Brief 21 NONMEASURING

C.A. No. 22-000677

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IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

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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.*

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**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.**

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# BRIEF FOR PLAINTIFF-APPELLANT- CROSS APPELLEE UNITED STATES ENVIROMENTAL PROTECTION AGENCY

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*Attorneys for Plaintiff-Appellant- Cross Appellee Environmental Protection Agency*

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## STATEMENT OF JURISDICTION

This appeal is from an order from the United States District Court for the District of New Union granting and denying summary judgment that effectively terminates prosecution, in 17-CV-1234 AND 21-CV-1776 (consolidated cases). The District Court for the District of New Union had subject matter jurisdiction in this case under 28 U.S.C.A. § 1291. The order was entered on June 1, 2022. The Appellee filed a timely Notice of Appeal; see Fed. R. App. P. 4(a)(4)(A). J.A. at 45. This Court has jurisdiction over this appeal pursuant to 28 U.S.C.A. § 1291.

## STATEMENT OF THE ISSUES

The Environmental Rights Amendment passed by New Union (hereinafter, "ERA") ensures the right to clean water for all persons. The Comprehensive Environmental Response, Compensation, Liability Act (hereinafter, "CERCLA") establishes liability on Potentially Responsible Parties and provides an avenue for other parties to receive compensation for costs incurred when undertaking remediation efforts. Here, the Better Living Corporation (hereinafter, "BELCO") released a contaminant into the public water supply for two towns resulting in the Fartown Association for Water Safety (hereinafter, "FAWS") bringing action in District Court. Pursuant to CERCLA remediation efforts, BELCO and the Environmental Protection Agency (hereinafter, "EPA") entered into a Consent Decree with limited reopener provisions, however after the ERA was passed, EPA opened the Consent Decree and added the Unilateral Administrative Order (hereinafter, "UAO") provisions. The District Court denied the reimbursement of testing costs to FAWS under CERCLA, ruled in favor of reopening the Consent Decree, accorded no deference towards EPA's decision regarding filtration systems in

Fartown, and exercised supplemental jurisdiction over the remaining tort claims. The following questions are presented for this court to review:

1. Is a citizen group entitled to compensation under CERCLA when the testing costs, conducted at its own discretion, would have resulted in no action until a later standard was adopted?
2. Was the ERA that provided a fundamental right of clean water to all New Union citizens an applicable or relevant and appropriate standard under CERCLA?
3. Did the District Court err in determining EPA's decision not to Order BELCO to install filtration systems in Fartown was inconsistent with the broad goal of the ERA when levels did not exceed allowances by the Health Advisory Level?
4. Does a federal court, exercising federal question jurisdiction over the anchor claim, have supplemental jurisdiction over the remaining state tort claims arising out of the same set of operative facts?

## STATEMENT OF THE CASE

The Human Advisory Level (hereinafter, "HAL") for NAS-T in drinking water is 10 parts per billion (hereinafter, "ppb"). EPA determined the HAL for NAS-T almost thirty years ago based on reliable scientific data. Anything above 5 ppb can provide a sour or stale smell, however, it is only harmful to drink above a level of 10 ppb or more. J.A. 6.

In 2015, complaints from citizens of Centerburg led to the Department of Health testing the public water supply for chemical contamination, including NAS-T, a chemical produced by BELCO. *Id*. Initial tests resulted in readings of between 45 to 60 ppb, prompting the Department of Health to notify the residents of Centerburg to stop drinking their water and the Department of Natural Resources referring the investigation to the EPA for lack of resources and expertise. *Id.*

Subsequent litigation resulted in a Consent Decree requiring BELCO to conduct a cleanup and implement a remedy selected by the EPA before BELCO would receive a Certificate of Completion. The Consent Decree provided that after issuance of the Certificate of Completion, it could only be reopened under two conditions: (1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or (2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy. CD, § 13.3.

Over the following several years, remediation efforts were largely successful, showing multiple non detections, with the notable exception of two detections of NAS-T between 5 to 6 ppb. Citing these numbers, the EPA issued a Certificate of Completion to BELCO in September 2018. J.A. 8.

Members of Fartown, upon learning of the investigation and entry of the Consent Decree, requested that the Department of Health sample their wells, which it did in February of 2019, which showed no detectable levels of NAS-T. *Id*. FAWS asked for a second round of testing which the EPA declined, citing the prior test showing no NAS-T in the Fartown wells. Members of Fartown then formed FAWS and conscripted Central Laboratories, Inc. to test their wells, taking 225 samples. These tests resulted in 120 non-detects; 51 between 1 to 4 ppb; and 54 between 5 to 8 ppb. *Id*. None reached the level in which the drinking water would be contaminated or "not clean" for consumption. FAWS asked the EPA to reopen the Consent Decree based on the results of their tests and on June 10, 2020, the EPA declined FAWS request, citing the low levels of NAS-T and the limited reopener provisions of the Consent Decree. *Id.*

On November 3, 2020, the state of New Union passed the ERA, amending their Constitution, announcing for the first time 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. I § 7.

During the proposal hearing for the bill, the legislators went through a question-and-answer period. They explained that the intention of the statute regarding water was to "be able to consume water through public water supply without any harm." Nu Assembly Nos. A10377, A10455. "Clean would mean... water that is free from contamination that would make the water unhealthful or harmful to consume." Nu Assembly Nos. A10377, A10455. Additionally, the framers added "that does not mean that the water is free of any or all substantives," that "a public water supply involves other chemicals, substantives." *Id*. Furthermore, harmful would be "something that causes disease or convulsion." *Id*. When asked specifically about the issue of a bad smell, the framers explained that the ERA neither proactively nor regressively addresses smell, just that the smell can be an indication to a community that the water or air is unclear. *Id*.

On February 14, 2021, the Department of Natural Resources recognized that "the EPA should identify the ERA as an Applicable or Relevant and Appropriate Requirement (hereinafter, "ARAR") where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulation." J.A. 9. On March 20, 2021, the EPA reopened the Consent Decree on grounds that the ERA constituted an ARAR. *Id* The EPA directed BELCO to do three things in the UAO:

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

UAO, § 3.2.

When the EPA decided to reopen the Consent Decree, FAWS requested filtration systems for any well that contained any measurable trace of NAS-T. In denying the request for filtration under harmful levels, EPA cited that neither FAWS' nor EPA's sampling results found any well that tested above the HAL for NAS-T. When the Consent Decree was modified BELCO failed to supply households with sufficient monthly bottled water for each resident that tested above 5 ppb. Nevertheless, the EPA took measures under the ERA to supply water bottles to Fartownians whose wells tested above ppb. J.A. 9.

## SUMMARY OF THE ARGUMENT

The District Court did not err when it ruled that FAWS was not entitled to compensation under CERCLA for water testing done after the EPA granted BELCO a Certificate of Completion regarding their Consent Decree, and before the passing of the ERA. In order to recover costs under CERCLA, a private party must show that their actions were necessary and consistent with the National Contingency Plan (hereinafter, "NCP"). FAWS testing was not necessary because it was duplicative in that it uncovered no actionable data. To be consistent with the national consistency plan, the costs incurred must also have a nexus with the actual cleanup. In this case, FAWS costs did not lead to any cleanup and therefore could have no nexus with an action that never occurred. Additionally, administrative economy and public policy goals would be frustrated by allowing FAWS to collect its unnecessary testing costs under CERCLA.

The District Court properly ruled that the ERA was an ARAR and thus EPA had a sufficient basis to open the Consent Decree. In order to be an ARAR, a state standard must be (1) promulgated, (2) more strict than federal standards, (3) applicable or relevant and appropriate to the selected remedial action, and (4) timely identified. BELCO mistakenly challenges that the

ERA does not satisfy the first three of these elements. The ERA meets each of these elements. The statutory text and legislative history clearly indicate this law is generally applicable and legally enforceable and thus satisfies the promulgated element. The ERA grants New Union citizens a "fundamental right" to clean water and air without any caveats and is thus more strict than federal standards. Furthermore, all of the possible relevant factors weigh in favor of the ERA being relevant and appropriate to the selected remedial action. For these reasons, this Court should also find the ERA is an ARAR under CERCLA.

District Court erred in determining EPA's decision not to Order BELCO to install filtration systems in Fartown was inconsistent with the broad goal of the ERA when levels did not exceed allowances by the Health Advisory Level. Statutory interpretation of the word "clean," legislative history throughout passage, and similarly situated laws align with EPA's reading of the ERA. Here, the broad language of the ERA and legislative review by the Senate gives a clear signal that the EPA is entitled to agency deference.

The District Court properly denied FAWS motion to dismiss its nuisance and negligence claims and properly exercised supplemental jurisdiction over FAWS tort litigation. The anchor claim in this case implicates a federal regulatory scheme, CERCLA, and a federal court exercising federal question jurisdiction has supplemental jurisdiction over any state law claims that stem from the same set of facts have pursuant to both the Fed. R. Civ. P. 1367(a) and prior case law. Therefore, the lower court's retention of jurisdiction over the remaining state law claims should be upheld.

## ARGUMENT

## THE DISTRICT COURT CORRECTLY DECIDED THAT (1) FAWS WAS NOT ENTITLED TO COMPENSATION UNDER CERCLA, (2) THE ERA WAS A PROPER BASIS TO REOPEN THE CONSENT DECREE, AND (4)

## THE COURT CORRECTLY EXERCISED SUPPLEMENTAL JURISDICTION OVER THE REMAINING TORT CLAIMS. THE DISTRICT COURT ERRED IN DECIDING THAT (3) EPA'S DECISION NOT TO ORDER BELCO TO INSTALL FILTRATION SYSTEMS IN FARTOWN WAS INCONSISTENT WITH THE ERA.

### Standard of Review

An appellate court "review[s] a summary judgment [claim] *de novo*." *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 459 (5th Cir. 2020)(citing *Salinas v. R.A. Rogers, Inc.*, 952 F.3d 680, 682 (5th Cir. 2020)). Summary judgment is granted when "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(a).

### Discussion

#### 1. FAWS is not entitled to compensation under CERCLA.

The EPA asks this Court to sustain the lower court's judgment that costs incurred by FAWS are not reimbursable CERCLA. Under § 107 of CERCLA, a responsible party can be held liable for necessary costs incurred by a response action that is consistent with the NCP. 42 U.S.C. § 9607 (a)(4)(B). To claim compensation under CERCLA, a plaintiff must prove that: (1) The site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release." *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). A non-governmental plaintiff must additionally show that costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan. *Young v. U.S.*, 394 F.3d 858, 863 (10th Cir. 2005).

It is not disputed that BELCO is the responsible facility that released the hazardous substance in question (hereinafter, "NAS-T") and the plaintiff, FAWS incurred costs when it tested private wells. FAWS, however, is not entitled to compensation under CERCLA because as a non-governmental entity, its actions were not necessary, consistent with the NCP, and allowing a citizen group to recover costs that aren't necessary or consistent with the regulatory scheme, would frustrate the administrative process and endanger the efficacy of the EPA in carrying out its duties.

**A. FAWS' testing of private wells was not necessary because it was a duplicative action that showed no new data, was not closely tied with the actual cleanup, and was done for the purpose of overseeing another party's legal obligation.**

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

"overseeing another private party's legal obligation to [remediate] a property." *See Fronabarger*, 209 F.Supp 3d at 1113.

In *Key Tronic Corp. v. United States*, the court held that the costs of identifying unknown Potentially Responsible Parties (hereinafter, "PRP") are recoverable as supportive of the overall cleanup effort, but studies undertaken primarily to advance a party's interests and that are not closely tied to the actual cleanup are not recoverable, even where such costs may have aided the EPA or affected the ultimate scope and form of the clean-up. 511 U.S. 809, 819-20 (1994). In *Wilson Rd. Dev. Corp v. Fronabarger Concreters* the court explained that costs associated with identifying an unknown PRP fall within CERCLA's provisions only where such expenses are actually necessary to discover that PRP. 209 F.Supp 3d at 1093.

In this case, the stipulations of the Consent Decree entered into between BELCO and EPA provided that it could only be reopened if: (1) there was new information not previously available known to the EPA showing that the cleanup plan was no longer protective of human health or the environment; or (2) where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy. CD, § 13.3.

The Human Health Advisory Board set the toxicity level for NAS-T in drinking water at 10 ppb. J.A. 6. The levels of NAS-T that the EPA found permissible before issuing a Certificate of Completion was between 5 to 6 ppb. FAWS subsequent testing showed two instances of wells testing between 6 to 8 ppb of NAS-T, levels still below the toxicity level set by the Human Health Advisory Board. FAWS testing resulted in no new data as the EPA knew that there were low levels of NAS-T in the Fartown wells, but still issued a Certificate of Completion in September of 2018, over a year before FAWS conducted its own testing in December 2019. FAWS testing was duplicative because the EPA had already conducted its own testing and

engaged in remedial action via the Consent Decree, FAWS the testing showed no new data and resulted in a denial from the EPA to reopen the Consent Decree.

At the time FAWS conducted its testing, BELCO had already fulfilled its duty under the Consent Decree and EPA issued a Certificate of Completion. FAWS stated interest was to reopen the Consent Decree and as such is not entitled to compensation under CERCLA because the testing was done not to aid the overall cleanup but to advance private parties interests, making this case like *Key Tronic*, where the court found that such costs are not recoverable under CERCLA. A private entity's testing costs to identify PRPs may be entitled to compensation, however, it is not disputed that the PRP was already known as BELCO, thus FAWS testing was not done to identify a potential PRP. This makes FAWS case analogous to *Fronabarger*, where the court found that a major factor when considering if an action is necessary is when the action was done to uncover a potential PRP, not a known PRP. The totality of circumstances show that FAWS testing was done at its own discretion to further its own interests, this renders their testing unnecessary and its costs incurred unrecoverable under CERCLA.

The EPA did use the FAWS testing data to eventually reopen the Consent Decree after the ERA was passed, however, it makes no difference that FAWS found levels of NAS-T that would constitute a reopening of the Consent Decree later, only that its testing was not necessary at the time. FAWS conducted testing in December of 2019, the ERA was not passed until November 2020 and it was not until February 14, 2021 that the Department of Natural Resources recognized that the ERA is an ARAR and its provisions should be considered as gap filling measures for CERCLA purposes. The Consent Decree included stipulations for contamination that would endanger human health and the environment, it was not until the ERA passed where a more stringent standard providing the right to clean air and water that FAWS' detection levels of

NAS-T would be sufficient grounds to reopen the Consent Decree. There was no ARAR at the time FAWS did its testing. As the district court said, this is an issue of timing, FAWS could not have detrimentally relied on future rules relaxing stipulations regarding reopening the Consent Decree to justify the recovery of incurred costs when it was unclear whether there would ever be an ERA.

The totality of the circumstances show the FAWS testing was unnecessary and duplicative because it occurred at FAWS own discretion, after the EPA already took its own actions and did not seek to uncover information different than or above and beyond what EPA's testing had already shown, low levels of NAS-T. FAWS action also occurred after the EPA had already informed the private parties that it would be conducting its own investigation, evidenced by citizens of Fartown conducting their tests only after finding out the EPA and BELCO had entered into a Consent Decree. For these reasons, the District Court did not err when it denied compensation under CERCLA for costs incurred by FAWS in its testing of private wells because it was duplicative and not necessary, this Court should therefore uphold the lower courts judgment.

### B. FAWS testing was not consistent with the national plan because there is no nexus between its costs incurred and an actual cleanup.

The lower court declined to assess whether or not FAWS' testing is consistent with the NCP, finding it sufficient to deny relief on grounds that its action was not necessary; but an analysis of this question shows that FAWS' actions fail this inquiry as well. To recover costs incurred for a response action under CERCLA, a private party must prove its response action is consistent with NCP. *Washington State Dept. of Transp. v. Natural Gas Co.*, 59 F.3d 793, 799-800 (9th Cir. 1995); *County Line Inv. Co. v. Tinny*, 933 F.2d 1508, 1512 (10th Cir. 1991)

(Showing that an action was consistent with the NCP is part of the prima facie case for recovery under CERCLA). The NCP is a set of regulations promulgated by the EPA that establishes procedures and standards for responding to releases of hazardous substances. 42 U.S.C. § 9605. Determinations as to whether a response is consistent with the NCP varies depending on whether the response action is characterized as a removal or a remedial action. A removal action costs less, takes less time, and is geared to address an immediate release or threat of release whereas a remedial action seeks to effect a permanent remedy to the release of hazardous substances by addressing the underlying source of contamination. *Cooper Crouse-Hinds v. City of Syracuse*, 568 F.Supp 3d 205, 227 (ND. N.Y. 2021). FAWS testing was a remedial action because it was done with the intent of reopening the Consent Decree, which provided a permanent remedy to address the underlying source of contamination.

Under 40 C.F.R. § 300.700, a response action will be consistent with NCP if a private party substantially fulfills requirements for: (1) Worker health and safety; (2) Documentation of cost recovery; (3) Permit requirements; (4) Identification of applicable or relevant and appropriate requirements (ARARs); (5) Remedial site evaluation; (6) Remedial investigation/feasibility study and selection of remedy; and (7) Providing an opportunity for public comment concerning the selection of the response action" which might include preparing a formal community relations plan. *Public Serv. Co. v. Gates Rubber*, 175 F.3d 1177, 1182 (10th Cir. 1999). In addition, courts have found an action to be consistent with the NCP when the requirements for the purposes 40 C.F.R. § 300.700 is fulfilled *and* results in a CERCLA quality cleanup. *Young v. U.S.*, 394 F.3d 858, 864 (10th Cir. 2005). In *Gussack Realty Co. v. Xerox Corp*. the Second Circuit held that plaintiffs testing costs were not recoverable as they were not closely tied to the actual cleanup. *Gussack Realty Co. v. Xerox Corp*., 224 F.3d 85 (2d Cir.

2000). The court in *Gussack Realty* further explained that the dual goals of CERCLA are to clean up hazardous waste sites and impose the costs of such cleanup on PRPs, "the former, under the statutory scheme, must precede the latter." *Id* at 91.

**C. Costs were not tied to a CERCLA Quality Cleanup.**

To achieve CERCLA quality cleanup, the relevant requirements are that a party must: (1) utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable; (2) attain applicable and relevant and appropriate requirements; and (3) provide for meaningful public participation. *County Line*, 933 F.2d at 1514; 40 C.F.R. § 300.700.

In *Young v. U.S.*, the plaintiffs purchased a parcel of land adjacent from a Superfund site that they knew the EPA had conducted cleanup actions on. Plaintiffs subsequently tested their land, incurring testing costs, but undertook no cleanup efforts. 394 F.3d 858, 861 (10th Cir. 2005). The plaintiffs incurred costs for site investigation, soil sampling, and risk assessment, yet, the court held that none of those costs were necessary to the containment and cleanup of hazardous releases nor consistent with the NCP. *Id* at 864.

In *Wickland Oil Terminals v. Asarco Inc.* the Ninth Circuit found that a private party does not need EPA approval of a cleanup program to recover under CERCLA, and investigatory costs fall within the costs of response under CERCLA. *Wickland Oil Terminals v. Asarco Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). In *Wickland*, the plaintiff incurred costs for testing hazardous substances which were left behind by a previous operator on the site and was required to undertake permanent cleanup measures, showing a nexus between the costs incurred by the plaintiff and the actual cleanup effort.

This case is more like *Young* than *Wickland*, because like in *Young*, FAWS incurred testing costs but it undertook no cleanup efforts failing to establish that testing costs were consistent with the NCP because its costs had no nexus with a cleanup response. Unlike *Wickland* where costs were tied directly to a cleanup, FAWS only conducted a remedial investigation and there was no nexus between the site investigation and CERCLA quality cleanup because FAWS undertook no cleanup efforts.

In *Walnut Creek Manor, LLC v. Mayhew Ctr., LLC*, the plaintiff argued that it does not have to perform the cleanup, rather because their efforts will play a significant role in the cleanup effort, their activities are considered consistent with the NCP. F.Supp 2d 918, 931 (N.D. Ca 2009). The court rejected this argument, finding that merely performing a few investigations of the site did not constitute substantial compliance with the entirety of the NCP, made clearer by the fact that a cleanup had not yet begun. *Id.*

In this case, FAWS action was only a preliminary site test for the levels of NAS-T in Fartown wells. This limited investigation is analogous to the actions by the plaintiff in *Walnut Creek Manor*, where the court found that the performance of a few investigations did not constitute substantial compliance with the NCP. Here FAWS, testing falls even shorter than in *Walnut Creek Manor*, in that its testing did not show actionable levels of NAS-T, and therefore no cleanup was done.

There was no CERCLA quality cleanup associated with FAWS actions. The action consisted solely of testing private wells for the purpose of collecting data, there was no permanent solution or alternative treatment proposed, thus no cleanup action.

CERCLA does not define ARARs, but courts have found that actions must meet a standard that meets legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements. *Ohio v. United States EPA*, 997 F.2d 1520, 1525 (D.C. Cir. 1993).

There was no identification of applicable or relevant and appropriate requirements, because the ERA had not yet passed and the Department of Natural Resources had not recognized the ERA as an ARAR until February 2021, over a year after FAWS conducted testing at its own discretion. The standard for meeting ARARs set out in *Ohio v. U.S. EPA*, is not met by FAWS in the present case because there was no applicable or stricter federal or state requirement at the time of FAWS testing. Providing a monetary remedy for parties to retroactively recover testing costs after a legislature codifies a more stringent standard would flood the courthouse doors every time an agency promulgated different regulations.

Courts look to the extent to which the public was involved and voicing their concerns when assessing whether the public participation requirement is satisfied, this includes preparing a formal community relations plan to ensure public involvement; there must also be a a selection of a remediation plan which shall be published and provide ample opportunity for submission of comments and provide an opportunity for a public meeting. *Carson Harbor Village Ltd. v. County of L.A.*, 433 F.3d 1260, 1267 (9th Cir. 2006).

Nothing in the record suggests that there was a period for any meaningful public comment or participation outside the fact that a discrete portion of the public were members of FAWS. In this case, FAWS may satisfy the first requirement of public participation by forming FAWS and collecting sworn testimony from the community voicing their concerns about their private wells, however a formal community relations plan is not known to have been prepared to show full compliance with this threshold inquiry. The second requirement, however, FAWS

clearly does not satisfy, as there is no evidence of a public meeting, or a transcript of a meeting being made to the public.

Because FAWS incurred no necessary costs consistent with the NCP, CERCLA provides no remedy and the lower court's judgment should be upheld.

### D. Public Policy reasons support the District Courts judgment, denying FAWS from collecting costs pursuant to CERCLA.

CERCLA is not a general vehicle for toxic tort claims. *County Line Inv. Co. v. Tinny*, 933 F.2d 1508, 1517 (10th Cir. 1991). In *Dedham Water Co. v. Cumberland Farms Dairy*, the First Circuit held that a private plaintiff may recover costs if they show that a release of a hazardous substance from the defendant's facility caused the plaintiff to *reasonably* incur response costs. *Dedham Water Co. v. Cumberland Farms Dairy,* 889 F.2d 1074, 1157-58 (1st Cir. 1986). A reasonableness analysis in this context balances government interests with private interests. *See GE v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010).

The FAWS testing was not reasonably incurred because there is a valid governmental interest in avoiding duplicative testing on environmental sites and the private interests were not vindicated by doing the testing because until the passage of the ERA loosened the stipulations for reopening the Consent Decree there was no vehicle to vindicate the FAWS testing. If the Court were to endorse compensation to FAWS under these circumstances, it may provide "temptation to improve one's property and charge the expense of improvement to someone else." *quoting G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995).

The New Union Department of Natural Resources referred the investigation and remediation to the EPA specifically because of the lack of resources and expertise. Environmental testing is a delicate and complex task best left to an agency with expertise in the matter, in this case the EPA. The requirements for private action to be necessary and consistent

for the recovery of costs reflects this intuition to ensure that private parties are not conducting frivolous or opportunistic testing at the expense of others. NAS-T is not regulated by the Safe Water Drinking Act, awarding compensation to private parties conducting ad hoc testing at their own discretion–which show no significant levels of unregulated substances–endorses as the lower court describes "fishing expeditions" from private parties attempting to collect compensation under CERCLA for individual interests. The EPA and the courts would incur significant costs to administrative and judicial economy by having to remedy an onslaught of compensation claims and therefore FAWS should not be compensated for superfluous testing costs done at their own discretion.

Failure to recover costs under CERCLA does not end FAWS ability to recover costs by other means, they can still seek compensation for damages by bringing a tort action. As the court in *County Line* opined, CERCLA is not a vehicle for toxic torts, where testing is meritorious a private party can recover under state tort law, rather than a CERCLA action.

FAWS has failed to show that its costs were necessary, consistent with the national contingency plan, and were reasonable. For these reasons, the EPA asks this Court to uphold the lower courts judgment denying compensation to FAWS under CERCLA.

**2. <u>The ERA is An Applicable or Relevant and Appropriate Standard.</u>**

The 2017 Consent Decree between BELCO and the EPA set two conditions for which the EPA could reopen it: "(1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or (2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." CD, § 13.3. The Consent Decree defined "Regulatory Standards" to include "applicable or relevant and appropriate requirements under CERCLA" ('ARARs').

The EPA reopened the Consent Decree on the second condition, finding the ERA from New Union was an ARAR and that the clean-up plan did not satisfy this ARAR. CD, § 1.12.

To be an ARAR under CERCLA, a state environmental standard must be (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *U.S. v. Akzo Coating of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991); 42 U.S.C. § 9261. BELCO contends that the ERA fails to meet the first three elements. However, the ERA meets all of these requirements and, thus the EPA properly found the ERA to be an ARAR. As an ARAR, the ERA was a sufficient basis for the EPA to reopen the Consent Decree.

**A. The ERA is Properly Promulgated.**

Since the passage of CERCLA, the EPA clarified the definition of "promulgated" in its *National Oil and Hazardous Substances Pollution Contingency Plan* stating, "[f]or purposes of identification and notification of promulgated state standards, the term promulgated means that the standards are of general applicability and are legally enforceable." 40 C.F.R. § 300.400(g)(4). The ERA standards satisfy both requirements, that of general applicability and legal enforceability. As a result, this amendment is "promulgated" under the CERCLA regulatory scheme.

The first of these "promulgated" requirements, general applicability, is satisfied if the state standards create binding rules on all citizens of the particular state. 52 Fed. Reg. 32,495, 32,498 (Aug. 27, 1987)(EPA guidance that gives eligible requirements that "advisories, guidance, or other non-binding policies, as well as standards that are not of general application"); *U.S. v. Akzo Coatings of America, Inc.*, 719 F.Supp. 571, 583 (E.D. Mich. 1989). The text of the

ERA clearly indicates within the first few words that it creates binding rules for every citizen of New Union:

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

N.U. Const. Art. I § 7.

The legislative history corroborates this intention as the ERA's sponsor, Wright, emphasized that the law would create a "self-executing" effect for every citizen of New Union. Nu Assembly Nos. A10377, A10455. Consequently, the ERA is an amendment of "general applicability," meeting the first "promulgated" requirement.

To meet the second "promulgated" requirement, "legally enforceable," the state standard must not interfere with the U.S. Constitution nor any other federal law or regulation. While BELCO may contend that the ERA is unconstitutionally vague relying on the general word "clean," the law provides clear guidance for how citizens must comply by not adding "contaminants and pollutants caused by humans" to the environment. N.U. Const. Art. I § 7. The EPA has listed a comprehensive list of regulated contaminants and pollutants under federal environmental laws. The contaminant pertinent to this litigation is currently regulated federally under the 1995 Health Advisory Level as a contaminant not subject to the National Primary Drinking Water Regulation. By specifying with reference to the legally specific terms of "contaminant" and "pollutant," the ERA meets the vague-ness standard; it is sufficiently definite that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In so doing, the ERA provides "fair warning" to citizens that they may be in violation. *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

Furthermore, the ERA conforms to EPA's specified regulatory rules for ARARs. EPA's regulations state that "Even if a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria for state ARARs. However, EPA would have considerable latitude in determining how to comply with the goal in the absence of implementing regulations." 40 C.F.R. § 300.400(g)(4). While the ERA states a general fundamental right, it is not precluded from being a state ARAR. In accordance with the ERA, the EPA determined that New Union law restricts corporations from adding already regulated contaminants to groundwater. The EPA's interim guidance grants it further discretion to such decision making, adding "[g]eneral State goals that are duly promulgated have the same weight as explicit numerical standards, although the former have to be interpreted in terms of a site and therefore may allow more flexibility in approach." 52 Fed. Reg. 32,496-01 (Aug. 27, 1987). By conforming as well to these federal CERCLA requirements, the ERA meets the second "promulgated" requirement of being "legal enforceability."

**B. The ERA is More Stringent Than Federal Standards.**

The second requirement to be a State ARAR is for it to be more stringent than federal standards. EPA regulations have expounded on the scope of this requirement, stating that "Where no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a State ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." 40 C.F.R. § 300.400(g)(4)). This corroborates with how Senator Mitchell, one of the key authors of 42 U.S.C. § 9261 explained the more stringent requirement, stating it includes "any State requirement where there is no comparable Federal requirement." 132 Cong. Rec. 14,915 (1986).

The ERA is more stringent than any federal standards that preceded it, setting a distinctly broader limitation on the release of pollutants and contaminants. The ERA gives its citizens a fundamental right that the air and water of New Union be "clean," a plainly higher standard than the Clean Air Act or Clean Water Act provide." N.U. Const. Art. I § 7. The legislative history of this amendment shows that the sponsor considered "clean" to mean "healthful to human beings," "healthful to our fellow creatures in the environment," and "free from harm." Nu Assembly Nos. A10377, A10455. The ERA's goal of "clean" with respect to water sets a higher standard for the protection goals than the Clean Water Act and Safe Drinking Water Act.

The Clean Water Act states its objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Unlike the ERA goal of "clean" which means "healthful to human beings," the end-goal of the Clean Water Act is "chemical, physical, and biological integrity" which does not set a clear standard that these waters be healthful for human consumption. *Id*. This is equally true for the subgoals of the Clean Water Act, which pertain to goals other than human consumption. For example, some of these goals include eliminating discharge of pollutants into "navigable waters," providing protection and propagation of "fish, shellfish, and wildlife," providing for "recreation" in and on the water and prohibiting "discharge of toxic pollutants in toxic amounts." 33 U.S.C. §1251(a)(1)-(3).

The Safe Drinking Water Act is more similar to the ERA "clean water" provision, but still this law narrows its application further than the ERA. The Safe Drinking Water Act only applies to public drinking water supply systems that serve a minimum number of customers, whereas the ERA applies to "each and every person" within New Union including the private drinking wells pertinent to this litigation. 42 U.S.C. §§ 300(f)–(g)(4); N.U. Const. Art. I § 7. By

including such a broad fundamental right to "clean water" that is "healthful to human beings" and applying it to all citizens of the state, the ERA is more stringent than existing federal laws.

**C. The ERA is Relevant and Appropriate to Selected Remedial Action.**

The last requirement for a state ARAR is that the selected remedial action be "legally applicable to the hazardous substance or pollutant or contaminant concerned" or that it be "relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant." 42 U.S.C. § 9261. The ERA is an amendment that establishes a general fundamental right to clean air and water from human caused contaminants and pollutants and thus it does not "specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site." N.U. Const. Art. I § 7; *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). However, the ERA is relevant, addressing a problem "similar to those encountered at the site," water contaminated by human activity. *Id*. The ERA is also appropriate to the remedial action pursued as it establishes a fundamental right to "clean water" for New Union Citizens.

A "relevant and appropriate" ARAR breakdown of the ERA to the Fartown situation would be similar to the analysis conducted by the 6th Circuit in *U.S. v. Akzo Coating of Am.* on a similarly broad Michigan statute. In *U.S. v. Akzo Coating of Am.*, the Michigan law in question was the following:

> It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters.

M.C.L.A. § 323.6(a).

The *U.S. v. Akzo Coating of Am.* lawsuit action was brought against twelve defendants who cited PCBs, phthalates, organic solvents, oil and grease, phenols and heavy metals which later seeped into the soil and groundwater. *U.S. v. Akzo Coating of Am.*, 949 F.2d at 1416. For the relevancy analysis, the Sixth Circuit analyzed the possible factors to consider under the ARAR, which included the environment in question ("groundwater"), the type of substance ("injurious"), and the goal of the potential ARAR ("protecting aquifers from actual or potential degradation") and determined that each factor was relevant to the damaged site. *U.S. v. Akzo Coating of Am.*, 949 F.2d at 1440. Similarly, in the case involving BELCO, the possible factors to consider are relevant to the damaged site. Here, the environment in question is groundwater, the type of substance is NAS-T, a human caused contaminant listed under the EPA's 1995 HAL, and the objective of the ERA is granting citizens of the state clean water free of harm from human caused contaminants. Each of these factors are relevant to the Fartown site that was experiencing harm in their groundwater due to a human-caused contaminant. Additionally, after considering these factors, the use of the ERA to this particular problem is appropriate. Through the ERA, the EPA has ordered BELCO to sample the fifty contaminated wells, provide clean bottled water to residents whose water is between 5 ppb and 10 ppb (which detectable by the human nose as a sour smell), and provide filtration systems to those residents whose is above 10 ppb HAL. Since this solution addresses all the currently known harms of NAS-T, the ERA is appropriately addressing the problem at the Fartown site.

### 3. EPA's Decision Not to Order BELCO to Install Filtration Systems in Fartown is consistent with the ERA.

The EPA followed the APA and correctly interpreted the ERA when they decided not to order BELCO to install filtration systems in Fartown. Where a challenge is made to an EPA

enforcement order under the Administrative Procedure Act (hereinafter, "APA"), courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The District Court correctly decided that the EPA is entitled to deference in its application of CERCLA and ARARs but erred in determining EPA's decision-making process was inconsistent with the ERA. The ERA is an ARAR, but "clean water" does not mean water free from *any* contamination, and the EPA is entitled to deference to apply the ERA.

The District Court erred in determining that the EPA's interpretation of the ERA was arbitrary and capricious when they decided provision of bottled water is sufficient to address the low amounts of contamination in Fartown. To pass the arbitrary or capricious test, an agency action must be a permissible construction of the statute and the decision must have a rational connection to the facts on the record. *Dep't of Com. v. New York*, 204 L. Ed. 2d 978, 2569 (2019). This test is narrow and exceedingly deferential such that a court may not overturn an environmental-protection agency's decision if the decision constitutes a reasonable conclusion based on the administrative record. *See Town of Southold v. Wheeler*, 48 F.4th 67, 77-78 (2d Cir. 2022); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Ocean Conservancy v. Evans*, 260 F.Supp. 2d 1162, 1185 (M.D. Fla. 2003). "A court is not empowered to substitute its judgment for one of an agency." *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 417; *see also Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004) (*citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281 (1974)(explaining that even when an agency rationalizes its decision with less-than-ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.))

Under the APA, an action can be arbitrary and capricious when the agency relies on factors Congress did not want it to consider, the agency "entirely failed" to consider important aspects of the problem, the agency offered explanation counter to the evidence, or the agency made a decision so improbable that it could not be ascribed to differences in view or product of agency expertise. *Motor Vehicle Manufac. Assoc. v. State Farm*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A). Mere evidence of additional steps an agency could have taken is not enough, that is not the courts job nor is it the applicable legal standard, a clear error of judgment must have been made. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 759 (4th Cir. 2019); *Sierra Club v. State Water Control Bd.*, 898 F.3d 383,407 (4th Cir. 2018). When a court is determining if an agency had a reasonable basis in the record to arrive at the conclusions it reached, courts typically look at statutory interpretation and the legislative history of the statute. *Alaska Dep't of Env't Conservation*, 540 U.S. 461, 496-97*; Dep't of Com.* 204 L. Ed. 2d at 2569.

In determining whether EPA's actions under the statute were arbitrary and capricious, it is important to look at the plain meaning of the statute. A plain meaning of the statute clearly indicates that EPA's interpretation of the statute is correct. The "Environmental Rights Amendment," to the constitution of the State of New Union, Article 1, Section 7 provides that "each and every person of this State has a fundamental right to clean air and clean water." N.U. Const. Art. 1 § 7. Central to this bill is ensuring clean water, it does not specify how to provide clean water to residents, what clean water means, nor who should bear the costs for a bad smelling and non-toxic leveled water. At no point in the ERA does it explain that EPA is under any responsibility to order the payment of filtration for water quality levels that do not meet harmful levels, nor would this be a reasonable reading of the statute. When a statute is broadly written, courts typically defer to the experts, here the EPA, to decipher and carry out the law. *See*

*Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020). Here, the broad language of the statute by the Senate gives a clear signal that the EPA is entitled to agency deference to ensure clean water remains with permissible gap filling to address shortfalls of previous legislation. A plain view meaning of clean water would not require the EPA to order filtration of drinking water that does not exceed the maximum contaminant level of drinking water.

In denying the request for filtration under harmful levels, EPA cited that neither FAWS' nor EPA's sampling results found any well that tested above the HAL for NAS-T. EPA determined the HAL for NAS-T almost thirty years ago based on reliable scientific data. As discussed in *Sierra Club v. Water Control Board*, monitoring requirements would allow a government agency to act swiftly if water samples revealed exceedances of an agency standard is not arbitrary and capricious. Similarly, "[o]wners of private wells are responsible for ensuring that their well water is safe from contaminants." Centers for Disease Control Prevention: Drinking Water Frequently Asked Questions https://www.cdc.gov/healthywater/drinking/drinking-water-faq.html. The EPA ordered BELCO to filter water that exceeds the HAL meaning any water in which the EPA deemed to be harmful for drinking purposes, they recognized needed the filter. This is in accordance with the word clean and upholds the traditional plain meaning of the word.

Under the ERA, legislative history is also an important factor to consider. Throughout its passage, the framers of this amendment addressed what clean meant to them. Interpretation and intention of the statute regarding water was to "be able to consume water through public water supply without any harm." Nu Assembly Nos. A10377, A10455. Additionally, the framers added "that does not mean that the water is free of any or all substantives," that "a public water supply

involves other chemicals, substantives." *Id*. "Clean would mean... water that is free from contamination that would make the water unhealthful or harmful to consume." *Id*. Additionally, harmful would be "something that causes disease or convulsion." *Id*. When passing the ERA, it is clear that the framers did not intend to mean any foreign substance, just contamination that would significantly affect or hurt citizens. According to EPA's Health Advisory Level for NAS-T drinking water is 10 ppb. Anything above 5 ppb can provide a sour or stale smell however, it is only harmful to drink 10 ppb or more. Here, the majority of the tests done on Fartown are between levels of 5 ppb and 8 ppb. None reach the level in which the drinking water would be contaminated or "not clean" for consumption. When asked specifically about the issue of a bad smell, the framers explained that the ERA neither proactively nor regressively addresses smell, just that the smell can be an indication of an expectation of their citizens. Nu Assembly Nos. A10377, A10455. Nevertheless, the EPA took measures to supply water bottles to Fartownians whose wells tested above 5 ppb. These wells only consist of 20% of the population as the majority of the Fartown wells did not detect NAS-T. No Fartown well has ever tested above 8 ppb. Additionally, the EPA directed BELCO to do three things in the UAO:

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

UAO, § 3.2.

Absent a provision specifically addressing NAS-T, EPA reasonably and with cause interpreted the ERA by handing out water bottles to each well in Fartown that tested above the smell level of 5 ppb. Thus, ensuring that every person had access to clean water "free from

contaminants and pollutants caused by humans" and fulfilling this specific duty accorded to them by the ERA. N.U. Const. Art. 1 § 7.

Requiring water free from any substance at all would not be a reasonable application of the ERA or consistent with current environmental laws. To call this action arbitrary and capricious is a judicial error that must be addressed. EPA considered important aspects of the problem, EPA offered explanations of the actions taken during this time, and EPA's measures are consistent with the ERA and other environmental regulations. Requiring water entirely free from any other substance than H2O would result in invalidating countless permits under the Clean Air Act, Clean Water Act, and other federal regulations that all allow some "safe" levels of contamination in discharges. All of these provisions are similar in goals which the EPA is accorded deference to carry out the day-to-day oversight. For example, under the Clean Water Act, state agencies have the primary role in promulgating water quality standards. Even though the Clean Water Act has the word "clean" in its title EPA is not required to abate all pollution, just enough to maintain the integrity of the water. Reading the ERA as the District Court intends does not allow for the Clean Water Act and other environmental laws to function reasonably. Thus, it would mean a greater implication for invalidating countless environmental actions in which the framers did not intend. It is clear that the reading of the ERA should function as aiding in gap filling, not changing the entire landscape for environmental law to come.

FAWS and the District Court contend that the EPA, in not ordering BELCO to cover costs of testing, acted in an arbitrary and capricious way because they did not do any means necessary to address the issue. However, as seen from legislative history and justification when "agencies discover something, or a private entity creates something new that ends up harming our citizen… then this amendment would fill that gap and help ensure that no one suffers until

such a time as a law is passed to encompass that scenario or substance." Nu Assembly Nos. A10377, A10455. Therefore, EPA's role under the ERA is to ensure that no one suffers from the absence of clean drinking water while the Senate passes a law that encompasses a scenario or substance. *Id*. It is not the role of the EPA to create and pass a law to cover this specific instance. Simply put, that is the job for members of the legislative branch. Even more telling is the District Court's decision that agency deference is appropriate for the EPA, yet the court failed to give the EPA that deference when the agency explained their reasoning for their actions. Here, EPA's decision is within their purview of their duties under the ERA, therefore the court must defer to the EPA's interpretation of the ERA. The District Court fell short in not deferring to the experts' opinion, and thus substituted its judgment for one of the agencies.

Overall, statutory interpretation, legislative history, and similarly situated laws align with EPA's reading of the ERA. Hence, EPA acted reasonably and with clear rationale when it decided to provide the City of Fartown with water bottles instead of exceeding its power and authority under the ERA.

**4. <u>The District Court has supplemental jurisdiction over state law claims.</u>**

The district court's judgment, exercising its discretion to hear the supplemental state law claims should be upheld because pursuant to 28 U.S.C. § 1367(a) it has discretion to do so.

In *United Mine Workers of America v. Gibbs*, the United States Supreme Court held that a federal court has jurisdiction over state law claims that arise from the same nucleus of operative fact. The court in Gibbs opined that justification for jurisdiction lies in: (1) consideration of judicial economy; and (2) convenience and fairness to litigants. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966). The Federal Rules of Civil Procedure sec. 1367 was enacted to codify *Gibbs* and provides that "any civil action of which the district

courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction." 28 U.S.C. § 1367(a). Claims are part of the same case or controversy if they stem from a "common nucleus of operative facts." *Rosmer v. Pfizer Inc.,* 263 F.3d 110, 116 (4th Cir.2001) (*citing Gibbs,* 383 U.S. at 725). Generally, only a "loose factual connection between the claims' ' is required for claims to arise from a common nucleus of operative facts. *Posey v. Calvert Cnty. Bd. of Educ.,* 262 F.Supp.2d 598, 600 (D.Md.2003).

A federal court may decline to hear supplemental state law claims pursuant to 28 U.S.C. § 1367(c), however, in the context of state nuisance claims arising from the same set of operative facts as a CERCLA lawsuit, a federal court has discretion to exercise supplemental jurisdiction over a Plaintiff's state law claims under 28 U.S.C. § 1367(a). *Talarico Bros. Bldg. Corp. v. Union Carbide Corp.*, 2021 U.S. Dist. LEXIS 79793 at *16 (W.D. NY. April 26, 2021). Courts may decline to exercise supplemental jurisdiction when the state law claims rest on novel or complex issues, however, a tort claim is generally not considered novel or complex. While some courts have declined to exercise supplemental jurisdiction over state nuisance claims stemming from a CERCLA lawsuit, the courts which decline to exercise supplemental jurisdiction over state law claims related to CERCLA claims concede that supplemental jurisdiction does in fact exist. *See e.g. May v. Apache Corp.*, 870 F.Supp 2d 454, 459 (S.D. Tex. 2012).

In this case the district court exercised federal question jurisdiction over the anchor claim with an embedded state law claim of nuisance. The anchor claim implicates a federal question because CERCLA is a federal statute. All of the Plaintiff's claims stem from an incident which took place at the same time and on the same property, making the federal claim sufficiently interrelated to the state law claim, giving the federal court supplemental jurisdiction over those

state law claims. FAWS' state tort claims regarding negligence and nuisance are not a novel or complex issue and a federal court has the right to assert supplemental jurisdiction over these claims. Judicial economy is served by the district court retaining jurisdiction because the district court will continue to be involved in this case insofar as it has jurisdiction over the enforcement of the Consent Decree. There is also no issue of fairness to the litigants for the same reason as all parties will continue to be involved with the district as it retains jurisdiction over the Consent Decree.

Because the district court has discretion to exercise supplemental jurisdiction over state law claims that stem from a federal question claim, EPA asks this Court to uphold the judgment of the lower court in denying FAWS motion to dismiss the remaining state law claims.

## CONCLUSION

The District Court's ruling that FAWS should not be entitled to compensation under CERCLA is correct. FAWS failed to present evidence supporting the claim that it is entitled to compensation under CERCLA for either of the two elements required. The District Court concluded that FAW's testing costs were not recoverable because they were duplicative and therefore unnecessary within the meaning of the law. The lower court ended its inquiry there, but for the aforementioned reasons, FAWS also failed to show that its actions were consistent with the NCP, failing the second element to recovering costs under CERCLA. These reasons along with public policy implications serve to bolster the District Court's conclusion, and therefore its judgment should be upheld.

The District Court also correctly ruled that the ERA of New Union is an ARAR under CERCLA. In order to be an ARAR, a state standard must be (1) promulgated, (2) more strict than federal standards, (3) applicable or relevant and appropriate to the selected remedial action,

and (4) timely identified. BELCO only challenged the ARAR classification on the first three elements, and the ERA satisfies all of these elements. The statutory text and legislative history show that the ERA is of general applicability and legal enforceability, and thus promulgated. Unlike other federal standards, the ERA elucidates a standard of clean water and air without any caveats and is thus stricter than federal standards. Furthermore, all of the possible relevant factors weigh in favor of the ERA being relevant and appropriate to the selected remedial action. This Court should therefore rule the ERA is an ARAR under CERCLA.

The EPA followed the APA and correctly interpreted the ERA when they decided not to order BELCO to install filtration systems in Fartown. Statutory interpretation, clear legislative history, and similarly situated laws align with EPA's reading of the ERA. EPA acted reasonably and with clear rationale when it decided to provide the City of Fartown with water bottles instead of exceeding its power and authority under the ERA. The Court should therefore defer to EPA's interpretation of the ERA.

The Federal Rules of Civil Procedure and prior case law give a federal court discretion to exercise jurisdiction over related state law claims when they stem from a common nucleus of operative fact. FAWS remaining nuisance and negligence claims arise from the same set of facts and common law tort claims are neither novel nor complex, thus the District Court properly exercised supplemental jurisdiction over the remaining tort claims.