other necessary costs of response incurred by any other person consistent with the national contingency plan.'" *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004) (quoting 42 U.S.C. § 9607(a)(4)(B)). Cost recovery is permitted when "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release." *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008).

There is no dispute that the BELCO Facility is a statutory "facility," *see* 42 U.S.C. § 9601(9) (defining "facility" to include "any . . . building, structure . . . pond, [or] lagoon"), that BELCO is a responsible party, or that there has been a "release" of NAS-T from the BELCO Facility, *see id.* § 9601(22) (defining "release" under CERCLA to include "spilling," "leaching," and "disposing into the environment"). Because NAS-T is a "hazardous substance" and FAWS has incurred response costs, BELCO is liable for those costs under section 107(a).

A. NAS-T is a "hazardous substance."

As the district court correctly recognized, R. 11-13, NAS-T is a hazardous substance. CERCLA's definition of "hazardous substance" encompasses a number of substances regulated by other environmental statutes, including, as relevant here, any hazardous waste "having the

characteristics identified under" section 3001 of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 9601(14); *see also* 42 U.S.C. § 6921. These wastes are known as "characteristic hazardous wastes" and are identified with reference to two criteria.

First, characteristic hazardous wastes must be "hazardous wastes" as defined under RCRA. This definition includes solid waste[6] that may "cause or significantly contribute to . . . serious irreversible, or incapacitating reversible, illness" or "pose a substantial present or potential hazard to human health or the environment when improperly . . . disposed of." 42 U.S.C. § 6903(5)(A)-(B). Given its status as a probable carcinogen, NAS-T easily qualifies.

Second, characteristic hazardous wastes exhibit at least one of the following characteristics: ignitability, corrosivity, reactivity, or toxicity.[7] *Id.* § 6921; 40 C.F.R. §§ 261.20-261.24. NAS-T exhibits reactivity because, "[w]hen mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment."[8] *Id.* § 261.23(a)(4).

NAS-T produces a sour or stale smell when mixed with water at concentrations as low as 5 ppb. Furthermore, studies have established that NAS-T is a likely human carcinogen. Thus, it can be inferred that NAS-T produces toxic gases, vapors, or fumes when mixed with water. While the record does not indicate at what quantity NAS-T fumes present a danger to human

[6] "Solid waste" is defined broadly by RCRA and includes "liquids . . . resulting from industrial operations," 42 U.S.C. § 6903(27), that have been "[d]isposed of," 40 C.F.R. § 261.2(b)(1).
[7] While NAS-T is obviously toxic, EPA defines toxicity very narrowly to include only those substances containing specific concentrations of specific contaminants. *See* 40 C.F.R. § 261.24. Perhaps due to its scarcity, NAS-T is not listed among these contaminants.
[8] EPA has recognized that reactivity is defined more subjectively than the other three characteristics, because it "embraces a wide variety of . . . effects, each of which can be triggered by an equally wide variety of initiating conditions or forces," and is thus less susceptible to numerical measurement than the other characteristics. U.S. EPA, G-80-00019, Resource Conservation and Recovery Act, Subtitle C – Identification and Listing of Hazardous Wastes § 261.23 – Characteristic of Reactivity 5 (1980).

health, concentrations of NAS-T in water drawn from the Sandstone Aquifer are as high as 60 ppb—6 times EPA's HAL.[9] Therefore, NAS-T fumes plainly pose a danger to human health.

In addition, NAS-T fumes clearly present a "danger to the environment" even at current levels of exposure in Fartown. Simply put, they stink. That stench, emanating from faucets in Centerburg and Fartown, is a quintessential form of environmental harm. Odors that interfere with use and enjoyment of property have long been actionable under nuisance law, *see* Restatement (Second) of Torts § 832, cmts. b & c (Am. L. Inst. 1979) (specifically noting that foul odors from water pollution interfere with use and enjoyment of property), and are properly the subject of regulation under environmental statutes, *see generally, e.g.*, *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) (recognizing the relationship between environmental statutes and common law nuisance claims). NAS-T fumes undeniably affect use and enjoyment of Fartown residents' property: the off-putting odor, indicating the presence of a likely carcinogen, casts doubt as to whether the water is safe for any use without filtration.

Because NAS-T forms toxic fumes in sufficient quantities to present a danger to human health or the environment when mixed with water, it is a characteristic hazardous waste under RCRA, and thus a hazardous substance under CERCLA.

B. FAWS has incurred recoverable costs responding to the release of NAS-T.

The costs incurred by FAWS here are recoverable. "CERCLA response costs are defined generally as the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) (quoting *Cnty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1512 n.7 (10th Cir. 1991)). To

[9] Given the migration of the plume, NAS-T concentrations in Fartown wells will likely increase.

be recoverable by a private party, response costs must also be "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

The costs incurred by FAWS here, including for "site investigation, . . . sampling, and risk assessment," are "classic examples" of CERCLA response costs. *Young*, 394 F.3d at 864. Furthermore, the costs were both necessary and consistent with the NCP.

i. The costs incurred by FAWS were necessary to respond to the release of NAS-T.

Response costs are "necessary" when they are incurred in response to an "actual threat to human health or the environment," *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001), and the plaintiff had "an objectively reasonable belief that the defendant's release . . . of hazardous substances would contaminate [their] property" when the costs were incurred, *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 964 (8th Cir. 2000). Here, FAWS incurred testing costs to monitor a plume of carcinogenic chemicals that was—and still is—infiltrating their drinking water. The threat could not be more concrete.

The district court held that FAWS' testing costs were not necessary because, at the time they were incurred, EPA had completed its investigation into the spread of NAS-T and "there was no indication that further testing was needed, given existing test results." R. at 12. However, the record supports neither conclusion.

First, at the time testing costs were incurred, BELCO was still monitoring the final line of wells near the Fartown border, as required by the CD. Thus, EPA's investigation into the spread of NAS-T had not yet concluded. Second, there were several indications that further testing was needed: (1) BELCO's own sampling indicated that the plume was migrating toward Fartown; (2) Fartownians had been smelling NAS-T in their water since 2016; and (3) in general, water in the Sandstone Aquifer flows from Centerburg to Fartown, undermining any claim that the plume is

not migrating accordingly. These facts strongly support a reasonable belief that Fartown wells would be contaminated with NAS-T at the time testing occurred.

Several district courts have held that "'investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA' are not considered necessary because they are 'duplicative' of the work performed by EPA." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997) (quoting *Louisiana-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993)). However, this rule is inapposite here. EPA was not engaged in a remedial investigation of NAS-T pollution *in Fartown*—its investigation was limited to Centerburg. This is exactly why FAWS had to incur testing costs in the first place. Furthermore, to the extent this rule could be read to apply here, it would operate to disincentivize necessary response actions where EPA has not adequately investigated or remediated contamination. This Court should avoid that result, which is at odds with CERCLA's remedial goals.

In addition, several circuits impose a requirement that there be "some nexus" between the costs incurred and an "actual effort to respond to environmental contamination."[10] *Young*, 394 F.3d at 863. The Tenth Circuit held that where plaintiffs' response costs "were not tied in *any* manner to the actual cleanup of hazardous releases," the costs incurred were not "necessary." *Id.* at 864. The court reasoned that because the contamination had not been removed from the

[10] The court in *Young* noted that the Second, Third, Fifth, and Sixth Circuits require that response costs be tied to an actual cleanup to be recoverable. *Young*, 394 F.3d at 863. However, many of the cases cited deal with attorney's fees and other litigation costs. *See, e.g., Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85 (2d Cir. 2000). The Supreme Court has expressly held that such costs are not recoverable because CERCLA contains no attorney's fees provision, nor can one be implied in its text. *Key Tronic Corp v. United States*, 511 U.S. 809, 818-19 (1994). The same cannot be said for costs incurred from investigating contamination, which are "classic" CERCLA costs.

plaintiff's property and no further remediation was planned, there was no nexus between the plaintiffs' alleged response costs and "the containment or cleanup of hazardous releases." *Id.*

As an initial matter, this construction of section 107(a) lacks support in the plain language and purposes of the statute. *See James Langley Operating Co.*, 226 F.3d at 962 ("We disagree with [decisions of other circuits] to the extent that they saddle a landowner with the costs of testing and sampling in response to a release or threat of a release of hazardous substances. CERCLA plainly contemplates liability for site assessment."); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 580-81 (9th Cir. 2018). As the Ninth Circuit noted in *Pakootas*, CERCLA's "broad remedial purpose" weighs in favor of "a liberal interpretation of 'recoverable costs' to ensure that polluters pay for the messes they create—including the difficulties of identifying them in the first place." 905 F.3d at 580-81. Also, the statute does not distinguish between the "costs of response" incurred investigating contamination and those incurred for containment and cleanup. 42 U.S.C. § 9607(a)(4)(B); *Pakootas*, 905 F.3d at 581.

However, even if this Court were to adopt the rule that response costs must share some nexus with an actual cleanup, the costs at issue here clearly do. FAWS incurred testing costs to identify any need for additional cleanup or containment. When the test results indicated the presence of NAS-T in Fartown wells, FAWS immediately requested that EPA reopen the CD and undertake further remediation of the NAS-T plume. While EPA initially rejected this request, it ultimately reopened the CD and cited FAWS' test results as one reason for doing so. EPA then issued a UAO requiring BELCO to undertake monthly monitoring of wells in Fartown and provide drinking water free of NAS-T. These actions are all consistent with the monitored natural attenuation cleanup of the NAS-T plume. Thus, there is a direct and causal connection between FAWS' testing costs and an actual cleanup.

Even though BELCO continues to drag its feet, refusing to comply with EPA's lawful order, this Court should not allow it to escape section 107(a)'s sweeping liability by simply ignoring its other legal obligations under CERCLA. Furthermore, EPA has begun to undertake the actions contemplated in the UAO at its own expense. Unlike in *Young*, FAWS' testing has already resulted in an "actual effort to respond to environmental contamination," and further remediation will occur. The costs incurred by FAWS were therefore "necessary," regardless of the rule this Court chooses to adopt.

ii. The costs incurred by FAWS were consistent with the NCP.

A private plaintiff's costs must also be "consistent with the" NCP. 42 U.S.C. § 9607(a)(4)(B). A response action is "consistent with the NCP" if, "when evaluated as a whole, [it] is in substantial compliance with [40 C.F.R. § 300.700(c)(5)-(6)], and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i); *see Young*, 394 F.3d at 863 (explaining that sections 300.700(c)(5)-(6) provide "requirements for worker health and safety, documentation of cost recovery, permit requirements, identification of applicable and appropriate requirements, remedial site investigation, selection of a remedy, and providing an opportunity for public comment concerning the selection of a response action."). Strict compliance with these standards is not necessary, and "an immaterial or insubstantial deviation from the NCP will [not] . . . be deemed inconsistent" for purposes of cost recovery under section 107(a). *Union Pac. R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835 (8th Cir. 2000) (quoting *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998) *abrogated on other grounds by W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009)).

There is no indication in the record here that FAWS or Central Labs substantially deviated from these requirements. The testing done by Central Labs was simply an extension of

earlier testing conducted by BELCO and DOH, and the resulting response actions came from EPA, not FAWS, which obviates the need for public comment. *See Sills*, 156 F.3d at 428 (noting that § 300.700(c)(6) does not strictly mandate public comment where an environmental agency is "substantially involved in the formulation and execution of a . . . remediation plan"). And no party challenges the quality of the testing done, or the veracity of its results. Thus, FAWS testing was in substantial compliance with 40 C.F.R. § 300.700(c)(5)-(6).

The testing also resulted in a "CERCLA-quality cleanup." This standard is met when the costs incurred result in a response action that "protects human health and the environment through the utilization of permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible." *Young*, 394 F.3d at 863. As discussed above, there is a direct and causal connection between FAWS' testing and EPA issuing its UAO to require BELCO to undertake further remediation. And while EPA's current remedy is insufficient, a determination by this Court that EPA's decision not to require water filtration at every Fartown well was arbitrary and capricious would rectify that deficiency.

Because FAWS incurred necessary costs responding to BELCO's release of NAS-T, a hazardous substance, and those costs were consistent with the NCP, FAWS is entitled to cost recovery from BELCO. This Court should reverse the district court's contrary holding.

IV. EPA properly determined that the ERA constitutes an ARAR, and therefore had authority to reopen the CD.

The CD between BELCO and EPA expressly permits EPA to reopen the CD "[w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." R. at 7. The CD further defines Regulatory Standards to include "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." *Id.*

A state standard constitutes an ARAR when EPA determines that the standard was "(1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified."[11] *Akzo Coatings*, 949 F.2d at 1440; *see also* 42 U.S.C. § 9621(d)(2)(A)(ii); 40 C.F.R. §§ 300.5, 300.400(g); ARAR Interim Guidance, 52 Fed. Reg. at 32,498.

Here, EPA properly concluded, consistent with its longstanding policies, that the ERA constitutes an ARAR. Courts must give considerable deference to agency interpretations of their own regulations[12] that reflect the agency's "relative expertness," *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), and "informed judgment," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The weight afforded "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* This Court should

[11] An ARAR is timely identified if it is identified "in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." Superfund Program; Interim Guidance on Compliance with Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. 32,496, 32,498 (Aug. 27, 1987) [hereinafter ARAR Interim Guidance]. Here, the CD expressly incorporated new ARARs into the remedial action, R. at 7, precluding any argument related to timely identification of the ERA as an ARAR. Further, because BELCO did not argue this factor on appeal, this Court may assume that the ERA was timely identified. *See United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1446 (6th Cir. 1987) (concluding Michigan anti-degradation law was timely identified when the factor was not argued on appeal). This brief addresses only the outstanding three elements.

[12] To the extent this Court finds that NCP regulations governing ARARs are "genuinely ambiguous," EPA's decision was "reasonable" and "authoritative," and such a decision would not cause "unfair surprise," the Court should afford controlling *Auer* weight to EPA's determination that the ERA constitutes an ARAR. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-2418 (2019). Because *Auer* deference is "cabined in its scope," *id.* at 2408, this brief demonstrates that the ERA constitutes an ARAR even under a lower level of deference.

therefore afford persuasive weight to EPA's determination that the ERA is an ARAR, and affirm the district court's holding that EPA had authority to reopen the CD.[13]

A. The ERA was properly promulgated.

Under the NCP, properly promulgated state ARARs are requirements "imposed by state legislative bodies . . . that are of general applicability and are legally enforceable." *Akzo Coatings*, 949 F.2d at 1440; 40 C.F.R. § 300.400(g)(4). While neither CERCLA nor the NCP specifically identify state constitutions as ARARs, the statute provides that "*any* promulgated standard" that otherwise meets the requirements for an ARAR qualifies. 42 U.S.C. § 9621(d)(2)(A)(ii) (emphasis added). The ERA was first approved by the New Union Assembly before becoming law by popular vote, and meets these prerequisites.

i. The ERA is generally applicable.

EPA defines "general applicability" as applying "to all circumstances covered by the requirement, not just Superfund sites." U.S. EPA, EPA/540/G-89-009, CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements 7-3 (1989) [hereinafter Compliance Manual II]; *see also* U.S. Dep't of Interior, TR-1703-1/TR-3720-1, ARARs: Determining Which Federal and State Regulations Apply in the Cleanup Process 11 (2007) (defining "generally applicable" as "apply[ing] to a broader universe than just CERCLA sites"). When a state standard is "generally applicable on its face," it "is a potential ARAR." *Ohio v. EPA*, 997 F.2d 1520, 1528 (D.C. Cir. 1993).

Even more so than most environmental laws, the ERA is generally applicable on its face. While the ERA is especially meaningful with respect to human-created toxic pollutants, it also

[13] In addition, this Court could conclude EPA had authority to reopen the CD based on Central Labs' testing revealing contamination of Fartown wells. R. at 9.

applies to a broader universe of environmental concerns, including landfills, food security, and water quality. *See* Add. at 4-6.

ii. The ERA is legally enforceable.

A state standard is legally enforceable when it is "enforceable by means of the general authority in other statutes or in the State constitution." Compliance Manual II, at 7-3. A standard need not set a numerical limit; indeed, "[g]eneral state goals that are duly promulgated" carry the same weight as numerical standards and warrant "more flexibility in approach." *Id.*; *e.g.,* ARAR Interim Guidance, 52 Fed. Reg. at 32,498. When EPA considers a potential narrative ARAR, it "has considerable discretion in determining what is required to interpret or comply with the law." U.S. EPA, Pub. No. 9234.11/FS, ARARs Q's & A's: State Ground-Water Antidegradation Issues 2 (1990) [hereinafter ARARs Q's & A's].

Both EPA and the Sixth Circuit have concluded that general narrative standards, without implementing regulations providing numerical definitions, are legally enforceable and not impermissibly vague when they express "more than statements of intent about desired outcomes," *id.*, and are "sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited," *Akzo Coatings*, 949 F.2d at 1441 (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)).

For example, the Sixth Circuit held that a Michigan groundwater antidegradation policy was legally enforceable when it prohibited discharges "into waters of the state any substance which is or may become injurious to the public health, safety, or welfare," and its implementing regulations similarly only contained narrative standards. *Id.* Because EPA has "considerable latitude" to determine how to comply with a narrative standard and because the antidegradation

policy adequately identified "a standard beyond which would-be polluters may not pollute," the court concluded that the policy was legally enforceable. *Id.* at 1441-42 (citations omitted).

EPA's determination that the ERA is legally enforceable comports with its prior interpretation of narrative state antidegradation policies. While the ERA lacks implementing statutes or regulations, the legislative history makes clear that the amendment is self-executing and enforceable on its face, at least in the context of defining the minimum standard of unacceptable pollution. Like Michigan's antidegradation policy considered in *Akzo Coatings*, the amendment provides clear warning of forbidden conduct by polluters like BELCO: at minimum, the ERA unambiguously prohibits the presence of detectable, malodorous levels of carcinogenic, human-created hazardous pollutants in New Union water supplies. And given EPA's broad discretion to determine whether it can comply with that prohibition, the fact that the remedial action has already removed NAS-T from Centerburg's water supply weighs heavily toward concluding that the ERA is legally enforceable without additional legislation.[14]

Furthermore, although consideration of a state constitutional provision as an enforceable ARAR is a matter of first impression in the federal courts, state environmental rights amendments have proven sufficient to enforce environmental requirements in other contexts. In *BNSF Railway Co. v. Montana*, a Montana court addressing the state equivalent of CERCLA upheld a cleanup order requiring groundwater cleanup at a level "100 times more stringent than

[14] This is not to say the ERA needs no additional interpretation in other contexts. While the amendment warrants further interpretation in the state courts regarding its compensatory and equitable implications in tort, its clear provision for an environment free from harmful chemical pollution is more than enough guidance to accomplish CERCLA's remedial objectives. *Cf. Akzo Coatings*, 949 F.2d at 1442 (recognizing that, although a state antidegradation policy required further interpretation for the purpose of sovereign immunity under the Clean Water Act, its narrative standards were sufficient to qualify as an ARAR under CERCLA).

cleanup levels at other CERCLA sites" on the basis that any lower standard "would violate Montana's constitutional guarantee of a clean and healthful environment." No. BDV-2008-1146, 2011 Mont. Dist. LEXIS 84, at *23-27, *38 (Dec. 19, 2011). The fundamental right to a clean environment compelled a particular and strict degree of cleanup, even without specific regulations spelling out that standard. *Id.* at *10, *33-35; *see also, e.g., Cnty. of Hawaii v. Ala Loop Homeowners*, 253 P.3d 1103, 1120-29 (Haw. 2010), *abrogated on other grounds by Tax Found. of Hawai'i v. State*, 439 P.3d 127 (Haw. 2019) (holding that Hawaii's self-executing environmental rights amendment, which guarantees a "healthful environment," permitted citizens to enforce the provisions of a state environmental statute requiring certain agricultural land use permits); *Cape-France Enters. v. Estate of Peed*, 2001 MT 139, ¶¶ 31-33, 305 Mont. 513, 29 P.3d 1011 (holding that Montana's constitutional "right to a clean and healthful environment" prohibited a private party from drilling a well where doing so would result in "degradation of uncontaminated" groundwater).

Like other states' amendments, the ERA mandates a specific degree of cleanup that restores Fartown's groundwater supply to an objectively clean and healthful condition. Just as these amendments are sufficient to proscribe particular polluting conduct, the New Union ERA dictates an enforceable cleanup standard for the BELCO site.

B. The ERA is more stringent than federal standards governing the NAS-T remedial action.

When no comparable federal standards exist for a CERCLA site, any state environmental law that is "pertinent to the conditions" at the site is more stringent. Compliance Manual II, at 7-8; *see* 132 Cong. Rec. S14,195 (daily ed. Oct. 3, 1986) (statement of Sen. George Mitchell) ("[N]ew requirements [that have no Federal counterpart] are more stringent because they add to Federal law requirements.").

BELCO contends that the ERA cannot be more stringent than federal requirements for the NAS-T cleanup because both CERCLA and the NCP require ARARs to achieve "overall protection of human health and the environment." R. at 11. However, this argument conflicts with the well-established principle that where stricter state requirements are incorporated into EPA's chosen remedy, "CERCLA sets only a floor, not a ceiling for environmental protection." *Akzo Coatings*, 949 F.2d at 1454; *see Town of Acton v. W.R. Grace & Co.-Conn., Techs., Inc.*, No. 13–12376, 2014 WL 7721850, at *10 (D. Mass. Sept. 22, 2014).

Further, to the extent that there is a comparable federal standard in this case,[15] Montana's jurisprudence demonstrates why the fundament right to a clean and healthful environment imposes a more stringent cleanup standard than EPA's allowable risk level for carcinogenic compounds like NAS-T. *BNSF*, 2011 Mont. Dist. LEXIS, at *23-25, *38. *See generally* 40 C.F.R. 300.430(e)(2)(i)(A)(2). New Union's ERA, which employs nearly identical language to Montana's, mandates stricter standards than the only enforceable federal standard.

C. The ERA is relevant and appropriate.

FAWS concedes that the ERA is not legally applicable to the BELCO site. However, the amendment still binds the remedial action. CERCLA remedies must comply with state requirements that are relevant and appropriate to the site. 40 C.F.R. § 300.400(g)(2). A requirement is relevant and appropriate if it "addresses problems or situations sufficiently similar to the circumstances of the release or remedial action" and is "well-suited to the site." *Id.*

EPA conducts a two-step analysis to make its determination, using flexible factors to compare the content of the requirement to the conditions of the site. U.S. EPA, EPA/540/G-

[15] The NAS-T health advisory is not a comparable federal standard because health advisories are not legally enforceable. *Drinking Water Health Advisories (HAs)*, U.S. EPA, https://www.epa.gov/sdwa/drinking-water-health-advisories-has (last visited Nov. 18, 2022).

89/006, CERCLA Compliance with Other Laws Manual: Interim Final 1-65 (1988) [hereinafter Compliance Manual I]. First, EPA must screen for relevance, comparing "the action, location, or chemicals, [sic] covered by the requirement and related conditions of the site, the release, or the potential remedy." *Id.* Second, EPA must determine "whether the requirement is appropriate by further refining the comparison." *Id.* The factors relevant to the ERA include: the purpose of the requirement and the purpose of the CERCLA action, the medium affected by the regulation and the medium contaminated, the substances regulated and the substances present, and the use of the affected resources in the requirement and the use at the site.[16] 40 C.F.R. § 300.400(g)(2)(i)-(iv), (viii); Compliance Manual I, at 1-71 to -72.

Applying these factors, the ERA obviously passes screening muster for relevance. The purpose of the remedial action is to eliminate health and environmental risks of a contaminated water supply, while the amendment assures a healthful environment. The BELCO site involves man-made hazardous chemicals—the type of contaminant expressly referenced by the amendment—and the action primarily contemplates use of the contaminated aquifer for drinking, just as the amendment ensures a water supply free of harmful chemicals. In every aspect, the ERA addresses problems sufficiently similar to the BELCO site.

The ERA is also appropriate for the site. While some requirements "may be relevant but not appropriate," EPA guidance typically limits such a determination to instances in which some, but not all, pertinent factors match the site circumstances. Compliance Manual I, at 1-67. That is not at issue here. Rather, a refined comparison of the above factors demonstrates that the ERA is not only well-suited, but necessary for the BELCO site.

[16] These factors apply to "action-specific" requirements, like the ERA, that limit the actions of would-be hazardous waste polluters. *See* Compliance Manual I, at xiv; ARARs Q's & A's.

First, the substance and medium of the BELCO site align seamlessly with the amendment. On its face, the amendment concerns human-caused contaminants in water supplies, especially contaminants that are otherwise unregulated. NAS-T is such a contaminant, and BELCO was solely responsible for its release into Fartown's water supply. Although the amendment's sponsor recognized that not all human-created chemicals will be harmful, NAS-T is precisely the type of substance the ERA is meant to address. Even the "simple" language derided by the amendment's opponents is sophisticated enough to suit this action. Add. at 7.

Next, the use contemplated by both the amendment and the remedial action compels a strict degree of cleanup. As the district court noted, the ERA is meant to fill gaps where federal law leaves harmful chemicals unregulated. In the absence of any other relevant and enforceable environmental standard regulating NAS-T, there would be no avenue, even under CERCLA's aggressive liability structure, to remediate Fartown's water supply. Fartown relies on wells that pull from the contaminated aquifer; the community has no other water source. Thus, the ERA is essential to restore use of the aquifer for drinking water.

Finally, the purpose of the amendment is to provide a clean and healthful environment to each and every New Union citizen, including those who reside in EJ communities like Fartown. The ERA reflects a commitment to pursuing equal access to a clean environment—a goal shared by EPA, evidenced by its recent pursuit of environmental justice policies. *See, e.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021); Exec. Order 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021); U.S. EPA, EPA 502/P-21/001, EJ Action Plan: Building Up Environmental Justice in EPA's Land Protection and Cleanup Programs 2 (2021). "For decades, EPA[] [and] state environmental regulators . . . have made decisions that contributed to the disproportionate pollution burden on people of color and underserved communities." U.S. EPA, E.O. 13,985

Equity Action Plan: U.S. EPA 4 (2022). By passing the ERA, New Union has taken a meaningful step to reverse that trend. EPA, recognizing its substantial discretion to determine how to comply with ARARs and the liberal construction of CERCLA provisions, properly identified the ERA as an appropriate standard for this cleanup. This Court should conclude, as EPA did, that the ERA is well-suited to accomplish the purpose of the present cleanup action.

EPA's determination that the New Union ERA constitutes an ARAR comports with its historical policies to flexibly apply state environmental standards to CERCLA remedial actions, and its recent shift toward addressing environmental justice through cleanup actions. Its decision deserves persuasive weight and compels the conclusion that EPA had authority to reopen the CD. This Court should affirm the grant of summary judgment on this issue.

V. EPA's failure to order filtration of Fartown's wells was arbitrary, capricious, and contrary to law.

Reviewing courts must "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although review under this standard is narrow, a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Veh. Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). When an agency has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency," the decision cannot stand. *State Farm*, 463 U.S. at 43.

EPA argues that, even though the ERA constitutes an ARAR setting forth a legally enforceable cleanup standard, it can ignore its plain command to provide clean water to all Fartownians. BELCO, meanwhile, argues that it is financially hamstrung to provide remediation

of Fartown's water supply commensurate with either the mandate of the ERA or the level of remediation already achieved in Centerburg. Neither argument holds water.

A. EPA's UAO is inadequate under CERCLA for failing to comply with the ERA.

CERCLA remedial actions must comply with all ARARs. 42 U.S.C. § 9621(d)(2). As determined by EPA, the New Union ERA is a valid ARAR. EPA's decision not to require filters on all Fartown wells failed to meet the standard mandated by the ERA and was contrary to law.

As an initial matter, the threshold for filtration of 10 ppb set by EPA inexplicably ignores EPA's own direction that HALs are not legally enforceable. Further, although EPA enjoys flexibility in determining how to comply with ARARs, neither regulations nor historical policies authorize EPA to ignore their substantive demands. *See Akzo Coatings*, 949 F.2d at 1450 (noting that EPA's selected remedy would not comply with the state antidegradation ARAR if EPA determined that the remedy would cause contaminant levels to increase during cleanup). Instead, if EPA determines it cannot comply with an ARAR, it must validly waive that requirement. 40 C.F.R § 300.430(e)(9)(iii)(B), (f)(1)(i)(A). EPA did not waive the ERA, nor could it have done so under the avenues for waiver set forth in the NCP. *See id.* § 300.430(f)(1)(ii)(C).

Having selected the ERA to govern the remedial action, EPA was bound to select a remedy that ensured Fartownians access to clean water, free from malodorous concentrations of NAS-T. But the remedy selected by EPA currently would leave many Fartownians with contaminated water for every use other than drinking water. Even accepting the untenable proposition that EPA can declare a daily ration of drinking water for these Fartownians, providing bottled water does nothing to remedy the environmental harm these citizens will suffer from exposure to carcinogenic water and fumes when bathing, cooking, maintaining a home or garden, or making any other suitable use of their water. Declining to provide filters to all

Fartown wells is a gross abdication of the responsibility to restore objectively clean water to Fartownians—a responsibility EPA purported to accept when it deemed the ERA an ARAR.

EPA's decision to shirk filtration for Fartown homes that have tested positive for any concentration of NAS-T entirely ignores its own determination that the ERA imposes a binding cleanup standard on this action and denies Fartownians their fundamental right to a clean environment. The decision was manifestly contrary to law.

B. Even if the ERA does not control this cleanup, the UAO was arbitrary and capricious.

Irrespective of whether the ERA constitutes an ARAR, this Court should conclude that EPA's decision not to require filters for all Fartown wells was arbitrary and capricious because filtration is financially feasible, the UAO's current structure ignores the fact that the NAS-T plume is migrating toward Fartown, and the UAO ignores EPA's responsibility to consider environmental justice in its decisionmaking.

Contrary to BELCO's claims, installing filters on each and every well would not be a prohibitive financial burden. While the cost of cleanup in Centerburg is absent from the record, an alternative that would have cost $45 million was rejected as infeasible. The cost to install filters in every household is a small fraction of that amount.[17] This expense would be orders of magnitude below the threshold found to be infeasible and well within BELCO's means.

Additionally, the decision not to install filters ignores the fact that contamination of the Sandstone Aquifer in Fartown will get worse before it gets better. The evidence clearly shows that the NAS-T plume is migrating toward Fartown, such that the high concentrations seen in Centerburg in 2013 will presumably soon hit Fartown. If homes that currently only qualify for

[17] Even if BELCO provided a personal filter to all five hundred Fartown residents, the cost would be 1/20th of the $45 million pump-and-treat cost.

bottled water begin seeing concentrations above EPA's arbitrary 10 ppb threshold, it is unclear how quickly BELCO will install filtration, if it responds at all. Regardless of how quickly BELCO can mobilize, there will inevitably be periods of noncompliance with the UAO as NAS-T concentrations increase in Fartown's aquifer.

Finally, the UAO is contrary to all conceptions of environmental justice.

i. EPA policy requires consideration of environmental justice, and CERCLA's strict liability regime should compel a higher standard to protect vulnerable communities.

Despite its liberal construction and public health focus, CERCLA has plainly failed to protect EJ communities at every stage. Although people of color and the poor are more likely to live near hazardous waste sites, *see* U.S. Gov't Accountability Off., GOA/RCED-83-168, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities (1983), responses to hazardous releases in these communities are consistently less effective than responses in non-EJ communities. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, Nat'l L. J. 1, 2, 5 (1992) (revealing that CERCLA actions at sites near predominantly minority communities compared to predominantly white communities are prioritized for cleanup more slowly, begin later and take longer, and result in significantly lower penalties); *see also* Linda D. Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 Env't L. 1109, 1129 (1994).

These failures are even more pronounced in recent cleanups given EPA's obligation to consider environmental justice. *See* Exec. Order No. 14,008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. at 7629, *amending* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994); Exec. Order No. 13,985, 86 Fed. Reg. 7,009. Moreover, EPA has prioritized environmental justice on its own. U.S. EPA, 502/P-21/001, Building up Environmental Justice in

EPA's Land Protection and Cleanup Programs 22 (2021) (recommending that environmental justice be considered in evaluating CERCLA remedies).

CERCLA is no exception. Its strict liability scheme, combined with EPA's responsibility to consider environmental justice in its decisionmaking and discretion to dictate cleanup orders, compels a higher standard to protect vulnerable communities.

ii. EPA was required, and failed, to consider Fartown's status as an EJ community.

Environmental justice requires the fair treatment of all people, regardless of race or socioeconomic status, and can only occur when "everyone enjoys[] [t]he same degree of protection from environmental and health hazards." *Environmental Justice*, U.S. EPA, https://www.epa.gov/environmentaljustice (last visited Nov. 20, 2022).

EPA's decision not to order BELCO to provide filters to every household in Fartown actively denies fair treatment and equal protection from environmental hazards to Fartown citizens, who possess a fundamental right to a clean and healthful environment under the ERA. Each and every Centerburg citizen had this right respected in the initial cleanup, which provided clean water at the tap to all Centerburgers through the public treatment facility. Yet, despite knowing that filters can effectively remove NAS-T from the water supply, EPA selected a remedy that affords protection only to those Fartownians exposed to the highest level of risk. This difference in remedies evidences a failure to consider disparate impacts of the UAO on an EJ community and sends a clear message: if you live in a poor or minority community, your right to a clean environment matters less. Given EPA's wide discretion under CERCLA in selecting a remedy, and its mandate to consider environmental justice, its failure to provide Fartown with clean water rendered the UAO arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision not to dismiss FAWS's state law claims and remand with instructions to dismiss those claims without prejudice, and should grant summary judgment to FAWS on the CERCLA claims.