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,*

-and-

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

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

Brief of Appellant, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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## JURISDICTIONAL STATEMENT

The Fartown Association for Water Safety and a group of Fartown residents claiming harm (together Appellants) appeal from a Decision and Order dismissing Plaintiffs' Complaint, entered June 1, 2022, by the honorable Judge Dolman in the United States District Court for the State of New Union, Nos. 17-CV-1234 and 21-CV-1776. The district court had subject matter pursuant to 28 U.S.C. § 1331, given the complaint raises questions arising under federal law. The district court also had jurisdiction over the state law claims of nuisance and negligence due to supplemental jurisdiction under 28 U.S.C. § 1367(a), as the state law claims are part of "the same case or controversy." Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 28 U.S.C. § 1291, which grants the Court of Appeals jurisdiction over a final judgement issued by a federal district court.

## STATEMENT OF THE ISSUES PRESENTED

I. Did the District Court err when it determined that costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA?

II. Did the District Court err when it upheld EPA's determination that the ERA constitutes an ARAR, and, accordingly finding that EPA's reopening the CD based on that ARAR and ordering further remedial action in the UAO was proper?

III. Did the District Court err when it vacated as arbitrary, capricious, or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA?

IV. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

## STATEMENT OF THE CASE

### A. BELCO NAS-T Contamination

Centerburg, a small town of 4,500 residents, and Fartown, a rural community of 500 residents, are both located about 300 feet above the underground Sandstone Aquifer in the state of New Union. Record (R.) at 2. Specifically, the residents of Fartown are located two miles south of Centerburg, which is also the natural direction the aquifer flows underground. *Id*. This means the groundwater underneath Centerburg eventually reaches the groundwater underneath the people of Fartown. *Id*. In accessing this water, the people of Centerburg have one publicly owned water source while the people of Fartown use numerous private wells spread throughout the area. *Id*.

From 1973 to 1998, Better Living Corporation (BELCO), the manufacturer of a sealant product called "LockSeal," manufactured said product at a factory in Centerburg. *Id*. at 2–3. As part of the production process BELCO used Nitro-Acetate Titanium (NAS-T), a liquid chemical which helped create the sealant. *Id*. Starting in the mid-1980's various medical studies began showing NAS-T as a probable human carcinogen. *Id*. at 3. These studies eventually prompted the Environmental Protection Agency (EPA) to adopt a Health Advisory Level (HAL) for NAS-T in drinking water of 10 parts per billion (ppb). *Id*. All parties agree that at 5 ppb the human nose can detect NAS-T in water, where the chemical produces a sour or stale smell. *Id*.

Beginning in 2013, the people of Centerburg began complaining about their water smelling "off" or "sour." *Id*. Eventually, in January of 2015, the Centerburg County Department of Health (DOH) began testing the public water supply and discovered that the water contained

between 45 and 60 ppb of NAS-T. *Id*. Due to these results, the DOH notified Centerburg residents to cease drinking their tap water in September of 2015, at which point BELCO began supplying all residents of Centerburg with bottled water. *Id*. The following year, in 2016, residents of Fartown also began noticing the same "off" smell from their private wells. *Id*. at 5.

**B. EPA Involvement**

Following a brief investigation by the New Union Department of Natural Resources (DNR), the state referred the investigation and remediation to the EPA on January 30, 2016. *Id*. The EPA and BELCO then entered into an agreement wherein BELCO agreed to continue providing bottled water to the residents of Centerburg and to investigate the cause and extent of the NAS-T contamination. *Id*. Following this investigation, BELCO agreed to evaluate proposed cleanup remedies for the Site, known as a remedial investigation and feasibility study (RI/FS). *Id*. Through this RI/FS, BELCO concluded the NAS-T entered the soil from sporadic spills and from an unlined lagoon used to store wastewater and stormwater in the 1980s and early 1990s. *Id*. This contamination eventually migrated to the groundwater, creating a plume of NAS-T in the Sandstone Aquifer. *Id*.

BELCO then investigated the extent of the plume under further EPA oversight. *Id*. at 4. From July of 2016 through January of 2017, BELCO installed numerous monitoring wells in three successive lines each getting farther from Centerburg and closer to Fartown. *Id*. The final five monitoring wells were located approximately half a mile north of Fartown, which initially tested as negative for NAS-T. *Id*. In June of 2017, based on BELCO's RI/FS and comments received by the EPA after issuing its Proposed Plan, the EPA selected a clean-up plan for the Site known as a Record of Decision (ROD). *Id*. Thereafter, the EPA brought a cost recovery action against BELCO (Case No. 17-CV-1234); which was immediately followed with a Consent

Decree (CD) entered into between BELCO and the EPA on June 30, 2017. *Id*. In accordance with the CD, BELCO agreed to implement the ROD which was approved by the United States District Court for the District of New Union on August 28, 2017. *Id*.

The CD required BELCO to (1) install and maintain a water filtration system known as "CleanStripping" to remove NAS-T at the Centerburg public water well; (2) excavate soils contaminated with NAS-T from around the abandoned lagoon at the Site; and (3) conduct monthly sampling of the monitoring wells installed during the investigation. *Id*. In January of 2018, as part of this monthly sampling, two of the monitoring wells closest to Fartown tested positive for NAS-T at 5 ppb and 6 ppb, respectively. *Id*. at 5. However, neither BELCO nor the EPA treated these positive tests as significant and the EPA issued a Certificate of Completion (COC) to BELCO in September of 2018, signifying that BELCO had completed the CD. *Id*.

Once the EPA awarded the COC to BELCO it was no longer permitted to order BELCO to further remediate the Site without first reopening the CD as stipulated within it. Within the CD the rules for reopening were the following:

> (1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or
>
> (2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

Consent Decree (CD), § 13.3. *See also* R. at 4. Within the CD, "Regulatory Standards" is defined as, among other things, "applicable or relevant and appropriate requirements under CERCLA ('ARAR')." CD, § 1.12. *See also* R. at 4.

### C. FAWS Investigation

While some residents of Fartown noticed the "off" smell in their water since at least 2016, they first became involved once residents learned of the investigation and entry of the CD.

R. at 5. After learning of the contamination, the residents of Fartown asked the DOH to test their drinking water for NAS-T contamination. *Id*. Eventually, the DOH tested only five of the 75 private drinking water wells located in Fartown, each of which returned negative for NAS-T. *Id*. Unsatisfied with this limited testing, the residents of Fartown then asked the EPA to order BELCO to perform more extensive tests on their wells, but the EPA declined. *Id*.

Following the lack of interest by the EPA, 100 Fartown residents then formed the Fartown Association for Water Safety (FAWS) and hired a private company, Central Laboratories, Inc. to conduct more extensive tests on their wells in order to determine the level of NAS-T contamination in their drinking water. *Id*. These much more specific tests included taking three samples each from all 75 wells in Fartown, totaling 225 samples. *Id*. Of these samples, 105 returned positive for NAS-T contamination, ranging from 1 to 8 ppb. *Id*. This testing cost FAWS $21,500. *Id*. In May 2020, citing these results, FAWS asked the EPA to reopen the CD and order BELCO to further investigate their wells for remediation. *Id*. Again, the EPA declined, citing the fact that none of the positive results were over the 10 ppb HAL. *Id*.

However, with the passage of the New Union Environmental Rights Amendment (ERA) on November 3, 2020, the EPA re-opened the CD. *Id*. at 5–6. The EPA determined the language of the ERA stating, "[e]ach 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," constituted an Applicable or Relevant and Appropriate Requirement (ARAR) for the purposes of being a more stringent regulatory standard under the CD. N.U. Const. art 1, § 7. Therefore, the NAS-T contamination discovered in Fartown by FAWS violated this ARAR and justified re-opening the CD. *Id*. at 6. In response, BELCO challenged that the ERA constitutes an

ARAR and thus refused to comply with the EPA's further orders. *Id*. Eventually, the EPA issued a Unilateral Administrative Order (UAO) which required BELCO to:

(1) Sample 50 private wells in Fartown, selected by EPA, each month.

(2) For any well where sampling shows NAS-T concentration between 5 ppb and 10 ppb, supply such households with sufficient monthly bottled water for each resident until testing reveals levels of 4 ppb or lower.

(3) For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install CleanStripping filtration on the well.

UAO, § 3.2. See also R. at 6–7. Following BELCO's continued refusal to comply, the EPA then began performing the UAO actions itself. R. at 7.

**D. Proceedings Below**

Plaintiffs EPA and FAWS both filed actions, which were consolidated by the district court. The EPA filed a motion against BELCO seeking to recover its costs incurred performing the UAO and for penalties for BELCO's violation of the UAO. *Id*. To which BELCO answered and argued that because the ERA is not an ARAR the CD was improperly reopened and therefore the UAO was invalid. *Id*. FAWS then filed its own motion to intervene in the BELCO Action asserting a claim against the EPA challenging the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A). *Id*. It cited the UAO's failure to compel BECLO to provide CleanStripping filtration systems on FAWS' members' private wells, which FAWS argues is required under the ERA. *Id*.

Plaintiff FAWS and 85 additional Fartown residents also filed a separate action against BELCO in which they requested a cost recovery claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the $21,500 testing costs, as well as negligence and private nuisance claims under New Union state laws for the contamination of the Sandstone Aquifer. *Id*. FAWS asked the Court to order BELCO to: (1) pay its response costs; (2)

install CleanStripping on the private wells that test positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay damages for the loss of use and enjoyment of the residents' property and diminished property values; and (5) pay punitive damages. *Id*.

All members of FAWS reside in New Union and BELCO is a Delaware Corporation with its principal place of business in Centerburg, New Union and therefore the United States District Court for the District of New Union properly exercised original jurisdiction over the CERCLA claims under 28 U.S.C. § 1331 and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. *Id*.

After completing discovery on the CERCLA claims, each party moved and cross-moved for summary judgment on those claims. FAWS also moved for the state law claims to be dismissed to state court without prejudice should the CERCLA claims be resolved by motion, to which BELCO and the EPA resisted. *Id*. at 8. The District Court: (1) denied FAWS' motion for summary judgment and granted BELCO's motion for summary judgment on FAWS' action to recover response costs, *id*. at 10; (2) granted EPA's motion for summary judgment on its action that the ERA is an ARAR, *id*. at 12; (3) granted FAWS' motion for summary judgment on its action that the UAO was arbitrary, capricious, and contrary to law, *id*. at 14; and (4) denied FAWS' motion for dismissal of state law claims to state court, *id*. at 15. This appeal followed.

## SUMMARY OF THE ARGUMENT

While the district court properly found that the ERA was an ARAR and that the EPA's UAO was arbitrary, capricious, and contrary to law, it was incorrect in finding that BELCO did not owe response costs to FAWS. The District Court also was incorrect in holding that FAWS' state law claims should not be dismissed to state court.

The district court erred in determining that costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA. There is no dispute that the BELCO facility was a facility as defined under CERCLA, that BELCO was the responsible party of the facility, that NAS-T is a hazardous substance which was released from the facility, and that FAWS did incur costs in response to the release, meaning that FAWS must only prove the additional requirements for being a non-governmental party. 42 U.S.C. § 9607(a)(4)(B); *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012).

Response costs performed by a non-governmental party are reimbursable when the actions taken were necessary and consistent with the national contingency plan (NCP). *Id*. Courts have defined necessary as meaning not duplicative of the EPA or state agency's actions, *United States v. Hardage*, 750 F.Supp. 1460, 1511–17 (W.D.Okla. 1990), *aff'd*, 982 F.2d 1436 (10th Cir. 1992), and "closely tied to the *actual cleanup* of hazardous releases." *Young v. U.S.*, 394 F.3d 858, 863 (10th Cir. 2005). Therefore, the FAWS' response costs are reimbursable because the sampling and testing was not duplicative of the EPA's actions and was in fact closely tied to the actual cleanup of the NAS-T.

The EPA also argues that allowing individuals like FAWS to undertake their own response actions would undercut the authority of the EPA and CERCLA and encourage "fishing." R. at 9. However, courts have already found protections against party "fishing" by holding that response actions incurred solely for litigation and not for any benefit related to cleanup of the hazardous waste are not compensable. *See*, *e.g.*, *Young* at 865. Therefore, because the testing and sampling by FAWS was incurred to determine contamination levels and to aid cleanup of the NAS-T from the Fartown wells, it is compensable.

Next, BELCO challenges the district courts approval of the EPA's determination that the ERA is an ARAR and therefore allows the CD to be reopened and a UAO to be issued. In order for a state standard to constitute an ARAR under CERCLA it must be properly promulgated, more stringent than a federal standard, have sufficient legal applicability or relevance and appropriateness, and be timely identified. 42 U.S.C. § 9621(d)(2)(A).

To be properly promulgated, the ERA must first be generally applicable and legally enforceable. *See* Environmental Protection Agency, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance*, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987) [hereinafter *Interim Guidance*] (codified at 40 C.F.R. § 300.400(g)(4)). The ERA is properly promulgated because it clearly applies to all the citizens within New Union and it is legally enforceable because it clearly states that the addition of any pollutant or contaminant into the water or air of New Union is in violation of the ERA and therefore "sufficiently specific" to "provide a fair warning that certain kinds of conduct are prohibited." *Colton v. Kentucky*, 407 U.S. 104, 110 (1972).

Some courts have further analyzed the EPA's general applicability and legally enforceable requirement by requiring a potential ARAR to be "imposed by state legislative bodies and [have] regulations developed by state agencies," *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991). Therefore, because the ERA was properly voted on by the people of New Union and is a self-executing amendment, it fulfils this requirement.

Courts have also sometimes needed to address concerns over the validity of standards which are "general state goals." *Id.* at 1442. However, the EPA has provided guidance by stating: "general State goals that are duly promulgated . . . have the same weight as explicit numerical

standards." *Interim Guidance* at 32498. Therefore, because the ERA is properly promulgated, it is considered to have the same weight as numerical standards by the EPA.

To be more stringent than federal standards, a state regulation must simply be broader in scope than any other comparable Federal standard if there is one. 132 Cong. Rec. S. 28333, 28426 (Oct. 3, 1986). *See also* Environmental Protection Agency, *National Oil and Hazardous Substances Pollution Contingency Plan; Proposed Rule*; 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988). Here, because the ERA is much broader than the Federal regulation and also sets the acceptable level of NAS-T contamination at 0 ppb instead of the federal acceptable level of 10 ppb, it is clearly more stringent.

To be legally applicable or relevant and appropriate, ARARs must, "specifically address a hazardous substance, pollutant, contaminant, remedial action, or other circumstances at a CERCLA site" and "address problems or situations sufficiently similar to those encountered at a site that their use is well situat[ed] to that site." *Akzo Coatings*, 949 F.2d at 1445. Here the ERA specifically states that water or air which is contaminated by those pollutants which are *caused by humans* are the only types specifically covered under it. N.U. Const. art 1, § 7. This specifically puts those people who deal in man-made pollutants on notice that the ERA applies. Further, the ERA addresses ground water contamination, like that which has occurred at the BELCO site, therefore properly covering a situation which is prepared for in the ERA.

To be timely identified, the EPA must be notified of the standard, "in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." *United States v. Akzo Coatings of Am.*, 719 F.Supp. 571, 584 (E.D. Mich. 1989). Here, the ERA was timely identified because the EPA was notified of the standard by the DNR in a February 14, 2021 letter. R. at 6.

BELCO and the EPA then challenge the court's granting of motion for summary judgment on FAWS' action that the EPA's determination that BELCO is not required to install CleanStripping filtration systems in the Fartown wells is arbitrary, capricious, or contrary to law. Where a challenge to an EPA enforcement order is made under the APA, the court must determine, "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496–497 (2004). BELCO's first argument is based on its earlier argument that the ERA is not an ARAR and therefore fails. The additional arguments of BELCO and the EPA also fail because installing the filters is necessary and the most cost-effective solution under the ERA.

The ERA requires the complete removal of NAS-T from the wells of Fartown because it clearly states, "[e]ach and every person of this state has a fundamental right to . . . clean water . . . free from contaminants and pollutants caused by humans." N.U. Const. art 1, § 7. Combining this plain text with the legislative history of the passing of the ERA, it is clear the people of New Union now expect their water to be free of all contaminants caused by humans. *See* NU Assembly Rec. A10377, at 3–5 (2019). It is therefore necessary that the water in the private wells of the residents of Fartown be completely free from any NAS-T contamination.

CleanStripping filtration systems are the most cost-effective solution to remove NAS-T. Cost-effectiveness of a response action, and its consistency with the NCP, is found by evaluating whether costs are proportional to the: (1) long-term effectiveness and permanence; (2) reduction of toxicity, mobility, or volume through treatment; and (3) short-term effectiveness. *Franklin County Conv. Facilities Auth. v. Am. Premier Underwriters*, *Inc*., 240 F.3d 534, 546 (6th Cir. 2001) (citing 40 C.F.R. § 300.430(f)(1)(ii)(D)). Here, the current plan of the EPA is to simply

continue supplying bottled water to those affected and do nothing to address the long-term issues or reduce the toxicity of the NAS-T in the wells around Fartown.

The EPA also argues that its interpretation of the ARAR gets deference. However, allowing the EPA to alter the application of the ERA would undermine the wishes of the people of New Union. Section 9614 states, "nothing in this chapter [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the hazardous substances within such State." 42 U.S.C. § 9614. Accordingly, when a State passes a law related to the remedial action of a hazardous substance which is more stringent than those at the federal level, which New Union has done, the EPA must attain that higher standard at the completion of the remedial action. *See Akzo Coatings*, 949 F.2d at 1418. Therefore, the EPA must meet the ERA's higher standard.

Finally, FAWS argues that the district court erred in retaining jurisdiction over the remaining state law tort claims. In determining whether or not to dismiss state law claims after dismissing the relevant federal claims, federal courts must consider the judicial economy, convenience, fairness, and comity of the state law claims prior to retaining jurisdiction over said claims. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996).

In deciding the judicial economy and convenience of a case, the court looks at when the dismissal of the federal claims occurs in relation to the trial date as well as examining the administrative burden of state law claims on a federal court. *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994); *In re Modafinil Antitrust Litigation*, 837 F.3d 238, 254 (3d Cir. 2016). Here, there is no trial date yet set and thus dismissal of the state court claims would not cause issues with timing.

In deciding whether dismissal of state law claims is fair, the United States Supreme Court has found that dismissal of the federal claims is a sufficiently "powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988). Adding to this, the fact that substantial discovery over the state law claims has yet to take place and the lack of any trail date mean dismissal of the state law claims would be fair.

Last, decisions involving novel issues of state law should be solved by a state court to ensure proper interpretation of state law. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Here, the ERA is a new amendment, and its interpretation in the understanding of the state negligence claim is novel and therefore should be decided by the New Union state courts.

Appellant FAWS respectfully requests the Twelfth Circuit Court of Appeals reverse the district court's decision on the first and fourth issues and affirm the district court's decision on the second and third issues before the court.

## STANDARD OF REVIEW

The court must review a district court's grant of a motion for summary judgement *de novo* in regard to a CERCLA claim. *Sycamore Indus. Park Ass'n v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). *See Jackson v. Cnty. of Racine*, 474 F.3d 493, 498 (7th Cir. 2007). The court must review "all facts and reasonable inferences . . . in the light most favorable to the nonmovant party." *Sycamore Indus.* at 850. The court must review an issue involving CERCLA as final unless the court finds the EPA's final decision to be "arbitrary and capricious or otherwise not in accordance with the law." 42 U.S.C. § 9613(j)(2). *See also United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1232 (9th Cir. 2005). Although the court should presume the agency's decision to be valid, the appellate court should not take an agency's decision as final and should review

the decision fully for accuracy. *Oceana, Inc. v. Ross*, 920 F.3d 855, 863 (D.C. Cir. 2019) (finding the court is not to "rubber stamp" all decisions made by agencies and should instead "ensure that the agency considered all of the relevant factors"). Therefore, review of an agency's fact-finding procedures proving to be inadequate are to be reviewed *de novo*. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) ("[*d*]*e novo* review is authorized when the action is adjudicatory and the agency fact finding procedures are inadequate"). A claim to remove state law claims from a federal court is reviewed under an abuse-of-discretion standard. 28 U.S.C. § 1367(a). *See Carver v. Nassau Cnty. Interim Fin. Auth.*, 730 F.3d 150, 154 (2d Cir. 2013).

## ARGUMENT

### I. The District Court erred when it determined that costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA.

In order for a plaintiff to recover response costs from a potentially responsible party (PRP) under CERCLA, the party seeking recovery must prove that: "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release." 42 U.S.C. § 9607(a)(4)(B); *Rolan v. Atlantic Richfield Co.*, No. 1:16-CV-357-HAB-SLC, 2019 WL 5429075, at *5 (N.D. Ind. 2019) (citing *Sycamore Indus.* at 850). Because BELCO and the EPA do not dispute that the BELCO site was a facility as defined under CERCLA, that BELCO was the responsible party, that NAS-T is a hazardous substance which was released from the facility, and that FAWS did incur costs in response to the release, these elements will not be addressed. Instead BELCO and the EPA argue that FAWS fails to meet the increased standard required for a non-governmental plaintiff. A non-governmental plaintiff must show; "that any costs incurred in responding to the release

were 'necessary' and 'consistent with the national contingency plan.'" *Forest Park Nat. Bank* at 977. The EPA also argues that allowing FAWS to undertake its own response actions would frustrate the EPA and CERCLA's authority. However, because FAWS does meet the increased standard and its actions do not frustrate the authority of the EPA and CERCLA—the costs of sampling, testing, and analyzing the well water by FAWS are reimbursable.

A. FAWS' testing, sampling, and analyzing of the well water samples was necessary and consistent with the NCP.

In order for a response cost to be determined as "necessary" courts have generally found that it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question. *See Louisiana–Pacific v. Beazer Materials & Services, Inc.*, 811 F.Supp. 1421, 1425 (E.D. Cal. 1993) (citing *Hardage*, 750 F.Supp. at 1511–17). Further, several circuit courts have held that the response action must also be "closely tied to the *actual cleanup* of hazardous releases." *Young* at 863. *See also Black Horse Lane Ass'n, L.P. v. Dow Chemical Corp.,* 228 F.3d 275, 297 (3d Cir. 2000) (holding response costs were not necessary because they did not pertain to a remedial or removal action on the contaminated property); *Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664, 669–70 (5th Cir.1989) (explaining that "[t]o justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment"). Because the testing was not duplicative of the EPA's tests and was related to the actual cleanup of the release of NAS-T the testing was necessary and consistent with the NCP.

1. *The sampling, testing, and analyzing of the well water samples were not duplicative of the EPA's actions.*

Courts have found that private party response actions may be "duplicative" if they occur at the same time as the EPA's own actions and do not seek to uncover information different than

or above and beyond that of the EPA; or if they occur after the EPA had already informed the private parties that it would be conducting its own investigation. *See*, *e.g.*, *Louisiana-Pacific* at 1425. The EPA and BELCO contend that they sufficiently investigated Fartown's contamination for two reasons: (1) because their tests of the monitoring wells closest to Fartown only showed positive test results in the January 2018 tests; and (2) because of the non-detect samples performed by the DOH (at the request of Fartown residents). R. at 5. However, because the EPA never actually tested the FAWS wells themselves, even after both receiving the positive 2018 results and after residents of Fartown began complaining of the "off" smell of their water, their tests were insufficient to determine the contamination level of Fartown and therefore FAWS tests were distinct and different. *Id.*

In *Louisiana-Pacific* a non-governmental party failed in arguing that its investigative costs were not duplicative of the EPAs. In that case, the court found that it was, "not disputed that the EPA and Louisiana-Pacific investigations were essentially the same." *Louisiana-Pacific* at 1425. Because of this finding, the court held that the investigations by the non-governmental party and the EPA were, "essentially the same," and only performed, "as a matter of sound business and litigation judgment . . . to make certain that the EPA conclusions were justified." *Id.*

In the present case, FAWS' tests were not "essentially the same" as the EPA's because they were not completed to make sure the EPA's conclusions were justified. Instead, they were performed to determine the contamination level—and therefore their own water safety, not for litigation—of the water in Fartown, not the area that BELCO and the EPA were monitoring *outside* of Fartown. *See* R. at 5. In testing the wells around the area, neither the EPA nor BELCO ever attempted to test the actual wells located within Fartown, not even after the January 2018 positive NAS-T detections in those monitoring wells closest to Fartown. *Id*. Instead they simply

cited the insufficient DOH test from February 2019. *Id.* Meanwhile, the testing and sampling performed by FAWS was completed within the private wells around Fartown, located outside the range of monitoring wells established by the EPA and BELCO. *See id.* at 4–5. If anything, the negative test results by BELCO outside Fartown and the positive test results by FAWS within Fartown is further proof of the fact that the testing and sampling by FAWS was different and distinct. *Id.* at 5. Accordingly, the testing was not duplicative to that of the EPAs.

*2. The sampling, testing, and analyzing of the well water samples were closely tied to the actual cleanup of hazardous waste.*

Circuit courts generally find that response actions are necessary if they are "closely tied to the *actual cleanup* of hazardous releases." *Young* at 863 (string citations omitted). In other words, there must be some evidence that the response actions were taken to "assist with and help plan the eventual remediation and cleanup efforts." *See Wilson Road Dev't Corp. v. Fronabarger Concreters*, *Inc*., 209 F.Supp.3d 1093, 1114–15 (E.D. Mo. 2016). *See also Walnut Creek Manor*, *LLC* v. *Mayhew Ctr*., 622 F.Supp.2d 918, 929 (N.D. Ca. April 16, 2009). Because high amounts of NAS-T in water can be dangerous to human health and the environment, staying aware of the level of contamination in the Fartown wells was necessary to assist and plan for possible cleanup efforts of the spread of NAS-T. *See* R. at 3, 5.

BELCO essentially argues that the release of NAS-T into the water around Fartown is so insignificant that it cannot be considered hazardous for the purpose of necessitating the testing response costs. *Id.* at 9. However, the Fifth Circuit found in *Amoco Oil Co.* that "the question of whether a release has caused the incurrence of response costs should rest upon a factual inquiry into the circumstances of a case and the relevant factual inquiry should focus on whether the particular hazard justified any response actions." *Amoco Oil Co.* at 670, as clarified on denial of reh'g (Jan. 23, 1990). Based on the facts in *Amoco Oil Co.* the Fifth Circuit went on to hold that

even though the average level of contamination of the site was safe for human health and the environment, the existence of hot spots above the acceptable level of contamination warranted the plaintiff's response costs as being necessary. *See generally id.* at 670–72. Therefore, it stands to reason that even though none of the wells in Fartown had NAS-T levels above the pre-ARAR acceptable limits, the fact that some of the testing wells connected to the same aquifer *were* above those limits means that testing was necessary in the Fartown area to determine whether one of their wells could also become a hot spot. *See* R. at 5.

Further, the residents of Fartown needed to know their level of contamination in order to properly assist with and plan for the remediation efforts of BELCO and the EPA. R. at 5. In order for a proper remediation attempt to be performed, it was important for there to be an accurate reading of the NAS-T levels in the wells of Fartown. *See id.*

Finally, as will be further discussed below in Issue III, once the ARAR was implemented, the acceptable level of NAS-T contamination in the Fartown wells became 0ppb and therefore any costs by FAWS in testing for the contamination level of NAS-T was related to the monitoring and cleanup of the hazardous waste and were therefore necessary. *See id* at 6. *See also* NU Assembly Rec. A10377, at 3–5 (2019) (statements by Rep. Wright).

### B. Allowing FAWS to undertake response actions would not frustrate the authority of CERCLA or the EPA.

The EPA also contends that allowing FAWS' tests to be considered compensable response costs would encourage other private parties to undertake their own response actions to obtain relief even in the face of objective investigations concluding otherwise. R. at 9. Generally, courts have found that when plaintiff's response costs are not linked to an actual effort to contain or cleanup an actual or potential release of hazardous substances and instead are incurred solely for litigation, they are not compensable. *See Franklin County Conv.* at 550 (6th Cir. 2001)

(finding that attorney's fees in identifying PRP's were a necessary cost of response because they, "had nothing to with any litigation, and benefitted the cleanup as a whole by increasing the probability that the cleanup would be effective"); *Young* at 865 ("[w]hile costs for initial investigation and monitoring might be compensable if linked to an actual effort to contain or cleanup an actual or potential release of hazardous substances, costs incurred solely for litigation are not") (referencing *United States v. Hardage*, 982 F.2d 1436, 1447 (10th Cir. 1992)); *Black Horse Lane Ass'n.* at 295–96; *Redland Soccer Club, Inc. v. Dep't of the Army,* 55 F.3d 827, 850 (3rd Cir. 1995); *Louisiana-Pacific* at 1425 (finding that, "[t]he issue is who should pay for [the parties] exercise of business and litigation judgment [in performing its own investigation in parallel to the EPA], even assuming good faith."). Because FAWS tests were not performed for the purposes of litigation, but instead to aid the EPA and BELCO in remediation and cleanup attempts, they are compensable. *See* R. at 5.

The EPA is worried that allowing FAWS to recover the costs of testing well water samples will encourage other parties to do the same. R. at 9. However, there is a difference between investigations commenced for the purposes of "fishing" in the face of conclusive evidence that is contrary, and investigations commenced with reasonable evidence in support of further studies. *Id.* Here, the citizens of Fartown complained about the "off" smell in some of their wells and requested tests by the DOH, who in response only tested 6.67% of their private wells before the EPA determined that it was not worth performing further tests. *Id.* at 5. The EPA even made this determination while aware of the positive detections in the January 2018 tests near Fartown's wells. *See id.* at 5, 9. Therefore, the tests by FAWS were not "fishing" expeditions but instead made under a reasonable belief that the previous tests were insufficient and not properly reflective of the actual contamination level of their wells. *Id.* The tests

performed on behalf of FAWS were much more extensive, totaling 225 tests of 75 different wells which returned a positive NAS-T result in 46.67% of the wells. R. at 5.

These additional tests were clearly not made by FAWS to prepare a suit or litigation with the EPA or BELCO, but instead to ensure that their water was safe to drink. *Id.* at 5, 9. By investigating the level of NAS- contamination in their water, the residents of Fartown were simply attempting to assist and ensure that the EPA and BELCO had all necessary information in order to properly clean up the contamination in the area. *Id.* This is clearly not a "fishing" expedition and therefore not a policy risk.

## II. The District Court correctly upheld the EPA's determination that the ERA constitutes an ARAR, and, therefore finding that EPA's reopening of the CD based on that ARAR and ordering further remedial action in the UAO proper.

An ARAR under CERCLA is defined as

> [A]ny promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant.

42 U.S.C. § 9621(d)(2)(A). Because the ERA fulfills the four requirements to constitute an ARAR under CERCLA—those being proper promulgation, whether it is more stringent than a federal standard, sufficient legal applicability or relevance and appropriateness, and timely identification of the standard or requirement—and to ignore the ERA would defy the will of the people of New Union, it is an ARAR. *Id.*

### A. <u>The EPA properly applied the relevant elements in determining the ERA constitutes an ARAR.</u>

When the EPA determines whether a state standard will constitute an ARAR, it reviews four specific requirements: proper promulgation, whether it is more stringent than a federal standard, legal applicability or relevance and appropriateness, and if the standard or requirement has been timely identified. *Id.* The EPA's determination of what constitutes an ARAR is given deference and therefore the determination should be considered final. *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (showing that EPA's interpretation is given deference based upon its persuasiveness); *Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 843–44 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). Because the EPA properly evaluated the four requirements in determining the ERA constitutes an ARAR, it must be upheld.

*1. The ERA is properly promulgated because it is generally applicable and legally enforceable.*

BELCO argues that the ERA was not properly promulgated in New Union and therefore cannot be a valid ARAR. Proper promulgation under section 9621 is defined by the EPA as "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Interim Guidance* at 32498 (codified at 40 C.F.R. § 300.400(g)(4)). Because the ERA is generally applicable and legally enforceable it is properly promulgated and therefore validly constitutes an ARAR.

First, general applicability means a law or regulation that is broad in scope and more comprehensive than a law that is directed at a particular activity. The ERA is very clear in that it applies to any individual or entity within the state of New Union and is therefore sufficiently broad. *See* NU Assembly Rec A10377, at 3 (2019).

Second, in order to be legally enforceable, the standard must have "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This means the standard must be plainly written in such a way that any individual in the state is able to understand a certain activity is barred from happening within the state. Here, the ERA is written so any individual within New Union understands the activity of polluting the air or water in the state is forbidden as "every person . . . has a fundamental right to clean air and clean water." N.U. Const. art 1, § 7. This type of language is "sufficiently specific" to "provide a fair warning that certain kinds of conduct are prohibited." *Colton* at 110.

Next, in determining proper promulgation, courts have also determined that the law or standard must be "imposed by state legislative bodies and [have] regulations developed by state agencies." *Akzo Coatings*, 949 F.2d at 1440. The ERA properly followed the channels needed to become a legally enacted amendment for the State of New Union. It was voted on by the people of New Union on November 3, 2020, passing with 71% voting for the measure and 29% voting against the measure. R. at 5. The amendment was considered "self-executing" and therefore took effect immediately. *Id.* at 12.

Finally, some courts have also needed to address arguments against general state goals being considered properly promulgated. *See, e.g., Akzo Coatings*, 949 F.2d at 1442. However, while the ERA may be a general state goal, the EPA has provided guidance on such point: "general State goals that are duly promulgated . . . have the same weight as explicit numerical standards." *Interim Guidance* at 32498. The EPA has not limited the validity of general state goals when determining if a standard or regulation is an ARAR. *Akzo Coatings*, 949 F.2d at 1441–42. General state goals typically allow for more flexibility in the interpretation and application of the rule but are none-the-less a factor to be considered by the EPA. *Id.* at 1441. Specifically, "[g]eneral State goals that are contained in a promulgated statute and implemented

via specific requirements found in the statute or in other promulgated regulations are potential ARARs." *Id.* at 1442. Because of this, the EPA properly determined that the general requirement of New Union without specific numerical standards —that every citizen have a fundamental right to clean air and water—can be an enforceable ARAR. *Id.*

*2. The ERA is more stringent than federal standards.*

BELCO further argues that the ERA only mirrors the first criteria to be analyzed pursuant to the NCP by a remediating party when determining its measures and is therefore no more stringent than the federal environmental standard. Under section 9621, a potential ARAR must be more stringent than federal standards that are already enacted in order to be a feasible ARAR. 42 U.S.C. § 9621(d)(2)(A). In *Akzo*, the court found a state regulation to be more stringent even though the regulation was broader than the federal regulation. *Akzo Coatings*, 949 F.2d at 1443–44. Congressional records show that when reviewing a state regulation, more stringent means anything that is broader in scope than the Federal ARAR and anything where there is not a federal requirement. 132 Cong. Rec. S. 28333, 28426 (Oct. 3, 1986) (including "any state requirement where there is no comparable Federal requirement"). *See also* Environmental Protection Agency, *National Oil and Hazardous Substances Polution Contingency Plan; Proposed Rule*; 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988) ("[w]here no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent").

Here, the ERA is clearly more stringent even though it falls into a category of being broader than any Federal regulation. As will be described below, the ERA is a fundamental right granting provision which makes it more protective than existing federal regulations. R. at 11. Federal regulation says NAS-T cannot exceed 10ppb. *Id.* at 3. The ERA says "every person . . .

has a fundamental right to . . . clean water . . . free from contaminants and pollutants." N.U. Const. art 1, § 7. The legislative intent of this provision shows that the purpose of enacting the ERA is to provide clean water—water that is free from "chemicals" and "other substances" such as NAS-T. NU Assembly Rec. A10377, at 3–5 (2019). The ERA is taking the federal regulation of 10ppb one step further and broadening it to include *any* trace of a hazardous contaminant in the water.

*3. The ERA is legally applicable or relevant and appropriate.*

Section 9621(d) provides a third requirement for potential ARARs: that they must be "legally applicable to the hazardous substance or pollutant or contaminant concerned or . . . relevant and appropriate under the circumstances of the release or remedial action selected." 42 U.S.C. § 9621(d)(2)(A). In order to be "relevant and appropriate," the "standards promulgated under federal or state law [must] specifically address a hazardous substance, pollutant, contaminant, remedial action, or other circumstance at a CERCLA site" as well as "address problems or situations sufficiently similar to those encountered at a site that their use is well situated to that site." *Akzo Coatings*, 949 F.2d at 1445. BELCO's final arguments are that the ERA does not address either of these requirements.

First, the ERA specifically addresses "a hazardous substance, pollutant, contaminant, remedial action, or other circumstance at a CERCLA site" by regulating the amount of any pollutants or contaminants that can be in New Union's water or air which are *caused by humans*. *See id.* at 1443, 1445; N.U. Const. art 1, § 7. The relevant language in the amendment to this requirement is "caused by humans." N.U. Const. art 1, § 7. By adding this language, the New Union legislature ensured that only those toxins which are not naturally occurring are covered by the ERA and therefore it is sufficiently specific. *See id.* Given that NAS-T is a contaminant

which is man-made and therefore can only enter the water of citizens of New Union by human addition, it is clear that any entity which were to add NAS-T to the water, consciously or inadvertently, would be able to understand the ERA as specifically applying to them.

Second, in determining whether the standard addresses problems or situations that will be encountered at CERCLA sites and is therefore useful in dealing with those sites, courts have found, "[t]he factors the court should consider are the environmental media, the type of substance, and the objective of the potential ARAR." *Akzo Coatings*, 949 F.2d at 1446. The environmental media here is the ground water which was contaminated by the BELCO site. The ground water has been contaminated by the NAS-T which is directly contributable to BELCO. R. at 3. The substance is injurious to the people of New Union because, as discussed earlier, any contaminant or chemical in the water that is not ordinarily found there is considered a pollutant and therefore considered injurious. *Id. See also* NU Assembly Rec. A10377, at 3–5 (2019). Finally, the objective of the potential ARAR is to provide clean water to all individuals of the state of New Union. *See id.* Because the NAS-T released by BELCO meets the above factors, the ERA is relevant and appropriate to the case at hand.

*4. The ERA was timely identified.*

For a potential ARAR to be timely identified, the EPA must be notified of the standard "in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." *Akzo Coatings*, 719 F.Supp. at 584. In *Akzo Coatings*, the court found the ARAR to be timely identified to the EPA because the law was communicated to the EPA via "the RI/FS Report, the 1987 Record of Decision, the Responsiveness Summary, and the State's Comments on the Proposed Consent Decree." *Id.* Therefore, in the case at bar, the EPA was timely notified of the

ARAR through the DNR's February 14, 2021, letter, which allowed the EPA to review and take notice of the ERA as an ARAR. R. at 6.

B. To find that the ERA is not an ARAR would be to defy the will of the people of New Union.

The ERA was brought to a vote of the people of New Union on November 3, 2020, passing with 71% of the votes. *Id.* When a law is enacted by a state, a federal court cannot choose to ignore the law so long as the state has not "abandoned their precedent on the matter." *Mayes v. Summit Ent. Corp.*, 287 F.Supp.3d 200, 207 (E.D.N.Y. 2018). *See also Erie R.R. v. Tompkins*, 304 U.S. 64, 91 (1938). Because the people have unequivocally accepted the ERA as an acceptable law which entities operating in New Union must follow, federal courts must also accept the state's interpretation and uphold said interpretation of the law, so long as the law does not defy a federal law already in effect. *See Erie R.R.* at 91. Although BELCO argues the ERA requires additional legislation to become an adopted and enforceable amendment, it is clear by reviewing the legislative history that the ERA is to be a self-executing measure. R. at 12. *See also Senra v. Town of Smithfield*, 715 F.3d 34, 41–42 (1st Cir. 2013), ("a constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced"). A clear rule is given by the ERA that the people of New Union expect clean and healthful water. N.U. Const. art. I, § 7. Therefore, if the court were to uphold BELCO's argument, the people of New Union will have a fundamental right stripped from them and this would defy the will of the people.

## III. The District Court did not err when it vacated as arbitrary, capricious, or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA.

Where a challenge is made to an EPA enforcement order under the APA, 5 U.S.C. § 706(2)(A), courts must determine, "whether the Agency's action was 'arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation* at 496–497 (2004); *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012). BECLO argues that it doesn't need to install the CleanStripping filtration systems in part because the ERA is not an ARAR, however—as discussed above—the ERA is an ARAR and therefore this argument will instead focus on why the ERA requires installing the filtration systems. Because the ERA's language and intent is clear in requiring the filtration systems, and because the EPA does not get complete deference in determining the application of the ERA, the EPA should require BELCO to install the CleanStripping filtration systems.

A. Installing the CleanStripping filtration systems is necessary to follow the meaning of the ERA.

The full text of the ERA states, "[e]ach and every person of this state has a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art 1, § 7. The EPA and BELCO argue that allowing some NAS-T contamination in the wells does not violate the meaning of the ERA and therefore does not require the installation of filtration systems. Further, BELCO argues that the cost of installing filters is too prohibitive to require BELCO to do so. However, because the ERA requires that the water of the citizens of New Union be clear from contaminants and pollutants caused by humans, both the EPA's and BELCO's arguments fail.

*1. The interpretation of the ERA requires that the water of Fartown citizens be free of all levels of NAS-T.*

In determining the interpretation of a word or phrase in a text, courts must first read the plain language of the text, then consider the purpose and context of the text, and then consult any precedents or authorities that inform their analysis. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 7 (2011). As this is a new amendment and there is no

established precedent or authorities to help in the analysis, this argument will instead focus only on the plain language and the legislative history of the amendment.

First, the plain language of the ERA clearly states that each and every person in the state of New Union has a "fundamental right to . . . clean water . . . free from contaminants and pollutants caused by humans." The simplicity and clarity of this phrase leave no doubt about the phrases meaning, it being that the citizens of Fartown now have a right under the New Union constitution to have the water in their wells completely free from contamination, such as NAS-T.

Second, even if the court determines that the language of the amendment is too vague to come to this determination, the legislative history of the text gives an additional understanding of the purpose and context of it. On pages 3–5 of the transcript from NU Assembly No. A10377, two representatives, Mr. Wright and Mr. Maloney, discussed the definition of "clean" as it was stated in the amendment. NU Assembly Rec. A10377, 3–5 (2019).

First, Mr. Wright explained,

> This proposal is simple, it is not complicated, there are no curve balls. It is what it says: The right that every citizen of [New Union] should have, to know that they and their families can live and grow them here in this State within a healthful environment with clean air and clean water and free from human-caused contaminants and pollutants.

*Id.* This language further reinforces the plain language of the text as meaning exactly what it says. However, in the interest of clarity Mr. Maloney later asked Mr. Wright to more thoroughly explain the definition of "clean" under the ERA, specifically as it pertained to additives in public water supplies; in response Mr. Wright stated,

> We know that some of the best tasting water is because there are parts of what you're tasting that is not H20. Let's be clear: What is appropriate and desirable for a public water supply involves other chemicals, other substances. But they should not harm you. . . . They should be objectively perceived as 'clean.'

*Id.* He went on, "'[c]lean' certainly means healthful to human beings." *Id*. Later, Mr. Wright even gave the example, "If you [sic] able to buy fresh produce and the produce is without contamination in the way that nature intended it to be consumed, it will be healthful." *Id*.

As this exchange exemplifies, the understanding of those legislators who passed the bill was that it would ensure that the water used by the citizens of New Union was clear of contamination and pollution caused by humans which would have the effect of making water *unhealthful* to consume. *Id.* This language means more than simply not harmful, as Mr. Wright gave in his 'produce' example, it means free of unnatural contamination. *Id.* Combining this definition with the earlier statement in which Mr. Wright explained that water doesn't have to be free of all chemicals, only those which aren't added to the water by the public water supplier for taste or otherwise, it is clear the legislature intended for the amendment to guarantee the right of all citizens of New Union to have access to water which is free of those contaminants—added by humans—which were not added for some benefit, which NAS-T was not. *Id.*

Further, Mr. Wright later discussed with Mr. Harrison the effect the ERA was to have on noxious odors. *Id.* Mr. Wright explained that odors which are "sufficiently offensive and if they impact what the community would consider 'clean' air," could also create an unhealthful environment for which the amendment would provide protection. *Id.* Accordingly, it would stand to reason that if odors could make the air "unhealthful" under the definition of the amendment, then the sour and stale effect of NAS-T on the water of the residents of Fartown would also be sufficient to make the water unhealthful. *Id.*; R. at 5. Combining both the clear plain language of the amendment and the intent of the legislators who passed the ERA, it is evident that the residents of Fartown have a fundamental right to have their water be free and clear of all levels of NAS-T.

*2. The installation of BELCO's CleanStripping filtration systems in every contaminated Fartown well is the best way to remove NAS-T entirely from their water supply.*

BELCO argues that requiring it to install CleanStripping filtration systems in every contaminated well in Fartown would not be a cost-effective response to the contamination, while the EPA argues that simply supplying bottled water is sufficient. R. at 13. However, the best and most cost-effective solution is installing CleanStripping filters in every affected well. *Id.*

Determining the cost-effectiveness of a solution, and its consistency with the NCP, is found by evaluating whether its costs are proportional to the: (1) long-term effectiveness and permanence; (2) reduction of toxicity, mobility, or volume through treatment; and (3) short-term effectiveness. *Franklin County Conv.* at 546 (citing 40 C.F.R. § 300.430(f)(1)(ii)(D)).

If BELCO were to follow the EPA's plan and simply supply bottled water to the residents of Fartown, then only one of the three factors in determining cost would be met – short-term effectiveness. This is because supplying bottled water would do nothing to address the long-term effects of the NAS-T contamination and do nothing to work toward treating or reducing the toxicity of the water. Without addressing the long-term problems associated with the NAS-T contamination, BELCO and the EPA fail to present another solution which is as cost-effective as the installation of the CleanStripping systems.

B. The EPA does not get deference in determining the application of the ERA.

The EPA adds to its arguments that finding the ERA as requiring BELCO to make well water for the Fartown residents free of all NAS-T contamination would cause other permits in New Union under the Clean Air Act and Clean Water Act to be invalid and therefore argues against this decision in part because of its belief that the EPA's determination of the proper application of the ERA should get deference. R. at 13. However, allowing the EPA to alter the

application of the ERA in New Union would undermine the wishes of the New Union legislature. *See* NU Assembly Rec. A10377, at 3–6 (2019). Therefore, in order for the ERA to be properly applied the EPA cannot get deference in its application.

As discussed above, the intent of the legislature in drafting the ERA was to ensure that all citizens of New Union could have water free of all contaminants made by humans, which clearly includes NAS-T. *Id.* It is not for the EPA to worry about the implications of the passing of such a law, but instead to follow the wishes of the people of New Union and to institute the new standard in each case it encounters. In this case, the EPA should simply apply the ERA to the NAS-T contaminated water of Fartown as the ERA requires.

Section 9614 states, "nothing in this chapter [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the hazardous substances with such State." 42 U.S.C. § 9614. In addition, Section 9621 states,

> With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if . . . any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation . . . is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, *the remedial action* selected under section 9604 of this title or secured under section 9606 of this title *shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation*."

42 U.S.C. § 9621 (emphasis added). Accordingly, both of these statutes clearly explain that when a State passes a law related to the remedial action of a hazardous substance which is more stringent than those at the federal level, the EPA must attain that higher standard at the completion of the remedial action. *See Akzo Coatings*, 949 F.2d at 1418 (holding that when the EPA has waived a more stringent state requirement, states may challenge the EPA's remedial

implementation); *Franklin County Conv.* at 544 (holding that CERCLA requires that ARAR based "remedial actions result in a level of cleanup that at least meets the legally applicable or otherwise relevant and appropriate federal (*or stricter state*) requirements"). Therefore, because the ERA sets a higher standard than that of the federal levels, the EPA must ensure that the remedial actions taken with respect to the NAS-T meet this increased standard.

## IV. The District Court erred in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.

A federal court may claim "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). Federal courts must consider the judicial economy, convenience, fairness, and comity of the state law claims prior to retaining jurisdiction over said claims. *Nowak* at 1191. *See also Ullmo v. Ohio Turnpike and Infrastructure Com'n*, 126 F.Supp.3d 910, 920–21 (N.D. Ohio 2015) (finding at each stage of litigation these factors of judicial economy, convenience, fairness, and comity, should be weighed by the presiding court). When significant proceedings have not yet occurred, all federal claims have been dismissed, and only novel and complex state law claims remain the federal court must dismiss the claims to a state court. *Id.*

### A. Because significant proceedings have not yet occurred, judicial economy and convenience dictate the state claims should be dismissed.

In deciding the judicial economy and convenience of a case, the court often first looks at when the dismissal of the federal claims occurs in relation to the trial date. *Purgess* at 138 (2d Cir. 1994) (quoting 28 U.S.C.A. § 1367, Practice Commentary at 835 (1993)). For example, in *Nowak* the court determined that dismissing the federal claims nine days before trial was too close to the trial date and therefore kept the state law claims in a federal court. *Nowak* at 1192

(showing that it would be against the factors of supplemental jurisdiction if the case were to be dismissed to state court when the case is ready for trial). Conversely in *Ullmo v. Ohio Turnpike*, the court held, "[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Ullmo* at 920–21(emphasis removed). Presently, there is no trial date set in the case at bar for the state claims and thus dismissal of the state court claims would not be against the factors of supplemental jurisdiction because of timing.

Judicial economy also involves examining the administrative burden of state law claims on a federal court. *Modafinil* at 254. When extensive discovery and judicial proceedings have already taken place in a federal court system, it makes sense to continue the case in such a forum. *Id.*; *Nowak* at 1191–92; *Purgess* at 138. However, when all federal claims have been dismissed, only state law claims remain, and significant proceedings have not yet occurred, the federal courts should dismiss the remaining state law claims to a state court under judicial economy to preserve federal judicial assets for other federal claims. *Ullmo* at 920–21. *See also* 28 U.S.C. § 1367(c)(3).

Finally, convenience weighs toward the dismissal of the state law claims because further discovery regarding the state law claims is necessary and discovery regarding damages has not begun. R. at 15. Although it would be more "convenient to try every claim in a single forum," doing so here would cause the federal courts to be held up with the discovery process. *Ameritox v. Millennium Labs., Inc.*, 803 F.3d 518, 539 (11th Cir. 2015). Therefore, because drastic steps in discovery remain prior to the resolution of the state law claims, it is more convenient for the state court to handle those claims.

B. Because all federal claims have been dismissed it is in the interest of fairness that the state law claims be tried in state court.

While 28 U.S.C. § 1367(c)(3) states that dismissal of rightfully brought claims in a federal jurisdiction is *optional* by the federal court, the Second Circuit found in *Nowak* that state law claims should be dismissed when there will not be a severe disturbance of any factor of supplemental jurisdiction. *See generally Nowak*. Typically, when federal claims have been dismissed, the court finds that in and of itself as a sufficiently "powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon Univ.* at 351. Accordingly, fairness to the parties weighs toward dismissing the claims to state court. As discussed in *Miller*, even if all discovery has already taken place within the federal court—which isn't the case here—that federal court discovery can still be used in the state action. *Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152 (M.D. Fla. 2020). In most cases, fairness concerns will almost always not weigh in favor of the federal court retaining jurisdiction. *See Ameritox* at 540.

C. Because the remaining state law claims are novel and complex, comity requires they be dismissed to state court.

Finally, courts should dismiss any state law claim where "novel or complex" issues have arisen. *Miller* at 1152–53. Therefore, "comity cuts against exercising supplemental jurisdiction." *Id.* Decisions involving unresolved issues of state law should be solved by a state court to ensure proper interpretation of the state law. *United Mine Workers* at 726 ("needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law"). *See also Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1353 (11th Cir. 1997) ("[s]tate courts, not federal courts, should be the final arbiters of state law"). Although nuisance and negligence claims are a well resolved issue of state law, the interpretation of the ERA which this specific negligence claim turns on should be

done by a state court, as the interpretation is new to state law and is therefore novel and possibly complex. *Miller* at 1152. *See also* 28 U.S.C. § 1367(c)(3).

## CONCLUSION

For the foregoing reasons, this Court should: (1) reverse the district court's determination that costs incurred by FAWS in sampling, testing and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA; (2) affirm the district court in upholding the EPA's determination that the ERA constitutes an ARAR, and, accordingly finding that EPA's reopening of the CD based on that ARAR and ordering further remedial action through the UAO was proper; (3) affirm the district courts holding in vacating as arbitrary, capricious or contrary to law the EPA's determination that BELCO is not required to install CleanStripping filtration systems in Fartown despite the existence of the ERA; and (4) reverse the district court's determination in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.