

C.A. No. 22-000677

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.

BRIEF OF APPELLANT BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

The District Court had original jurisdiction for the case now docketed as C.A. No. 22-000677 (consolidated from 17-CV-1234 and 21-CV-1776). The original actions included alleged violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§ 9601-9675. Federal district courts have original jurisdiction of civil actions arising from federal laws under 42 U.S.C. § 1331. Further, under 28 U.S.C. § 1367(c), district courts have supplemental jurisdiction over any claims that are part of the “same case or controversy” as the actions for which the district court has original jurisdiction. For appellate review, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final judgment that is the subject of appeal was entered on June 1, 2022 and disposed of all parties' claims.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court correctly find that costs incurred by FAWS to test private drinking wells were not reimbursable as response costs under CERCLA when the expenses are duplicative of previous expenses, not connected to clean up efforts, not incurred in response to an actual threat, and not preceded by an opportunity for public comment?
2. Under the relatively non-deferential standard of review giving deference to agency decisions relative to their persuasiveness, did the District Court err in upholding the EPA’s decision that the ERA was an ARAR under CERCLA, thus allowing the CD to be reopened, when the ERA lacked specificity and lacked similarity to the CERCLA action?
3. Under the highly deferential standard of review giving deference to agency decisions unless arbitrary, capricious, or contrary to law, did the District Court err when it vacated the EPA’s determination that BELCO could attain ERA regulatory standards by supplying bottled water rather than installing filtration systems for residents with wells with non-toxic concentrations of NAS-T?

4. Did the District Court abuse its discretion in retaining jurisdiction over FAWS' remaining state law tort claims when the claims did not substantially predominate over the federal claims and the court determined the state claims involved no novel or complex issues and that retaining jurisdiction served judicial efficiency?

STATEMENT OF THE CASE

Better Living Corporation ("BELCO") is a manufacturing company that creates LockSeal, a chemical sealant. R. at 2. BELCO formerly made LockSeal at a now-closed plant in Centerburg, a town in the state of New Union. *Id.* Beneath Centerburg is the Sandstone Aquifer. *Id.* Centerburg residents receive their drinking water from the Sandstone Aquifer after it is treated at the Centerburg Water Supply ("CWS"). *Id.* Two miles south of Centerburg is Fartown, which also gets its water from the Sandstone Aquifer. *Id.* However, Fartown residents receive the aquifer's water directly from private wells, rather than through a public water supply. *Id.*

One of the chemicals in LockSeal is Nitro-Acetate Titanium ("NAS-T"). *Id.* While there is no concrete evidence proving carcinogenic effects from NAS-T consumption, the EPA decided to adopt a Health Advisory Level ("HAL") for NAS-T in 1995 because of the possibility of negative effects from NAS-T in high concentrations. R. at 3. The HAL limits the level of NAS-T in drinking water to 10 parts per billion ("ppb") and incorporates a significant margin of error. *Id.* Thus, water at or below the HAL is certainly non-toxic, and higher concentrations may be as well. *Id.* There are no other state or federal regulations restricting NAS-T, and the only effect of NAS-T at levels below the HAL is a potentially sour smell at 5 ppb or above. *Id.*

In 2013, the Centerburg County Department of Health ("DOH") found that water at the CWS contained NAS-T levels between 45 and 60 ppb. *Id.* DOH notified residents to cease drinking their tap water, and BELCO voluntarily provided bottled water to Centerburg. *Id.* DOH referred the investigation to New Union's Department of Natural Resources ("DNR"), who

referred the matter to the EPA in January 2016 due to the EPA's expertise and resources. *Id.* The EPA then initiated the present actions according to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. R. at 2.

In March 2016, the EPA and BELCO agreed to undertake a remedial investigation and feasibility study ("RI/FS"). R. at 4. In the investigation, BELCO discovered that wastewater at BELCO's shuttered facility contained NAS-T that migrated into the groundwater and created a plume in the Sandstone Aquifer. *Id.* After this discovery, BELCO installed numerous lines of monitoring wells from Centerburg to Fartown, with the final line of wells located about one-half mile north of Fartown. *Id.* Testing from the wells closest to Fartown did detect NAS-T, leading the EPA to determine that the NAS-T plume did not reach these southernmost wells. R. at 4-5.

BELCO's RI/FS findings showed that remediation of the NAS-T plume was infeasible and unnecessary. *Id.* Instead, in the Consent Decree ("CD") signed with the EPA, BELCO agreed to evacuate soil at the old BELCO site, install and maintain a "CleanStripping" filtration system to remove NAS-T at the CWS, and conduct monthly sampling of the existing monitoring wells. R. at 4. After signing the CD, BELCO continued to conduct monthly tests of the wells closest to Fartown from January 2017 to the present. R. at 5. These tests never detected any NAS-T, except for two tests in January 2018 that detected NAS-T levels of 5 ppb and 6 ppb. *Id.*

The CD also stated that once BELCO completed these remedial actions and the EPA issued a Certificate of Completion ("COC"), the EPA would not be able to order BELCO to conduct further remediation efforts unless the EPA reopened the CD. R. at 4. The CD can only be reopened in limited circumstances. *Id.* As relevant here, the CD can be reopened if the state passes regulatory standards that qualify as "applicable or relevant and appropriate requirements" (ARARs) under CERCLA. *Id.* The EPA could also reopen the CD if they learn new information

that shows the clean-up plan is “no longer protective of human health and the environment.” *Id.*

After learning of the CD and its terms, the citizens of Fartown wanted DOH to sample and test their own wells for NAS-T contamination. R. at 5. In response, DOH tested five private wells in Fartown, none of which showed a presence of NAS-T. *Id.* Despite these findings, Fartown residents asked the EPA to order BELCO to conduct additional testing in Fartown. *Id.* Citing the lack of evidence of NAS-T in Fartown water, the EPA declined. *Id.* In response, 100 Fartown citizens formed the Fartown Association for Water Safety (“FAWS”), a group that promptly hired Central Laboratories, Inc. (“Central Labs”) to test the Fartown wells. R. at ii, 5. Central Labs charged FAWS \$21,500 to conduct tests in 225 of Fartown’s wells. R. at 5. Most of these tests detected no NAS-T, and not a single test showed NAS-T levels above 8 ppb. R. at 3, 5. Despite these results, FAWS again asked the EPA to order further investigation of Fartown’s wells. R. at 5. Citing the low levels of NAS-T present, the EPA again declined. *Id.*

In 2020, the Environmental Rights Amendment (“ERA”) was added to the State of New Union Constitution, after being drafted and passed by the legislature, signed by the governor, and approved by public vote. *Id.* The ERA, in its entirety, states, “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.” *Id.*

The ERA does not define its key terms or provide specific regulatory standards for air and water. However, a Senate Report described the ERA as serving a gap-filling role, noting that there are toxic, unregulated chemicals in New Union that could potentially be regulated under the ERA without the passage of additional legislation or amendments. Addendum at 9. The ERA’s sponsor in the legislature, Mr. Wright, provided context into its intended reading prior to passage. *Id.* at 4. Confronted with concerns about the ERA’s lack of specificity, Wright appeared

to define “clean,” in the ERA, as “healthful,” and “healthful” as “[doing] no harm.” *Id.* at 5.

Wright also indicated that the ERA must not require water to be free from all other substances, saying, “what is appropriate and desirable for a public supply involves other chemicals.” *Id.*

In the same session, however, Wright also provided alternative definitions for the ERA’s key terms. He indicated that “healthful” may mean being able to consume something entirely without any additives or contaminants, “the way that nature intended it be consumed.” *Id.* In the context of air, he indicated that odors could violate the ERA if they were “sufficiently offensive” and “impact what the community would consider ‘clean’ air.” *Id.* at 6.

In early 2021, after the passage of the ERA, the EPA met with BELCO to request that BELCO sample private wells in Fartown, supply bottled water to Fartownians with NAS-T in their wells, and continue to monitor Fartown wells. R. at 6. However, the EPA could not require BELCO to take these remedial actions unless the EPA reopened the CD. R. at 4. When BELCO declined to take these steps, the EPA reopened the CD, justifying this decision by citing the Central Labs results and indicating that the ERA constituted an ARAR under CERCLA. R. at 6. The EPA’s administrative record includes the information it relied upon to reopen the CD. *Id.*

Upon reopening the CD, the EPA issued a Unilateral Administrative Order (“UAO”), which formally instructed BELCO to sample 50 private wells in Fartown each month, supply households with wells that showed NAS-T concentrations of 5 ppb to 10 ppb with bottled water, and install CleanStripping filtration systems on any wells with NAS-T concentrations above 10 ppb. *Id.* Notably, based on previous testing results from Central Labs and DOH, the EPA declined FAWS’ request to compel BELCO to install CleanStripping or otherwise remove NAS-T entirely from Fartown wells with less than 10 ppb of NAS-T. *Id.* The EPA included both FAWS’ request and the EPA’s response and justifications in the administrative record. *Id.*

When BELCO declined to complete the remedial action in the UAO, the EPA chose to supply water to Fartownians whose wells tested positive for NAS-T at 5 ppb or higher. R. at 7. The EPA also continued to test Fartown wells monthly. *Id.* To recover these remediation expenses, the EPA brought this action (“BELCO Action”) against BELCO in August 2021. *Id.* FAWS filed a motion to intervene, arguing that the UAO was arbitrary, capricious, and contrary to law under 5 U.S.C. § 706(2)(A) because it failed to require BELCO to provide CleanStripping in all Fartown wells. *Id.* FAWS believed that the ERA required such a mandate. *Id.*

FAWS filed two additional causes of action against BELCO in the District Court. *Id.* First, FAWS asserts a CERCLA recovery claim for the \$21,500 paid to Central Labs to test Fartown wells (“testing expenses”). *Id.* The second FAWS action includes private nuisance and negligence claims under New Union state law. *Id.* Among other remedies in this action, FAWS demands installation of CleanStripping in Fartown wells that test positive for NAS-T and full remediation of the Sandstone Aquifer. *Id.* After exercising jurisdiction over the state and federal claims, the District Court consolidated the FAWS and BELCO Actions. *Id.* Once discovery was completed on the CERCLA claims, all parties moved for summary judgment on the CERCLA claims. R. at 8. FAWS also moved to dismiss the remaining state law claims without prejudice if the CERCLA claims were resolved at the pleading stage. *Id.*

The District Court made four rulings in response to the party’s motions. First, the court held that FAWS’ Testing Expenses were not “necessary” under CERCLA and therefore not recoverable as a response cost. R. at 9-10. The court granted summary judgment in favor of BELCO on this claim. R. at 10. Second, the District Court upheld the EPA’s decision that the ERA was an ARAR, thus permitting the EPA to reopen the CD. The court reasoned that the language, purpose, and intent of the ERA supported the EPA’s determination. R. at 11.

Additionally, the court approved the EPA's finding that the ERA qualified as an ARAR because it followed normal governmental procedures for proper promulgation; it "offers a standard that is of general applicability and is legally enforceable;" its "fundamental right" to clean water is more stringent than any federal environmental laws, and its purpose of covering unregulated hazardous materials made it relevant and appropriate. R. at 11-12. The court granted summary judgment for the EPA and FAWS on this claim. R. at 12.

Third, the District Court overturned one of the EPA's selected remedial actions in the UAO, holding that the EPA's decision to require BELCO to provide water bottles—but not install CleanStripping—for residents with wells with 5 to 10 ppb of NAS-Tvwas arbitrary, capricious, or contrary to law. R. at 14. The court relied on its view of the language, purpose, and intent of the ERA, as well as its perspective that only "well-regulated and permitted discharge[s]" or "natural sources that do not require a permit" should be allowed under the ERA. R. at 13-14. Ultimately, the court vacated the portion of the UAO that required providing bottled water, rather than CleanStripping, for residents with wells with low levels of NAS-T. R. at 14.

Finally, the court declined FAWS' motion to dismiss the state claims. R. at 15. The court reasoned that the "tremendous amount of work" that had gone into these cases in that court meant there were efficiencies to be had in retaining jurisdiction. *Id.* Additionally, the court determined that remedies sought in the state claims threatened to interfere with federal court rulings made in the BELCO Action and ongoing monitoring of the contamination by the EPA. *Id.* As a result, the court held the state tort claims should be handled in district court. *Id.*

BELCO appeals the District Court's determination that the EPA had the authority to reopen the CD and issue the UAO because the ERA was an ARAR. BELCO and the EPA both challenge the District Court's order to vacate the portion of the UAO that does not require

BELCO to install filtration systems in Fartown wells with less than 10 ppb of NAS-T. FAWS appeals both the District Court's ruling that FAWS' Testing Expenses are not recoverable under CERCLA and the District Court's denial of FAWS' motion to dismiss the state court claims.

SUMMARY OF THE ARGUMENT

BELCO is asking this Court to affirm the District Court's rulings on the first and fourth issues and reverse its rulings on the second and third. On the first issue, the lower court correctly determined that FAWS' testing expenses were not recoverable under CERCLA as a matter of law. For FAWS to recover these testing expenses, they must show that they were "necessary" and "consistent with the national contingency plan" ("NCP"). FAWS can meet neither of these elements. First, FAWS cannot show these expenses were necessary. To be "necessary" under CERCLA, the expense cannot be duplicative of existing actions, must be closely tied to cleaning up or remediating contamination, and must be in response to a real threat to human health or the environment. *E.g., Young v. United States*, 394 F.3d 858 (10th Cir. 2005); *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006). FAWS's testing costs fail all three prongs. First, the testing expenses duplicated testing done by DOH and BELCO. Second, the expenses are not closely connected to any actual cleanup efforts. Finally, the absence of evidence showing NAS-T levels above the HAL proves that these tests were not in response to an actual threat. Therefore, these expenses cannot be necessary as a matter of law.

These expenses are also inconsistent with the NCP, which requires a CERCLA-quality cleanup. A CERCLA-quality cleanup requires a party to provide an opportunity for public comment before incurring response costs. There is no evidence FAWS abided by this requirement, meaning the testing expenses are inconsistent with the NCP as a matter of law. Because FAWS' fails both elements, the District Court correctly granted BELCO's motion for summary judgment on this issue.

On the second issue, the District Court erred as a matter of law when it held that the EPA properly found that the ERA was an ARAR under CERCLA, thus enabling the EPA to reopen its CD with BELCO and issue the UAO. In order for a state requirement like the ERA to be an ARAR, it must be “properly promulgated,” “legally applicable or relevant and appropriate,” “more stringent than federal standards,” and “timely identified.” *E.g., United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991). Here, the ERA did not meet at least the first two elements because it was unconstitutionally vague and did not address situations similar to those at the CERCLA site. Additionally, in deciding that the ERA was an ARAR, the EPA ignored key ARAR elements and applied other elements inconsistently with prior interpretations of the law. As such, the EPA’s decision-making process in determining that the ERA was an ARAR was not thorough or consistent, and thus the decision was not entitled to deference under the “deference according to persuasiveness” standard.

On issue three, the District Court erred as a matter of law when it vacated the portion of the UAO where the EPA decided to order BELCO to supply bottled water, rather than install expensive filtration systems, for residents with wells with non-toxic concentrations of NAS-T concentrations. Procedurally, the court erred by failing to restrict its review to the administrative record, as required by CERCLA, and by supplying its own assessment of what would be a reasonable response. Under the “arbitrary, capricious, or contrary to law” standard of review, and given the EPA’s subject-matter expertise, the District Court should have upheld the EPA’s response decision, as there was a rational connection between the facts and the decision. It is irrelevant if the District Court itself would have chosen a different response action.

Finally, for the fourth issue, the District Court properly exercised its discretion in retaining supplemental jurisdiction over FAWS’ remaining state claims. In determining whether

to exercise supplemental jurisdiction, courts are to consider the values of comity and judicial economy. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). With these values in mind, the court must weigh the statutory circumstances under 28 U.S.C. § 1367 to determine whether to retain jurisdiction. The first factor says that state claims presenting a complex or novel issue of law would weigh against retaining jurisdiction. In this case, FAWS' remaining claims are negligence and private nuisance claims. Because case law is clear that these claims are not novel or complex issues, this first factor weighs in favor of retaining jurisdiction.

The second factor asks whether the state claims predominate over the federal claims. In this case, the state remedies implicate the remedial actions as issue in the present case and threaten to conflict with ongoing remediation efforts by the EPA. These factors correctly compelled the court to determine that the District Court would be best able to handle these potential conflicting remedies. Third, the District Court must consider whether they disposed of accompanying federal claims. While the general practice is to decline jurisdiction over state claims when courts dispose of every federal claim, courts do not have to dismiss the claims in these circumstances. In fact, courts have often retained jurisdiction when it serves *Gibbs*' value of judicial economy. In this case, the court reasonably determined that judicial economy would be served by retaining jurisdiction. In sum, for this issue, this Court should uphold the District Court's reasonable exercise of discretion in maintaining jurisdiction over FAWS' state claims.

ARGUMENT

I. FAWS' testing expense is not recoverable under CERCLA because it is unnecessary and inconsistent with the national contingency plan.

The trial court appropriately granted BELCO's motion for summary judgment because the testing expenses failed the "necessary" and "consistent with national contingency plan" elements required under CERCLA. When reviewing a grant of summary judgment on a

CERCLA claim, this Court is to exercise *de novo* review. *E.g.*, *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 844–45 (3d Cir. 1995). Therefore, this Court cannot reverse the District Court’s decision unless the record, viewed most favorably to the non-moving party, shows a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).

While CERCLA is often critiqued for its clumsy drafting, the act’s goal is crystal clear: to encourage the timely and efficient cleanup of hazardous contamination. *E.g.* *Artesian Water Co. v. Gov't of New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988). *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602, (2009). CERCLA advances this narrow goal by allowing private parties to clean up hazardous pollution sites and then recover “response costs” from the parties responsible for creating these hazards. 42 U.S.C. § 9607. To recover response costs under CERCLA, private parties must prove, among other things, that the costs incurred were “necessary” and “consistent with the national contingency plan” (“NCP”). 42 U.S.C.A. § 9607; *e.g.*, *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir.1992). Unless the private party meets these two elements, any expense cannot be recovered under CERCLA as a matter of law. *E.g.*, *Reg'l Airport*, 460 F.3d 697, 703 (6th Cir. 2006).

The District Court correctly found that FAWS cannot, as a matter of law, recover the testing expenses under CERCLA. First, the testing expenses failed to meet the “necessary” element as they are duplicative of existing efforts, not closely tied to cleanup efforts, and not in response to a threat to human health or the environment. Second, the testing costs were inconsistent with the NCP because they did not result in a CERCLA-quality cleanup. Therefore, the District Court properly granted BELCO’s motion for summary judgment on this issue.

A. FAWS’ testing costs do not meet the “necessary” element because they duplicated existing efforts, were not closely tied to cleanup efforts, and were

not in response to a threat to human health.

FAWS' testing costs do not meet the "necessary" element and therefore cannot be recovered as response costs. This "necessary" element protects CERCLA's narrow goal by preventing opportunities for parties to realize financial windfalls or accrue personal benefits unrelated to actually cleaning up contamination. *See G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995); *City of Detroit v. Simon*, 247 F.3d 619, 630 (6th Cir. 2001); *Young*, 394 F.3d at 865 (allowing recovery for response costs unrelated to cleaning up contamination "would defeat the main purpose of CERCLA"). Therefore, every response cost must be necessary to cleanup efforts. *See G.J. Leasing*, 54 F.3d at 386.

The FAWS' testing costs do not meet this necessary prong for three separate reasons. First, these tests are duplicative of extensive testing already conducted. Second, the testing costs are not closely related to any efforts to clean up or remediate the NAS-T contamination. Finally, these testing costs did not respond to a threat to human health or the environment. Individually, each reason prevents FAWS from meeting the "necessary" element; cumulatively they compel this Court to find that FAWS fails to state a claim for recovery as a matter of law.

- i. FAWS' water testing costs were duplicative of testing already done by BELCO and the Centerburg County Department of Health.*

The trial court rightfully found that FAWS' costs were unnecessary under CERCLA, as these tests duplicated similar testing already completed. As a general matter, courts find that private expenses that duplicate previous efforts are "wasteful," "needless," and unnecessary under CERCLA. *E.g., Artesian Water*, 851 F.2d at 651. This includes expenses to investigate contamination that has already been investigated by the EPA, even if the party's investigations uncover new data. *Louisiana-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263 (E.D. Cal.

1997). For example, expenses incurred to investigate released contaminants, after the EPA had conducted a similar investigation, were duplicative and unnecessary even though the EPA used its findings to supplement their own data. *Iron Mountain Mines*, 987 F. Supp. at 1272.

Courts find duplicative expenses unnecessary in order to protect CERCLA's goal of efficiently remediating contamination. *Beazer Materials*, 811 F. Supp. at 1425. Allowing parties to recover duplicative expenses exponentially increases the remediation costs without significantly benefiting clean-up efforts. *Id.*; *Rolan v. Atl. Richfield Co.*, 427 F. Supp. 3d 1013, 1024 (N.D. Ind. 2019), *citing Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005). Thus, permitting recovery for duplicative efforts violates CERCLA's emphasis on efficiency and cost-effectiveness. *Hanford Downwinders v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995); *Beazer Materials*, 811 F. Supp. at 1425.

The Central Labs testing here was duplicative of BELCO and the Centerburg County Department of Health's (DOH) own investigative work. In the years leading up to the Central Labs testing, BELCO had conducted dozens of monthly tests at the monitoring wells closest to Fartown. R. at 5. Additionally, DOH tested multiple private wells in Fartown immediately prior to the Central Labs tests. *Id.* The BELCO and DOH investigations gave a comprehensive picture of the existence of NAS-T in and around Fartown. Yet, despite FAWS being aware of BELCO and DOH's extensive investigative efforts, the group paid Central Labs to test Fartown wells. *Id.* This effort to replicate earlier investigative measures is exactly the type of duplicative and wasteful activities courts have repeatedly found unnecessary under CERCLA. The fact that FAWS' investigation provided new information about the scope of the NAS-T contamination does redeem these duplicative expenses. *Iron Mountain Mines*, 987 F. Supp. at 1272.

Jurisdictions across the country have found duplicative actions unnecessary in order to

preserve CERCLA's core principles of efficiency, expediency, and cost-effectiveness. The District Court upheld those principles by barring FAWS from recovering their duplicative testing expenses, and this Court should affirm the lower court's grant of summary judgment.

ii. *FAWS' testing expenses are not closely tied to the actual cleanup of hazardous contamination.*

FAWS' testing expenses are unnecessary under CERCLA because they are not closely tied to any efforts to clean up or remediate hazardous contamination. CERCLA defines "response" as "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601. This intimate relationship between response, removal, and remedy has created a broad consensus that response costs are only necessary if closely tied to the actual removal or remediation of contamination. *E.g., Young*, 394 F.3d at 863; *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 294 (3d Cir. 2000); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669–70 (5th Cir.1989); *see Key Tronic Corp. v. U.S.*, 511 U.S. 809, 820 (1994). Expenses not directly spent "to clean up sites or to prevent further releases of hazardous chemicals" are generally not recoverable as a matter of law. *E.g., Redland Soccer Club*, 55 F.3d at 849–50; *Hardage*, 982 F.2d at 1448. For example, investigative expenses are not "closely tied" unless incurred as part of broader cleanup efforts. *Compare Young*, 394 F.3d at 864 with *CNH Am., LLC v. Champion Env't Servs., Inc.*, 863 F. Supp. 2d 793, 809 (E.D. Wis. 2012). Similarly, expenses that aid cleanup or remediation actions may still be unnecessary if not incurred for the purpose of cleaning up contamination. *Key Tronic*, 511 U.S. at 820-21.

Even when viewed in the light most favorable to FAWS, the facts here cannot show that FAWS' testing expenses were closely tied to actual cleanup or remediation efforts. Since there were no ongoing cleanup or remediation efforts at the time FAWS incurred the testing expenses, FAWS must show that these tests were closely tied to previous or future efforts. R. at 5. This

FAWS simply cannot show. First, the record is void of any evidence that the testing expenses were directly related to BELCO's previous remediation efforts under the CD. The COC, which marked the end of BELCO's remediation, was issued over a year prior to FAWS hiring Central Labs. *Id.* Because BELCO's remediation efforts ended long before the Central Labs testing, a reasonable factfinder cannot find that these expenses were closely tied to BELCO's efforts.

The Central Labs testing is also not closely tied to future clean-up or remediation efforts. FAWS never engaged in cleanup efforts of their own, and the EPA declined FAWS' request for remediation R. at 5. The FAWS expenses are also not closely tied to remediation efforts that occurred after the EPA reopened the CD. The Central Labs testing was done over a year prior to any *decision* to conduct remediation efforts. R. at 5-6. Surely an expense incurred without any knowledge of future remediation actions cannot later be deemed "closely tied" to those same actions. While FAWS may argue that the EPA reopened the CD in part because of the Central Labs results, costs not "closely tied" to cleanup efforts do not later become necessary merely because they incidentally benefit future cleanup efforts. *Key Tronic Corp.*, 511 U.S. at 820-21.

In summary, FAWS cannot tie their Central Labs expenses to any previous, concurrent, or future clean up or remediation efforts. Even when viewing the facts most favorably to FAWS, the trial court rightfully found these expenses unnecessary as a matter of law.

iii. FAWS' testing costs were not incurred in response to a threat to human health or the environment.

FAWS testing expenses are unnecessary as a matter of law because they were not incurred in response to a threat to human health or the environment. CERCLA does not cover costs to remediate *any* hazardous contamination, as this would expand recovery far beyond CERCLA's purpose. *Amoco Oil Co.*, 889 F.2d at 671; *see, e.g., G.J. Leasing*, 54 F.3d at 386; *Reg'l Airport*, 460 F.3d at 706. Therefore, a plurality of courts agree that only expenses

responding to a “actual and real threat” to human health or the environment are “necessary” under CERCLA. *E.g.*, *Carson Harbor Village, Ltd. V. Unocal Corp*, 270 F.3d 863, 871 (2001); *Reg'l Airport*, 460 F.3d at 703–04.

To determine whether the contamination poses an “actual and real threat,” courts often defer to regulations set by the EPA. *E.g.*, *Amoco Oil*, 889 F.2d at 671. For example, the plaintiff in *Regional Airport* owned property that was contaminated with hazardous lead released by the defendant. *Reg'l Airport*, 460 F.3d at 704-05. However, the concentration of the lead in the soil was in the “acceptable” range set by EPA regulations, meaning the lead contamination posed no “actual or real threat to human health or the environment.” *Id.* at 706. Therefore, the plaintiff’s response costs were unnecessary under CERCLA as a matter of law. *Id.* at 704.

FAWS cannot demonstrate that the testing expenses were done in response to an actual or real threat. The EPA’s HAL, the sole regulation for NAS-T, sets a clear bar for acceptable concentrations of NAS-T in drinking water at 10 ppb. R. at 3. Despite the extensive testing by BELCO and DOH, there is no evidence suggesting NAS-T levels ever reached 10 ppb in Fartown. R. at 3-5. The absence of any evidence showing NAS-T levels above the EPA’s HAL means FAWS' costs were not in response to an “actual or real threat.” Therefore, like the plaintiff in *Regional Airport*, FAWS’ testing expenses are not necessary as a matter of law.

B. FAWS testing expenses are inconsistent with the national contingency plan.

Even if this Court finds that FAWS’ testing costs were “necessary,” these expenses are still not recoverable because FAWS’ actions were inconsistent with the national contingency plan (“NCP”). All response costs under CERCLA must be consistent with the NCP, a set of EPA regulations that establish the appropriate “procedures and standards for responding to releases of hazardous substances.” 42 U.S.C. § 9605. Response actions consistent with the NCP must result in a CERCLA-quality cleanup. 40 C.F.R. § 300.700; *e.g.*, *Franklin Cnty. Convention Facilities*

Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 543 (6th Cir. 2001); *see also Young*, 394 F.3d at 865 (“response action is still inconsistent with the NCP because it did not result in any—let alone CERCLA-quality—cleanup”). A CERCLA-quality cleanup requires, among other things, an opportunity for the public to submit feedback, express concerns, and otherwise participate in selecting the chosen response. *Reg'l Airport*, 460 F.3d at 708; *see* 40 C.F.R. § 300.700(c)(6); *Carson Harbor*, 433 F.3d at 1266–67. Absent an opportunity for public comment, response costs are not consistent with the NCP and CERCLA provides no remedy. *Young*, 394 F.3d at 865; *see Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 837 (8th Cir.2000)

FAWS’ testing expenses are not consistent with the NCP as a matter of law. First, their testing costs did not result in *any* clean up or remediation efforts, as previously explained. Absent a connection to any cleanup of hazardous contamination, FAWS certainly cannot meet the CERCLA-quality cleanup standard required by the NCP. *See Young*, 394 F.3d at 865. Even if there was a connection to clean up efforts, FAWS’ testing expenses could not have resulted in a CERCLA-quality cleanup because FAWS did not provide an opportunity for public feedback before incurring expenses. *See R.* at 5. The record is completely void of any indication that FAWS took this required step, meaning CERCLA provides them with no remedy.

To recover expenses under CERCLA, a private party must demonstrate that the expenses were necessary and consistent with the NCP. FAWS’s testing expenses fall short of both prongs. First, the expenses were unnecessary, as they were duplicative, not closely tied to cleanup or remediation efforts, and not in response to an actual threat. Second, FAWS’ testing expenses were inconsistent with the NCP because they did not result in a CERCLA-quality cleanup. Because FAWS fails both elements, FAWS’ testing expenses are not recoverable as a matter of law. This Court should affirm the District Court’s grant of summary judgment on this issue.

II. The District Court erred as a matter of law when it determined that the EPA properly found the ERA was an ARAR under CERCLA, thus allowing the reopening of the CD.

By misapplying the law to the facts and misinterpreting the standard of review, the District Court erred when it granted summary judgment upholding the EPA's decision that the ERA was an ARAR under CERCLA, thereby allowing the EPA to reopen the CD. As described in section I, this Court reviews grants of summary judgment *de novo*. However, the underlying agency decisions related to requirements that an agency does not administer with the force of law are reviewed with deference "according to the agency's persuasiveness." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).¹

A. The District Court misapplied the law to the facts in finding that the ERA was an ARAR under CERCLA, as the ERA does not meet all of CERCLA's ARAR requirements.

The District Court misapplied the law to the facts when it held that the ERA was an ARAR. For a state requirement to qualify as an ARAR under CERCLA, the requirement must be (1) properly promulgated; (2) legally applicable or relevant and appropriate; (3) more stringent than federal standards; and (4) timely identified. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991); 42 U.S.C. § 9621; 40 C.F.R § 300.40. Here, the ERA does not meet the first two elements, at a minimum, and was thus incorrectly deemed an ARAR.

- i. The ERA is not properly promulgated, as required to be an ARAR, because it is not legally enforceable.*

The ERA was not properly promulgated because it is not legally enforceable. To be properly promulgated, a state requirement must be legally enforceable and generally applicable.

¹ When agencies have to make determinations about how something is categorized, Congress generally does not intend for those decisions to carry the force of law outside of their particular fact patterns. *Mead*, 533 U.S. at 234. These types of decisions are owed deference according to the agency's persuasiveness, a less deferential standard than for other agency decisions. *Id.* at 235. That is the case here: the EPA has the authority to decide if a state regulation qualifies as an ARAR, but that is a case-specific determination that does not carry the "force of law."

Akzo, 949 F.2d at 1440; 40 C.F.R. § 300.400(g)(4). One way a state requirement fails the “legally enforceable” element is being unconstitutionally vague. *See Akzo*, 949 F.2d at 1441. A requirement is unconstitutionally vague if a person of ordinary intelligence would not have fair warning of prohibited conduct, creating the risk of arbitrary and discriminatory enforcement. *E.g.*, *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Regulations, policies, or statutes can still be unconstitutionally vague even if they attempt to define terms or provide boundaries. *United Food*, 163 F.3d at 360. For example, the Sixth Circuit indicated that a local transit authority’s advertising policy, which prohibited advertisements on controversial issues that may adversely affect ridership, would likely be unconstitutionally vague. *Id.* Although the policy attempted to provide some boundaries by only prohibiting controversial issues that “may adversely affect ridership,” the Sixth Circuit noted the policy would still likely lead to arbitrary and discriminatory enforcement, as decisions on what “may adversely affect ridership” is highly subjective and would vary among individuals. *Id.*

Here, a person of ordinary intelligence could not possibly identify the applicable standard in the ERA, leading to inadequate warnings of prohibited behavior and arbitrary enforcement. The ERA’s text, “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,” is replete with unclear terms that are neither defined in the amendment itself nor enforceable based on common meaning. R. at 3. For example, the dictionary defines “clean” as either “free from dirt or pollution,” “free from contamination or disease,” or “free or relatively free from radioactivity.” *Clean*, Merriam-Webster Dictionary (2022). The ERA would require vastly different regulatory standards depending on which of these definitions is used.

The ERA does attempt to set a boundary and define one of its terms when it described a “healthful environment” as one “free from contaminants and pollutants caused by humans.” R. at 3. However, the terms “contaminants” and “pollutants” are not defined within the ERA. Turning to plain meaning, Merriam-Webster’s Dictionary defines “contaminant” as “something that contaminates” and “contaminate” as “to make unfit for use by the introduction of unwholesome or undesirable elements.” *Contaminant*, Merriam-Webster Dictionary (2022); *contaminate*, Merriam-Webster Dictionary (2022). It also defines “pollutant” as “something that pollutes” and “pollute,” in turn, as “to contaminate.” *Pollutant*, Merriam-Webster Dictionary (2022); *pollute*, Merriam-Webster Dictionary (2022). Combining these definitions, “contaminants” and “pollutants” can each be read as “substances that make something unfit for use by the introduction of unwholesome or undesirable elements,” and the ERA could be read as requiring the environment to be free from substances that make it “unfit for use.” However, “unfit for use,” “unwholesome,” and “undesirable” are also unspecific and unmeasurable, rather than clear boundaries allowing for non-discriminatory and non-arbitrary enforcement. Thus, like in *United Food*, even the attempted boundary in the ERA is not enough to render the ERA enforceable.

There is not additional context that would resolve the issue. The legislative history provides only confusing and contradictory definitions for terms in the ERA, and impermissibly relies on others’ interpretations to aid in enforcement. For example, the ERA’s sponsor, Mr. Wright, seemingly tries to define the ERA’s reference to “clean” as “healthful,” which he, in turn, defines as “[doing] no harm.” Addendum at 5. However, he later said that odors could violate the ERA if they were “sufficiently offensive” and “impact what the community would consider ‘clean’ air.” *Id.* at 6. In doing so, Mr. Wright both muddies the definition of “harm” and impermissibly relies on others’ subjective interpretations to enforce the ERA.

In further contrast to his “doing no harm” definition, Wright also implied that “healthful” could mean entirely free from unnatural substances. *See* Addendum at 5. However, elsewhere, Wright explicitly stated that the ERA is not meant to require absolutely no human-made additives or additional substances in water, saying, “what is appropriate and desirable for a public water supply involves other chemicals.” *Id.* at 4.

Both the text itself and its attempted boundaries are unclear, making the ERA unconstitutionally vague. A person of ordinary intelligence could not discern the ERA’s supposed standards for “clean” and “healthful,” and thus would not be on notice for what behavior is prohibited. As a result, the ERA could only lead to arbitrary and discriminatory enforcement as to which contaminants and pollutants must be excluded from air and water.

ii. The ERA is not an ARAR because it is neither applicable nor relevant and appropriate.

The ERA does not meet the “applicable or relevant and appropriate” requirements for state ARARs. As the parties stipulated to the ERA not being “applicable,” the only question under this element is if the ERA is relevant and appropriate. R. at 12. To be considered “relevant and appropriate,” a state requirement must “address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.” *E.g., State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1526 (D.C. Cir. 1993); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001); 40 C.F.R. § 300.400(g)(2). The NCP, a set of EPA regulations for implementing CERCLA, provides eight factors to consider in determining if a requirement is “relevant and appropriate.” 40 C.F.R. § 300.400(g)(2). These factors include whether the purpose of the requirement is similar to the purpose of the CERCLA action, whether the substances regulated by the requirement are similar to the substances found at the CERCLA site, and whether the actions or activities regulated by

the requirement are similar to the remedial action at the CERCLA site. *Id.*

Here, the ERA is not relevant and appropriate to the associated CERCLA action, as the purpose of and substances regulated by the ERA do not align with those of the CERCLA action. The District Court described the primary purpose of the ERA as serving a gap-filling role, allowing for new regulations of chemicals that are toxic and previously unregulated. R. at 12. However, the purpose of the CERCLA action was precisely to regulate and clean up the chemical NAS-T. R. at 3. Further, NAS-T levels are regulated by the EPA's HAL, requiring NAS-T in drinking water to be below 10 ppb to ensure that NAS-T is not at toxic concentrations in drinking water. R. at 3. Thus, NAS-T is both non-toxic and somewhat regulated, in contrast to the type of unregulated chemicals contemplated under the ERA. The ERA's purpose and regulated substances are in opposition to those of the CERCLA action.

Additionally, the ERA seemed to contemplate much broader activities than the CERCLA action. While vaguely defined, the ERA sought an environment "free from contaminants." R. at 5. In contrast, the CERCLA action focused on highly localized soil excavation and water filtration steps while explicitly rejecting the idea of entirely remediating the NAS-T plume. R. at 4. A highly localized action that rejected removing contaminants from the environment is not similar to one seeking an environment "free from contaminants." Because the ERA not only fails to satisfy the factors for being "relevant and appropriate" but often directly contradicts them, the ERA is not "relevant and appropriate" as required to be an ARAR.

B. The District Court misapplied the "deference according to persuasiveness" standard in upholding the EPA's decision that the ERA was an ARAR by inappropriately relying on the legislative history and wording of the ERA.

When the District Court noted that the EPA was entitled to "deference according to its persuasiveness" and upheld the EPA's decision that the ERA was an ARAR, the District Court incorrectly applied the "deference according to persuasiveness" standard of review. Under this

standard, an agency's decision should be given deference depending on the thoroughness of the agency's consideration, the validity of the agency's reasoning, and the agency's consistency with prior interpretations. *Skidmore*, 323 U.S. at 140; *Mead*, 533 U.S. at 228. Each of these factors requires inquiry into the agency's decision-making process alone.

Here, analysis under the correct factors for the "deference according to its persuasiveness" standard shows that the EPA's decision that the ERA was an ARAR under CERCLA should not be upheld. First, the decision was not consistent with previous EPA interpretations. CERCLA's text plainly indicated that, for a state standard to be an ARAR, it had to be "promulgated," "legally applicable or relevant and appropriate," "identified... in a timely manner," and "more stringent than any Federal standard." 42 U.S.C. § 9621. The District Court regurgitated these same elements, citing the EPA's prior interpretation of them, in its decision. R. at 10. However, when the court then described EPA's attempted application of the elements in this case, they were largely unacknowledged or unsatisfied.

The EPA's decision-making process was also not thorough. It entirely failed to consider some required elements of ARARs, while merely making conclusory statements that others were met. While the EPA at least explicitly provided some support for its claims that the ERA met the "properly promulgated," "more stringent than federal laws," and "applicable or relevant and appropriate" elements, the District Court did not mention whether the EPA considered the "timely identified" element at all. R. at 11. Additionally, according to the District Court, the EPA merely conclusively stated that the ERA was "of general applicability and is legally enforceable." R. at 11. While these are the precise elements that the EPA has historically required to meet the "properly promulgated" ARAR requirement, it is insufficient to claim that these elements are met without an iota of reasoning or support.

Elsewhere, the EPA did attempt to provide support for its claims that other ARAR requirements were met; however, that support contradicted previous EPA interpretations. Most notably, the District Court said that the EPA argued that the ERA was relevant or appropriate “because it is covering an unregulated hazardous material ‘caused by humans’ at the Site.” R. at 11. However, this justification bears almost no relation to the EPA’s established methods from the NCP for determining whether a state requirement is relevant and appropriate to a CERCLA action.² In this case, the EPA’s justification for its claim that the ERA was “relevant and appropriate” failed to directly compare the ERA to the CERCLA action at any point, despite all 8 NCP factors requiring such a comparison. The EPA also did not consider the topics of any of the NCP’s 8 factors except obliquely describing the type of substance as an “unregulated hazardous material ‘caused by humans.’” R. at 11. Because the EPA’s decision ignored its own previously established applications of the “relevant and appropriate” ARAR requirement, the EPA’s decision was not consistent with its prior interpretations.

Thoroughness and consistency with previous interpretations are key factors in determining if an agency decision should be given “deference according to its persuasiveness;” here, the EPA’s decision-making process in determining that the ERA was an ARAR was neither thorough nor consistent. Contrary to the District Court’s ruling, this analysis is not changed by the legislative history and wording of the ERA, since these factors are not to be considered when assessing the EPA’s decision under the “deference according to its persuasiveness” standard. Thus, the EPA’s decision that the ERA was an ARAR is owed no deference. This Court should overturn the District Court’s grant of summary judgment on this issue.

² As described in the NCP and in section II(A)(ii) above, there are 8 factors to use for determining if a requirement is “relevant and appropriate” to the CERCLA action. 40 C.F.R. § 300.400(g)(2). Each factor compares part of a state requirement with a CERCLA action. *Id.*

III. The District Court erred as a matter of law in vacating the EPA’s decision to order BELCO to supply bottled water, rather than install filtration systems to meet the regulatory standard from the ERA.

When the District Court vacated the EPA’s decision—which ordered BELCO to supply bottled water to attain the purported ARAR regulatory standard from the ERA—the court erred by including extraneous information in its analysis and incorrectly applying the “arbitrary, capricious, or contrary to law” standard of review. When reviewing the EPA’s choice of a particular cleanup method under CERCLA is, a court should uphold the EPA’s decision unless it is arbitrary, capricious, or contrary to law. *E.g., United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 748 (8th Cir. 1986).

A. The District Court erred as a matter of law by failing to restrict its review of the EPA’s decision to the administrative record, as required by CERCLA.

The District Court here erred as a matter of law when it included information outside of the administrative record in its judicial review of the EPA’s selected response action. Courts typically must only review the administrative record when considering response actions taken under CERCLA. *E.g., United States v. Puerto Rico Indus. Dev. Co.*, 18 F.4th 370, 373 (1st Cir. 2021); 42 U.S.C. § 9613(j)(1). Review outside the administrative record is only appropriate if needed to determine if the EPA’s decision was adequate; information outside the record cannot be used to determine if the decision was the best option. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1427 (6th Cir. 1991). Per the EPA, the administrative record may contain any documents that reflect public participation in the selection of a response action along with documents used to select the response action. 40 C.F.R. § 300.810. However, documents that do not fall into either category are generally not included in the administrative record. *Id.*

In the administrative record, the EPA appropriately included information about public participation by including FAWS’ request for the EPA to order BELCO to install filtration

systems at each private well. R. at 6. The EPA also correctly included information about the basis for its decision by including data from FAWS' 2019 testing and the EPA's own testing. *Id.* However, there is no evidence suggesting the legislative history or Senate Report about the ERA was included in the administrative record documenting the EPA's selection of a remedy. This information did not belong in the administrative record, as it did not provide insight into public participation in selecting the remedy action or give the basis for the EPA's choice of remedy action. Nevertheless, the District Court inappropriately justified its decision to vacate part of the EPA's remedy action by citing the supposed purpose of the ERA from the Senate Report. R. at 13. Thus, the District Court erred by using information outside of the administrative record to guide its decision that the EPA's selection of the remedy action was inappropriate.

B. Review of the administrative record alone reveals that the EPA's decision was not "arbitrary, capricious, or contrary to law."

From the administrative record, it is clear the EPA's decision was not arbitrary, capricious, or contrary to law. This standard is deferential to the agency and presumes the agency's decision to be valid if the agency articulates a satisfactory explanation for its action that demonstrates a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's decision is arbitrary and capricious if it relies "on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem...or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* This standard permits courts to uphold agency decisions with a "less than ideal" reasoning. *Id.*

Here, after the EPA determined that the ERA was an ARAR, the EPA decided to have BELCO supply bottled water, rather than install filtration systems, for wells with concentrations of NAS-T between 5 and 10 ppb. R. at 6. Since response actions must comply with ARARs, it

follows that the EPA determined that BELCO supplying bottled water for residents with wells with 5 to 10 ppb of NAS-T would satisfy the ERA's ARAR. Thus, the question is whether a rational connection exists between the facts in the administrative record and the EPA's decision not to require filtration systems for wells with 5 to 10 ppb of NAS-T. The facts show that the EPA based its decision on testing data provided in the administrative record. R. at 6. These data showed that the majority of wells had no detectible presence of NAS-T, and that, while some wells had NAS-T concentrations between 1 and 8 ppb, no wells had concentrations of NAS-T near the potentially toxic level of more than 10 ppb established in the HAL. R. at 3; 5-6.

There is a rational connection between this specific research showing no toxic concentrations of NAS-T and the EPA's decision to require BELCO to provide bottled water, rather than install expensive filtration systems for residents whose wells contain trace amounts of NAS-T. As described in section II(A)(i), there is a permissible construction of the ERA, based on plain meaning, as only forbidding contaminants and pollutants in the air and water to the extent that they make the environment "unfit for use." While BELCO maintains this ERA construction, like all ERA constructions, is unconstitutionally vague, the EPA reasonably could have chosen to adopt this reading. The EPA would then meet the ARAR under the ERA by choosing response actions that simply ensured the water was not unfit for use. That is precisely what it did when it selected a response action that ensured no toxic amounts of NAS-T were in the Fartown wells.

Additionally, there is no evidence that the EPA relied on improper factors, failed to consider important aspects of the problem, or made a decision contrary to the evidence. The only standard the EPA's decision did not meet was that of the District Court, which held the EPA's decision was not reasonable because it allowed substances that were not "well-regulated and permitted discharge[s]" or "natural sources that do not require a permit." R. at 13. This standard,

however, was entirely of the District Court's design, rather than pulled from the evidence or existing EPA concepts. As such, it did not belong in the District Court's analysis.

Under the highly deferential "arbitrary and capricious" standard, an EPA's decision in choosing a response action should be upheld if there is a rational connection between the facts found and the decision made. If such a rational connection exists, it is irrelevant whether the connection is clearly articulated or if the District Court would have acted differently. Here, a permissible reading of the ERA, which provides the purported regulatory standards, requires the environment to be void of harmful substances that make the environment "unfit for use." Under this reading, there is a rational connection between the facts found (no toxic concentrations of NAS-T) and the choice made (not to require installation of expensive filtration systems to remove non-toxic concentrations of NAS-T from the water). As such, based on the administrative record, the EPA's decision to require BELCO to provide bottled water, rather than install filtration systems, for some wells was not arbitrary, capricious, or contrary to law.

C. Even if information outside the administrative record could be considered, the EPA's decision was still not "arbitrary, capricious, or contrary to law."

Even if information outside of the administrative record could be considered, the EPA's decision should still be upheld, as this information, which related to the legislative history and purpose of the ERA, would not change the analysis of the EPA's decision in this case.

As described in section II(A)(i), the legislative history regarding the ERA does not provide insight into any potentially enforceable, non-arbitrary regulatory standards arising from the ERA. The legislators explicitly rejected the idea that the ERA requires water to be completely free of all additives, and provided conflicting definitions and unclear boundaries for what can and cannot be included in the water. Addendum at 4-5. The purpose statement of the ERA, found in the Senate Report, also does not support the view that the EPA's decision was

arbitrary, capricious, or contrary to law. *Id.* at 9. The statement indicates that the ERA is meant to provide a gap-filling for addressing previously unregulated toxic chemicals. *Id.* NAS-T is non-toxic at all the concentrations for which it was detected in the area. R. at 3, 5, 7. Further, it is regulated by the HAL. R. at 3. Therefore, it is neither a toxic chemical nor a chemical that is completely unregulated, and its potential regulation does not fall within the potential “gap-filling” purpose of the ERA. Because the purpose is irrelevant, it does not affect the analysis of the EPA’s decision as arbitrary, capricious, or contrary to law.

Therefore, the history and purpose of the ERA provides no evidence that the EPA made its decision by relying on factors it was not supposed to, failed to consider an important aspect of the problem, or made a decision contrary to the evidence. The EPA’s decision was also not contrary to the intent and purpose of the ERA, and, as described in section III(B), there is a rational connection between the EPA’s decision and the facts. As such, the EPA’s decision to require BELCO to provide bottled water rather than install filtration systems was not arbitrary, capricious, or contrary to law. Even if this Court incorporates information outside of the administrative record, the EPA’s decision must be upheld.

D. Public policy demands the EPA’s selection of remedial action be upheld, given its specific expertise about NAS-T and water quality.

Because of the EPA’s specific, technical expertise about water quality levels and environmental issues, its decision to require BELCO to provide water bottles rather than install filtration systems for wells with trace amounts of NAS-T must be upheld. Courts have often cited the EPA’s specialized expertise in selecting cleanup methods under CERCLA as justification for using the highly deferential “arbitrary and capricious” standard of review for such decisions. *E.g., Hardage*, 982 F.2d at 1442, *Ne. Pharm. & Chem.*, 810 F.2d at 748; *see also Nat. Res. Def.*

Council, Inc. v. U.S. E.P.A., 966 F.2d 1292 (9th Cir. 1992); *Bamidele v. I.N.S.*, 99 F.3d 557, 561 (3d Cir. 1996) (noting that decisions in an agency’s field of expertise are entitled to deference).

Here, the EPA, which has expertise in water quality and environmental issues, has been investigating the NAS-T chemical since at least 1995, when it adopted the HAL regulation for NAS-T. R. at 3. It also has been involved in observing NAS-T at the specific site in this case for at least 6 years, since the DNR referred this specific investigation to the EPA in 2016. R. at 3. In fact, the DNR referred the case to the EPA in part because of the EPA’s specific expertise in this area. *Id.* The EPA clearly has extremely relevant and specific expertise on the issue at hand.

This is precisely the type of situation that made the deferential “arbitrary and capricious” standard necessary. While judges are experts in law and owe agencies less deference when considering agency decisions related to interpreting the law or applying legal standards (as in section II), judges are not subject-matter experts in every field. They do not have the capacity to develop new areas of expertise each time they take a case. As such, judges cannot simply substitute their own solutions for that of expert agencies. If they could, the entire system would fall into disarray, rendering agencies nearly pointless, burdening judges’ dockets, and requiring judges to suddenly be the foremost authorities on complex content areas from environmental law to immigration law. Such a situation would be unsustainable and unjust. Agencies’ authority and expertise must be recognized when they make decisions in their particular field. Except in the most egregious, arbitrary, and capricious cases, agency decisions must be upheld. The EPA’s decision should be upheld here, and the District Court’s decision overturned on this issue.

IV. The District Court properly exercised its discretion in retaining jurisdiction over FAWS’ outstanding state law claim.

The District Court properly retained supplemental jurisdiction over FAWS’ remaining state claims after dismissing the CERCLA issues. Supplemental jurisdiction allows a federal

court to hear certain state law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). While district courts occasionally have the discretion to decline jurisdiction, they are never required to dismiss a supplemental claim. 28 U.S.C. § 1367(c); e.g., *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 439 (2d Cir. 2011); *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780 (3d Cir. 1995). When determining whether to exercise supplemental jurisdiction, there are four statutory circumstances that may permit a court to decline supplemental jurisdiction. 28 U.S.C. § 1367(c)(1)-(4). However, even in these circumstances, district courts must also weigh key values articulated in *Gibbs*: judicial economy, convenience, fairness and comity. 383 U.S. at 726; e.g., *Growth Horizons, Inc. v. Delaware Cnty., Pa.*, 983 F.2d 1277, 1284 (3d Cir. 1993).

The decision to exercise supplemental jurisdiction is squarely within the discretion of district courts. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009); *Gibbs*, 383 U.S. at 725–26. Because district courts can best weigh the competing interests in determining whether to retain jurisdiction, reviewing courts employ an abuse of discretion standard of review. E.g., *Carlsbad Tech.*, 556 U.S. at 639; *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1328 (11th Cir. 2010). Thus, this Court must affirm the District Court’s decision unless it was “manifestly erroneous.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

When weighing the circumstances outlined in 28 U.S.C. § 1367(c), the District Court here correctly retained jurisdiction over the state law claims. First, FAWS’ negligence and nuisance claims are not complex issues. The second circumstance also weighs against dismissal as the state claims do not substantially predominate. Next, the court was not obligated to dismiss the state claims despite granting summary judgment on the federal issues. Finally, the fourth circumstance can be dismissed from consideration. 28 U.S.C. § 1367(c)(4) is reserved only for

truly exceptional circumstances, and no facts here suggest a circumstance so exceptional that the court abused its discretion in declining jurisdiction. *E.g., Itar-Tass Russian News v. Russian Kurier, Inc.*, 140 F.3d 442, 448 (2d Cir. 1998). Weighing these circumstances alongside *Gibbs*' values, the District Court did not abuse its discretion in retaining supplemental jurisdiction.

A. FAWS' state claims do not involve novel or complex state issues that would favor declining supplemental jurisdiction.

FAWS' state law claims allege negligence and nuisance, neither of which are novel or complex issues that favor declining supplemental jurisdiction. A District Court may decline to exercise jurisdiction if the remaining claims involve novel or complex issues of state law. 28 U.S.C. § 1367(c)(1). Generally, however, tort claims involving nuisance or negligence are not novel or complex. *E.g., Montano v. City of Chicago*, 375 F.3d 593, 601 (7th Cir. 2004); *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743–44 (11th Cir. 2006) (where neither defendant could cite no case holding that negligence or nuisance claims were novel or complex).

The only remaining state law issues here are FAWS' negligence and private nuisance claims. R. at 7. In the District Court, FAWS speculated that these claims are novel and complex because they would require the District Court to apply newly enacted ERA to negligence per se cases. R. at 15. However, the District Court appropriately found this argument unpersuasive, as the record does not suggest the ERA is central to FAWS' tort actions. *Id.* Because neither claim is considered a novel or complex issue, this first factor weighs in favor of retaining jurisdiction.

B. The state tort claims do not substantially predominate over the federal claims and weigh heavily in favor of retaining supplemental jurisdiction.

FAWS' state tort claims do not substantially predominate over the federal claims, which compels the District Court to retain supplemental jurisdiction. This second factor under 28 U.S.C. § 1367(c) is pulled directly from *Gibbs*. 383 U.S. 715, 726-72; *e.g., Oneida Indian Nation*, 665 F.3d at 439. *Gibbs* allows District Courts to decline jurisdiction if the state issues

“substantially predominate” over the federal claims. *Gibbs*, 383 U.S. at 726–27. When weighing whether state issues substantially predominate, *Gibbs* advises courts to consider the overlap of the terms of proof required, the scope of the issues raised, and the remedies sought between the state and federal claims. *Id.*; *Borough of W. Mifflin*, 45 F.3d at 789; *see Allstate Interiors & Exteriors, Inc. v. Stonestreet Const., LLC*, 730 F.3d 67, 73-74 (1st Cir. 2013). *Gibbs*’ guiding value of comity underpins these considerations. *Gibbs*, 383 U.S. 715, 726-27; *Cohill*, 484 U.S. 343 (1988); *see, e.g., White v. Cnty. of Newberry, S.C.*, 985 F.2d 168, 172 (4th Cir. 1993) (“whether a state claim predominates...must address federalism concerns”). Federal courts should defer to states on specialized state issues, while state claims that impact federal policies weigh “particularly strongly” in favor of retaining jurisdiction. *Gibbs*, 383 U.S. at 726-29; *White*, 985 F.2d at 172; *see City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 174 (1997).

Here, FAWS’ state tort claims do not substantially predominate over the accompanying federal CERCLA claims. For the first two *Gibbs*’ factors, the proof required and the issues raised between FAWS’ state claims and the associated federal claims overlap significantly: all of FAWS’ claims stem from BELCO’s contamination and involve damages incurred in response to this contamination. Even though this overlap subsides once the District Court grants summary judgement on the federal claims, the remedies requested in the state claim still deeply implicate matters of federal policy and threaten the proper balance between state and federal authority.

The remedies sought in the state tort claims include installing CleanStripping on all private wells in Fartown and remediating the Sandstone Aquifer. R. at 7. These remedies conflict with remedies already implemented by the EPA in CD and UAO. *See* R. at 4-6. For over five years, the EPA has led remediation efforts as CERCLA requires by taking steps to remediate the BELCO contamination. *See* R. at 3-7. The desired remedies in FAWS’ state claims, however,

threaten to interfere with the EPA's ongoing efforts. Additionally, this Court's decision on whether the EPA properly reopened the CD implicates many of the remedial actions at issue in the state claims. Thus, FAWS' state claims intimately involve matters of federal policy, which, given *Gibbs*' emphasis on comity, weighs particularly strongly in favor of retaining jurisdiction.

C. The District Court reasonably retained jurisdiction of the state claims despite disposing of all federal claims.

The District Court's decision to retain jurisdiction after disposing of all federal claims is a reasonable exercise of discretion. Even though courts often decline jurisdiction over remaining state claims if they dispose of every federal claim prior to trial, the Supreme Court has been clear that courts are not required to dismiss state claims in these circumstances; district courts still have the discretion to determine the appropriate outcome while weighing the values outlined in *Gibbs*. the general. *Gibbs*, 383 U.S. at 726; *Cohill*, 484 U.S. 343, 350 n.7 (1988); *Rauci v. Town of Rotterdam*, 902 F.2d 1050, 1054–55 (2d Cir. 1990).

District courts have often retained jurisdiction in these circumstances, particularly when doing so adheres to *Gibbs*' value of judicial economy. *See, e.g., Rauci*, 902 F.2d at 1055; *Blakely v. United States*, 276 F.3d 853, 863 (6th Cir. 2002). For example, the district court in *Blakely* retained jurisdiction over state claims after dismissing all federal claims. *Blakely*, 276 F.3d at 863. After considering the extensive proceedings in the district court, the Sixth Circuit affirmed the district court's decision, stating that "it would make little sense to require [the defendant] to expend additional resources making the same arguments in state court." *Id.* Judicial economy, the Sixth Circuit reasoned, compelled the district court to retain jurisdiction. *Id.*

Like the court in *Blakely*, the District Court here thought judicial efficiency would be better served by retaining FAWS' state claims, despite dismissing the federal issues, given the "tremendous amount of work that has gone into these cases in this court." R. at 15. The District

Court's weighing of various factors, including the judicial economy value touted in *Gibbs*, is exactly the type of judicial discretion encouraged by binding case law. *Cohill*, 484 U.S. at 350. This Court should affirm this prudent and reasonable exercise of discretion.

The District Court has immense discretion to determine whether to exercise supplemental jurisdiction over FAWS' state claims. In weighing the four considerations under 28 U.S.C. § 1367(c), there is no evidence to suggest that the District Court's decision to retain jurisdiction was "manifestly erroneous." These tort issues are not complex or novel state issues better suited for state court. The District Court's emphasis on preventing state tort remedies from interfering with federal policy laudably conforms to *Gibbs*' principle of comity. Finally, the District Court's decision to retain these state claims prioritizes *Gibbs*' emphasis on judicial economy. In sum, the District Court's decision to retain jurisdiction over FAWS' state law claims is an entirely appropriate exercise of judicial discretion that should be affirmed by this Court.

CONCLUSION

The District Court properly denied recovery for FAWS' response costs but erred in upholding the EPA's decision that the ERA was an ARAR under CERCLA. The District Court also erred when it vacated the EPA's determination that BELCO could attain ERA standards by supplying bottled water rather than installing filtration systems in Fartown. Finally, the court properly retained supplemental jurisdiction over FAWS' remaining state claims. As a result, BELCO is asking this Court to affirm the District Court's rulings on issues one and four and reverse the District Court's findings on issues two and three.