NON-MEASURING BRIEF
TEAM 28

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 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 Cross Appellant, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

Better Living Corporation (BELCO) appeals from a New Union District Court Opinion and Order denying BELCO's motion for summary judgment in the consolidated matters of 17-CV-1234 and 17-CV-1776. 42 U.S.C. §9613(b) grants exclusive jurisdiction to federal district courts to hear cases arising under the Comprehensive Environmental Response, Compensation, and Liability Response Act (CERCLA). BELCO, EPA and Fartown Association for Water Safety (FAWS) all properly filed for interlocutory appeal pursuant to Fed. R. App. P. 5. Orders that do not dispose of all parties' claims are not final judgments under Fed. R. Civ. P. 54(b). Circuit courts have exclusive jurisdiction to hear interlocutory appeals from non-final orders of a district court. 28 U.S.C. §1291(c)(1).

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err when it prevented a private party from using CERCLA to recover unauthorized investigatory costs from Better Living Corporation?
2. Did the District Court err when it affirmed EPA's decision that a state constitutional amendment espousing general principles passed after the conclusion of a site remediation is a valid basis for reopening the site?
3. Did the EPA have the authority to issue the UAO after improperly reopening the Consent Decree and failing to identify an imminent and substantial endangerment to public health?
4. Did the District Court exercise proper discretion by deciding to retain supplemental jurisdiction over state law tort claims that are based on well settled principles of law?

STATEMENT OF THE CASE

A. The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Response Act (CERCLA) was enacted in 1980 to create an efficient process for handling hazardous waste sites throughout the country. 126 Cong. Rec. S.17,988-89 (daily ed. Jul. 11, 1979) (statement of Sen. John C. Culver). CERCLA has two primary goals: "to cleanup hazardous waste sites" and to distribute the costs of clean-up among responsible parties. *Young v. United States*, 394 F.3d 858, 860 (10th Cir. 2005). 42 U.S.C. §9607 (CERCLA §107) governs the fair allocation of liability for all releases of hazardous waste to potentially responsible parties (PRPs). PRPs are defined broadly as entities responsible for the release of a defined "hazardous substance" into the environment without consideration of a tort notion of causation or fault. *See* 42 U.S.C. §9607(a). CERCLA §107 is also not punitive in nature. *See* 126 Cong. Rec. S17,989. It is meant to maximize the resources available for remediating a site. *Id*.

The Environmental Protection Agency (EPA) has two options for enforcing liability. First, they can utilize federal tax dollars from the so-called "Superfund" to complete a cleanup themselves and then initiate a cost recovery action against PRPs. 42 U.S.C. §9611; 42 U.S.C. §9607; 40 C.F.R. §307 (2022). The second option is for the PRP to fund and complete the work with EPA oversight and approval. 40 C.F.R. §307 (2022). If a PRP chooses to work with the EPA, the PRP will then conduct a remedial investigation and feasibility study (RI/FS). *See* 40 C.F.R. §307.22 (2022). The RI involves rigorous data collection and risk assessment procedures which are used to inform remedial alternatives presented in the FS. Env't Prot. Agency, EPA/540/G-89/004, Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA (1988). The EPA uses the RI/FS produced by the PRP to develop a proposed

plan. *Id*. The plan, along with the information from the RI/FS, are published for comment. 42 U.S.C. §9617; Env't. Prot. Agency, EPA 540-R-98-031, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents, at 1-2 (1999). The EPA officially selects a plan for a site by issuing a Record of Decision (ROD.) Guide to Preparing Superfund Proposed Plans at 1-2. The selected plan must pass nine conjunctive requirements, one of which is compliance with applicable or relevant and appropriate environmental law (ARARs.) 42 U.S.C. §9621(d)(2)(A)(ii); Guidance for Conducting Remedial Investigations at 3-8. It is the state's responsibility to identify state ARARs and the EPA's responsibility to identify federal ARARs and make the final determination as to which will be incorporated into the ROD. Env't Prot. Agency, 9234.2-05/FS, CERCLA Compliance with State Requirements Quick Reference Fact Sheet (1989).

Following the ROD, the EPA can then bring a cost-recovery action against the PRP to trigger a Consent Decree (CD.) *See* 42 U.S.C. §9622(d)(1)(A). A CD is settlement instrument used to negotiate a PRPs compliance with the ROD. 42 U.S.C. §9622(d)(1)(A); Guidance for Conducting Remedial Investigations at A-11. CDs often contain two key provisions: issuance of a Certificate of Completion (COC) and reopeners. *See* Env't Prot. Agency, Memorandum: Issuance of 2021 Comprehensive Environmental Response, Compensation, and Liability Act Model Remedial Design/Remedial Action Consent Decree and Statement of Work (2021). The COC releases the PRP from liability for any future remediation pursuant to the CD unless the EPA has grounds for reopening the CD. *See id*. These grounds, called "reopeners," are criteria the EPA must meet to legally reopen the CD and require further remediation. *See id*.

B. NAS-T in Centerburg and Fartown

1. <u>The investigation and remediation.</u>

Better Living Corporation (BELCO) patented an industrial preventative corrosion treatment named "LockSeal" back in 1972. R. at 2. LockSeal is created by combining liquid NAS-T with a non-toxic powder to create a resulting solid product that protects metal equipment from water or other corrosive liquids. *Id*. For a time, BELCO manufactured NAS-T at a factory in Centerburg (the "Facility" or "Site") to fulfill contract orders for LockSeal. R. at 3. BELCO only used the Facility to produce NAS-T from 1973 through the 1990s before relocating elsewhere within the state of New Union. *Id*. BELCO retained ownership of the Site and still uses it for storage and training. *Id*. In the mid-1980s, rumblings began in the scientific community suggesting potential negative health effects related to NAS-T. *Id*. While NAS-T is detectable to the human senses at concentrations of around 5 parts per billion (ppb), the EPA eventually adopted a Health Advisory Level (HAL) of 10 ppb in 1995 out of an abundance of caution. *Id*. To date, this is the only regulation regarding NAS-T that exists at either the state or federal level. *Id*. EPA has also never opted to monitor NAS-T as an unregulated contaminant. *Id*.

Residents of Centerburg first complained of "sour" or "off" smelling water in 2013. R. at 3. The Centerburg County Department of Health, (DOH), responded to these complaints and began testing the public water supply in early 2015. *Id*. Because of the existence of the BELCO facility, DOH knew to test for NAS-T and did find a concentration of 60 ppb. *Id*. In response, DOH promptly notified residents to cease drinking tap water. *Id*. Concurrent to this, BELCO voluntarily supplied bottled water to the affected households pending further investigation by the New Union Department of Natural Resources (DNR). *Id*. DNR began investigatory efforts on September 22, 2015, but ultimately referred the case out to the EPA four months later due to a lack of resources and experience. *Id*.

In March 2016, BELCO was identified as a PRP and entered into an agreement with the EPA formalizing BELCO's commitment to provide bottled water to Centerburg and to investigate the cause and extent of NAS-T in the water supply. R. at 3. Following the CERCLA process, BELCO undertook an RI/FS and discovered the NAS-T originated from spills into the soil and routine storage of wastewater at the Facility. *Id*. After several decades, the NAS-T had made its way from these surface areas into the Sandstone Aquifer. *Id*. The Sandstone Aquifer is a subterranean body of water that grades downwards towards the south from Centerburg. R. at 2. Centerburg Water Supply (CWS) treats water pumped from the Sandstone Aquifer and then distributes it to residents of Centerburg. *Id*.

As for the extent of the NAS-T plume, BELCO worked with the EPA to install a series of monitoring wells from July 2016 through January 2017. Three successive lines of wells spanned 1.5 miles between Centerburg towards Fartown to the south with the last well placed .5 miles north of Fartown. R.at 4. Fartown does not have a central water supply and instead residents are responsible for pumping their own water via private wells. R.at 2. EPA and BELCO agreed they had reached the end of the NAS-T plume and EPA did not request BELCO's assistance placing any more wells. R. at 4. The conclusion of the RI/FS prepared by BELCO was that a $45 million, multi-decade pump and treat remediation project was not feasible for this Site. *Id*. BELCO instead proposed they eliminate the source of the NAS-T by removing the affected soil and further implement a filtration system at CWS to address NAS-T already in the aquifer. *Id*.

EPA issued the ROD for the Centerburg Site in June of 2017 after considering both the RI/FS and public comment. R. at 4. No members of Centerburg or Fartown objected to BELCO's RI/FS, the proposed plan, or the final ROD. *Id*. Given BELCO's cooperation, the EPA initiated a cost-recovery action that same month, and a court-approved CD was in place on August 28,

2017. *Id*. Under this CD, BELCO agreed to execute the plan laid out in the ROD. *Id*. Once again, no objections were made by members of the public regarding the terms of the CD. *Id*.

EPA inserted the following grounds as sufficient to reopen the CD:

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.

Paragraph 2 was stipulated to include ARARs. R. at 4

BELCO fully performed all their remediation activities prescribed by the EPA in the CD. *See* R.at 4. First, the company installed a "CleanStripping" water filtration system at the CWS public well to remove NAS-T from the water before it reached Centerburg households. R. at 4. Second, BELCO identified and removed soil containing NAS-T from the decades-old spills at the Facility. *Id*. Third, BELCO engaged in "monitored natural attenuation." *Id*. Monitored natural attenuation at this Site involved BELCO continuing to use the previously installed monitoring wells to conduct monthly tests of the water supply. *Id*. The soil excavation was completed in December of 2017 and the CleanStripping filtration system at CWS remains operational. R. at 5.

Throughout the remediation, BELCO continued the monitoring protocol using the well system and detected no NAS-T at the wells closest to Fartown through almost every test. R.at 5. In January 2018, levels of NAS-T were briefly detected in the last series of wells at levels below the HAL (5 ppb and 6ppb). *Id*. The EPA knew of these tests when they issued a COC to BELCO in September of 2018. *Id*.

At some point after the entry of the CD, a group of Fartown residents insisted water from their private wells had smelled "off" since as far back as 2016—right around the time the initial monitoring wells were placed near the town. R. at 5, 3. DOH followed up on these concerns in

February 2019 and found no evidence of NAS-T in a sampling of private wells. R. at 5. In May of that same year, the group then demanded that EPA require BELCO to conduct tests in Fartown despite the uncontested CD and COC. R. at 5, 4. EPA refused and cited the consistent non-detects found upstream of Fartown. R. at 5. Following this, the Fartown Association for Water Safety (FAWS) emerged. *Id*. This collective of concerned private citizens were frustrated with EPA's refusal and paid $21,500 a lab to conduct more tests in Fartown. *Id*. This testing yielded mixed results. *See id*. Out of 225 samples taken from 75 individual wells, none showed NAS-T concentrations above the HAL of 10 ppb and 120 showed no detectable levels. *Id*. The remaining 105 samples were split with 51 showing 1-4 ppb and 54 showing 5-8 ppb. *Id*.

2. The New Union Environmental Rights Amendment.

Two years after the EPA issued BELCO a COC, the New Union Constitution was updated with an Amendment. R. at 5. The Environmental Rights Amendment (ERA) made its way through New Union's government and passed as a ballot measure on November 3, 2020. *Id*.

The Amendment, in its entirety, reads:

> Each 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 ERA is unique among New Union's other laws regulating the environment. R.Ad. at 3-4. The state has a robust, intricate statutory and regulatory framework dedicated to environmental protection which commands a total of $250 million in appropriations each year. R.Ad. at 3. Passage of the ERA was understood to be a departure from New Union's approach to environmental protection being vested in the legislative and executive branches. R.Ad. at 4. It contains nothing more than the above statutory language and was intended to "frame the expectation of [New Union's] citizens." *Id*. Several terms within the ERA remain vague and

undefined; "clean" and "healthful" are not provided any sort of clarification by the text. *Id*. Concerns about the impact of these ambiguities on businesses trying to understand their obligations and citizens trying to understand their rights were repeatedly raised. *See, e.g.*, *id*. The language was ultimately passed without definitive answers to these questions appearing in either the amendment itself or the record. R.Ad. at 7.

The EPA contacted DNR following the passage of the amendment to inquire as to whether the ERA might be an ARAR. R. at 6. DNR answered by stating "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state of federal regulations." *Id*. EPA then entered information into the administrative record noting that Fartown is an environmental justice community and they have been experiencing odors due to the presence of NAS-T, a potentially carcinogenic compound. *Id*. Two months after reaching out to DNR, and one month after receiving the answer, the EPA decided to reopen the CD based on the new information submitted to the record. *Id*. EPA claimed the ERA satisfied the second reopener provision because it was an ARAR. *Id*. BELCO objected to this classification and the reopening of the CD. *Id*. At the same time, FAWS submitted a written request to EPA doubling down on their desire to have BELCO fund an installation of CleanStripping on private wells in Fartown. *Id*. The EPA issued a unilateral administrative order (UAO) over the objections of BELCO. *Id*.

The UAO required BELCO to conduct monthly sampling of 50 private wells, supply bottled water to any households showing a NAS-T concentration of 5-10 ppb until levels reached 4 ppb or less, and install CleanStripping on any wells with levels of NAS-T above 10 ppb. R. at 6. BELCO continued to believe the reopening of the CD was contrary to law and refused to comply with the conditions of the UAO. R. at 7. In response, EPA began sampling and providing

bottled water according to the thresholds of the UAO. *Id*. To date, only 20% of wells have tested with levels between 5 and 8 ppb. *Id*. 25% are in the 1 to 4 ppb range and 55% of samples contain no detectable levels of NAS-T. *Id*. Not a single well has shown levels above 8 ppb. *Id*.

C. Proceedings Below

On June 30, 2017, EPA brought a cost recovery action against BELCO (the "BELCO Action") through which BELCO and EPA filed the CD. R. at 4. On March 20, 2021, EPA reopened the CD and subsequently issued the UAO. R. at 6. When BELCO refused to comply with the UAO, the EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and for penalties for BELCO's violation of the UAO. *Id*. at 7. FAWs subsequently filed a motion to intervene in the BELCO Action and this court granted that motion for FAWs to challenge the UAO for failing to compel BELCO to provide certain remedial action to FAWs members' private wells. *Id*.

FAWs and 85 individual plaintiffs filed an action against BELCO as well (the "FAWs Action"). R. at 7. The FAWs Action includes a CERCLA cost recovery claim against BELCO and allegations of negligence and private nuisance under New Union state law. *Id*.

After completing discovery on the CERCLA claims, all three parties, BELCO, EPA, and FAWs, filed motions and cross motions for summary judgment on the CERCLA claims. R. at 8. FAWs also moved to dismiss the state law claims without prejudice should the CERCLA claims all be resolved by these motions. *Id*.

Judge T. Douglas Dolman of the New Union District Court granted BELCO's motion for summary judgment on the FAWs Action for recovery of CERCLA costs, holding the costs as not "necessary" CERCLA response costs and thus not reimbursable under the statute. R. at 10. Judge Dolman granted EPA's motion for summary judgment on the BELCO Action for costs and

penalties against BELCO for BELCO's failure to comply with the UAO. R. at 12. Judge Dolman also granted FAWS' motion for summary judgment vacating the portion of the UAO that requires only bottled water rather than filtration for removal of NAS-T from Fartown's wells. R. at 14. Finally, Judge Dolman denied FAWs' motion the dismiss to retain supplemental jurisdiction over the remaining state law tort claims. R. at 15. This timely interlocutory appeal followed.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment in favor of BELCO because FAWS' independent testing costs are not reimbursable under CERCLA. This court should not address the remedial action ordered under the UAO because the ERA is not an ARAR and therefore the EPA did not have the authority to issue the UAO. Finally, the District Court properly maintained supplemental jurisdiction over the pendent state law tort claims.

First, FAWS' independent testing costs are not reimbursable because only private parties who are forced to fund their own remediation efforts may recover the costs of a cleanup under CERCLA §107. *See* 42 U.S.C. §9607(a)(4)(B). The determining factor for liability under CERCLA §107 for investigatory costs is necessity; FAWS' costs were not necessary because they were duplicative at the time they were incurred. *Louisiana Pac. Corp. v. Beazer Materials & Servs.*, 811 F. Supp. 1421, 1422-25 (E.D. Cal. 1993). The costs were incurred after EPA investigation and undertaken without EPA approval and are thus subject to the general assumption that they are 'duplicative' and therefore not recoverable. *Id*. at 1425. Since response costs are only necessary when they are incurred in furtherance of an actual cleanup, FAWS' testing costs were also unnecessary because they were unrelated to an actual cleanup at the time they were incurred. *Young,* 394 F.3d at 863. Finally, these testing costs were not used to develop

remediation plans and the price of an investigation without remediation is not recoverable under CERCLA §107. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1512 (10th. Cir. 1991).

Next, the ERA is not an ARAR because state constitutional amendments are not properly promulgated pursuant to EPA requirements. *See* Env't Prot. Agency, 9234.2-05/FS, CERCLA Compliance with State Requirements (1989). The ERA does not contain its own enforcement provisions and it may not be enforced by New Union's general legal authority. *Id.* Further, the ERA is not applicable because it does not specifically address a hazardous substance or circumstance from a CERCLA site. *See Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001). Nor is the ERA relevant or appropriate because there is not a nexus between the problems it addresses and those encountered at this CERCLA site, and the ERA is poorly suited to handle the problems at this CERCLA site. *See* Env't Prot. Agency, EPA/540G/G-89/006, CERCLA Compliance with Other Laws Manual: Interim Final, at 1-65 (1988).

Since the ERA is not an ARAR, the EPA did not have the authority to issue the UAO. The EPA wrongfully relied upon the ERA to reopened the Consent Decree. The ERA is not an ARAR and thus is not a new, more stringent Regulatory Standard that the clean-up plan does not satisfy. With no other new Regulatory Standard to rely on, the EPA did not have the authority to reopen the Consent Decree. R. at 5. By closing the Consent Decree the EPA marked clean-up complete, thus further remedial action is unnecessary and the UAO was statutorily unauthorized. *See* 42 U.S.C. 9606(a); *U.S. v. Occidental Chem. Corp.*, 200 F.3d 143, 151 (3d Cir. 1999). Further, the EPA did not have the authority to issue the UAO for remedial action because there was no evidence of an imminent and substantial endangerment to the public health, or welfare, or the environment. *See* 42 U.S.C. 9606(a); *U.S. v. Conservation Chemical Co.*, 619 F. Supp. 162,

194-97 (W.D. MI, 1985). The presence of NAS-T in the few wells with positive test results is not an imminent and substantial endangerment because FAWs identified NAS-T at non-toxic levels and the contamination is contained. *Conservation Chemical Co.*, 619 F. Supp. at 194-97.

Finally, the District Court exercised proper discretion by retaining supplemental jurisdiction over the remaining state law tort claims. 28 U.S.C. §1367(c) makes retaining jurisdiction a "purely discretionary call" for the District Court and appeals courts "rarely overturn" these decisions. *Starkey v. Amber Enters.*, 987 F.3d 758, 765 (8th Cir. 2021). To determine whether the District Court abused its discretion, the court should weigh the values of judicial economy, convenience, fairness, and comity. *City of Chi. v. Int'l College of Surgeons*, 522 U.S. 156, 173 (1997). It is judiciously economical and convenient for the District Court to retain supplemental jurisdiction because of the extent of time and resources that have already gone into this and related cases. The District Court has been handling these CERCLA cases for five years and has developed a notable expertise as to the facts and issues. It would be inefficient to dismiss the state law tort claims and thus require the state court to come up to speed on the facts of this complex case. *See Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996); *Thomas v. United Steelworkers Local 1983*, 743 F.3d 1134 (8th Cir. 2014); *Trinity Indus. v. Chi. Bridge & Iron Co.*, 867 F. Supp. 2d 754, (W.D. P.A. 2012). Further, there is no issue of fairness or comity because these tort claims are not novel or complex. *Starkey*, 987 F.3d at 766. The judicial procedure will be the same regardless of which court handles this matter. *Id*. Finally, the torts of negligence and private nuisance are well settled principles of law, a determination that often makes it a simple decision for federal courts to retain supplemental jurisdiction. *Id*.

This Court should affirm the District Court's grant of summary judgment in favor of BELCO. This Court should vacate the UAO and invalidate the response actions that the EPA seeks to enforce. Finally, this Court should affirm the District Court's choice to retain supplemental jurisdiction over the remaining state law tort claims.

ARGUMENT

I. The District Court correctly determined that FAWS' independent testing costs are not reimbursable under CERCLA.

The District Court properly granted summary judgement in favor of BELCO because FAWS' independent testing costs are not reimbursable under CERCLA §107. The District Court's decision to grant summary judgment is a question of law to be reviewed de novo. *Jackson v. Fed. Express*, 766 F.3d 189, 193-94 (2d Cir. 2014). Summary judgment is properly granted when there is no dispute as to the material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e).

Private parties who are forced to fund their own remediation efforts may recover the costs of a cleanup under CERCLA §107. *See* 42 U.S.C. §9607(a)(4)(B). All parties seeking to recover under CERCLA §107 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." *Rolan v. Atl. Ritchfield Co.*, 2019 U.S. Dist. LEXIS 183333, *14-15 (N.D. Ind. 2019) (quoting *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008)). The dispute presently before the court does not relate to the prima facie factors identified in *Rolan*, but rather the requirement that response costs incurred by non-government parties must be "necessary." 42 U.S.C. 9607(a)(4)(B); *Forest Park Nat'l Bank &*

Trust v. Ditchfield, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012). Determining liability under CERCLA §107 for investigatory costs is not a question of good faith or reasonableness; a party can be acting within reason and even within sound "business and litigation judgment" and not be entitled to recover their costs. *Louisiana Pac. Corp. v. Beazer Materials & Servs.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993). The determining factor is necessity. *Id.* at 1424. CERCLA is not designed to fund fishing expeditions and a PRP is not liable for duplicative costs detached from any actual remediation. *See Forest Park*, 881 F. Supp. 2d at 977.

1. FAWS' costs were not necessary because they were duplicative at the time they were incurred.

Costs are unnecessary if they are duplicative of work performed by the EPA. *United States v. Iron Mt. Mines*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). Investigatory costs incurred after an EPA investigation, and undertaken without EPA approval, are subject to a general assumption that they "are 'duplicative' and therefore not recoverable." *Louisiana Pac. Corp.*, 811 F. Supp. at 1425. The plaintiff bears the burden of overcoming this presumption and proving necessity. *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992).

CERCLA §107 does not exist to finance citizen initiatives to double-check the EPA's work. *See Louisiana Pac. Corp.*, 811 F. Supp. at 1426. In *Louisiana Pac. Corp.*, a private party was aware of an EPA investigation being conducted under CERCLA. 811 F. Supp. at 1425. Despite this knowledge, the private party continued with a concurrent investigation they knew to be unauthorized and subsequently sued the corporation PRP for recovery of these costs under CERCLA §107. *Id*. The Court ruled against the private party's recovery action and held that allowing the recovery would "give [the private party] discretion, not merely to double the response costs, but potentially to pass those increased costs on to third parties without notice or consent." *Id*. Such discretion was found to be without any basis in the law. *Id*.

Allowing FAWS to recover their investigatory costs under CERCLA §107 would be contrary to law. Just as in *Louisiana Pac. Corp.*, FAWS knew of the existence of not just a concurrent investigation, but a completed EPA investigation into NAS-T contamination in Fartown. 811 F. Supp. at 1425; R. at 5. They continued to fund an investigation despite knowing their actions were unauthorized. R. at 5; *see Louisiana Pac. Corp.*, 811 F. Supp. at 1425. FAWS employed Central Laboratories, Inc. within 7 months of EPA finding no detectable levels of NAS-T in a sample of Fartown's wells. R. at 5. This was a direct response to EPA's reasonable denial for further testing due to the several non-detects. *See id*. FAWS' insistence on repeating work they knew was already completed by the EPA without the authority to do so makes their investigation duplicative and therefore unnecessary and unrecoverable as response costs. *See Louisiana Pac. Corp.*, 811 F. Supp. at 1425.

2. FAWS' testing costs were unnecessary because they were unrelated to an actual cleanup at the time they were incurred.

The price of an investigation without remediation is not recoverable under CERCLA §107. *Tinney*, 933 F.2d at 1512. Response costs are only necessary when they are incurred in furtherance of an "actual cleanup." *Young*, 394 F.3d at 863. This makes sense given the goal of assigning liability under §107 is to "encourage private parties to assume the financial responsibility of cleanup." *FMC Corp. v. AERO Indus.*, 998 F.2d 842, 847 (10th Cir. 1993). In *Young*, the owner of a parcel of land adjacent to a superfund site discovered hazardous substances on their property through a self-funded investigation. 394 F.3d at 861. The landowners claimed that contamination was continuing to flow to their property from the superfund site but made no efforts to clean up or contain the identified hazards. *Id*. In fact, none of their purported damages came from anything other than the investigation and identification study. *Id*. The court struck down the landowners §107 claim and found that allowing such a

recovery action would "defeat the main purpose of CERCLA - that hazardous waste sites actually be cleaned up - and flip the statutory scheme on its head." *Id.* at 865.

FAWS is attempting to use CERCLA as a "general vehicle for toxic tort claims" in direct opposition of the statute's design. *See Young*, 394 F.3d at 861. Their position is identical to the one described in *Young*. None of their $21,500 claim stems from anything other than Central Labs' testing costs. R.at 5. Once obtained, the test results were not used to develop plans for a cleanup but rather to bolster their case with the EPA. *See id*. The court does not have to question whether a nexus exists between FAWS' costs and an actual cleanup because no actual cleanup exists; it fails as a matter of law. *See Young*, 394 F.3d at 863.

II. This court must vacate the Unilateral Administrative Order because the EPA's Finding that the ERA is an ARAR is Unpersuasive.

This court must reverse the District Court's ruling and grant summary judgment in favor of BELCO because there is no basis for finding the ERA an ARAR. The District Court's decision to uphold the EPA's determination that the ERA is an ARAR via summary judgment is reviewed de novo. *Turtle Island Restoration Network v. United States DOC*, 878 F.3d 725, 732 (9th Cir. 2017) ("We review challenges to final agency action decided on summary judgement de novo…"). Summary judgment is properly granted when there is no dispute as to the material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e). Agency classification rulings are not given *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.*, 65 S.Ct. 161 (1944)). EPA's determination that the ERA is an ARAR is given weight only "according to its persuasiveness." *See Mead Corp.*, 533 U.S. at 219-220. When determining the persuasiveness of an agency decision, courts look to "the thoroughness evident in its consideration, the validity of its

reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 65 S.Ct. at 139.

The EPA's determination that the ERA is an ARAR contradicts their own guidance documents and belies an unpersuasive shallow depth of consideration, shaky reasoning, and inconsistency. *See Skidmore*, 65 S.Ct. at 139. A law is only an ARAR when it is properly promulgated and applicable or "relevant and appropriate." *U.S. v. Akzo Coating of Am.,* 949 F.2d 1409, 1440 (6th Cir. 1991). State constitutional amendments cannot be properly promulgated because they are not enforced through the state's general legal authority. *See* Env't Prot. Agency, 9234.2-05/FS, CERCLA Compliance with State Requirements (1989). General goals are categorically not applicable because they fail to "specifically address a hazardous substance, pollutant, or contaminant." *Franklin Cnty.*, 240 F.3d at 544 (citing 40 C.F.R § 300.5). Generic statutes may still achieve ARAR status if they are shown to be "relevant or appropriate." *Akzo*, 949 F.2d at 1440. But if EPA had applied their own methodology, they would have found the ERA to be neither relevant nor appropriate. CERCLA Compliance with Other Laws, at 1-66.

1. <u>The ERA is not an ARAR because state constitutional amendments are not properly promulgated requirements.</u>

A state constitutional amendment cannot be an ARAR because it is not properly promulgated. *See* CERCLA Compliance with State Requirements . The EPA defines properly promulgated requirements as those which "(1) have their own specific enforcement provisions written into them; or (2) [may] be enforced through the State's general legal authority." *Id*. State constitutional amendments do not contain their own enforcement provisions. "General legal authority" is not clearly defined by EPA or the courts but as a term, it most readily calls to mind a state's power to create and implement laws through their legislative and executive powers; the

judicial branch is traditionally positioned as a check on this authority as well as the primary enforcement arm of constitutional rights. *See, e.g.,* Alexander Hamilton, Federalist No. 78 (May 28, 1788) *in* The Federalist Papers, 463 (Clinton Rossiter & Charles R. Kesler eds., 1961). The EPA's own published guidance supports this understanding of constitutional amendments operating in a separate class from environmental laws. CERCLA Compliance with State Requirements (1989) ("Promulgated requirements are found in State statutes and regulations that have been adopted by authorized state agencies."). The EPA's examples of potential state ARARs include state siting requirements and anti-degradation requirements for groundwater among other pointed, highly specific statutes. *Id*.

Had the EPA conducted a sufficiently thorough analysis of the ERA as an ARAR, it would have been disqualified as not properly promulgated. The New Union ERA was meant to stand separate and distinct from "existing statutes and regulations." R.Ad. at 9. The legislature set out to enshrine a fundamental right and create something "self-executing;" a right that exists without the need for additional legislation. R.Ad. at 4. While noble, this circumvention of the state's general legal authority nullifies the force of the amendment as an ARAR under CERCLA. *See* CERCLA Compliance with State Requirements (1989).

2. <u>The ERA is not an ARAR because it does not specifically address a hazardous substance or other circumstance from a CERCLA site.</u>

The ERA is not an ARAR because it is not applicable. Applicable requirements must "specifically address a hazardous substance, pollutant, or contaminant…or other circumstance found at a CERCLA site." *Franklin Cnty.*, 240 F.3d at 544. The applicability standard is a rigid "legal and jurisdictional determination." Env't Prot. Agency, 9234.2-01/FS-A, ARARs Q's and A's: General Policy, RCRA, CWA, SDWA, Post-ROD Information, and Contingent Waivers, (1991). The first step in an applicability analysis is to identify the following pertinent facts

concerning the site: "Type of Substances, When Substances Placed at Location, Type of Site or Special Location, Types of Response Action Under Consideration…, Other Characteristics." CERCLA Compliance with Other Laws at 1-62. These same factors are then pulled from the statute and placed next to the site-specific facts; if there is not a 1-to-1 exact match all the way down the line, the law is not applicable and must be considered under a "relevant and appropriate" analysis. *Id*.

The New Union ERA is not applicable because there is no exact match between the pertinent site facts and the statutory language. The facts of the BELCO site are as follows: the type of substance is NAS-T, it was placed at the site between 1973 and 1998, the site is a former chemical manufacturing plant, the current action under consideration is placing CleanStripping technology on private wells and the EPA has already issued a CD following BELCO's remediation of the site. R.3-6. The ERA fails the applicability test because it is too vague for meaningful comparison. *See* CERCLA Compliance with Other Laws at 1-62. There are no specific substances mentioned, no time restriction, no mention of which sites it applies to. N.U. Const. art. 1, §7. It must therefore be considered under the relevant or appropriate framework. *See* CERCLA Compliance with Other Laws at 1-62.

3. <u>The ERA is not an ARAR because it is not relevant or appropriate.</u>

The ERA is not an ARAR because it is neither relevant nor appropriate. In contrast to the structured process of determining applicability, a relevant and appropriate determination is ultimately a matter of professional judgment. CERCLA Compliance with Other Laws at 1-66. As a classification ruling, the EPA's decision at this step is not entitled to deference but rather must stand on its own to persuade the court. *See Mead Corp.*, 533 U.S. at 219-220.

Relevant

A relevant requirement "regulates or addresses problems or situations sufficiently similar to those encountered at the CERCLA site." CERCLA Compliance with Other Laws at 1-65. The EPA provides a series of factors which can form a sufficient nexus for relevance. *Id*. Although the standard itself is more forgiving than the applicability analysis, individual factors are meant to be construed narrowly. *Id*. Defining the goal of the CERCLA site as "protection of human health and the environment" is too broad and creates overlap with nearly all environmental laws and regulations. *Id*. Relevant requirements should aim at the same practical, rather than ideological, purpose of the removal or remedial action. *See id*. Take, for example, an Ohio site addressing groundwater contamination from industrial sludge, including some pesticides. Env't Prot. Agency, US EPA Records Center Region 5 412028, Tremont City Barrel Fill Site Record of Decision (2011). One problem faced at the site was the containment of pesticides and 40 C.F.R. §165 (2022), Pesticide Management and Disposal, was listed as a relevant and appropriate requirement. *Id* at 10. The regulation is not applicable because it pertains to facilities producing and packaging pesticides for sale and the Ohio site was an abandoned dump. *See id* at Table 6; 40 C.F.R. §165.80(b) (2022). But guidelines on how to safely dispose of pesticide waste are instructive for a site requiring the safe disposal of pesticide waste and so the regulations were included as relevant. Tremont City Record of Decision at Table 6.

The ERA is not relevant because establishing a nexus between the law and the facts of the Centerburg Site requires overbroad definitions. The stated purpose of the Amendment is to string "a safety net" between the "gaps" in environmental protections. R.Ad. at 9. The provision itself articulates a right to "clean water…free from contaminants…caused by humans." N.U. Const. art. 1, §7. For the ERA to be relevant, the purpose of the CERCLA site would have to be for BELCO to remedy the damage done by human pollution generally and/or to singlehandedly

protect New Union citizens' fundamental rights. *See* CERCLA Compliance with Other Laws at 1-65; N.U. Const. art. 1, §7. This interpretation is incompatible with reality. The purpose of any remedial action, including the cleanup in Centerburg, is to deal with hazardous waste and apportion liability among responsible parties. *Young*, 394 F.3d at 863. The ERA is irrelevant given the inherent nature of a CERCLA remediation. *See* CERCLA Compliance with Other Laws at 1-65.

Appropriate

Even if the ERA is found to be relevant, it is not an ARAR because it is not appropriate. An appropriate requirement is one whose "use is well suited to the particular Site." CERCLA Compliance with Other Laws at 1-66. The process and considerations are identical to the relevance analysis, but there is greater attention paid to the "Nature/Character of Substances; Characteristics of the Site; Circumstances of the Release; [and] Proposed Response Action." *Id*. Returning to the Ohio groundwater example, 40 C.F.R. §165 (2022) passes muster on all points. *See* Tremont City Record of Decision at Table 6. The substance is a pesticide addressed by the regulations. Tremont City Record of Decision at Table 6; 40 C.F.R. §165.30 (2022). The site contained both unidentified containerized waste and uncontained pesticides. Tremont City Record of Decision at 10; 40 C.F.R. §165.80 (2022). The release was at least partially from spills. Tremont City Record of Decision at 15, 40 C.F.R. §165.80 (2022). And, finally, the proposed response action involved constructing containment buildings to house pesticides. Tremont City Record of Decision at Table 6, 40 C.F.R. §165.80 (2022) ("protection is achieved by the construction of secondary containment units…at certain facilities handling…pesticides"). These factors all build an overwhelmingly persuasive case in favor of finding the regulations appropriate.

The ERA fares much worse on this second look. Taking a methodical and thorough approach to classification is impossible with a single sentence statute. Going through the process outlined above with the New Union amendment is an exercise in word association, not analysis. Absent definitions, it is impossible to know whether NAS-T is a "contaminant" or "pollutant" covered by the amendment. *See* N.U. Const. art. 1, §7; R.Ad. at 5. The site does contain water and, presumably, air. *See* R. at 2. Any industrial action or mistake can be said to have been "caused by humans" if the timeline is taken back far enough. *See* N.U. Const. art. 1, §7. And, finally, the proposed response action is to "clean [the] water." N.U. Const. art. 1 §7; R. at 6. This attempt to justify the ERA as an ARAR is flimsy at best. But compared with the more representative example provided in the Ohio ROD it is impossible to take seriously.

The ERA is a poignant testament to New Union's dedication to the environment. *See* R.Ad. at 9. Acknowledging the limitations of the amendment as a codified general principle will not frustrate its purpose. Nor will it be a rebuke to the people who adopted it. Identification and classification of ARARs under CERCLA is ultimately a niche decision heavily constrained by the facts. *See* CERCLA Compliance with Other Laws at 1-62. Pennsylvania, for example, has had their own Environmental Rights Amendment since the 1970s and does not identify it as a state ARAR. Pa. Const. art. 1 § 27; Dep't of Env't Prot., 262-4500-606, Applicable or Relevant and Appropriate Requirements (ARARs) for Cleanup Response and Remedial Actions in Pennsylvania, (2013). Yet their ERA is routinely used to protect the rights of citizens as intended. *See, e.g., Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 919 (Pa. 2017).

III. The EPA did not have authority to issue the UAO because the UAO was unnecessary and there is no imminent and substantial endangerment.

The EPA did not have authority to issue the UAO and thus the UAO should be vacated in its entirety. The District Court's grant of summary judgment is reviewed de novo. *Turtle Island*, 878 F.3d at 732 ("We review challenges to final agency action decided on summary judgement de novo…"). Summary judgment is properly granted when there is no dispute as to the material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e). The EPA has statutory authority to issue a UAO when "necessary to protect public health and welfare and the environment." 42 U.S.C. §9606(a). Further, whether there was an imminent and substantial endangerment is a question of law to be reviewed de novo. *Conservation Chemical Co.*, 619 F. Supp. at 197 ("Assuming a given set of facts, the determination of whether or not those facts constitute an "imminent and substantial endangerment" is a question of law").

The EPA incorrectly relied upon the ERA as a new Regulatory Standard to reopen the Consent Decree. *See* R. at 6. The CD states two explicit grounds on which the EPA can reopen the remediation:

> 3) 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
> 4) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy. R. at 4.

The CD further states that Regulatory Standards include ARARs. R. at 4. As established above in Section II, the District Court erred in affirming the finding that the ERA is an ARAR. *See* R. at 12. Thus, the EPA was incorrect, and the ERA does not qualify as a "new, more stringent Regulatory Standard" that the clean-up plan fails to satisfy. *See* R. at 4.

The EPA did not have the authority to issue a UAO absent any authority granted by the reopener provisions. The EPA can issue a UAO as necessary if "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual

or threatened release of a hazardous substance from a facility." 42 U.S.C. §9606(a). CERCLA does not define necessity or "imminent and substantial endangerment." S*ee* 42 U.S.C. §9601.

1. The UAO is unnecessary because BELCO completed the remedial action under the Consent Decree.

The UAO is unnecessary because there was no basis to reopen the CD and therefore no need to compel BELCO to complete remediation. By issuing a COC, the EPA marked the clean-up as complete subject only to reopener terms. 42 U.S.C. §9622(a). Inherent in the reopener provisions is the prerequisite that circumstances change such that supplemental remedial action is required. *See* R. at 4. Under 42 U.S.C. §9606, "the question of whether an order may be necessary to protect public health, welfare, and the environment goes to the status of the contamination at the site." *Occidental Chem. Corp.*, 200 F.3d at 151. When reopening the CD, the EPA did not cite to the first re-opener as the basis for its action. R. at 6. Regardless, any argument by the EPA that the CD should be re-opened due to new information not previously available or known fails because the EPA did not receive new information that the clean-up plan is no longer protective of human health or the environment. The EPA knew of the smell and the Central Labs test result as of June 2020 and refused to reopen the CD at that time. R. at 5. Further, information regarding Fartown's status as an environmental justice community would have been available to the EPA throughout the entire CERCLA process. Finally, the EPA has known of the potential carcinogenic effects of NAS-T since the 1980s. R. at 3.

Since the EPA did not have any sufficient reason to reopen the CD, it was unnecessary for the EPA to order further remedial action. *Occidental Chem. Corp.*, 200 F.3d at 151 (finding that the UAO was necessary because there were still hazardous substances present at levels likely to endanger public health). In contrast to *Occidental*, this CD is still satisfied, which means the clean-up remains sufficient to eliminate a need for further action as NAS-T is only present in

some wells and at non-toxic levels. R. at 5; *see* Issuance of 2021 CERCLA Model Remedial Design/Remedial Action Consent Decree and Statement of Work (2021). Thus, the EPA did not have the authority under 42 U.S.C. §9606 to issue a UAO as further remedial action was unnecessary to protect the public health, welfare, or environment.

2. The EPA did not have the authority to issue a UAO for remedial action because there is not an imminent and substantial endangerment to the public health, welfare, or the environment.

There is not an imminent and substantial endangerment to the public health, welfare, or the environment because the NAS-T levels are not toxic and contamination is contained. Whether something is or may be an endangerment depends on the case-specific circumstances. *Conservation Chemical Co.*, 619 F. Supp. at 195. The EPA is not given deference in deciding when there is "imminent and substantial endangerment" and the determination should be reviewed de novo. *Id.* at 197 ("Assuming a given set of facts, the determination of whether or not those facts constitute an "imminent and substantial endangerment" is a question of law").

An endangerment is a threatened or potential harm and imminence occurs when such harm is "actionable" such that "it presents a threat to human health or the environment." *Conservation Chemical Co.*, 619 F. Supp. at 194 (citing S. Rep. No. 284, 98th Cong., 1st Sess., at 59 (Oct. 28, 1984)). Such an imminent endangerment can be considered substantial if there is "reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Conservation Chemical Co.*, 619 F. Supp. at 194. Courts have affirmed an imminent and substantial endangerment finding where quantities of compounds found are highly toxic at low dosage levels, the site was a continuing source of contamination to groundwater, or the contamination posed a significant level of risk. *See Conservation Chemical Co.*, 619 F. Supp. at 195; *U.S. v.*

Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 846 (W.D. MI 1984); *U.S. v. E.I. du Pont de Nemours & Co.,* 341 F. Supp. 2d 215, 251 (W.D. N.Y. 2004).

There is not an imminent and substantial endangerment because there is no threatened or potential harm, let alone "actionable" harm that presents "reasonable cause for concern". *Conservation Chemical Co.*, 619 F. Supp. at 194. NAS-T is not toxic at the low levels found in Fartown's wells and thus does not present an actionable threat to human health or the environment. *See Conservation Chemical Co.*, 619 F. Supp. at 194; *Northeastern Pharmaceutical*, 579 F. Supp. at 846 (finding an imminent and substantial endangerment where the dioxin and other compounds were highly toxic at low dosage levels). The original RI/FS and resulting 2017 CD between the EPA and BELCO established that BELCO need not focus the clean-up on wells with levels of NAS-T below the Health Advisory Level (HAL) of 10ppb because NAS-T is non-toxic at and below the level of 10ppb. R. at 3-4. The EPA adopted the HAL at 10ppb to ensure a significant margin of error before a human is exposed to a toxic level of NAS-T. *Id*. at 3. There is no new information on the record to support a change in the EPA's determination that NAS-T is not toxic below the HAL. Further, when there was an actionable threat, BELCO took action through the CD to remediate the high, toxic levels of NAS-T, between 45-60 ppb, in the Centerburg Water Supply. *Id*.

There is no reasonable cause for concern because the site is not a continuing source of contamination to groundwater. *See E.I. du Pont,* 341 F. Supp. 2d at 251. Over these past 5 years, NAS-T levels have barely fluctuated and, regardless of any changes, the levels have not surpassed 8ppb in Fartown wells. R. at 5. Low levels of NAS-T, 5ppd and 6ppb, respectively, were detected in wells near Fartown in January 2018 and the EPA deemed these levels low enough to close the CD and mark remediation as complete. *Id*. Then, in June 2020, when FAWS

conducted their own monitoring of wells in Fartown and identified levels as still below 8ppb in the local wells, the EPA again declined to take further action, "citing the low levels of NAS-T". *Id*. The levels have not and will not reach the toxicity threshold under the and do not pose an imminent or substantial risk of harm.

Due to the foregoing, the EPA did not have the authority, as a matter of law, to issue the UAO and thus this court should not consider the response actions within.

IV. The District Court exercised proper discretion by retaining supplemental jurisdiction over the remaining state law claims.

The District Court did not abuse its discretion when it decided to continue exercising supplemental jurisdiction over the remaining state law claims of negligence and private nuisance. Pursuant to 28 U.S.C. §1367, a court can choose to exercise supplemental jurisdiction over claims that are so related to claims in the action over which the court has original jurisdiction that they "form part of the same case or controversy." 28 U.S.C. §1367. As the suit progresses and the court grants motions for summary judgment on the federal claims, 28 U.S.C. §1367 gives courts the choice of whether to retain supplemental jurisdiction over pendent state law claims. *Id*. "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." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).[1]

This court should review the federal district court's decision to retain supplemental jurisdiction for abuse of discretion. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639-40

[1] The ERA is irrelevant to this issue of supplemental jurisdiction. Whether a party violated the ERA is an issue of state constitutional law that FAWs did not raise. Whether the ERA is an ARAR under CERCLA is an issue of federal statutory law that will not affect a trial on negligence and nuisance per se as these will be addressed under state tort common law.

(2009); *Starkey*, 987 F.3d at 765; *Trinity Indus.*, 735 F.3d at 135. “A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.” *Carlsbad Tech*, 556 U.S. at 639-40 (citing *Osborn v. Haley*, 549 U.S. 225, 245 (2007) ("Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction") and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims")). Since 28 U.S.C. §1367(c) makes retaining jurisdiction a “purely discretionary call” for the District Court, appeals courts “rarely overturn” these decisions. *Starkey*, 987 F.3d at 765.

The Federal Circuit Courts agree that a federal court has discretion to retain supplemental jurisdiction unless there is a specific reason for state court to handle the issue. *Starkey*, 987 F.3d at 765; *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994); *Trinity Indus.*, 735 F.3d at 140-41; *Greco v. Senchak*, 627 Fed. Appx. 146 (3d Cir. 2015). While assessing the circumstances, the court should weigh the values of judicial economy, convenience, fairness, and comity”. *Int’l College of Surgeons*, 522 U.S. at 173 (quoting *Carnegie-Melon v. Cohill*, 484 U.S. 343, 350 (1988); *see also Starkey*, 987 F.3d at 765; *Purgess*, 33 F.3d at 138. In making this decision, the court usually considers the amount of time and judicial resources that have already been dedicated to the case and whether the principles of state law are well settled. *Thomas*, 743 F.3d at 1141.

1. It is judiciously economical and convenient for the District Court to retain supplemental jurisdiction because of the extent of time and resources that have already gone into this and related cases.

With respect to judicial economy and convenience, "a tremendous amount of work has gone into these cases". R. at 15. The EPA first brought a cost recovery action against BELCO in the District Court for the District of New Union five years ago, on June 30th 2017. *Id*. at 4. Over the past five years, the District Court handled several related matters as the CERCLA process developed, thus studying the intricacies of the issue and developing a notable expertise as to the facts in these cases. *Id*. at 4-8. Further, the Federal claims were only dismissed after a significant discovery process. *Id.* at 8.

By nature of the District Court exercising supplemental jurisdiction over the negligence and private nuisance claims, we know they are so related to the CERCLA claims that they form part of the same case. 28 U.S.C. 1367(a). Evaluating the negligence and private nuisance claims would require a court to understand the extent of the CERCLA claims such that the court would have to become familiar with all of the contaminants, the history of the NAS-T contamination in the geographic area, the effect of these chemicals on humans and the environment, the part that BELCO, FAWSs, and the EPA each play in this story, and the 5-year history of these cases. It would be inefficient to dismiss the state law claims to be heard in state court and require state court to come up to speed on the facts of this complex case. *See Nowak*, 81 F.3d at 1191 (where the court retained SJ because it had presided over the case for 2 years and dismissed the federal claims just before trial); *Thomas*, 743 F.3d at 1141 (where the court retained supplemental jurisdiction over state law tort claims because the parties had already expended substantial time and judicial resources); *Trinity Indus.*, 867 F. Supp. 2d at 764-65 (where court hesitated to decline to exercise supplemental jurisdiction over state law claims after a granting a motion for summary judgment to dismiss federal claims due to the extensive amount of time the parties

spent litigating these facts in federal court, only to decline because of the complex issues of state law).

2. There is no issue of fairness or comity because these tort claims are not novel or complex.

There is no issue of fairness or comity if the District Court retains supplemental jurisdiction over the state tort claims. When it comes to tort claims that are not novel or complex, federal courts often find it a simple decision to retain supplemental jurisdiction. *Starkey*, 987 F.3d at 766 (where the court retained supplemental jurisdiction because the state law tort claim was not novel or complex); *Thomas* 743 F.3d at 1141 (where the district court properly exercised supplemental jurisdiction over a state tort claim involving "well-settled principles of state law"). Federal courts battle with retaining jurisdiction over state law claims that are complex or unresolved under state law. *Trinity Indus.*, 867 F. Supp. 2d at 1141 (where the court declined the exercise supplemental jurisdiction over state law statutory claims that raised a complex issue of state law currently being addressed in state courts); *Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470 (E.D. Mich. 1993) (where the court declined supplemental jurisdiction because the state statutory claims were currently the subject of state court litigation and the federal court didn't want to interfere with the state court's adjudication of this complex state law).

"Generally, state tort claims are not considered novel or complex". *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006). The torts of negligence and private nuisance, in particular, are well settled principles of law and thus do not present novel or complex questions to the court. *See Parker*, 468 F.3d at 743; *Starkey*, 987 F.3d at 766 (citing *Thomas*, 743 F.3d at 1141); Restatement 3d Torts §3; Restatement 2d Torts §822x.

Out of respect for the values of judicial economy, and convenience and because there is no issue of comity or fairness, this court should affirm the District Court's decision to retain supplemental jurisdiction over the remaining state law tort claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of summary judgment in favor of BELCO regarding FAWS' testing costs. Further, this Court should find that the ERA is not an ARAR and thus vacate the UAO and invalidate the response actions that the EPA seeks to enforce. Finally, this Court should affirm the District Court's choice to retain supplemental jurisdiction over the remaining state law tort claims.