Team 22

C.A. No. 22-000677

In The
UNITED STATES COURT OF APPEALS
for the Twelfth Circuit

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Plaintiff-Appellant-Cross Appellee,

v.

BETTER LIVING CORPORATION,

Defendant-Appellee-Cross Appellant,

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,

Intervenor Plaintiffs-Appellants-Cross Appellants.

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,

Plaintiffs-Appellants,

v.

BETTER LIVING CORPORATION,

Defendant-Appellee.

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

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JURISDICTIONAL STATEMENT

All members of Fartown Association for Water Safety are residents of the State of New Union. Better Living Corporation is incorporated in Delaware with its principal place of business in New Union.

The United States District Court for the District of New Union had, for consolidated cases docketed as 17-CV-1234 and 21-CV-1776, original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. The District Court entered final judgment on June 1, 2022.

The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Under CERCLA, can a party recover response costs, when the response in question was not necessary because the CERCLA site was already under investigation by a state agency?

II. Under CERCLA, can a state amendment be considered an applicable or relevant and appropriate requirement, when the amendment is general and provides no clarifying language to its definition?

III. Under CERCLA, can a party demand remedial actions, when the state standard is expensive, unnecessary, and contrary to federal regulatory schemes?

IV. Under 28 U.S.C. § 1367, can a federal court retain jurisdiction over supplemental state law claims, when the tort claims are not complex, and the federal court has already adjudicated the facts?

STATEMENT OF THE CASE

Better Living Corporation ("BELCO") is a business that specializes in the manufacturing and application of a sealant coating called "Lockseal," a product primarily used in industrial applications to prevent corrosion. (Record ("R.") p. 5). The manufacturing of Lockseal involves the combining of two chemicals, Nitro-Acetate Titanium ("NAS-T") and an "activation agent," to create a reaction that turns to a solid at room temperature. *Id.* BELCO patented the product in 1972 and began to manufacture the product in a facility in Centerburg, New Union in 1973. (R. p. 5-6).

Centerburg is a town of 4,500 residents that is located 2 miles north of Fartown, which has a population of 500. (R. p. 5). Both communities are positioned on top of the Sandstone Aquifer ("aquifer"), a south-flowing water source which the residents of both towns rely on for their drinking water. *Id.* Fartown accesses the water through private wells, while Centerburg has a public water supply, the Centerburg Water Supply ("CWS"). *Id.*

Initial Detections of NAS-T

In 2013, 40 years after BELCO began manufacturing, residents in Centerburg noticed that the water had a distinct smell. (R. p. 6). The Department of Health ("DOH") investigated the complaints in 2015 and found high levels of NAS-T in the CWS. *Id.* Prior to this finding, the EPA had adopted a Health Advisory Level ("HAL") of 10 ppb ("parts per billion") for NAS-T in water supplies based on studies from the 1980s showing that the substance was a "probable carcinogen." *Id.* They concluded that water was safe to drink under 10 ppb, regardless of a smell at 5 ppb. *Id*. The DOH, using the HAL, instructed residents to cease drinking water from the CWS. *Id.* BELCO began providing bottled water to the residents of Centerburg while the issue was being investigated. *Id.* The New Union Department of Natural Resources ("DNR") turned the investigation over to the Environmental Protection Agency ("EPA") in 2016. *Id.*

BELCO Investigation into the Source of Pollution

BELCO and the EPA entered into an agreement where BELCO would continue to provide bottled water and to investigate the issue. (R. p. 6). The investigation indicated that the NAS-T was leaching from a lagoon used to store wastewater at the Centerburg facility, creating a plume of NAS-T in the aquifer. *Id*. BELCO reviewed the cleanup remedies, a process known as a remedial investigation and feasibility study ("RI/FS"), and began working with the EPA to find the extent of the issue. *Id.* By January of 2017, BELCO installed several monitoring wells lining the aquifer, with the last five wells a half-mile outside of Fartown. (R. p. 7). Finding no NAS-T in the final wells, the EPA concluded that no more wells were needed. *Id*. In the RI/FS stage, no remediation of the plume was recommended, but BELCO was to remove the soils at the facility and install a filtration system on the CWS. *Id*.

The EPA selected a clean-up plan for the lagoon and brought a cost recovery action against BELCO in June of 2017. (R. p. 7). BELCO and the EPA entered into a Consent Decree ("CD"), whereby BELCO agreed to design and implement the selected action. *Id.* After receiving no objections from Fartown or Centerburg residents during public comment, the lower court approved the CD. *Id.*

The CD provided that the EPA would issue BELCO a Certificate of Completion ("COC") but allowed for the CD to be reopened on two grounds: new information revealed, or more stringent standards established. (R. p. 7).

BELCO's Remediation

To remediate the NAS-T issue, BELCO installed and maintained a water filtration system on the CWS, removed soils at the lagoon that presented any harm, and continued to sample the monitoring wells installed during the initial investigation. (R. p. 7). The filter installation and soil

removal were each completed in late 2017, while the monitoring of the wells continued. *Id.* The samples from the wells were consistent with previous findings, only finding two NAS-T detections in January 2018, both of which were below the HAL. (R. p. 8). Due to the continued low NAS-T results in the monitoring wells, the EPA issued the COC to BELCO in September of 2018. *Id*.

Fartown residents testified that they noticed the water in their private wells starting to smell as early as 2016. (R. p. 8). After becoming aware of the BELCO investigation, the residents requested that the DOH test private wells in Fartown. *Id.* In early 2019, the DOH testing of five Fartown wells did not detect any NAS-T in the tested wells. *Id*. After the EPA denied the Fartownians request that BELCO conduct more testing, 100 of those residents formed Fartown Association for Water Safety ("FAWS") and began their own testing. *Id*. The testing, through a private company for a cost of $21,500, found 105 detections of NAS-T out of 225 samples taken. *Id.* None of the samples showed NAS-T levels to be over the HAL of 10 ppb. *Id.* In June of 2020, the EPA declined to take further action based on the FAWS testing due to the low detections of the substance. *Id.*

The Passage the New Union Environmental Rights Amendment

In 2020, New Union passed the Environmental Rights Amendment ("ERA" or the "amendment"). (R. p. 8). The amendment was passed through the legislature and signed by the governor. *Id.* The ERA reads, "each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. I, § 7; *Id.*

Before the passage of the amendment a legislative assembly was held and the sponsor of the amendment, Mr. Wright, answered questions regarding the ERA. (Addendum ("Add.") p. 3). When asked about the potential confusion over certain terms within the amendment, such as "clean

water" and "harmful," Mr. Wright provided some clarity as to what the amendment is meant to protect. (Add. p. 4). He answered that "clean water" means safe for human consumption and healthful. (Add. p. 5). Other issues were raised in regard to confusion for businesses who, while they may be currently operating legally, may later be in violation of the amendment because, in that legislator's opinion, the amendment was too broad. (Add. p. 6). Mr. Wright responded that the amendment provides a framework for the courts to address the issue while the legislature enacts new laws to regulate or address the substance, making the right self-executing. *Id.*

ARAR and Reopening of the Consent Decree

In January of 2021, the EPA, with the insight of the DNR, found that the ERA constituted an Applicable or Relevant and Appropriate Requirement ("ARAR"). (R. p. 9). The EPA cited previously known information, such as the FAWS testing results, odors, and possible carcinogenic effects of NAS-T, as basis for reopening the CD. *Id.* The CD was reopened and BELCO was ordered to conduct testing in Fartown. *Id.* The response actions also included BELCO providing bottled water to Fartown residents whose wells tested positive for NAS-T, though the EPA refused to include the request from FAWS that BELCO be required to install filters on positive private wells that fall below the HAL. *Id.* BELCO refused to comply because, in their opinion, the ERA could not be an ARAR. *Id.* The EPA issued a Unilateral Administrative Order ("UAO"), directing BELCO to comply. *Id.*

BELCO refused to follow the UAO, so the EPA began testing the wells and supplying bottled water. (R. p. 10). The testing was completed monthly, finding results were consistent with the FAWS testing; no wells tested above 8 ppb. *Id.* The EPA filed a motion on August 2, 2021 against BELCO to recover its costs incurred in Fartown. *Id.*

FAWS filed a motion to intervene on the suit, claiming that the UAO was arbitrary, capricious, and contrary to law under the Administrative Procedures Act ("APA"), because it failed to require the installation of the water filters on all private wells that tested positive for NAS-T. (R. p. 10). FAWS also filed a motion to seek recovery for the $21,500 spent on the FAWS testing. FAWS also argued that they should recover from BELCO for tort violations under New Union law. *Id.*

All residents of FAWS reside in New Union, while BELCO has its principal place of business in New Union and is incorporated in Delaware. (R. p. 10). The US District Court for the District of New Union exercised original jurisdiction over the CERCLA claim, supplemental jurisdiction over the state law claims, and consolidated the claims into one action. *Id.* FAWS stated that they would later seek removal from the District Court for the state law claims once the CERCLA claims were resolved. *Id.* On December 30, 2021, each party moved for summary judgment on the CERCLA claims, while FAWS moved for dismissal of all state law claims without prejudice should those be resolved by motion. *Id.*

The District Court's Findings

First, the district court found that FAWS could not recover the testing costs of $21,500 for the private testing. (R. p. 11). The court reasoned that the response was not necessary and was duplicative with the testing already being performed in the initial remedial action and investigation. *Id.* Additionally, the court stated that, while the testing showing positive results does not change the analysis, FAWS still has remedy through common law claims. (R. p. 12).

Second, the court found that the ERA did establish an ARAR and that opening the CD was appropriate. The court held that the ERA was written to cover incidents like the one found at the

BELCO facility. (R. p. 12). It found that the amendment was not vague or too broad to apply, both of which were claims asserted by BELCO, and was legally enforceable. (R. p. 13).

Third, the court found that, while the EPA was entitled to deference, the determination that BELCO should not install filters on all positive testing wells was arbitrary and capricious. (R. p. 16-17). It held that the EPA's decision was not reasonable in light of the present facts and the ERA could not be interpreted in such a way as to lead to the EPA's conclusion. *Id.*

Finally, the court retained supplemental jurisdiction over the remaining state law claims. (R. p. 18). Recognizing that dismissing the case to a state court may risk altering the holdings from the CERCLA suit, the district court maintained jurisdiction. *Id.*

SUMMARY OF THE ARGUMENT

The issue before this Court is whether CERCLA was correctly applied with regard to four issues in the District Court. First is the lower courts holding that FAWS could not recover response costs for the private testing. Second is whether the ERA constitutes an ARAR. Third is if the EPA's determination of the meaning of "clean water" was arbitrary and capricious. The final issue is if the federal district court should remand the state law claims to a state court.

The district court was correct in finding that FAWS is unable to recover costs they incurred when they paid for their own testing on private wells in Fartown. The response was unnecessary in light of the extensive investigation that BELCO had conducted. The EPA expressly denied expanding the testing to include those wells, citing the numerous reports of little to no detections of NAS-T. FAWS chose to continue on with private testing, ultimately finding no information to indicate that the wells had dangerous levels of the chemical. The expenses from the testing are not recoverable because the additional testing was duplicative with the already existing data regarding the NAS-T in the aquifer.

The ERA does not establish an ARAR because it is too vague to apply to a CERCLA site. The ERA does not provide any clarifying language as to the meaning of "clean water" or how that is to be used as a standard. This renders the ERA legally unenforceable as a relevant and appropriate requirement because it cannot be applied to the circumstances without clarification from the New Union legislature. The lower court erred in finding that the ERA is an ARAR because it was not properly promulgated or relevant to the present cleanup and is, at most, just as stringent that the existing laws.

The district court incorrectly found that the EPA's determination that filters should not be applied to all positive wells in Fartown was arbitrary and capricious. Because the ERA cannot be considered an ARAR, attaining the standard claimed by FAWS is not required. Further, it would be unreasonable to put the cost, a relevant factor under CERCLA, of installing filters onto BELCO when the chosen remedies already reach levels of healthful water. Finally, even if the ARAR can be established, the EPA has deference to determine the meaning of undefined terms in the context of CERCLA.

Finally, the district court correctly found that the state law claims by FAWS should remain in the federal court. The claims, such as negligence and nuisance, are not complex and do not require the expertise of a state court to interpret these state laws. Further, the district court correctly recognized that it would be highly inefficient to remove these claims from a court that has already heard the facts and made several holdings based on those facts. Therefore, there is potential for requested remedies to interfere with those holdings.

This Court is asked to affirm the decisions on recoverability of response costs and the jurisdiction of the state law claims but reverse the decisions on the ERA establishing an ARAR and the EPA's determination that the FAWS request for filters should not be accommodated.

ARGUMENT

I. The District Court was correct in holding that FAWS is ineligible to recover the costs incurred from their private water testing as response costs under CERCLA because they were duplicative with the BELCO investigation.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was enacted to facilitate the cleanup of contamination caused by the release of hazardous waste. *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005) (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992)). Intending to promote assumption of responsibility, CERCLA has included a mechanism to allow private parties who assume responsibility of the cleanup to seek recovery of those expenses. *Young*, 394 F.3d at 862 (citing *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

For the recovery of those expenses, a claimant must prove that (1) the cite was a facility as defined by CERCLA, (2) the defendant is a responsible party, (3) a release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release caused the claimant to incur necessary response costs consistent with a National Contingency Plan ("NCP"). *Young*, 394 F.3d at 862 (citing *FMC Corp.*, 998 F.2d at 845). The NCP consists of regulations set by the EPA to "establish procedures and standards for responding to the releases of hazardous substances, pollutants, and contaminants." *Young*, 394 F.3d at 862 (quoting 42 U.S.C. § 9605(a)).

Further, the investigative costs taken on by a party must be "necessary" and "consistent with the NCP." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1271 (E.D. Cal. 1997); 42 U.S.C. § 9607(a)(4)(B). It is the plaintiff who carries the burden of proving that the incurred costs meet *both* of these requirements. *Young*, 394 F.3d at 863. These response costs are defined as costs, not only from investigating the pollution, but also remedying the effects the

polluting substance has on the environment. *Cnty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1512 n.7 (10th Cir. 1991) (citing 42 U.S.C. § 9601(23), (24), (25) (1982)).

Here, the costs that FAWS incurred by conducting their own testing of private wells cannot be recovered because they have not met the requirements for reimbursement of response costs under CERLCA. First, BELCO had already set up wells along the Sandstone Aquifer that were routinely checked, making the FAWS testing duplicative and unnecessary. Second, the testing was not consistent with the NCP because it would not result in a CERCLA-quality cleanup.

A. It was unnecessary for FAWS to conduct further testing when BELCO already set up monitoring wells to investigate the spread of NAS-T.

Many circuits have held that a cost incurred in response to a pollutant are only "necessary" by way of CERCLA if the "cost is closely tied to the actual cleanup of hazardous releases. *Young*, 394 F.3d at 863; e.g., *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 842 (6th Cir. 2004). Those costs are not necessary without the party establishing a "nexus between the alleged response cost and an actual effort to respond to the environmental contamination." *Young*, 394 F.3d at 863. When proving the existence of that nexus, it cannot be said that taking investigative action in anticipation of litigation amounts to a necessary cost. *See Fallowfield Dev. Corp. v. Strunk*, 766 F.Supp. 335 (E.D. Pa. 1991).

Additionally, for actions to be necessary they must not be duplicative with the work already being performed by the EPA. E.g., *Louisiana-Pacific Corp. v. Beazer Materials & Servs. Inc.*, 811 F.Supp. 1421, 1425 (E.D. Ca. 1993). To that point, "investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA, are duplicative and therefore not recoverable." *Id.* (citing *U.S. v. Hardage*, 750 F.Supp 1460, 1511-17 (W.D. Okla. 1990).

Here, the FAWS testing was completely unnecessary in light of the continued testing by BELCO through their monitoring wells. The wells installed by BELCO lined the Sandstone Aquifer from Centerburg to Fartown, tracing the aquifer and tracking the spread of the NAS-T plume. (R. p. 8). The investigation of the plume was not solely completed by BELCO, but rather with the oversight of the EPA. *Id.* In other words, the testing being performed was extensive and with great interest from federal agencies. There was no reason for FAWS to take matters into their own hands.

The residents of Fartown decided to conduct their testing, not only after BELCO with the EPA's oversight had investigated the issue, but also after the DOH tested several of the private wells in Fartown. (R. p. 8). The EPA was aware that trace amounts of NAS-T had made it to the southern monitoring wells as early as January 2018, but the numbers were far below the HAL of 10 ppb. *Id.;* (R. p. 6). With all of this information, the EPA determined that BELCO had completed their expectations, issuing the COC to BELCO in September of 2018. (R. p. 8).

Unhappy with the results of the investigation, however, Fartown residents requested that the DOH conduct additional testing, this time directly on Fartown private wells. (R. p. 8). The DOH tested five private wells in Fartown in February of 2019 and did not detect any NAS-T in the tested wells. *Id.* It was after all of this that Fartown residents formed FAWS and paid $21,500 to have their private wells tested by Central Laboratories, Inc. ("Central Labs"). *Id.* The testing results still did not show any wells with concentrations above the HAL. *Id.*

The Central Labs testing showed that less than half of the tested wells had trace amounts of NAS-T most of which ranged from only 1 ppb to 4 ppm, far lower than what is considered safe under the HAL. (R. p. 8). Once again, the majority of the tested wells gave results of no detectable NAS-T. *Id.* The testing conducted by FAWS returned no new information to the investigation, but

rather reinforced the initial findings. The EPA gave no instruction for FAWS to conduct testing, in fact, they explicitly denied further testing. *Id.; e.g. Louisiana-Pacific Corp.*, 811 F.Supp at 1425. Given this, FAWS testing was duplicative and not recoverable. There was no plan for FAWS to actually take action to clean up beyond the testing. This investigation was only done with the anticipation that they could convince the EPA to reopen the CD. This does not create a nexus between the Central Labs testing and an actual clean up, thus making the costs incurred unnecessary.

The testing performed by BELCO and the DOH did not present evidence of NAS-T in high amounts in the Fartown private wells and the testing did not amount to an *actual* clean-up of the aquifer. Therefore, the FAWS testing was not necessary, and the response costs are not recoverable.

B. Private testing of wells in Fartown was not "consistent with the NCP" because the response did not, and would not, result in a "CERCLA-quality cleanup."

A response taken by a private party is considered to be "consistent with the NCP" when it is consistent with the requirements in 40 C.F.R. § 300.700(c)(5)-(6) and "results in a CERCLA-quality cleanup." *Young*, 394 F.3d at 864 (quoting 40 C.F.R. § 300.700(c)(3)(i)). An action is considered to be a "CERCLA-quality cleanup" when it is cost-effective, protects human health and the environment by utilizing permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, and provides opportunity for meaningful public participation." *See Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001) (citing *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed.Reg. 8666–01, 8793 (March 9, 1990)).

The second requirement that a party must meet to be consistent with the NCP, is compliance with the provisions in 40 C.F.R. § 300.700(c)(5)-(6). *Young*, 394 F.3d at 864. Section 5 of the statute provides provisions that are *potentially* applicable to the response actions of a party. 40 C.F.R. § 300.700(c)(5). Section 300.430(f)(1)(ii), one of the potential requirements, provides that the lead agency (1) presents the alternative remedy to the public for comment and (2) reviews those comments to make the final decision. § 300.430(f)(1)(ii); *see Regional Airport Authority of Louisville v. LFG, LLC*, 460 F.3d 697, 707 (6th Cir. 2006) (finding that § 300.430(f)(1)(ii) was required to be consistent with the NCP).

Here, FAWS testing was not consistent with the NCP because the response did not result in a CERCLA-quality cleanup, nor did not it comply with the requirements in 40 C.F.R. § 300.700(c)(5)-(6). As to the reasons that it did not result in a quality cleanup, it is very similar to the "unnecessary" analysis. FAWS only incurred costs in testing and investigation, none of their actions were going to result in a CERCLA-quality cleanup. The costs were simply a last effort to force BELCO to do more than the EPA had already deemed was necessary.

FAWS testing was also not consistent with the provisions laid out in the statute, meaning that the testing was not consistent with the NCP. The Sixth Circuit found that § 300.430(f)(1)(ii) was required when the plaintiff failed to present any of the response actions to the agency to allow the public to comment before executing the remedies. *Regional Airport Authority of Louisville*, 460 F.3d at 707. Here, FAWS acted in a similar way. They performed the testing after being told by the EPA that further testing was unnecessary. (R. p. 8). The issue was not only that they did not provide the EPA with the opportunity to ask for public comment for the further testing, but also that the EPA had already previously asked for public comment when it had determined the initial

testing was adequate. (R. p. 7). The EPA's determination was that the FAWS testing was not needed, but FAWS did it anyway, disregarding the EPA's decision.

In a similar vein, FAWS failed to provide opportunity for the public to comment on the selection of the response action. 40 C.F.R. § 300.700(c)(6). It is true that FAWS is comprised of concerned Fartown citizens, but it is only 100 out of the 500 residents. This is hardly enough to comply with the statute's public comment provision. Without a chance for the public to hear and react to the proposed plan, FAWS response action is not consistent with the NCP.

Because FAWS failed to meet the requirements to be consistent with the NCP, FAWS's choice in conducting further testing cannot be said to be "necessary" under CERCLA. Therefore, because it was not consistent with the NCP, FAWS should not be able to recover the costs incurred from their private testing.

II. The ERA cannot be considered ARAR because it fails to provide standards, clarifying language, or relevant and appropriate requirements such that it can be applied to the BELCO site.

CERCLA provides opportunities to accommodate more stringent "applicable or relevant and appropriate requirements" ("ARAR"). 42 U.S.C. § 9621(d). These standards are not limited to the federal level, but rather can bring in state standards that are more stringent. *U.S. v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1439-1440 (6th Cir. 1991). In the identification of a state ARAR, the state's environmental standard must be (1) properly promulgated, (2) more stringent than the applicable federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *Id.*

In making the determination if a standard is an ARAR the EPA should be given deference to make decisions; however, the determination is based only on its persuasiveness. *United States*

v. Mead Corp., 533 U.S. 218, 219-20 (2001). This deference is weighted based on the thoroughness of the consideration, how valid the agency's reasoning was, and the consistency. *Id.* at 219.

Here, the CD can be opened on two grounds: when new information is presented or more stringent state standards are established, neither of which are met. The EPA has not presented persuasive reasons to rely on their deference. For example, all tests have shown the levels of NAS-T are below the safe level of 10 ppb, information that the EPA had when the COC was issued to BECLO, therefore no new information has been presented.

Instead, the EPA must show a more stringent standard has been established. Yet, the ERA passed by New Union does not meet any of the requirements necessary to classify as a state ARAR, therefore the reopening of the CD was inappropriate. The ERA fails to meet the requirements because: (1) it was not properly promulgated, (2) it is not more stringent than existing standards, and (3) it is not relevant to the BELCO site. First, the ERA was not properly promulgated because it is not legally enforceable due to the lack of clarifying language in the statute. Second, the ERA is not more stringent than the standards set forth in the NCP to protect human health. Finally, given the vagueness, the ERA fails to provide any clarification that the amendment would be relevant to the circumstances found at the BELCO site. Without the ERA meeting the requirements to be designated as an ARAR or new information being presented, it was improper to reopen the CD.

A. The ARAR was not properly promulgated because it is too vague to be legally enforceable.

A state standard must be properly promulgated to be considered an ARAR. 42 U.S.C. § 9621(d)(2)(A)(ii). Within the context of CERCLA, promulgated refers to "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." 40 C.F.R. § 300.400(g)(4); *Akzo Coatings of Am.*, 949 F.2d at 1440. This

definition indicates that a state standard must be "generally applicable" on its face and must be applied consistently to be considered an ARAR. *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1527 (D.C. Cir. 1993). A general state goal could be considered an ARAR if that goal is consistently applied and legally enforceable. *Akzo Coatings of Am.*, 949 F.2d at 1440.

Here, the ERA was not properly promulgated because its vagueness deems it legally unenforceable. It is not contested that the amendment was adopted through the legislature and signed by the governor, but that is simply not enough to meet the CERCLA requirement of "properly promulgated." The ERA is not legally enforceable without some clarification from New Union about what the right to "clean air and clean water and to a healthful environment free of from contaminants and pollutants" means in the context of the statute. N.U. Const. art. 1, § 7. The text of the statute is not clear if the legislature meant for the amendment to mean safe for humans or free of any contaminants. Two vastly different outcomes. Turning to the legislative history of the ERA provides no more clarity on the meaning of the statute.

During the legislative assembly for the ERA, the sponsor of the bill, Mr. Wright, clarified the meaning of "clean." He provided, when questioned about the ambiguity of the statute, that the "intent is very clear, that you should be able to consume water through your public water supply without any harm." (Add. p. 4). He further clarified that "clean" means healthful to human beings and that no harm should come from drinking the water. (Add. p. 5). It was also pointed out in the assembly that the amendment is too simple and will cause New Union citizens and businesses alike to be unsure what the amendment is meant to accomplish. (Add. p. 7).

Without the legislature answering the concerning questions, there is no way for New Union to apply the ERA consistently, making it not "generally applicable." *See State of Ohio,* 997 F.2d at 1440. While the district court did hold that the ERA was properly promulgated, its interpretation

of the legislative history and the statute was incorrect. The lower court stated that "the ERA serves no purpose if it cannot be implemented when there is no regulatory standard in place." (R. p. 11). And that the ERA was "enacted to cover just this sort of situation." *Id.* Yet, the ERA provides no standard to be met or prohibited conduct, only overly broad goals. In other words, the statute's intent is not clear. The statute fails to provide a standard that is "sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); c.f. *Akzo Coatings of Am.*, 949 F.2d at 1440 (finding that a state statute was not vague because it detailed what conduct was permitted and moved to establish pollution standards). The lower court even notes that the EPA and FAWS disagree on the proper interpretation of the ERA, further highlighting the ambiguity of the amendment. (R. p. 14).

Without further insight from the New Union legislature to define terms within the ERA, the amendment is too vague to be consistently applied or legally enforceable.

B. The ERA is not more stringent than the EPAs standards because the ERA essentially mirrors the NCP's first step in the analysis of viable alternatives.

After it has been recognized that a site is threatening the environment or human health, a remedial investigation should be conducted to evaluate the extent of the threat. *Sealy Connecticut, Inc. v. Litton Industries, Inc.*, 93 F.Supp.2d 177, 183 (D.C. Conn. 2000); 40 C.F.R. § 300.430(d)(4). Additionally, a feasibility study provides the opportunity to develop alternative solutions to address the site in question. *Sealy Connecticut, Inc.*, 93 F.Supp.2d at 183. It is under this stage that the NCP requires the remediating party to complete an analysis of the proposed alternatives based on a list of factors from the least to most important; the first on the list states "overall protection of human health and the environment." 40 C.F.R. § 300.430(e)(9)(iii).

Here, the ERA contains no more stringent language than the factors in the NCP. The ERA provides that the residents "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. This right is already available under the first factor when considering alternative approaches to the remedial action. 40 C.F.R. § 300.430(d)(4). It cannot be said that simply calling the provision a "fundamental right," as the ERA attempts to do, creates a more stringent standard when that right is in the NCP. Further, the NCP's factor is used against a detailed analysis and investigation of a specific site. *Id.* The ERA simply puts forward a vague goal to strive for but provides no strict conduct to adhere to. The ERA cannot be an ARAR when its language is not more stringent than the NCP.

C. The ERA is not legally applicable or relevant because it lacks specificity to the substances and circumstances found at the CERCLA site.

The NCP notes that applicable requirements "specifically address a hazardous substance, pollutant, contaminant, redial action, location, or other circumstance. *Franklin Cnty. Convention Facilities Auth*., 240 F.3d at 544 (6th Cir. 2001) (quoting 40 C.F.R. § 300.5). The NCP goes on to describe relevant and appropriate requirements that are not directly applicable, but nonetheless address problems commonly found at CERCLA sites and are well suited to the particular site in question. *Franklin Cnty. Convention Facilities Auth*., 240 F.3d at 544 (6th Cir. 2001).

Here, the ERA provides no language to indicate it meets the definition of an ARAR. To be an applicable requirement, the state law must provide substantive cleanup requirements and "specifically" address a hazardous substance or circumstance found at a CERCLA site. 42 U.S.C. § 9621(d)(2)(A). The ERA fails to do this. The ERA does not provide a substance it is meant to mitigate, only mentioning "contaminants and pollutants caused by humans." N.U. Const. art. I, §

7. This is not a "specific" hazardous substance, contaminant, or circumstance as is required to be an applicable requirement.

The ERA is similarly not relevant and appropriate because it is too vague to address problems or situations at the BELCO site. As stated above, the amendment does not provide any definition for "clean water," but the legislative history does provide some insight. Statements made at the legislative hearings lead one to believe that "clean water" means water that is safe to drink. (Add. p. 5). This is not applicable to the BELCO site when the testing results in Fartown have all fallen below the HAL. Yet, the lower court found the opposite.

The lower court held that NAS-T is a contaminant that is not regulated and therefore applicable to the amendment. (R. p. 14). While it is not regulated, that does not mean it has not been addressed by the EPA. NAS-T is currently limited to 10 ppb by an HAL adopted by the EPA in 1995, after it was determined that NAS-T was a *probable* carcinogen. (R. p. 6). Further, the HAL was set with a "significant margin of error" and there is no evidence to show that the HAL should be adjusted to less than 10 ppb. *Id.* At no point did the testing by BELCO, the DOH, or the FAWS testing produce results that NAS-T levels near or in Fartown were above the HAL. (R. p. 8). With all of this in mind, the water in Fartown is "clean" and "healthful" as defined in the legislative history. (Add. p. 5). Therefore, the amendment is not addressing circumstances found at the site and is not relevant and appropriate, indicating that the ERA is not an ARAR.

III. The EPA's decision not to require BELCO to apply filters was reasonable and not arbitrary, capricious, or contrary to law.

The Administrative Procedure Act ("APA") governs judicial review of agency actions and particularly states that "agency action[s], findings and conclusions" are to be "set aside" if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." 5 U.S.C. § 706(2)(A). An agency action is considered reviewable under the APA if the action is "final" and has "no other adequate remedy in court." *Id.* at § 704. CERCLA similarly provides that EPA decisions in "selecting a response action should be upheld, unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. § 9613(j)(2). In applying arbitrary or capricious standards a court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971) (applying the arbitrary or capricious test of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

Here, all parties stipulate that the CD and the UAO are final agency actions; and that FAWS has no other adequate remedy in court and thus the requirements to invoke review under the APA have been met. (R. p. 11). Further, the EPA did not act arbitrarily, capriciously, or contrary to law when it decided that CleanStripping technology was not required because: (1) the ERA is not an ARAR, (2) the implementation of the technology carries unreasonable costs, (3) even if the ERA *is* an ARAR, requiring water wholly free of any contaminants would invalidate countless permits under the Clean Air Act, Clean Water act and other regulatory schemes.

A. CleanStripping technology cannot be required because the ERA is too vague to establish an ARAR.

"CERCLA only requires that cleanups comply with state law that is ARAR, it clearly imposes no obligation to comply with *non*-ARAR state law when conducting a CERCLA cleanup." *Ft. Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828, 831 (9th Cir. 1999); *See United States v. Denver,* 100 F.3d 1509, 1513 (10th Cir. 1996).

Here, as argued above, the ERA presents such undeniably vague language that it does not meet the requirements under CERCLA to be considered an ARAR. 42 U.S.C. § 9621(d). Because the ERA does not satisfy the requirements for an ARAR, there is no obligation for the EPA to comply with broad goals stated in the amendment. Thus, it was reasonable for the EPA to determine that the CleanStripping technology was not an appropriate remedial action.

Additionally, the CD should not be reopened given that the ERA is not an ARAR. Without reopening the CD, the EPA and FAWS do not have any grounds to require the installation of filters on private wells after the issuance of the COC. Therefore, while the EPA was incorrect in finding the ERA to be an ARAR, it was correct in finding that the filters would not produce outcomes that the present response actions were not already accomplishing.

B. CleanStripping technology, presenting a massive cost, cannot be required because FAWS has presented no evidence of harmful levels of contamination.

CERCLA requires that the remedy selection is cost-effective. 42 U.S.C. § 9621(b)(1). The NCP authorizes the EPA to balance nine different criteria for the remedy selection process. *State of Ohio*, 997 F.2d at 1533. Contained within the nine requirements is the cost factor. 42 U.S.C. § 9621(b)(1). While the first threshold requirement states that the remedy should ensure the "protection of human health and the environment," the cost of that remedy is a highly relevant factor in choosing said remedy. E.g., *State of Ohio*, 997 F.2d at 1531 (D.C. Cir 1993); 42 U.S.C. § 9621(b)(1). The NCP defines cost-effective remedy as a remedy with costs "proportiona[l] to its overall effectiveness." 40 C.F.R. § 300.430(f)(1)(ii)(D). Further, "[cost] can be considered in selecting from options that are adequately protective." *State of Ohio*, 997 F.2d at 1533. In meeting the requirement that the remedy meet the "protection of human health and the environment," CERCLA does not require the remedy to be as "protective as conceivably possible" only that it is

"adequately protective." *Id.* Moreover, the safe level of exposure requirements that the EPA sets are "due significant deference." *Id.; See New York v. EPA,* 852 F.2d 574, 580 (D.C. Cir. 1988).

Here, the decision to not require CleanStripping below NAS-T levels of 10 ppb adequately protects human health and the environment and therefore pushing the exorbitant costs onto BELCO is unreasonable. The HAL for NAS-T in drinking water, set at 10 ppb with a "significant margin of error," was adopted based on the results from a variety of medical studies stating that any levels under 10 ppb are safe for human consumption. (R. p. 6). Requiring only filters on the Fartown wells that have reached or exceeded this conservative number, certainly provides a remedy that is adequately protective and ensures the health of the citizens of Fartown. The private wells in Fartown have gone through a series of testing from the DOH, BELCO, and Central Labs on separate occasions, and each time the results showed that the levels NAS-T in the water was less than 10 ppb. The private water wells have never shown a level of NAS-T that is harmful, yet FAWS still requests that BELCO install significant infrastructure. (R. p. 9). FAWS contends that the issue is the smell of the water, an issue that presents itself at 5 ppb, still well below the HAL. (R. p. 6). In essence, FAWS requested that CleanStripping filters be installed on every well slightly affected by an unpleasant odor. The concern here, as in every instance of public water contamination in the context of CERCLA and the NCP, is to ensure the safety of those affected. Relying solely on the smell, when the water is otherwise safe and healthful to humans, is inadequate to justify the installation of the filters.

Because the threshold consideration of the protection of human health and the environment has been satisfied, the factor of cost is to receive consideration. The cost of installing filters on every private well that tests positive is substantial. Fartown consists of 500 residents and the cost of each individual filter is $4,500. Therefore, if just a quarter of the town tested positive, but below

the HAL, BELCO would be forced to spend over half a million dollars to filter water that is already healthy and safe for human consumption. FAWS further contests that the water is occasionally used in cooking, bathing, cleaning, showering, and other household tasks. FAWS did not contest that the HAL is incorrect at 10 ppb. Their argument hinges on the water having a distinct smell, a phenomenon that occurs well below the established healthy level of NAS-T exposure. Safe for consumption is the standard here. FAWS presented no evidence that drinkable water is otherwise dangerous when used for other daily tasks. Because the water has not been shown to exceed the HAL, it was reasonable to not force BELCO to face such substantial costs.

C. The EPA has deference in deciding what response actions are to be taken under the UAO, meaning the decision to exclude the FAWS request for filters on all wells was not arbitrary or capricious.

The APA governs judicial review of agency actions and particularly states that "agency action[s], findings and conclusions" are to be "set aside" if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). When an agency decision is site specific and is not subject to notice and comment, the court is to give deference to the agency's expertise. *Mead Corp.*, 533 U.S. at 228.

Here, FAWS has challenged the EPA's determination of the meaning of "clean water" within the context of the ERA and CERCLA. However, the EPA was correct in their determination because (1) the EPA is granted deference to interpret in the context of CERCLA and (2) finding "clean water" to be in line with a broader national standard is a reasonable interpretation.

i. The EPA's expertise is given deference in the application of ARARs because it is a site-specific classification ruling.

When analyzing the measurement of deference to an agency administering a classification decision, courts should look to the agency's degree of care, consistency, formality, relative

expertise, and overall persuasiveness. *Mead Corp.*, 533 U.S. at 220; *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). When an agency makes a classification decision, it is "best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines,'" *Mead Corp.*, 533 at 220 (quoting *Christensen v. Harris County,* 529 U.S. 576 (2000)). Given an agency's specialized experience, investigative knowledge, information and the value in uniformity in its administrative understandings of national law, an agency's interpretation may merit some deference. *Skidmore*, 323 U.S. at 139-140.

Here, the EPA is owed Skidmore deference in its ability to interpret the meaning "clean water" within the context of CERCLA. Both FAWS and the EPA stipulate that "the EPA has the obligation to interpret and apply the ERA as an ARAR." (R. p. 14). Additionally, ARARs are site-specific determinations that the EPA may have to make at numerous CERCLA sites around the country. E.g. *Mead Corp.*, 533 U.S. at 233 (finding that because tariff letters are individualized and are routinely issued, the agency was owed Skidmore deference). Here, the EPA has been charged with determining what standards are to be classified as ARARs, in order to apply the standard if it qualifies as an ARAR. In addition to deference being mandated by CERCLA, where the EPA "may" find an ARAR, it would be counter intuitive to assume that the agency charged with administering a statute does not have deference in interpreting the standards to with it is obligated to classify and apply. 42 U.S.C. § 9621(d)(4).

ii. A reasonable interpretation of the ERA indicates that "clean water" does not mean completely contaminant free, but rather safe for human consumption.

In applying the arbitrary and capricious standard a court must decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park*, 401 U.S. at 416 (applying the arbitrary or

capricious test of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). An agency's decision is arbitrary or capricious if "the agency has relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm,* 463 U.S. 29, 43 (1983). Further, "[e]ven when an agency explains 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.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004).

Here, given the reasonable deference to the EPA's expertise, the reasoning for excluding FAWS' request for CleanStripping is persuasive. This is evident through the legislative history and the fact that FAWS' interpretation of the ERA would invalidate countless federal permits.

The legislative history for the ERA provides that the EPA was reasonable in its decision to interpret "clean water" as safe for consumption. Specifically, when asked "what is clean?", Mr. Wright, the sponsor of the bill, responded in saying "you should be able to consume water though your public water supply without any harm." and that "what is appropriate and desirable for a public water supply involves other chemicals, other substances." (Add. p. 5). These statements affirm the EPA's decision in that the water need only be healthy for consumption. Further, regarding NAS-T, the HAL shows that levels are safe for consumption below 10 ppb. As previously stated, the 10 ppb is very conservative and includes a "*significant* margin of error." (R. p. 6) (emphasis added).

The EPA issues countless permits under the Clean Air Act, the Clean Water Act, and other regulatory schemes, allowing for "safe" levels of contamination. (R. p. 16). Construing the ERA

to prohibit even safe amounts of contaminants or other substances in the water could invalidate federal permits for power generation, construction, and more. If "clean water" were to mean zero substances other than H2O, one would potentially be in violation of the ERA for boat exhaust or copper from plumbing. The statute articulates no bounds. Further, in creating such a strict standard as to invalidate federal permits, industry and business will be incentivized to relocate to an area with more reasonable standards. It would be unwise to allow states to injure themselves and others by creating immeasurable and unreasonably strict standards. The EPA as charged with administering CERCLA provides consistency among standards across the nation, thus allowing the states to create more stringent standards in their best interest without fear of economic constriction. Therefore, considering the legislative history, and the concerning consequences for not allowing EPA oversight, demonstrate that the EPA's decision against CleanStripping was reasonable.

IV. The Federal District Court should retain jurisdiction over the remaining state law claims because the issues are not novel or complex and it ensures consistency with the resolved federal claims.

A federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The phrase "case or controversy" provides supplemental jurisdiction over claims that share a "common nucleus of operative fact." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). The existence of such a nucleus of operative fact provides the district court with the power to exercise supplemental jurisdiction over state law claims. *Parker v. Scrap Metal Processors, Inc*., 468 F.3d 733, 743 (11th Cir. 2006). When federal claims have been resolved, district courts consider factors like "judicial economy, convenience, fairness, and comity" when deciding

whether to retain supplemental jurisdiction over state law claims. *Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182, 1191 (2d Cir. 1996) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994)).

While courts have declined to retain supplemental jurisdiction over state law claims when the issues are "novel or complex," it is also recognized that absent novel or complex legal questions it is appropriate for courts to retain supplemental jurisdiction over state law claims. *Miller v. City of Fort Myers*, 487 F.Supp.3d 1136, 1152-53 (D.C. Fl. 2020); *Nowak*, 81 F.3d at 1191-92. Further, as a general rule, "state tort claims are not considered novel or complex." *Parker*, 468 F.3d at 743-44 (11th Cir. 2006). "Moreover, negligence, nuisance, and property damage claims have been held as not raising novel or complex issues of state law." *INX Intern. Ink Co. v. Delphi Energy & Engine Management Systems,* 943 F.Supp. 993, 997 (E.D. Wis. 1996). Additionally, when the state law issues involve settled law or the court has put forth a great effort to familiarize itself with the facts and issues of a case, courts have deemed it appropriate to retain supplemental jurisdiction over state law claims to ensure judicial efficiency. *Nowak*, 81 F.3d at 1191-92; *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990). Further, "the policy of supplemental jurisdiction is to support the conservation of judicial energy and avoid multiplicity in litigation." *Rosado v. Wyman,* 397 U.S. 397, 405 (1970).

The decision to exercise the power of supplemental jurisdiction lies within the discretion of the district court, therefore the decision to retain the state law claims is to be reviewed for abuse of discretion. *Parker*, 468 F.3d at 738.

Here, the district court has original jurisdiction over the CERCLA claim pursuant to 28 U.S.C. § 1331 and jurisdiction for the remaining state law claims comes from supplemental jurisdiction under 28 U.S.C. § 1367. Supplemental jurisdiction should be retained over the state

claims because (1) the torts alleged are not complex state law claims. Additionally, (2) retainment of the claims ensures consistency and judicial efficiency because the District Court of New Union has a strong grasp of the facts in the present case.

A. The negligence and nuisance claims filed by FAWS are not novel or complex.

The state law claims that FAWS has brought are nothing more than run of the mill tort claims that do not require the specialized state court. The FAWS action claims against BELCO include state law claims of negligence and private nuisance for contamination of the sandstone aquifer. Claims of negligence and nuisance are standard civil suits that do not require a court to consider anything but settled tort law. *INX Intern. Ink Co.* 943 F.Supp. at 997. The particular claim that BELCO has contaminated the sandstone aquifer does not require complex issues to be considered. Further, liability for the contamination of the aquifer has been settled.

Additionally, the determination of damages for negligence and nuisance do not require the consideration of anything complex that the district court is not appropriately equipped to handle. The requests for relief include the payment of response costs; installation of well filters; aquifer remediation; damages for loss of use and enjoyment of their property and diminished property values; and punitive damages. However, none of these damages require consideration of anything novel or complex either. The claims for damages can be determined based on the well-established facts and do not require the consideration as to whether the ERA qualifies as an ARAR.

The claims for damages against BELCO need not question such issues presented in the federal claim because the determinations of the EPA and its action are not at issue. The questions that follow the FAWS state claims are those that entertain whether BELCO appropriately acted in relation to the standards that were required. Not whether the standards in place were appropriate.

In other words, the damages can be settled by ordinary doctrines under tort law as to whether the use and enjoyment of property has been lost. The determination that property values have diminished is a mere question of fact, and punitive damages by design will not require any novel or complex determinations to be made. Therefore, with liability for the contamination settled, and with the ordinary issues brought forth by FAWS' tort claims, the district court did not abuse its discretion in exercising supplemental jurisdiction over the state law claims.

B. Retainment of the negligence and nuisance claims ensures consistency and judicial efficiency.

Judicial efficiency is only guaranteed if the remaining state law tort claims are retained by the district court. The district court has taken time to become acquainted with the facts from which both the federal and state claims stem from. Thus, they have the adequate background knowledge of the issues to appropriately adjudicate the claims. To send the state law claims back down to the state courts is to frustrate the concept of judicial efficiency. It forces the state courts to handle cases that could have been decided by the federal district court who has already spent countless hours understanding the facts. The state court then must take time to become acquainted with the issues from ground zero. Absent any novel or complex issues that only a state court could appropriately handle – which is not the case here – it is a waste of effort and judicial economy to remand the case to state court.

Additionally, forcing the state court to learn all of the facts from the ground up without the context of the CERCLA claims, brings forth a concern for consistency with the EPA's prior remedy determinations. Particularly, FAWS requests that the State of New Union provides the injunctive relief compelling BELCO to remediate the aquifer. The court in New Union, in making such a decision, would be overstepping the EPA in their decision in selecting the appropriate

remedy under CERCLA, where the EPA has been given exclusive authority to make such determinations. The injunctive relief is concerning as it questions the EPA's primary jurisdiction over the remediation of the aquifer. Moreover, the district court maintains jurisdiction over the BELCO action regarding the enforcement of the CD. If the state court were to make decisions regarding the injunctive relief, it opens up the door for inconsistency in adjudication and remedy selection. Such inconsistency is unnecessary and would only promote confusion and more litigation, this certainly does not promote judicial efficiency. The district court is acclimated to the issues surrounding the claims and the district court did not abuse their discretion when it declined to remand the tort claims to state court.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decisions on issues II and III to find that the ERA is not an ARAR and the EPA acted with appropriate discretion. The Court should affirm the district court's decisions on issues I and IV to find that FAWS cannot recover the costs incurred in the private testing and the federal court's retention of jurisdiction over the state law claims.