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..
Plaintiff-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, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated cases No. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court has subject-matter jurisdiction pursuant to 5 U.S.C. §706 (Review of Agency Actions), and 28 U.S.C. §1331 (Federal Question). Fartown Association for Water Safety, EPA, and Better Living Corporation filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal as appellate courts have the power to review final decisions of the district court under 28 U.S.C. §1291. Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1707 (2017). This is an appeal from the final decision of the New Union District Court.

STATEMENT OF ISSUES PRESENTED

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

II. Whether the ERA constitutes an ARAR requiring a reopening of the Consent Decree based on the ARAR and further remedial action in the UAO?

III. Whether the EPA's determination that BELCO was not required to install filtration systems in Fartown was arbitrary, capricious or contrary to ERA?

IV. Whether the District Court correctly retained jurisdiction over FAWS' remaining state law tort claims after resolution of the federal claims?

STATEMENT OF THE CASE

Between 1973 and 1998, Better Living Corporation (herein "BELCO") manufactured a sealant coating to prevent corrosion called "LockSeal," producing liquid known as NAS-T in a factory (herein "Site") in Centerburg, New Union, that when combined with a nontoxic activation agent solidified into the final "LockSeal" product. R. at 5. Two miles south of Centerburg sits the rural community of Fartown, an environmental justice community of 500 residents. Id. BELCO began producing the product in a new facility in New Union in 1998, but still owns and utilizes the building in Centerburg. Id.

In the mid-1980s, it became known that NAS-T could be a possible human carcinogen, causing the Environmental Protection Agency (herein "EPA") to set a Health Advisory Level (herein "HAL") for NAS-T in drinking water to be 10 parts per billion (herein "ppb") in 1995, representing the only state or federal regulation of NAS-T specifically. Id. at 6. However, NAS-T can be detected as a sour or stale smell at levels as low as 5 ppb. Id.

Centerburg receives its water from the Centerburg Water Supply (herein "CWS") that pumps its water supply from the Sandstone Aquifer lying under both Centerburg and Fartown. Id. This water flows south from Centerburg towards Fartown. Id. In 2013, residents of Centerburg began complaining to the Centerburg County Department of Health (herein "DOH") about a smell consistent with the concentration of NAS-T. Id. A DOH investigation in January 2015 testing public water supplies found that the water supplied to CWS contained between 45 and 60 ppb NAS-T, substantially above the 10 ppb considered harmful, prompting DOH to notify Centerburg residents to cease drinking the tap water on September 17, 2015 and for BELCO to supply all residents with bottled water. Id. The EPA began investigation and remediation of the situation after the deferral of the New Union Department of Natural Resources on January 30, 2016. Id.

The EPA and BELCO engaged in an agreement in March 2016 to investigate the cause and extent of the NAS-T contamination, evaluate proposed cleanup remedies in a process called remedial investigation and feasibility study (herein "RI/FS") along with continuing to provide residents with bottled water. Id. Through the RI/FS, BELCO investigated sources of contamination, risks to human health and the environment, and remedial alternatives for the site. Id. The source of the contamination was found to be from the Site where NAS-T entered the soil from sporadic spills and an unlined lagoon that stored wastewater and stormwater, before being carried by groundwater to the Sandstone Aquifer. Id. at 7. Three lines of monitoring wells were installed by BELCO between Centerburg and a half a mile north of Fartown, with the last five wells near Fartown showing no detectable NAS-T, leading BELCO to install no further testing wells and provided a RI/FS recommendation to excavate the soil at the Site with filtration systems installed in Centerburg's CWS instead of performing remediation of the NAS-T plume in the Sandstone Aquifer through pumping and treatment of the water that would cost BELCO about $45 million and decades to provide thorough treatment. Id. at 7. Sometime in 2016, members of the Fartown community (herein "FAWS") began to notice that there was an "off" smell to the water. Id. at 8.

The EPA selected a clean-up plan in June 2017 through a Record of Decision (herein "ROD") after reviewing the RI/FS and public comment on proposed plans. Id. at 7. A Consent Decree (herein "CD") was entered between the EPA and BELCO after a cost recovery action was filed on June 30, 2017 in which BELCO agreed to design and implement a clean-up plan pursuant to the ROD. Id. At the completion of clean-up, the EPA was required to issue a Certificate of Completion (herein "COC") that forbid the EPA to require further remediation of

the Site without reopening the CD on specific grounds.[1] Id. "Regulation Standards" includes any requirements including an Applicable or Relevant and Appropriate Requirement (herein "ARAR") under the Comprehensive Environmental Response, Compensation and Liability Act (herein "CERCLA"). Order at 1. After public comment and a determination of reasonableness, the CD was entered on August 28, 2017, without public objection. Id. at 7.

Pursuant to the CD, BELCO installed a water filtration system (herein "CleanStripping") in the CWS public water well, excavated NAS-T contaminated soil around the Site, and performed monitoring well tests on the wells from the initial investigation, including two detections of NAS-T found in the wells closest to Fartown in January 2018 at levels of 5 ppb and 6 ppb. Id. at 8. However, based on the completion of the CD tasks and low levels of detection, the EPA issued the COC to BELCO in September 2018. Id.

In February 2019, at the request of FAWS who learned of the CD, The Department of Health (herein "DOH") tested five private drinking water wells in Fartown, finding no NAS-T in the wells. Id. Due to these findings, the EPA declined FAWS request for additional testing in Fartown. Id. FAWS contracted with Central Laboratories, Inc. to test and analyze private well water for $21,500, finding contamination in 105 of 225 samples taken from private wells in Fartown, including 54 containing contamination in a 5 to 8 ppb range. Id. The EPA declined to take action to investigate because the low levels and the limitation for CD reopening. Id.

On November 3, 2020, the Environmental Rights Amendment (herein "ERA") was passed by the vote of the citizens and added to the New Union Constitution. Id. The ERA reads: Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans. Id. The

[1] See, Record at 4.

EPA was advised by the DNR in January 2021 that the "ERA constitutes an ARAR for CERCLA purposes . . . 'where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations.'" Id. at 9.

The EPA reopened the CD based on the results of the Central Labs and the passage of the ERA, and ordered the evaluation of 50 private wells in Fartown, bottled water supplied to persons with wells that tested positive, and continuing well monitoring. Id. BELCO challenged that the ERA was not an ARAR and, as a result, the order was inconsistent with CERCLA. Id. EPA similarly declined a request from FAWS to install CleanStripping at each residential well that tested positive for NAS-T or take action to remove NAS-T from their water supply. Id. EPA moved forward ordering a Unilateral Administrative Order (herein "UAO") to be followed. Id.

BELCO refused to comply, and the EPA began providing bottled water to Fartownians with wells in excess of 5 ppb and monitored those wells on a monthly basis. Id. at 10. 45% of the wells in the testings continued to provide positive NAS-T results. Id.

STATEMENT OF PROCEDURAL HISTORY

FAWS filed a motion to intervene in the action between the EPA's motion against BELCO to recover costs incurred in Fartown and penalties associated with BELCO's violation of the UAO. Id. FAWS asserts a claim that "the UAO [i]s arbitrary, capricious, and contrary to law under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), to the extent that it failed to compel BELCO to provide CleanStripping filtration systems on FAWS' members' private wells, which . . . is required under the ERA." Id. FAWS additionally filed a separate suit on August 30, 2021 to recover costs of the independent testing and analysis of the wells, negligence in the contamination of the wells, and nuisance under the State law. Id.

The United States District Court for the District of New Union exercised jurisdiction under 28 U.S.C. §1331, and supplemental jurisdiction over state law claims under 28 U.S.C. §1367, based on FAWS being residents of New Union and BELCO being a Delaware corporation with a principal place of business in Centerburg, New Union. Id. FAWS made clear that they intended to seek dismissal of its state law claims once the CERCLA claims are resolved to litigate state claims in state court. Id. After discovery was completed, all parties moved and cross-moved for summary judgment on the CERCLA claims, with FAWS moving to dismiss the state law claims without prejudice on December 30, 2021. Id. at 10-11.

The District Court granted summary judgment in favor of BELCO on the issue of recovery the cost of the Central Labs testing, determining that FAWS could not recover testing costs from BELCO because there was no longer an investigation occurring and no indication that the further testing was necessary. Id. at 10-11, 15. Second, the court granted summary judgement in favor of the EPA on the issue of its determination to reopen the CD, determining that the reopening of the CD was proper based on the determination that the ERA was an ARAR. Id. Third, the court granted summary judgement in favor of FAWS on the issue of vacating the EPA decision not to install CleanStripping technology on Fartown's wells, determining that based on the wording of the ERA, the EPA's determination that installation of CleanStripping technology on Fartown wells was not required, as it was contrary to the state Amendment. Id. at 12-14, 15. Finally, the court declined to dismiss FAWS remaining state law claims, choosing to continue to exercise supplemental jurisdiction over the claims. Id. at 14-15.

SUMMARY OF THE ARGUMENTS

I. The District Court erred in granting BELCO's motion for summary judgment, as the FAWS investigation is "necessary" within the meaning of CERLA because it is not

duplicative of the EPA investigation and will lead to the actual cleanup of the NAS-T contamination of the Sandstone Aquifer.

II. The District Court did not err in determining that the ERA properly constitutes an ARAR that would constitute a Regulatory Standard under the Consent Decree and would not prohibit remedial action.

III. The District Court did not err in determining that the EPA's determination that filtration systems for the residents of Fartown was arbitrary, capricious, and contrary to the laws of New Union based on the plain meaning and understanding of the ERA and language of the CERCLA requiring the EPA to act in accordance with more stringent state standards.

IV. The District Court erred in retaining supplemental jurisdiction over FAWS state law claims, as they pose novel and complex issues of state law given they involve the interpretation of a new state constitutional provision.

ARGUMENT

I. THE FAWS INVESTIGATION OF THE NAS-T CONTAMINATION IS NECESSARY AND CONSISTENT WITH THE NATIONAL CONTINGENCY PLAN UNDER CERCLA

42 U.S.C. § 9607(a)(4)(B) of CERCLA creates a private right of action where a nongovernmental plaintiff may recover costs incurred in responding to a release of hazardous substances that are "necessary" and "consistent with the national contingency plan" from a potentially responsible party. Rolan v. Atlantic Richfield Company, 427 F.Supp.3d 1013, 1020 (N.D. Ind. 2019). To determine if costs are "necessary," the action must not be duplicative of any other action taken by the EPA. U.S. v. Iron Mountain Mines, Inc., 987 F.Supp. 1263, 1272 (E.D. Cal. 1997). Additionally, the actions taken must be related to the actual cleanup of the hazardous substance. Young v. U.S., 394 F.3d 858, 863 (10th Cir. 2005). Consistency with the NCP is not a

precondition to recovery of preliminary investigatory and monitoring costs. Carlyle Piermont Corp. v. Federal Paper Bd. Co., Inc., 742 F.Supp. 814, 822 (S.D.N.Y. 1990). Because the costs incurred by FAWS were only investigatory in nature, and because the District Court did not explicitly find that the FAWS investigation was inconsistent with the NCP, this argument will only address whether the costs incurred by FAWS were "necessary." Therefore, the following analysis will argue that the District Court erred in determining that these costs were not necessary, as the FAWS investigation was necessary to the removal or remediation of the NAS-T contamination because [1] the FAWS investigation was not duplicative of the EPA actions and [2] the FAWS investigation will lead to the actual cleanup of the NAS-T contamination of the Sandstone Aquifer.

A. The Actions Taken Within the FAWS Investigation were Not Duplicative of the EPA Investigation and Therefore Necessary Within the Meaning of CERCLA

The FAWS investigation is not duplicative because the investigation was made after, not during, the close of the EPA's remediation efforts and the FAWS investigation sought to uncover more extensive information on the NAS-T plume and its threat to the residents of Fartown. An investigation may be "duplicative" if the action occurs after or at the same time as the EPA's own investigation and does not seek to uncover information different than that of the EPA. Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc., 811 F.Supp. 1421, 1425 (E.D. Cal. 1993); Forest Park Nat. Bank & Trust v. Ditchfield, 881 F.Supp.2d 949, 978 (N.D. Ill. 2012).

In Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc., the EPA conducted an investigation of land owned by plaintiff after defendant had dumped large amounts of hazardous substances into the water flowing between the properties, which ultimately collected on plaintiff's land. 811 F.Supp. at 1423. Plaintiff conducted their own investigation, which was nearly completed before the EPA undertook its own investigation. Id. Plaintiff sought to recover

the costs of their investigation from defendant. Id. The court explained that investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA, are duplicative, and therefore not recoverable. Id. at 1425. Since the EPA and plaintiff's investigations were essentially the same, the court held that once the EPA notified plaintiff that it was conducting its own investigation, from that point on plaintiff's investigation was duplicative and thus unnecessary, Id.

In Forest Park Nat. Bank & Trust v. Ditchfield, the court found that investigative costs were "necessary" within the meaning of CERCLA. 881 F.Supp.2d at 978. Defendants owned commercial property, part of which operated as a drycleaning business that used solvents containing a likely human carcinogen. Id. at 953-54. Defendants conducted an investigation of their land that detected an extensive plume of groundwater contamination. Id. at 956-57. Plaintiffs conducted their own investigation on the side of their property closest to defendant's property which found elevated concentrations of the contaminant in the soil and groundwater and the EPA became interested in the contamination and conducted testing that showed elevated levels of contaminants as well. Id. at 958-959. Plaintiffs brought suit against the defendants under CERCLA to recover the costs of their environmental investigation and assessment. Id. Defendants argued against the results of the various investigations, claiming that no imminent threat to human health or the environment existed to the plaintiffs. Id. at 977. The court noted that its circuit had not held that an actual and real threat to human health or the environment must exist in order for a response cost to be "necessary," and that even if it had, a migrating plume of a contaminant from a neighboring property seems likely to qualify as such a threat. Id. The court found that these investigative costs were "necessary" to help determine the extent of the threat presented by the contaminant plume, particularly since the property was residential. Id. at 978.

The District Court incorrectly assumed that since the EPA was no longer investigating the spread of the NAS-T contamination, that meant that FAWS could not recover for their investigative costs. R. 9-10. The EPA investigated the contamination of NAS-T over the course of several years, but only installed five wells about a half mile north of Fartown. R. at 2-5. Given that the Sandstone Aquifer is relied upon by most residents of Fartown as their direct water supply, the residents of Fartown took it upon themselves to investigate the extent of the threat to their health that the NAS-T plume posed. R. at 2, 5. This case then aligns with Forest Park Nat. Bank, where testing was conducted to determine the magnitude and extent of the contamination. 881 F.Supp.2d at 978. The more extensive testing conducted by Central Labs that tested 75 private wells in Fartown found more NAS-T more consistently in the aquifer than the previous testing conducted by the EPA. R. at 4-5. This case is then distinguishable from Louisiana-Pacific Corp., where plaintiffs had been told that the EPA would be conducting tests, and yeatt plaintiffs continued with their own investigation. 811 F.Supp. at 1425. FAWS was not told that further testing would be conducted, but rather that no further testing would continue. R. at 5. The EPA itself found the results from Central Labs compelling enough to reopen the CD in light of Article 1 § 7 of the New Union Constitution. R. at 6. Because the FAWS investigation was made after, not during, the close of the EPA's investigation and the investigation sought to uncover more extensive information on the NAS-T plume and its threat to the residents of Fartown, the FAWS' investigation is not duplicative.

B. The FAWS Investigation Will Lead to the Actual Cleanup of the NAS-T Contamination

The cost of the Central Labs testing is "necessary" as it leads to the actual cleanup of the NAS-T contamination of the Sandstone Aquifer. A plaintiff is not required to plead that a cleanup program is underway on the land as long as the cost was a necessary antecedent to the

remediation of the contamination. Foster v. United States, 926 F.Supp. 199, 204 (D.D.C. 1996). Additionally, the costs must not be incurred solely in anticipation of litigation. Young v. U.S., 394 F.3d at 865.

In Young v. U.S., plaintiffs, whose property was adjacent to a superfund site, sued the Government after an an investigation conducted by plaintiffs to assess the potential risks to humans who worked on their property returned positive for hazardous substances. Id. at 860-861. Upon learning these results, plaintiffs abandoned their property and did not intend to spend any money to clean up the contamination. Id. at 861-862. Plaintiffs brought their suit to recover the costs of the investigations and assessments they conducted. Id. at 861. The Tenth Circuit explained that CERCLA "response costs" are defined as the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment. Id. at 863. While some of the costs plaintiffs expended are "classic examples" of preliminary steps taken in response to the release or threatened release of hazardous substances, such as the investigatory costs, none of the costs were spent on the actual cleanup of the property. Id. The court held that because there was a lack of evidence to suggest that the expenses were related to containment or cleanup of the contamination of the plaintiff's property, that it appeared the costs were incurred in preparation of undertaking litigation, which are not compensable. Id.

In Foster v. United States, plaintiff filed a complaint after discovering environmental contamination of his property, seeking to recover response costs incurred by him in connection with the investigation of contamination of the property. Foster v. United States, 922 F.Supp. 642, 647 (D.D.C. 1996). The costs incurred were the services of an environmental consultant that was only hired in order to identify and assess barriers to the development of the site. Id. at 652-653. The court explained that while a plaintiff is not required to plead, as a part of the prima facie

case, that a cleanup program is underway on the land, they must still demonstrate that the costs for which they seek recovery were a necessary antecedent to the remediation of the contamination. Foster v. United States, 926 F.Supp. at 204. Because plaintiff' investigatory costs were not meant to detect or determine the extent of contamination, these costs were not necessary to the antecedent to the remediation of the contamination and therefore plaintiff could not recover. Id. at 203-204.

The FAWS investigation will lead to the actual cleanup or removal of the NAS-T contamination from the Sandstone Aquifer. Unlike Foster where plaintiff's investigatory costs were to identify barriers to development and not to aid in the remediation of the land, the FAWS investigation was for the express purpose of uncovering the potential threat and extent of a known contamination of the Sandstone Aquifer. 922 F.Supp. at 652-653; R. 5. Therefore, this court should distinguish this case from Foster, especially since the results of the Central Labs testing did lead FAWS to pursue further action in the cleanup of the contamination by successfully petitioning the EPA to reopen the CD. R. 6. Likewise, where the plaintiffs in Young abandoned their property and did not plan to return or perform any cleanup or remediation efforts, the members of FAWS have made no mention of leaving their homes. 394 F.3d at 861; R. 5-7. In fact, residents of Fartown formed FAWS to ensure that their drinking water was free of contaminants and if not, to petition the EPA to reopen the CD in order to begin removal or remediation efforts. R. 5. FAWS has made their intentions of pursuing these removal or remediation efforts known, and therefore this court should distinguish this case from Young. R. 5. Additionally, FAWS' independent investigation was not initiated in anticipation of litigation, as FAWS didn't even initiate the present action, and merely wished to reopen the CD between BELCO to assert their affirmative right to clean water as granted to them

by the New Union Constitution. R. 5-7. Conversely in Young, plaintiffs were found to have only taken the investigatory actions they did in anticipation of litigation. 394 F.3d at 865. This is further cause to distinguish Young from the case at hand. Because the FAWS investigation leads to, but does not need perform, the actual cleanup of the NAS-T contamination of the Sandstone Aquifer, it is therefore a "necessary" cost.

C. Conclusion

In conclusion, the Court should find that the FAWS investigation is "necessary" within the meaning of CERLA, as it is not duplicative of the EPA investigation and will lead to the actual cleanup of the NAS-T contamination of the Sandstone Aquifer, and thus the District Court erred in granting defendant's motion for summary judgment.

II. THE ERA WAS CORRECTLY DETERMINED TO CONSTITUTE AN ARAR AND THE CONSENT DECREE WAS PROPERLY REOPENED

We urge the Court to affirm the Twelfth Circuit Court of Appeals decision that the State of New Union's ERA constituted an ARAR and that the reopening of the Consent Decree based on that ARAR was justified. The 6th Circuit Court of Appeals established a four-part test in determining whether a state environmental standard qualifies as a state ARAR in US v. Akzo Coating of Am. The four factors are whether the standard was "properly promulgated, more stringent than federal standards, legally applicable or relevant and appropriate, and timely identified" US v. Akzo Coating of Am., 949 F.2d 1409, 1440 (6th Cir. 1991). The environmental standard passed by New Union sufficiently meets all four of these standards. As the environmental standard properly qualifies as an ARAR, it constitutes a Regulatory Standard under the Consent Decree and does not forbid further remediation actions to be brought by FAWS should the previous clean-up plan not satisfy the new Regulatory Standard. In the

present issue, the members of FAWS have been exposed to man-made pollutants that hinder the enjoyment of the drinking water and are thus in violation of the new Regulatory Standard.

A. The State of New Union's Environmental Standard was Properly Promulgated, Sufficiently Stringent, Relevant and Appropriate, and Timely Identified

This Court should use the same four-part test used by the lower court to determine if the standard passed by New Union constitutes an ARAR. This test is appropriate as it allows for a thorough analysis of all the necessary elements of an ARAR as set out in 42 U.S.C. § 9621(d). Applying this test to the standard passed by New Union, this Court should find that the ERA sufficiently satisfies all requirements of an ARAR determination and should affirm the lower court's ruling.

1. The ERA Was Properly Promulgated

The EPA defines "promulgated" as referring to "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." EPA, Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987). It is not disputed that the ERA was imposed by the legislative body of the State of New Union, thus the determination of whether or not the ERA is properly promulgated rests on whether the ERA is deemed "of general applicability" and "legally enforceable".

First, to the question of general applicability, the ERA was intended to and in effect applies to the entirety of the State of New Union. This is apparent in the language that the amendment starts with, "each and every person of this State". There is no limiting language within the language of the amendment itself, nor within the intent of the state legislature that would indicate that the amendment is meant to apply to only a select subset of citizens or entities

within the State of New Union. This makes the ERA different from the by-law proposed in Town of Acton v. W.R. Grace & Co. -- Conn. Techs., Inc., in which the EPA rejected a proposed by-law that would only be applicable to one town within the state of Massachusetts, stating that "local requirements are not ARARs" Town of Acton v. W.R. Grace & Co. -- Conn. Techs., Inc., No. 13-12376-DPW, 2014 U.S. Dist. LEXIS 132684 (D. Mass. Sep. 22, 2014). The ERA does not limit itself to a specific location and is indeed statewide, thus it cannot be considered a local requirement like the by-law in Town of Action v. W.R. Grace & Co. The statewide nature of the ERA can even be found in the Senate Report, referring to "the people of the State" rather than any specific location within the State of New Union. S. Rep. No. A02137 at 1. With no limiting language within the language of the ERA proper, or the accompanying Senate Report, the Court should determine the ERA to be generally applicable to the State of New Union.

In addition to being generally applicable, a standard must also be legally enforceable to meet the EPA's definition of promulgated. The ERA should be considered legally enforceable as an act of legislation passed by the proper state legislature. The amendment has its own area of enforceability in the gaps between already enacted statutes and regulations. This can be found in the accompanying Senate Report reading "where those regulatory gaps exist, the amendment will serve to create a safety net." Id. The ERA, as a properly passed piece of legislation with no conflicts in scope, is legally enforceable as a piece of legislation targeted to existing gaps of regulation.

Since the ERA is both generally applicable in that it applies to the entire state and is legally enforceable as a lawfully passed piece of state legislation, this Court should find that it satisfies the first requirement of an ARAR determination in that it is a properly promulgated piece of legislation.

2. The ERA was More Stringent than Federal Standards

BELCO argues that the ERA is not more stringent than any Federal Standard, as it mimics the first requirement in an NCP determination and thus cannot constitute an ARAR. However, this argument fails because the ERA fills in a regulatory gap that current federal ARARs do not and bestows a fundamental right upon the citizens of New Union whereas current federal environmental standards do not.

The 6th Circuit Court of Appeals reasoned that "where no federal applicable 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." Akzo Coatings of Am., 949 F.2d at 1443. The ERA both covers a chemical that is not covered by an existing federal ARAR and is broader in scope than existing federal ARARs. The ERA specifically refers to pollution "caused by humans". This language or that of sufficient similarity is not present in existing federal ARARs and should therefore be covering a chemical, or more specifically a class of chemicals, that is not currently covered by existing federal ARARs. Even should the Court find that man-made chemicals do not warrant their own classification so as to be covering a chemical not covered by an existing federal ARAR, the ERA should be considered to cover an action that currently lacks coverage. The same phrase of "caused by humans" lends the amendment to cover intentional or willing acts of pollution by persons within the State of New Union whereas existing federal ARARs do not specifically highlight such actions as cause for remediation.

Should the Court find that the ERA does not sufficiently cover a new chemical or action not covered by existing federal ARARs, the Court should still find that the ERA is more stringent than existing ARARs based on its broader scope. Existing federal ARARs target either

specific qualifications of sites or areas. These ARARs and targeted to the clean-up and care of specific locations within specific areas. The ERA in granting the "fundamental right" to "each and every person" of the State of New Union removes itself from the standard applicability standards that apply to federal ARARs and holds accountable the entire state to a standard of environmental health that applies state-wide without qualification.

A plain reading of the amendment reveals that it bestows a "fundamental right" in clear and unambiguous language upon the people of New Union. Such language indicates that the legislature of the State who wrote the amendment, as well as the people who passed it, determine that pollution free air and water were indeed so fundamental to their personal interests that it be cemented into the State Constitution. The act of passing legislation as an amendment rather than a statute or ordinance should also carry with it persuasive weight. Should it have been passed as a statute, it could be construed that the intent was to have an alternative remedy seeking option available to those that feel affected by pollution. If the ERA were passed in such a way, BELCO's contention that it replicates the first requirement of an NCP requirement could cause the ERA to fail the stringency requirement of an ARAR determination. However, its passing as an amendment to the State Constitution renders it fundamentally different and ultimately more stringent than federal standards such as the NCP. Unlike the NCP, the ERA does not lend itself to having other options or considerations when applying it, beyond the cleanliness of the air and water and the lack of man-made pollutants in the environment. The sole purpose of the ERA is to enshrine, as a fundamental right, clean air and water, whereas federal standards like the NCP merely list environmental health as one of many criteria to consider. It is the lack of alternatives in the ERA that lends itself to being more stringent than existing federal legislation.

Evidence that the ERA is intended to be more stringent than existing federal legislation can be found in its legislative history. The legislature in New Union recognized gaps in federal regulations that were allowing for man-made pollutants to seep into the environment. Thus, the Amendment was created to provide protection "where those regulatory gaps exist." S. Rep. No. A02137 at 1. To determine that the ERA is no more stringent than any existing federal regulation is to voluntarily dismiss the clear intent of the State legislature.

This Court should find that, the ERA's clear language bestowing a fundamental right as well as the unambiguous legislative intent is sufficient to determine that the ERA is more stringent than federal standards which lack the same qualities.

3. The ERA was Relevant and Appropriate as well as Timely Identified

The Code of Federal Regulations defines a relevant and appropriate regulation as on that will "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site" 40 C.F.R. § 300.5. The ERA is a regulation that addresses situations similar to the one that has actually occurred at the CERCLA site. The ERA's main purpose is to provide remedy in situations where man-made pollutants cause potential harm to persons of the State through air or water. This can be observed clearly in the Senate Report, where it declares that the Amendment will ensure the people of New Union air and water from "non-natural, human-caused pollutants and contaminants" S. Rep. No. A02137 at 1. At the site located in Centerburg, BELCO produced NAS-T, a product that has since been recognized as a harmful carcinogen. The water near the site had tested positive for the product and was deemed unsafe for consumption. Therefore, the ERA perfectly meets the provided definition of a relevant and appropriate regulation in that its very purpose and intent addresses the exact similar situation that was found at the site used by BELCO. The ERA itself specifically

mentions man made pollutants, the very same kind found at the site. To determine that the ERA is not relevant and applicable would be to determine that either the product produced by BELCO is not a harmful pollutant, or that the ERA is not tailored to man-made pollutants. However, to do so would require a complete disregard of both the background facts of the case, as well as the purpose of the Amendment that is laid out in plain language in both its text as well as the Senate Report. While not at issue, it is worth noting that the ERA was timely identified as a piece of legislation that properly passed through the necessary channels of the State legislature. The Court should accept the ERA as a relevant and appropriate regulation according to its purpose and text satisfying the very definition of the standard provided by The Code of Federal Regulations.

B. Conclusion

This Court should apply the four-part test, first used in the 6th Circuit Court of Appeals and later the 12th Circuit and find that the ERA properly constitutes an ARAR that would constitute a Regulatory Standard under the Consent Decree and would not prohibit remedial action. The ERA passes the first factor of the test as a properly promulgated as a generally applicable and legally enforceable piece of legislation. It passes the stringency factor of the test by being both broader in scope and by bestowing a fundamental right. Finally, it passes the last two factors of the test by being sufficiently relevant to the scenario encountered at the site and was timely identified as an appropriately passed piece of State Legislation.

III. EPA'S DETERMINATION THAT BELCO WAS NOT REQUIRED TO INSTALL FILTRATION SYSTEMS IS ARBITRARY, CAPRICIOUS AND CONTRARY TO THE ERA

FAWS urges the Court to affirm the District Court's decision to vacate the EPA's determination that BELCO is not required to install filtration systems in Fartown despite the

existence of the ERA and the CERCLA as arbitrary, capricious or contrary to law, pursuant to the Administrative Procedure Act. EPA enforcement order challenges are to be brought under the Administrative Procedure Act to determine whether an action "[is] 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'." 5 U.S.C. §706(2)(A); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-7 (2004); Sackett v. EPA, 566 U.S. 120 (2012). "Under the arbitrary and capricious standard, a lower court's discretionary action 'cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon the weighing of the relevant factors.'" United States v. Akzo Coatings of Am., 949 F.2d 1409, 1429 (6th Cir. 1991)(citing McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961)). CERCLA charges the EPA with "monitoring . . . and conducting cleanups on sites that have sustained environmental damages as a result of hazardous materials." Vill. Of DePue v. Exxon Mobil Corp. 537 F.3d 775, 778-9 (7th Cir. 2008). Clean-up Agreements for pollutant sites must be "fair, reasonable, and consistent with the purpose of the CERCLA". United States v. Charter Int'l Oil Co., 83 F.3d 510, 512 (1st Cir. 1996). New Union's ERA promises their citizens "a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans", creating a requirement greater than that set by CERCLA. R. at 8. Pursuant to the deference to state regulatory standards in the CERCLA, and the plain meaning of the ERA, the Court should affirm their decision to vacate as arbitrary, capricious or contrary to law the EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA.

A. The ERA Should be Interpreted Using the Plain Meaning and Voter Understanding

In interpreting a Constitutional Amendment, the Supreme Court has recognized that "the meaning of a statute must... be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 453 (1917). Where the language is plain, and no other statute challenges that language, the plain meaning should control. Amoco Prod. Co. v. Vill. Of Gambell, 480 U.S. 531, 552-3 (1987); Biodiversity Conservation Alliance v. Jiron, 762 F.3d 1036, 1062 (10th Cir. 2014). The Supreme Court has acknowledged "plain language of the enacted text is the best indicator of intent." Nixon v. United States, 506 U.S. 224, 232 (1993).

The ERA of New Union's Constitution is plain and unambiguous on its face. R. at 8. Like in Amoco, the legislature was clear in its intent to protect the New Union community from human-made contaminants and pollutants, providing, "a fundamental right to clean air and clean water and a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, §7. The legislature did not provide for a quantitative level of human-made contaminants and pollutants by design. Id. The Merriam-Webster dictionary defines "free" as, "not determined by anything beyond its own nature or being" as well as "relieved from or lacking something and especially something unpleasant or burdensome." *Free*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/free (last visited Nov. 21, 2022). Citizens would have based their votes on the proposed legislation ensuring New Union to be relieved of any human-made contaminants and pollutants from persons or companies that could pollute New Union's environment and detrimentally alter the enjoyment of their homes. R. at 8. To find that the ERA means anything different would be an injustice to the democratic process and a nullification of the votes of the people. Therefore, the Court should find that the plain

meaning of the ERA ensures the citizens of New Union a human-made pollutants or contaminants free environment.

B. Legislative Intent Behind the ERA Is Consistent with Plain Meaning Interpretation

The legislative intent in writing the ERA points towards a finding that the drafters wanted to ensure a human-made contaminant and pollutant-free New Union. The EPA's contention that "clean water" does not necessarily mean water free from any contamination should be found in error. Environmental Rights Amendment Assembly Information 2019-2020, A02137, Concurrent Resolution of the Senate and Assembly, NU ASSEMBLY Nos. A10377, 5-6 (2020). Although by EPA standards the water is "healthful" up to 10 ppb, NAS-T is a human-made carcinogen that has been shown to cause harm when exposed to humans. Sponsor Mr. Wright specifies, "clean would mean . . . water that is free of contamination or pollution caused by humans that would make that water unhealthful or harmful to consume." Id. at 5. The NAS-T contamination is the exact situation that the ERA was enacted to remedy and the safety of the citizens of New Union comes into question if a company is allowed to spill dangerous substances in the environment with no penalty or responsibility to clean-up their mess. Id. at 6. The ERA Assembly Justification provides, "[t]his proposed constitutional amendment will ensure that clean air and water are treated as fundamental rights for the citizens of New Union and to protect the overall health of the people and the environment, in particular from harms caused by un-natural, human-made or human-caused contamination and pollutants." Id. at 2. It is plainly inferable that the sponsor of the bill intended for the ERA to protect New Union citizens from the contamination of water, like the private wells of Fartown.

Analogously, the sponsor made clear that the smell of a landfill, if it is adequately offensive, could constitute a pollutant that violates the idea of "clean" air. Id. at 5. Since an

offensive smell could be a violation of the ERA, and NAS-T positive water has an unclean odor and taste, this odor could be considered a violation of the ERA. R. at 6. These byproducts have caused a plume of pollutant in the Sandstone Aquifer that directly feeds the wells of the rural community of Fartown, impeding the right of the members of FAWS to clean water against the intent of the ERA's drafters. Id. at 5-6. Therefore, the Court should find that both the plain meaning and the legislative intent of the ERA was to provide the citizens of Fartown with "clean" water that is free from any human-made pollutants or contaminants.

C. CERCLA requires the EPA to abide by more stringent state regulations when available

CERCLA requires the EPA to comply with more stringent state standards for environmental cleanup where one exists. City of Bangor v. Citizens Communs. Co., 532 F.3d 70, 91 (1st Cir. 2008)(Citing, 42 U.S.C. §9621(d)(2)(A)). The CERCLA was enacted to ensure the "prompt and efficient cleanup of hazardous waste sites and to place the costs of those cleanups on the [potentially responsible parties]" and "accommodate more stringent 'applicable or relevant and appropriate requirements' ("ARARs"), i.e. environmental standards of the state in which a site is located." Akzo Coatings of Am., 949 F.2d at 1417, 1418. CERCLA history shows federal remedies were not intended to preempt state environmental law. The original cosponsor of CERCLA stated, "the law 'establishes an admittedly complex . . . mechanisms which allows for the preservation of these [state] laws and prevents unilateral action to override them.'" Id. at 1455 (Citing, 132 Cong. Rec. S17136 (Oct. 17, 1986). §9621(d) of CERCLA requires remedial action for environmental cleanup to be compliant with legal ARARs. Amoco Oil Co. v. Borden, Inc., 889 F.2d 644, 671 (5th Cir. 1989). § 9621(d)(2)(A)(ii) specifies that "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 . . .” Therefore, where there is a more stringent standard set by the state, CERCLA requires remedial action to follow that state regulation.[2]

The plain wording of the ERA provides that the citizens of New Union are to have an environment that is free from contaminants and pollutants such as BELCO-released NAS-T that caused a plume in the Sandstone Aquifer feeding the wells of Fartown. R. at 6-7. EPA had knowledge of the extent of the plume in the Sandstone Aquifer and positive test results for the private Fartown wells after the RI/FS performed by BELCO but refused to provide remediation beyond providing bottled water unless the wells tested at 10 ppb. Id. at 8; 9. However, the ERA provides more stringent ARARs, requiring an environment free from human-made contaminants or pollutants. R. at 8. The EPA reopened the CD and ordered the testing of wells in Fartown after acknowledging the ARAR. Id. at 9. These tests showed levels of NAS-T in the wells that would constitute a violation of the ERA’s plain meaning. Id. at 10. The EPA only addressed the water supply of the town of Centerburg and the plume of pollutants in the Sandstone Aquifer supplying

[2] In Amoco Oil Co., the Fifth Circuit Court of Appeals determined the district court erred in using a less stringent standard in evaluating the response costs associated with the dumping of hazardous materials. Amoco Oil Co., 889 F.2d at 671-2. Similarly, the 1st Circuit Court of Appeals stated that, “cleanups . . . must comply with federal standards or more stringent state standards if they exist.” City of Bangor, 532 F.3d at 91. Approval of a CD was affirmed where the CD abided by the laws of the state and the federal government, and therefore could be applied to remedy the contamination. Id. at 100.

water to Fartown was unaddressed with bottled water supplied only to residents with wells testing at or above 5 ppb. Id. at 7; 9. When faced with a knife wound caused by BELCO, the EPA provided Band-Aids. FAWS is asking the court to affirm the District Court's ruling and provide the remedy to adequately address Fartown's injuries.

The EPA contends that they should have discretion to determine the quantitative level of pollutants because to require that the environment is completely free from any contamination would cause the invalidation of countless permits under the Clean Air Act and Clean Water Act that allow for some "safe" levels of contamination in discharges. R. at 16. However, this is entirely inconsistent with the wording of §9602 and §9621(d) of CERCLA because New Union set more stringent standards. Consistent with rulings like Amoco Oil Co., the Court should use the higher standards of the ARARs and affirm that the EPA must base its remedial measures off the stricter standard of the ERA. 42 U.S.C. §9621(d)(2)(A); Amoco Oil Co., 889 F.2d at 671-2.

§9602 of CERCLA defined hazardous substances as, "elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment . . ." 42 U.S.C.S. §9602. In Amoco Oil Co., the 5th Circuit Court of Appeals examined the extent of pollutants in the context of the CERCLA and determined that radionuclides were a hazardous substance under § 9602(a) of CERCLA, as well as § 112 of the Clean Air Act. Amoco Oil Co., 889 F.2d at 668-9. In their determination that radionuclides constituted a hazardous substance, the court ruled that, "plain statutory language [of CERCLA] fails to impose any quantitative requirement on the term hazardous substance". Id. This ruling is consistent with the Second, Third, and Ninth Circuits. A&W Smelter & Refiners v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2nd Cir. 1992); United States v. Alcan Aluminum Corp., 964 F.2d 252,

260 (3rd Cir. 1992). In A&W Smelter & Refiners v. Clinton, the ninth circuit recognized the decision in Amoco Oil Co. but decided that it was, "not [their] function to read into the statute a limitation that Congress did not put there." A&W Smelter & Refiners, 146 F.3d at 1111. In B.F. Goodrich Co. v. Murtha, the Second Circuit added that if Congress would have wanted to incorporate a distinction on what was hazardous material based on concentration or quantity, they would have drawn distinctions based on concentration or quantity. 958 F.2d at 1200.

NAS-T is a hazardous substance under §9602 that requires remediation as a human carcinogen that poses a substantial danger to public health and welfare. R. at 6. Actions taken by the EPA in addressing the contaminants present at levels over 10 ppb are evident in Centerburg, but the language of CERCLA enacted by Congress does not provide a quantitative level of pollutants and therefore any amount of hazardous substance is a redressable amount of hazardous material, including 45% of positive-testing Farwell private wells. Murtha, 958 F.2d at 1200; R. at 10. Since CERCLA requires the EPA to follow more stringent state standards where they exist, the Court should find that the EPA must mandate filtration systems installation in all private Fartown wells that have tested positive for NAS-T. The EPA's claim for discretionary authority over the NAS-T levels of contamination is contrary to the ERA and the plain meaning of CERCLA. Thus, summary judgment for FAWS should be granted.

BELCO contends that the installation of the CleanStripping system would be too costly based on the lack of evidence that the levels of contamination in the wells is harmful for drinking, as well as all other purposes. R. at 16. However, this is inconsistent with the law of the ERA and, therefore, the language of CERCLA requiring the EPA to take remedial measures in compliance with state regulations that are more stringent. Id. at 9; City of Bangor, 532 F.3d at 91. The intention of the ERA was to fill the gaps left by federal regulations and to protect the

citizens and environment from spills identical to the one caused by BELCO. S. Rep. No. A02137 (2020).

BELCO has yet to take any meaningful remedial measures to remedy the mess that they have created in Fartown. The original CD did not require remediation of the plume of contaminants in the Sandstone Aquifer and BELCO refused to comply with the Unilateral Administrative Order of the EPA. R. at 7. As the Sandstone Aquifer provides water to the citizens of Fartown, contamination of the private wells will continue so long as the plume is not addressed through the installation of filtration systems in NAS-T positive wells. Id. at 5. To be compliant with the ERA, BELCO should be required to install the filtration systems so that the citizens of Fartown may enjoy "clean water . . . free from contaminants and pollutants caused by humans." N.U. CONST. art I, §7. The cost of $4,500 per household to remedy BELCO's actions is not overly expensive to effectuate a meaningful adherence to the standards set by the ERA.

IV. UNDER §1367(C) AND GIBBS, THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS INVOLVING NOVEL AND COMPLEX QUESTIONS OF STATE LAW AFTER ALL FEDERAL CLAIMS HAVE BEEN DISMISSED AND COMITY OUTWEIGHS THE PRESENSE OF ANY OTHER FACTOR

28 U.S.C. §1367(c) list four reasons why a court may decline to exercise supplemental jurisdiction over a state law claim where it would otherwise be appropriate to exercise such jurisdiction. These reasons include whether [1] the claims raise novel or complex questions of state law; [2] the state claim substantially predominates over the federal claims; [3] all claims of original federal jurisdiction have been dismissed; and [4] there exists other exceptional circumstances or compelling reasons for declining jurisdiction. 28 U.S.C. §1367(c). Whether the state claims substantially predominate over the federal claims is not at issue here, and the most exceptional circumstances or compelling reason for declining jurisdiction is that the novel and

complex issue of state constitutional law presented by the state law claims calls for considerations of comity, which is already a reason to decline exercising supplemental jurisdiction listed within §1367(c). R. at 5, 7-8, 15. Once it has been determined that one or more of these factors exists in a case, courts have used the factors articulated in United Mines Workers v. Gibbs to determine if they should exercise supplemental jurisdiction. Ameritox, Ltd. v. Millennium Laboratories, Inc., 803 F.3d 518, 536 (11th Cir. 2015). While supplemental jurisdiction is matter of judicial discretion, a district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. Ameritox, Ltd., 803 F.3d at 539. Therefore, the following argument will first examine how [1] the District Court abused its discretion in retaining supplemental jurisdiction over the state law claims because [2] all federal claims in which the District Court had original jurisdiction over have been resolved through summary judgment, and [3] the Gibbs factor of comity outweighs judicial economy present in this case.

A. The Remaining State Law Claims Involve the Novel and Complex Issue of Interpreting a New State Constitutional Provision

FAWS state law claims involve the interpretation of Article I §7, a new provision of the New Union Constitution which poses a novel and complex question of state law. The Supreme Court has recognized that it is fundamental that state courts be left free and unfettered in interpreting their state constitutions. Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940). Therefore, courts should decline to exercise supplemental jurisdiction over difficult questions of state constitutional law when the provision at issue has yet to be interpreted by the courts of the state. O'Connor v. State of Nev., 27 F.3d 357, 363 (1994); Isaac v. North Carolina Dept. of Transp., 192 Fed.Appx. 197, 199-200 (2006).

In O'Connor v. State of Nev., the Ninth Circuit affirmed the district court declining to exercise supplemental jurisdiction over a state law claim because difficult questions of state constitutional law are the very sort of novel issue that usually will justify declining jurisdiction. 27 F.3d at 363-364. In Isaac v. North Carolina Dept. of Transp., the Fourth Circuit held that because the state constitutional provision in question was not new, and state courts had explicitly held that the provision parallels the U.S. Constitution's Fourteenth Amendment, the district court did not abuse its discretion in exercising supplemental jurisdiction the claims. Id. at 199-200.

Similar to O'Connor, where the plaintiffs filed an action with several federal and state constitutional claims, the present case involves several federal law claims and state law claims involving interpretation of the New Union Constitution. O'Connor, 27 F.3d at 359-360; R. at 15. Article 1 §7 of the New Union Constitution has no counterpart in the U.S. Constitution, unlike in Isaac where the state constitutional provision was found by state courts to parallel the Fourteenth Amendment. Isaac, 192 Fed.Appx. at 199-200; R. at 5. Finally, the District Court has resolved all federal claims through summary judgment, and thus should follow Isaac and O'Connor in declining supplemental jurisdiction over the state law claims as a matter promoting comity and respecting federalism. R. at 15; Isaac, 192 Fed.Appx. at 199-200; O'Connor, 27 F.3d at 363. Therefore, this Court should find that because the state law claims in the case at hand involve the interpretation of a new provision of the New Union Constitution, the District Court should dismiss the claims without prejudice to be refiled in state court.

B. All Federal Claims Have Been Dismissed Leaving Only Questions of State Law That Involve the Interpretation of the New Union Constitution

The Court should find that the resolution of all other claims in this case warrants the refusal to continue the exercise of supplemental jurisdiction over the remaining state law claims.

It is an abuse of discretion to retain supplemental jurisdiction of state law claims when all federal claims have been resolved and the remaining claims present novel or complex issues of state law. Edmondson & Gallegher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1266 (1995); Raucci v. Rotterdam, 902 F.2d 1050, 1055 (1989).

In Edmondson & Gallegher v. Alban Towers Tenants Ass'n, the D.C. Circuit Court examined 1367(c) and found that because all federal claims had been dismissed, and the remaining issues involved complex and novel questions of state law, the court abused its discretion and should have dismissed the claims without prejudice or remanded the remaining claims to be tried in state court. Id. at 1263, 1266. In Raucci v. Rotterdam, the Second Circuit found that the district court had not abused its discretion in retaining jurisdiction of state law negligence claims after the plaintiff's federal claims had been resolved on summary judgment in favor of the defendant because discovery had closed, the parties were ready for trial, and the claims did not involve complex or novel issues of state law. 902 F.2d at 1055.

In the present case, the federal CERCLA claims have been resolved on summary judgment and only state law claims that require the interpretation of a new provision of the New Union Constitution remain. R. at 14. Similarly, in Edmondson the D.C. Circuit found that the district court had abused its discretion when all federal claims had been resolved and the remaining state law claims involved novel or complex questions of state law. 48 F.3d at 1266. Additionally, the District Court has only just gotten to the close of discovery and all that remains are the state law claims that involve an interpretation of the New Union Constitution. R. at 8, 14-15. Conversely, in Raucci, the state law claims involved no novel or complex questions of state law. 902 F.2d at 1055. Since FAWS' federal claims have been resolved and all that remains are

issues involving questions of novel and complex state law, the Court should find that these state law claims should be dismissed to be tried in the courts of New Union.

C. The Factors Articulated in Gibbs Weigh in Favor of Declining to Exercise Supplemental Jurisdiction

Despite the codification of Gibbs in 28 § 1367(c), the factors articulated in that case are still used to determine whether supplemental jurisdiction should be exercised over state law claims. City of Chicago v. International College of Surgeons, 522 U.S. 156, 173 (1997). These factors include judicial economy, convenience, fairness to parties, and comity to determine if exercising supplemental jurisdiction is appropriate. United Mines Workers v. Gibbs, 383 U.S. 715, 726 (1966). The District Court prioritized the factor of judicial economy by stressing the amount of work that had already gone into the litigation but does not mention the factors of convenience or fairness. R. 15. Therefore, the following argument will address how in the present case [i] judicial economy is a comparatively lightweight factor compared to what can be found in other caselaw, and [ii] that the interest of comity weighs significantly in favor of dismissal of the state law claims, and thus the District Court abused its discretion in choosing to exercise supplemental jurisdiction.

1. The Factor of Judicial Economy Contributes Little to No Weight to the Current Analysis Compared to Other Case Law

The Court should find that the factor of judicial economy contributes little to no weight in this case. Judicial economy can be determined by the extent of judicial resources that have been used on matters of state law already settled by state courts. Parker v. Scrap Metal Processors, Inc., 468 F.3d 733, 746 (2006); RWJ Management Co. Inc. v. BP Products of North America, 672 F.3d 476, 478 (2012).

In Parker v. Scrap Metal Processors, Inc., the Eleventh Circuit found that because district court had already conducted a four-day jury trial, two pretrial hearings, had handed down 18 orders, ruled on over 40 motions, and the tort claims remaining did not present novel or complex questions of state law, the case should be retained by the district court in the interest of judicial economy. 68 F.3d at 746. In RWJ Management Co. Inc. v. BP Products of North America, the Seventh Circuit found that even though the district court had already held 35 hearings, considered 70 motions, and issued 45 orders that, because the claims involved issues of novel and complex state law, supplemental jurisdiction should not be exercised. The court noted that evaluating considerations efficiency is not determined by the sum of motions, page counts, and judicial orders produced, and concerns of judicial economy have their greatest force when significant federal judicial resources have already been expended to decide the state claims, or when there is no doubt how those claims should be decided. Id. at 479, 481

In the present case, the District Court decided summary judgement on the claims after discovery, but before more extensive discovery could be completed for the state law claims. R. at 15. Conversely, in Parker the extent of the judicial resources that had been spent on those cases exceeded those of the present case. 468 F.3d at 479. However, in RWJ, the court emphasized that the factor of judicial economy has its greatest weight when the judicial resources used have been focused on resolving state claims involving questions already settled by state law. 672 F.3d 476, 481. Because fewer judicial resources have been spent on the state law claims in this case compared to cases in other circuits, and because further discovery is necessary for the state law claims, the Court should find that judicial economy is not at issue in this case.

2. Comity Weighs Heavily in Favor of Dismissing the State Law Claims to Be Heard in State Court

The Court should find that the factor of comity weighs in favor of dismissing the state law claims so that they may be tried in New Union courts. When a state law claim involves the interpretation of that state's constitution, especially if the provision is new, then comity weighs in favor of dismissing the state law claim to be tried in state court. Young v. New York City Transit Authority, 903 F.2d 146, 164 (1990); Doe v. Sundquist, 106 F.3d 702, 708 (1997).

In Young v. New York City Transit Authority, the Second Circuit found that the district court had abused its discretion in exercising supplemental jurisdiction over claims under the state constitution, explaining that New York State has a definite interest in determining whether its own laws comport with its constitution. 903 F.2d at 164 (1990). In Doe v. Sundquist, the Sixth Circuit held that if the Tennessee Constitution provided broader protection of privacy rights than the U.S. Constitution, then the interest of comity between states and federal governments in allowing states to have the first opportunity to construe its own constitution weighs in favor of refusing to exercise supplemental jurisdiction. 106 F.3d at 705, 707-708.

FAWS filed this action alleging several federal claims as well as state law claims that involve an interpretation of the New Unions Constitution. R. at 7, 15. Similarly, in Young the claims brought by the plaintiffs arose under federal law as well as state law that involved an interpretation of the state constitution. 903 F.2d at 148. Additionally, Article I §7 of the New Union Constitution has not had the chance to be substantially examined by New Union courts as it was only just enacted in November of 2020. R. at 5. Similarly, in Sundquist the court determined that the statute in question should be examined by the state courts given that the question involved an interpretation of the Tennessee Constitution. 106 F.3d at 708. Because the only claims remaining in this action are state law claims that involve an interpretation of a

recently enacted provision of the New Union Constitution, the Court should find that comity weighs in favor declining to retain jurisdiction over the state law claims.

D. Conclusion

Because this case presents a novel and complex question of state constitutional law, all federal claims have been resolved, and the factor of comity weighs in favor of declining to exercise supplemental jurisdiction, this Court should respect the autonomy of the states by dismissing FAWS remaining state law claims without prejudice so that the courts of New Union may interpret their own constitution.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that the 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. Additionally, this Court should affirm the district court's rulings that the ERA constitutes an ARAR constituting a reopening of the Consent Decree and further remedial actions in the UAO and that the EPA's determination that BELCO is not required to install filtration systems in Fartown despite the ERA was arbitrary, capricious, and contrary to law. Finally, the Court should reverse the district court's determination that it retained jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.