UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant-Cross Appellee,

v.

BETTER LIVING CORPORATION,
Plaintiff-Appellant-Cross Appellee,

-and-

FARTOWN ASSOCIATION FOR WATER SAFETY,
Intervenor Plaintiff-Appellant-Cross Appellee.

On Appeal from the United States District Court for the District of New Union in consolidated cases nos. 17-CV1234 and 21-CV-1776, Judge Douglas Bowman.

Brief of the Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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III. INTRODUCTION

The foundation of this dispute concerns the Better Living Corporation's ("BELCO") cleanup of Nitro-Acetate Titanium ("NAS-T") contamination in the state of New Union. BELCO's factory in Centerburg contaminated the soils and the Sandstone Aquifer with NAS-T. Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the EPA entered an agreement or Consent Decree with BELCO to remediate the contaminated site. NAS-T dispersed from Centerburg via the aquifer and was detected in wells by residents of Fartown. The EPA alleged that the Fartown Association for Water Safety ("Association") wrongly sought reimbursement of its costs from BELCO, which were incurred from private well sampling. Additionally, the EPA argued that New Union's recently enacted Environmental Rights Amendment ("Amendment") was an applicable or relevant and appropriate requirement (commonly "ARAR", here "Relevant Standard") that allowed the EPA to reopen BELCO's Consent Decree. Consequently, the EPA contended that it may order BELCO to conduct further remediation; however, the EPA argues it was not required to order BELCO to install CleanStripping systems in Fartown. Finally, the EPA asserted that the district court should exercise supplemental jurisdiction and retain the Association's state tort claims.

IV. JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union had subject matter jurisdiction, because the claims involved a question of federal law. 28 U.S.C. § 1331. The Association brought claims for recovery under CERCLA. 42 U.S.C. § 9607(a)(4)(B). The district court granted summary judgment on the claims on June 1, 2022. Pursuant to 18 U.S.C. § 1291,

this court has jurisdiction to hear appeals from any final decisions of the United States District Court for the District of New Union.

V. STATEMENT OF ISSUE PRESENTED

I. Whether the expenses incurred by the Association's actions to sample, test, and analyze the private drinking wells in Fartown were recoverable response costs under CERCLA.

II. Whether the Amendment was a Relevant Standard that authorized the EPA to reopen the Consent Decree and issue the Unilateral Administrative Order.

III. Whether the EPA's determination that the Amendment did not require BELCO to install filtration systems in Fartown was arbitrary, capricious, or contrary to law.

IV. Whether the district court should retain jurisdiction over the Association's remaining state tort claims after the resolution of the federal claims.

VI. STATEMENT OF THE CASE

A. Facts Relevant to the Issues Submitted for Review

1. Comprehensive Environmental Response, Compensation and Liability Act

In 1980, Congress passed CERCLA, 42 U.S.C. §§ 9601-9675, to remedy "the serious environmental and health risks posed by industrial pollution." *Burlington N. and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009). The EPA compiles and revises the National Contingency Plan to "specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances." 42 U.S.C. § 9605(a). Any person or entity affected by a hazardous substance, pollutant, or contaminant may petition the EPA to conduct a preliminary site assessment. 42 U.S.C. § 9605(d). Based on a hazard

ranking system, the EPA may add contaminated sites to the National Priorities List to begin the cleanup process. 42 U.S.C. § 9605(g)(2). The EPA is authorized to act when "(A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604(a).

After a site is identified, a remedial investigation and feasibility study (RI/FS) is completed to develop a cleanup plan. The EPA may lead the RI/FS or task the owner of the contaminated site with the investigation. *Id*. Ideally, the remedial action results in "treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances." 42 U.S.C. § 9621(b)(1).

CERCLA was written with the purpose "to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington*, 556 U.S. at 602. CERCLA does this by applying broad liability to potentially responsible parties who are associated with the contaminated site. 42 U.S.C. § 9607(a). CERCLA also broadly applies responsibility of costs. Determining which party pays for the costs of the cleanup depends on variables like the terms of any agreements and which entities engaged in the cleanup. Non-responsible parties may seek reimbursement of costs from either the EPA or from potentially responsible parties. 42 U.S.C. § 9606(b)(2)(C). A potentially responsible party must prove the EPA's remedial action selection was arbitrary and capricious to recover partial costs. 42 U.S.C. § 9606(b)(2)(D). Overall, the remedial action is the priority that may be followed by litigation for recovery or distribution of costs.

2. NAS-T Contamination of the Sandstone Aquifer

In 1995, in response to medical studies showing NAS-T was a probable carcinogen, the EPA determined a safe level of exposure to NAS-T in drinking water and set a Health Advisory Level at 10 ppb. Decision, 6. NAS-T has no other standards or regulations. *Id*. Importantly, humans can detect NAS-T through taste and smell at a lower concentration of 5 ppb. *Id*.

From 1973 to 1998, a BELCO factory manufactured NAS-T in Centerburg. *Id*. In 2013, residents of Centerburg complained their drinking water smelled sour. *Id*. The Centerburg County Department of Health found that the drinking water contained 45 to 60 ppb of NAS-T. *Id*. In response, the New Union Department of Natural Resources began an investigation and BELCO voluntarily began providing bottled water to residents. *Id*.

3. Consent Decree and Remediation

In 2016, New Union sought assistance from the EPA for both investigation and remediation of the contamination. *Id*. The EPA and BELCO entered into an agreement that required BELCO to provide bottled water to residents of Centerburg and to investigate the origin of the NAS-T contamination. *Id*. Through the RI/FS process, BELCO found that NAS-T entered the Sandstone Aquifer by way of spills and improperly stored waste water from its unlined lagoon. *Id*. The Sandstone Aquifer is beneath both Centerburg and Fartown; however, groundwater moves towards the former. *Id*. at 5. To study the extent of the contamination, BELCO installed three lines of test wells, each moving farther from Centerburg towards Fartown. *Id*. at 7. At the time of testing in 2017, the wells showed a steady decrease in NAS-T concentrations for each successive line of wells moving towards Fartown. *Id*. Other than low levels of NAS-T detected in 2018, BELCO's continued readings at test wells showed no further contamination. *Id*. at 8.

The EPA and BELCO entered into the Consent Decree that required BELCO to install CleanStripping on Centerberg public water treatment wells and to excavate contaminated soils. *Id*. at 6–7. The EPA published the cleanup plan and the Consent Decree for public comment; residents of New Union supported both. *Id*. at 7. BELCO would receive a Certificate of Completion upon fulfilling the Consent Decree. *Id*. Once the Certificate of Completion is entered, the EPA may not order BELCO to further remediate the site without specific changes in circumstances showing the cleanup plan is no longer protective of human health or passage of more stringent New Union law. *Id*. In 2018, BELCO finished the required remediation and was issued the Certificate of Completion by the EPA. *Id*.

4. Fartown Contamination

Residents of Fartown use private wells; they do not have public water treatment like in Centerburg. *Id*. at 5. Starting in 2016, residents of Fartown complained their well water smelled sour. *Id*. at 7. However, New Union did not detect NAS-T upon testing five wells in Fartown. *Id*. at 8. In response to the perceived inaction, around 100 residents of Fartown formed the Association to pool resources and hire a private testing service. *Id*. The Association's wells tested positive for NAS-T at levels below 10 ppb; it cost the Association $21,500. *Id*. At this point, the EPA did not believe there was sufficient evidence to trigger the reopening of the Consent Decree; therefore, it turned down the Association's request to take action. *Id*.

5. Enactment of the Amendment

In 2020, New Union passed the Amendment that read, "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*.; N.U. Const. art. I, § 7. This provided the residents of New Union with a fundamental right to clean water and a healthful

environment free from human-caused pollutants. Decision, 8. In 2021, New Union wrote the EPA to state that the Amendment should be considered a Relevant Standard under CERCLA. *Id*.

6. Reopening the Consent Decree

The Consent Decree allowed the EPA to reopen it if either one of two triggers was satisfied: (1) "Where new information not previously available or known to the EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment" or (2) "[w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." *Id*. at 7. Reopening the Consent Decree means the EPA may order further remediation from BELCO. *Id*.

In 2021, the EPA reopened the Consent Decree citing both the passage of the Amendment and the presence of NAS-T in Fartown as sufficient reasons to act. *Id*. at 9. The EPA issued a Unilateral Administrative Order for BELCO to test water from private Fartown wells; supply bottled water to households with positive, but safe, levels of NAS-T; and to install CleanStripping on wells testing above the Health Safety Level of 10 ppb. *Id*. at 9. BELCO refused to comply with the Unilateral Administrative Order and challenged both the reopening of the Consent Decree and the further ordered remediation. *Id*. at 10.

B. Procedural History

This is a consolidated case from (1) BELCO's action against the EPA, where the Association intervened and (2) the Association's action against BELCO. *Id*. at 4. In the first action, BELCO challenged the EPA's Unilateral Administrative Order, which directed BELCO to take additional investigative and response actions after the EPA determination that the Amendment constituted a Relevant Standard under CERCLA. *Id*. at 9. The EPA sought to recover costs and fines from BELCO. *Id*. at 10. The costs were from EPA's cleanup in Fartown

and the fines were for BELCO's violation of the Unilateral Administrative Order. *Id*. The Association motioned to intervene in the BELCO action to assert a claim against the EPA. *Id*. The Association alleged that the EPA failed to compel BELCO to provide CleanStripping filtration systems on the private wells and challenged the Unilateral Administrative Order as arbitrary, capricious, and contrary to law under 5 U.S.C. § 706(2)(A). *Id*. The Association further contended CleanStripping filtration is required under the Amendment. *Id*.

In the second action, the Association and 85 individual plaintiffs from Fartown argued that the Amendment "grants a 'fundamental right' to clean water above and beyond any general or specific relevant federal environmental law." *Id*. at 10, 14. The Association's first cause of action sought recovery of costs from BELCO for the $21,500 spent on testing and analysis. *Id*. at 10. The Association's second cause of action sought tort and punitive damages from BELCO for negligence and private nuisance claims under New Union state law. *Id*. The Association plead for the district court to order BELCO to: (1) pay the response costs; (2) install CleanStripping on their private wells that tested positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay it damages for the loss of use and enjoyment of its properties and diminished property values, and; (5) pay punitive damages. *Id*.

All three parties filed timely motions and cross-motions for summary judgment on the CERCLA claims. *Id*. at 11. Additionally, the Association motioned to dismiss any remaining state law claims without prejudice if the CERCLA claims are resolved by motion. *Id*. at 10. The district court denied the motion to dismiss and retained jurisdiction over the state claims. *Id*. at 10–11. The district court granted summary judgment: (1) to BELCO in respect to reimbursement of the Association's expenses in testing; (2) in favor of the EPA with respect to its determination to reopen the Consent Decree and to issue the Unilateral Administrative Order and; (3) in favor

of the Association as to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells. *Id*. at 18. The court denied the Association's motion to dismiss the remaining state law claims. *Id*. This appeal followed.

VII. SUMMARY OF THE ARGUMENT

The parties to this case collectively disagree about the significance of low levels of NAS-T in the Sandstone Aquifer, what constitutes an appropriate response by the EPA to BELCO's contamination, and finally, what parties should bear the costs stemming from NAS-T contamination. In responding to the NAS-T contamination, the EPA reasonably interpreted the Amendment, determined a sufficient and economical course of action, and appropriately sought costs from BELCO. The EPA's response actions were proportionate to the specific risks NAS-T posed to residents of Fartown.

The Association's sampling, testing, and analyzing of private drinking wells were not reimbursable response costs because the EPA had already issued the Certificate of Completion to BELCO. Therefore, the Association's subsequent testing was unnecessary. To allow the Association to recover its expenses as response costs would undermine the EPA's authority under CERCLA and would set a dangerous precedent allowing private parties to recover costs from their own investigation absent EPAs consent.

The Amendment was a Relevant Standard that authorized the EPA to reopen the Consent Decree and issue the Unilateral Administrative Order, requiring further remedial action from BELCO. The Amendment was applicable to the Sandstone Aquifer contamination under CERCLA because it was properly promulgated by the New Union Legislature, was more stringent than federal law, was applicable or relevant and appropriate to the NAS-T

contamination, and was timely identified under the Consent Decree. The EPA properly reopened the Consent Decree after the Association's testing revealed the greater extent of NAS-T contamination and the Amendment was enacted. Therefore, the Unilateral Administrative Order was enforceable against BELCO and necessary to protect public health.

The EPA's decision not to order BELCO to install CleanStripping technology in Fartown was not arbitrary and capricious because the actions were reasonably based on the administrative record and reflected the purposes and requirements of both CERCLA and the Amendment. The EPA's actions and its Unilateral Administrative Order were reasonable in light of the Amendment. Further, the EPA action was not arbitrary and capricious because it was consistent with prior actions and was the product of EPA expertise.

The district court was correct to retain jurisdiction over the Association's remaining state tort claims. The district court had original jurisdiction over the CERCLA claims and properly exercised supplemental jurisdiction because the tort claims are neither novel nor complex. Throughout these consolidated cases the district court has demonstrated a diligent application of New Union state law and has provided this Court no reason to hold that dismissal is the proper course of action.

VIII. STANDARD OF REVIEW

The district court granted summary judgment on issues I, II, and III. A grant of summary judgment is proper when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On appeal, review of a district court's grant of summary judgment should be heard de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). On review, the appellate court should apply

the same standard as the district court. *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003).

As to issue IV, the district court denied the Association's motion for voluntary dismissal. On appeal, denial of such a motion is reviewed for abuse of discretion. *Fluker v. Cnty. of Kankakee*, 741 F.3d 787, 794 (7th Cir. 2013); *Davis v. Huskipower Outdoor Equip. Corp*., 936 F.2d 193, 198–99 (5th Cir. 1991).

IX. ARGUMENT

A. Under CERCLA, the Association's sampling, testing, and analyzing of private drinking wells are not reimbursable response costs.

The district court appropriately held that the Association's costs incurred through testing are not necessary response costs, and are not reimbursable under CERCLA. Because BELCO introduced NAS-T into the Sandstone Aquifer, they are a liable party that must pay for any necessary response costs incurred by another party consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B). To qualify for response costs, the Association must prove: (1) the site in question is a 'facility'; (2) BELCO is a responsible party; (3) there has been a release of a hazardous substance; and (4) the Association has incurred costs in response to that release. *Sycamore Indus. Park Assoc. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008).

Additionally, because the Association is a private party, it "must show that any costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan.'" *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012). To recover the response costs incurred testing the private wells, the Association must show their tests were necessary and in furtherance of the investigation required by the EPA. The Association has failed to show that their testing was necessary or in furtherance of the EPA's

requirements in the Consent Decree. Therefore, the Association should not be able to recover response costs because the costs were unnecessary, and did not comply with the EPA's authority under CERCLA.

1. The Association's costs are not recoverable because the EPA had already issued the Certificate of Completion to BELCO, and therefore the Association's subsequent testing was unnecessary.

Response costs must be necessary for cleanup efforts in order to be recoverable. In *Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc.*, the Tenth Circuit stated that as a matter of law, response costs are not necessary if the efforts were not "closely tied to the actual cleanup." 209 F. Supp. 3d 1093, 1114 (E.D. Mo. 2016). In that case, the plaintiff was unable to show that the response costs were in any way tied to the cleanup of a hazardous release. The plaintiffs sought to show that their property was still contaminated, but they did not offer new evidence from their investigation, nor did they attempt to clean up the hazard. *Id.* (citing Y*oungs v. U.S.*, 394 F.3d 863, 863–865 (10th Cir. 2005)). The court went on to say that "plaintiffs ha[d] not proven their response costs 'significantly benefit[ted] the entire cleanup effort.' Therefore, [the plaintiff's] costs [were] not recoverable under CERCLA" *Id.* at 1115 (citing *Gussack Realty Co. v. Xerox Corp.,* 224 F.3d 85, 91–92 (2d Cir. 2000)). Here, the district court held that the conducted testing did not offer new evidence, but only showed what already existed. Decision, 12–13. Specifically, while the contamination did exist and was migrating toward the properties in Fartown, the testing offered no new scientific findings. *Id*. at 12. The Association did not act in furtherance of an EPA investigation; their actions were unnecessary because BELCO continued regular testing. *Id*. at 8. The Association did not provide new information other than re-establishing confirmed results from testing that the EPA required BELCO to perform in the initial remediation process. *Id*. at 12.

As a general requirement, response actions are unnecessary if they are duplicative of testing that has already been performed. In *U.S. v. Iron Mt. Mines, Inc.*, the court held, "for a response action to be 'necessary,' it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question." 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). Even if the actions were taken in good faith or if the plaintiffs had been reasonable in their conduct, the response actions remain unnecessary if they are not relevant to the remediation process. *Louisiana-P. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1997). Similarly, when the Association conducted its own testing of the private drinking wells, the EPA had already issued the Certificate of Completion to BELCO. Decision, 8. In the initial remediation process, the EPA required BELCO to test the wells and soils near Fartown. *Id*. at 7. BELCO continued to test throughout 2019 and 2020. *Id*. at 8. When the EPA issued the Certificate of Completion to BELCO in 2018, the EPA was not permitted to order further remediation of the Sandstone Aquifer without reopening the Consent Decree. *Id*. at 7–8. The EPA declared that no new testing was required by BELCO on the private wells in Fartown, thus concluding the EPA's investigation. The Association's testing was duplicative of the EPAs concluded actions.

When the EPA concluded its remediation, New Union had not adopted the Amendment. The EPA required no further testing of Fartown wells and soils. In *Youngs v. U.S.*, the court held that response actions are necessary if they are "closely tied to the actual cleanup of hazardous releases." 394 F.3d 858, 863 (10th Circ. 2005). Here, the Association wanted the additional testing to reopen the Consent Decree so that BELCO would be required to implement new systems to remove NAS-T. Decision, 8. Because the Amendment was not yet adopted, the EPA held that BELCO was not required to implement CleanStripping filtrations nor require further

remediation in Fartown. *Id*. at 7–8. Thus, the response was unnecessary as a timely matter because no further investigation was pending, and no new testing was necessary because the Amendment was not yet adopted.

The nonexistent or low concentrations of NAS-T identified in Fartown wells were deemed non-harmful. *Id*. at 6. BELCO continued to test the wells, but no significant detections had been reported since the issuance of the Certificate of Completion. *Id*. at 8. Thus, the EPA required no new testing, regardless of the adoption of the Amendment. The EPA had already issued the Certificate of Completion and stopped further investigation and remediation into the Sandstone Aquifer contamination. *Id*. at 7–8. When the Association initiated its own response action through testing of private drinking water wells, the response action was unnecessary as a timely matter. The Association should not be able to recover their response costs because the testing was unnecessary and the EPA had already issued the Certificate of Completion.

2. Allowing the Association to recover its expenses as response costs will undermine the EPA's authority under CERCLA and would set a dangerous precedent allowing private parties to recover costs from their own investigation, absent EPA's consent.

EPA's authority under CERCLA will be frustrated if private parties—absent the EPAs' permission—are able to perform further investigations into CERCLA cleanups and then recover their costs. According to the National Contingency Plan, prior approval is needed by the administrator of the EPA in order to be reimbursed for any response actions. Activities by Other Persons, 40 C.F.R. § 300.700(d) (2022). Further, the rule states that prior approval from the EPA indicates the response actions are consistent with the National Contingency Plan, and are reasonable and necessary. *Id*. Here, the Association conducted its own response action without receiving prior EPA approval, after EPA refused to conduct further testing. Decision, 8. The EPA had already issued BELCO the Certificate of Completion following the testing and remediation required by the Consent Decree. *Id*. Thus, the EPA required no new testing to be

conducted in Fartown. The district court approved the Consent Decree after taking public comment with no objection from the residents of Fartown, and determined that the Consent Decree was fair and reasonable. *Id*. at 7. Thus, there was no legal basis for the Association to recover response costs from testing conducted on its private wells.

As a policy matter, a private party should not be allowed to claim response costs incurred during further unauthorized investigation because to do so would undermine the EPA's authority. A plaintiff that is a non-government party must show that their investigative actions are necessary and consistent with the National Contingency Plan, in order to be recoverable. *Ditchfield*, 881 F. Supp. 2d at 977. The EPA issued the Certificate of Completion to BELCO in September of 2018 at the conclusion of the testing of the final line wells located near Fartown—with non-detectable or low concentrations of NAS-T in the wells. The Association was not pleased that EPA would not conduct further testing. Decision, 8. The Association chose to conduct their own testing despite the EPA not authorizing more testing to be done. *Id*. The additional testing by the Association undermined the EPA's authority. If the Association were allowed to recover, it would set a dangerous precedent that private parties can recover response costs even after a Certificate of Completion had been issued and absent approval from the EPA.

B. The Amendment was a Relevant Standard that authorized the EPA to reopen the Consent Decree and issue the Unilateral Administrative Order requiring further remedial action from BELCO.

Under CERCLA, Relevant Standards may determine the extent of cleanup goals; they provide the state meaningful involvement in crafting a remedial action. 42 U.S.C. § 9621(f)(1). At minimum, CERCLA requires that remedial actions meet federal environmental law standards. 42 U.S.C. § 9621(d)(2)(A). Furthermore, the remedial action must meet "any promulgated standard, requirement, criteria, or limitation under a State environmental...law that is more

stringent than any federal standard." *Id*. These provisions allow the application of state law as a Relevant Standard to provide "a mechanism for state involvement in the selection and adoption of remedial actions." *State of Colo. v. Idarado Mining Co*., 916 F.2d 1486, 1495 (10th Cir. 1990).

The EPA appropriately applied the Amendment as a Relevant Standard to supplement the remedial action of the Sandstone Aquifer contamination. The purpose of the Amendment is to "protect public health and the environment" from "contaminants and pollutants caused by humans." Legislative History, 2. Similarly, the purpose of a remedial action under CERCLA is to reduce the "volume, toxicity or mobility" of hazardous substances present in the environment. 42 U.S.C. § 9621(b)(1). The Amendment's environmental protections are relevant to the Sandstone Aquifer contamination caused by spills and improper storage of NAS-T. Decision, 3. The Amendment qualifies as a Relevant Standard because it was enacted to prohibit harmful human-caused contamination. Legislative History, 2.

1. The Amendment, enacted by the New Union Legislature to ensure access to clean water, was applicable to the Sandstone Aquifer contamination as a Relevant Standard under CERCLA.

The Sixth Circuit decision in *Akzo* recognized a Michigan nondegradation law promoting a healthy environment as an acceptable Relevant Standard. *U.S. v. Akzo Coatings of Am., Inc*., 949 F.2d 1409 (6th Cir. 1991). In *Akzo*, the public expressed concern that a remedial flushing technique violated state nondegradation law. *Id*. at 1441. Michigan intervened for the public and challenged the remedial action in the proposed consent decree. *Id*. at 1442. The Sixth Circuit agreed with Michigan's argument that its nondegradation law qualified as a Relevant Standard. *Id*. Using CERCLA, the Sixth Circuit determined the nondegradation law qualified as a Relevant Standard because it was (1) properly promulgated, (2) more stringent than federal standards, (3)

legally applicable or relevant and appropriate, and (4) timely identified. *Id.* at 1440; 42 U.S.C. § 9621(d)(2)(A). The four-part *Akzo* test is a restatement of CERCLA's language and can be appropriately applied here. As in *Akzo*, the Amendment is a Relevant Standard that may be applied to the Sandstone Aquifer remedial action.

a. First, the Amendment was properly promulgated by the New Union Legislature.

A state law must be promulgated to be recognized as a Relevant Standard. 42 U.S.C. § 9621(d)(2)(A). The EPA views a law or regulation as promulgated when it is generally applicable, legally enforceable, and was imposed by state legislative bodies or developed by state agencies. Notice of Guidance, 52 Fed. Reg. 32496, 32498 (Aug. 27, 1987). The Amendment was passed by the New Union Legislature and signed into law by the Governor. Decision, 8. Therefore, the Amendment was properly enacted and carries the force of law.

In *Akzo*, Michigan successfully argued that the enforcement of its nondegradation law in other actions was evidence that it was promulgated. 949 F.2d at 1442. Here, the extent of the Amendment's enforceability is untested; and yet, similar constitutional language has been enforced in other states. For example, Montanans have successfully litigated both their constitutional right to a "clean and healthful environment" and the duty to "maintain and improve" the environment. Mont. Const. art. II, § 3; *id*. art. IX, § 1. The Montana constitutional rights have been enforced in lawsuits that allowed recovery of remedial damages for land contaminated by benzene; enjoined a landowner from digging a test well to prevent the spread of contaminated water; and found that state permits allowing test wells to discharge into a river were arbitrarily issued. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 165 P.3d 1079 (Mont. 2007); *Cape-France Enterprises v. Est. of Peed*, 29 P.3d 1011 (Mont. 2001); *Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999). Here, the Amendment shares with the

Montana Constitution the language and goals of providing a "healthful environment." Both New Union and Montana have enshrined their environmental protections as fundamental constitutional rights. The similarity between both constitutional rights supports the enforceability of the Amendment.

Importantly, EPA guidance defining promulgation excludes "[s]tate advisories, guidance, or other non-binding policies, as well as standards that are not of general application." 52 Fed. Reg. at 32498. To avoid vagueness, a standard must have "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). In *Akzo*, the Sixth Circuit held the language of Michigan's nondegradation law was not vague because banning "discharge into the waters" that "may become injurious" provided sufficient context and substance for interpretation. 949 F.2d at 1441.

Similarly, the Amendment's language provides sufficient detail for residents of New Union to understand that BELCO's contamination of the Sandstone Aquifer is prohibited conduct. The Amendment provides a right to a "healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. I, § 7. NAS-T is a contaminate that was spilled and introduced into the environment by BELCO. Decision, 6. This specific type of contamination was contemplated by the New Union Legislature and provided for in the Amendment's plain language. Legislative History, 2. The Amendment was properly promulgated because it was enacted by the New Union Legislature, it is enforceable, and definitive.

b. Second, the Amendment is more stringent than federal law because it strictly prohibits human-caused contamination while broadly applying to air, water and the environment.

To be recognized as a Relevant Standard, a state law must be more stringent than federal law. 42 U.S.C. § 9621(d)(2)(A). EPA regulations explain that where a state Relevant Standard is

broader in scope than the federal standard, the state's is considered more stringent. National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988) (to be codified at 40 C.F.R. pt. 300). In *Akzo*, the Michigan nondegradation law prohibited contaminated discharge, even where the receiving water showed similar levels of contamination. 949 F.2d at 1444. The Sixth Circuit found this standard broader and more stringent than the applicable federal standards, which allowed discharge with levels of contamination similar to those in the receiving waters. *Id*. at 1444.

Likewise, the Amendment's language provides a broad and declarative statement against harmful contamination. Future lawsuits will determine how best to interpret an "environment free from contaminants and pollutants caused by humans," but legislative history indicates that "clean" air and water cannot be harmful to residents of New Union or their environment. Legislative History, 5. NAS-T was manufactured by BELCO and is a possible carcinogen that has contaminated the Sandstone Aquifer. The Amendment provides a fundamental right that requires all air and water to be clean and further prohibits human-caused contamination of the environment. N.U. Const. art. I, § 7. The scope of the Amendment is broader than federal standards and is therefore more stringent.

c. Third, the Amendment protects New Union's environment and the health of its residents from human-caused contaminants such as NAS-T.

A state law must be applicable or relevant and appropriate to the contaminated site to be recognized as a Relevant Standard. 42 U.S.C. § 9621(d)(2)(A). CERCLA requires a potential Relevant Standard be "legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release...of such hazardous substance or pollutant or contaminant." *Id*. Applicable is a higher standard that requires the standard "specifically address a hazardous substance." Definitions, 40 C.F.R. §

300.5 (2020). Whereas a relevant and appropriate standard must "address the problems or situation sufficiently similar" to the CERCLA remediation. *Id*.

In *Akzo*, the Michigan nondegradation law regulated discharges into state waters. 949 F.2d at 1445. The Sixth Circuit found the law was legally applicable to the proposed remedial flushing technique. *Id.* at 1445. Importantly, CERCLA accepts both applicable or relevant and appropriate laws as Relevant Standards; the Sixth Circuit stated that even if the Michigan nondegradation law was not applicable, it was still relevant and appropriate. *Id*. at 1446.

Here, the Amendment was relevant to the contamination of the Sandstone Aquifer. The Amendment's language provides a right to non-harmful water and prohibits human-caused contamination of the environment. N.U. Const. art. I, § 7. NAS-T became a human-caused contaminant when BELCO introduced it to the environment through spills and improper storage in an unlined lagoon. Decision, 6. The New Union Legislature intended the Amendment to fill the "regulatory gaps" for chemicals that "remain unregulated." Legislative History, 9. The EPA Health Advisory Level is the only extant federal guidance for NAS-T; otherwise, it remains an unregulated hazardous material. Decision, 6. The Amendment is relevant to the Sandstone Aquifer contamination, and it is appropriate for the EPA to apply it as a Relevant Standard.

d. Finally, the Amendment was timely identified under the Sandstone Aquifer Consent Decree.

Although CERCLA usually requires the EPA to apply new Relevant Standards prior to issuing a consent decree, the Sandstone Aquifer Consent Decree allowed the EPA to consider new Relevant Standards if they arose. 42 U.S.C. § 9621(f)(2)(A); Decision, 7. The New Union Department of Natural Resources wrote the EPA, stating that the Amendment should be recognized as a Relevant Standard. Decision, 9. The Amendment is a valid Relevant Standard

because it was properly promulgated, is broader and more stringent than federal standards, is relevant to the Sandstone Aquifer contamination, and was timely identified.

2. The EPA properly reopened the Consent Decree after the Association's testing revealed the greater extent of NAS-T contamination and the Amendment was enacted, establishing a new Relevant Standard.

BECLO agreed to specific triggers that would allow the EPA to reopen the Consent Decree even after the Certificate of Completion was issued. To do this, either new information had to arise showing that the remediation was no longer protective of human health, or a more stringent environmental standard had to be established that made the cleanup insufficient. *Id*. at 7. The spread of NAS-T, established by the Association's testing, constituted new information not previously known to the EPA. *Id*. at 9. And the Amendment, enacted by the New Union Legislature, constituted a new, more stringent Regulatory Standard. *Id*. Both events are independently sufficient for reopening the Consent Decree.

The first trigger was satisfied when the Association reported the spread of NAS-T contamination. In 2020, the Association found that almost half of the sampled Fartown wells had detectable NAS-T concentrations. *Id*. at 8. The EPA did not act immediately on these results because the NAS-T levels were low. *Id*. However, the EPA had heightened concern about the possible harm that NAS-T would cause in Fartown because of its status as an environmental justice community and concluded it should act on the new information. *Id*. at 9. The detection of NAS-T in Association wells was new information that showed the original cleanup plan was insufficient to protect human health.

The second trigger was satisfied when the New Union Legislature passed the Amendment. The cleanup plan did not satisfy the Amendment because it allowed residents of Fartown to be exposed to human-caused contamination. Furthermore, the Amendment is broader

and therefore more stringent than the existing laws informing the Consent Decree. The new information on the greater extent of the contamination and the recognition of the Amendment as a new Relevant Standard are each sufficient to reopen the Consent Decree.

3. After the Consent Decree was properly reopened, the Unilateral Administrative Order was necessary to protect public health.

A unilateral administrative order is appropriate to avoid "imminent and substantial endangerment to the public health or welfare or the environment because of actual…release of hazardous substances." 42 U.S.C. § 9606(a). Here, the Association found that NAS-T contamination was more extensive than the EPA or BELCO originally believed. Decision, 8. NAS-T had spread to Fartown and was detectable in residents' private drinking wells. *Id*. Accordingly, the EPA determined the contamination presented an imminent threat to public health and issued the Unilateral Administrative Order. *Id*. at 9–10. The EPA required BELCO to assist in testing for NAS-T, and where necessary provide bottled water and install CleanStripping technology. *Id*. at 9. The new information regarding the extent of the contamination makes the Unilateral Administrative Order appropriate. Importantly, if this Court finds that the Amendment is a new Relevant Standard, neither the Association nor BELCO dispute the legitimate authority of the EPA to issue a Unilateral Administrative Order. *Id*. at 13.

C. The EPA's decision not to order BELCO to install filtration systems was not arbitrary and capricious because the decision was reasonably based on the administrative record and reflected the purposes and requirements of both CERCLA and the Amendment.

Although the Association brought their claim on this matter under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), CERCLA itself provides specific limits on judicial review of claims concerning the adequacy of EPA response actions. CERCLA limits such judicial review to an arbitrary and capricious standard of review. 42 U.S.C. § 9613(j)(2). The EPA's

actions will be upheld unless the objecting party can demonstrate on the administrative record "that the decision was arbitrary and capricious or otherwise not in accordance with law." *Id*. Similarly, judicial review "shall be limited to the administrative record." 42 U.S.C. § 9613(j)(1). An agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

The Association contends that the EPA's decision was arbitrary and capricious because the EPA did not require BELCO to pay for or install CleanStripping filtration technology on Fartown wells that tested positive for NAS-T in concentrations below 10 ppb. Decision, 16. This claim rests on the Association's alternate interpretation of the term "clean water" in the Amendment, and the implication that any concentration of NAS-T renders a source out of compliance with the Amendment as a Relevant Standard. The Association does not allege that the EPA failed to consider important aspects of the problem, that it considered factors beyond what Congress had intended in these circumstances, or that its explanation runs counter to the evidence. Therefore, the Association's sole claim under the arbitrary and capricious standard of review rests narrowly on the reasoning the EPA applied to the administrative record in determining the scope of remedial action required by the Relevant Standards.

The EPA's application of the Amendment to the situation in Fartown was a reasonable decision, and was not arbitrary, capricious, or contrary to law. The directives in the Unilateral Administrative Order reflect the statutory requirements of CERCLA, a plain language reading of the Amendment, agency expertise, and consistency with EPA policy. Applying the

Amendment's guarantee of "clean water" to Fartown, the EPA rationally interpreted the administrative record and issued directives that adequately protected the health and wellbeing of Fartown residents.

1. The Unilateral Administrative Order reasonably reflects the requirements and purposes of both CERCLA and the Amendment.

a. The EPA's actions reflect the requirements and purposes of CERCLA.

The purposes of CERCLA are to "designate and promote the timely cleanup of hazardous waste sites" and "to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington,* 556 U.S. at 603. As part of accomplishing CERCLA's basic statutory purposes, section 121(b)(1) requires the EPA to select a remedial action that is "that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." 42 U.S.C. § 9621(b)(1). Therefore, an appropriate remedial action should (1) protect human health and the environment, (2) be cost effective, and (3) offer a measure of permanency.

The range of actions available to the EPA in implementing the Amendment is explicitly limited by CERCLA section 121(b)(1), which requires the EPA to attain or waive Relevant Standards for any contamination or hazardous substance that will remain onsite. 42 U.S.C. § 9621(d). The EPA's internal guidance states that general state goals (as opposed to explicit numerical standards) "may have to be interpreted in terms of a site and therefore may allow more flexibility in approach." 52 Fed. Reg. at 32498; *see also Akzo*, 949 F.2d at 1450.

The EPA's choice of action was reasonable under the CERCLA framework. The Association's argument focuses solely on "clean water." Decision, 16. Because the Association's clean water claim only relates to the first factor from section 121(b)(1), requiring protection of

human health and the environment, the EPA action was not arbitrary and capricious with regard to cost or permanency. Still, the EPA was required to balance the three factors of section 121(b)(1), and it follows that the implementation of the Relevant Standards did just that. Indeed, the administrative record includes the earlier remedial actions, which required BELCO to permanently address the source of the contamination by excavating contaminated soils from and around the abandoned BELCO lagoon. *Id*. at 9. Further, the administrative record shows an attention to the cost-effectiveness of various remedial measures. The RI/FS included estimates for the costs of pumping and treating the water in the Sandstone Aquifer, and ultimately informed the EPA's 2017 Record of Decision. *Id*. at 7. In addition, the EPA ultimately required BELCO to provide bottled water, rather than order the more expensive options of CleanStripping filtration system. *Id*. at 9. Finally, the EPA consulted the existing Health Advisory Levels to determine safe and allowable levels of NAS-T concentration. *Id.* Therefore, the EPA's application of the Relevant Standard shows a balance of all three factors from CERCLA section 121(b)(1) and is the product of reasoned decision making.

The EPA's choice of action was a reasonable application of the Amendment to the specific circumstances in Fartown. As the EPA's internal guidance indicates, a general state environmental goal "may have to be interpreted in terms of a site." 52 Fed. Reg. at 32498. The EPA was therefore charged not with interpreting the Amendment for the state of New Union, but with determining how to reasonably apply the Amendment to these specific circumstances while avoiding conflict with CERCLA and EPA procedure. Here, the administrative record shows that the EPA considered the specific circumstances in Fartown. The resulting agency action reflected scientific data from the Health Advisory Levels, test results from local wells, and the odors and potential health effects associated with NAS-T. Decision, 9. Therefore, the directives in the

Unilateral Administrative Order reflect these local conditions, and require adherence to detailed protocols attuned to the local situation. Furthermore, the EPA's application of the Amendment was specific to NAS-T, and did not make any broader pronouncements regarding its application to contamination and clean water in New Union.

In applying the Amendment, the EPA was not merely interpreting it, but rather was exercising discretion in determining a course of action that was reasonable given the geographic circumstances of Fartown and the requirements of CERCLA. The arbitrary and capricious standard is deferential to agency decision making, and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfr. Ass'n,* 463 U.S. at 43. Applying the Amendment required the EPA to exercise considerable discretion, and in doing so the EPA reasonably interpreted the administrative record to arrive at a conclusion satisfying the requirements of CERCLA.

b. The EPA actions are reasonable in light of the Amendment.

The text of the Amendment supports the EPA's interpretation and choice of action. The plain language of the Amendment grants to the people of New Union a fundamental right that encompasses three distinct guarantees. Specifically, the Amendment enumerates "a fundamental right to *clean air* and *clean water* and to *a healthful environment free from contaminants and pollutants caused by humans*." N.U. Const. art. I, § 7 (emphasis added). The EPA does not contest the guarantees to "clean air" or "a healthful environment free from contaminants and pollutants caused by humans." Further, the Association has appealed specifically on the grounds of the EPA's application of "clean water" as a Relevant Standard. Decision, 16.

A careful reading of the plain language of the Amendment does not indicate a requirement that "clean water" be "free of all contaminants and pollutants caused by humans." N.U. Const. art. I, § 7. Rather, that specific requirement is reserved for the guarantee of a

"healthful environment." The administrative record includes the Amendment, and the EPA consulted its text as the primary authority on the standards it represents. The term "clean water" as it appears in the text is devoid of additional modifying language. In contrast, the guarantee to "a healthful environment" is modified by "free from all contaminants and pollutants caused by humans." *Id*. For the EPA to ensure an environment—including air, water, and land—"free from contamination caused by humans" would require action far beyond the scope of CERCLA. The state may in time determine the precise standard indicated by the term "clean water." But lacking any examples or numerical guidance from New Union, the EPA was left to apply the term to the specific circumstances of Fartown by applying its expertise to the information in the administrative record. The EPA's choice of action was therefore the product of reasoned decision making, given the plain language of the Amendment.

The EPA's action also reflects the basic intent and purpose of the Amendment. The administrative record in front of the EPA at the time of its decision includes the passage of the Amendment. Decision, 9. The legislative history, included as part of that passage, indicates that the "Purpose or General Idea" of the bill that later became the Amendment was to "protect public health and the environment ensuring clean air and water, including and not limited to, harms from contaminants and pollutants caused by humans." Legislative History, 2. The New Union Legislature therefore voted on a bill that was clearly premised on protecting health, rather than ensuring water absolutely free from contaminants. This same focus on human health is reflected in the EPA's decision making, where it used the previously determined Health Advisory Levels to shape its remedial approach. Decision, 9. The requirement for CleanStripping filtration on wells showing more than 10 ppb of NAS-T is based on the EPA's understanding of the health

effects of NAS-T. *Id*. Further, the Health Advisory Level included a margin of error to further protect human health. *Id*. at 6.

The legislative history of the Amendment also shows a focus on drinking water. The justification offered to the New Union Legislature to support the Amendment specifically refers to the "importance of clean drinking water." Legislative History, 2. The EPA's application of the Amendment to Fartown's wells reflects this specific focus on drinking water. While the Health Advisory Levels would likely not require the EPA to take any action for wells showing less than 10 ppb of NAS-T, the EPA required BELCO to provide bottled water for any well showing a concentration of NAS-T greater than 4 ppb. Decision, 6, 9. While the Association argues that the EPA must require water entirely free of NAS-T for all purposes, the EPA's choice of actions reflects a strict and reasonable reading of the intent and purpose behind the Amendment.

2. The EPA action was not arbitrary and capricious because it was consistent with agency policy and was the product of EPA expertise.

Agencies are required to justify changes in policy. In *State Farm*, the court held that a change in agency policy would be arbitrary and capricious if it lacked adequate justification within the administrative record. *Motor Vehicle Mfr. Ass'n,* 463 U.S. at 29. Similarly, the court previously held in *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade* that a change in agency policy requires a reasoned analysis explaining the change, lest the change be arbitrary. 412 U.S. 800, 808 (1973). In *F.C.C. v. Fox Television Stations, Inc.*, the court held that a change in agency policy by the FCC was *not* arbitrary and capricious, and further clarified the bar an agency must clear for changing it's position, explaining "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." 556 U.S. 502, 514–15 (2009).

The EPA's choice of action was a reasonable application of its expertise, consistent with its prior practice. In selecting a remedial action, the EPA gave a "hard look" to a wide variety of information and sources in the administrative record. The EPA's decision was shaped by prior studies on the health effects of NAS-T, multiple tests of wells in and around Fartown, and the input of the New Union Department of Natural Resources. Decision, 9. This last source of information is particularly compelling, given the state of New Union instructed the EPA to apply the Amendment in a manner that was consistent with federal regulations. The EPA is charged with administering a vast array of programs that regulate water quality, the most notable of which is the Clean Water Act. As a general matter of practice, the Clean Water Act authorizes the EPA to administer programs regarding permitted and unpermitted discharges of pollutants into the waters of the United States. 33 U.S.C. §§ 1311, 1313. In neither instance does the EPA pursue a broad, and inflexible course of action that prohibits the discharge of any pollutant or contaminant. The EPA is instead charged with determining the appropriate levels and amounts of pollutants that can safely be present in water fit for other purposes. Here, the EPA performed precisely the same role when it determined the appropriate and safe concentrations of NAS-T based on the Health Advisory Level.

The term "clean water" may likely have enough play in the joints to accommodate both understandings; the practical application where certain levels of contamination are tolerated as safe and legal by the EPA (as in the case of Clean Water Act) and the absolute standard of no contamination (as advanced by the Association). The EPA was forced to select a remedial action with limited guidance as to the precise meaning of New Union's Amendment. To have applied the Amendment as the Association requested would have gone against the significant weight of agency procedure, and would have required significant justification not supported by the

administrative record. Litigation may determine that "clean water" as described in the Amendment is distinguished from its plain language application elsewhere. But in making its decision, the EPA lacked any evidence that would distinguish the term in this context. Ultimately, the EPA applied its expertise to the issue, and reasonably interpreted the term "clean water" in a manner consistent with EPA policy.

D. The district court should retain jurisdiction over the Association's remaining state tort claims.

The district court appropriately retained jurisdiction over the remaining state tort claims. Exercising supplemental jurisdiction will maintain fairness and convenience for all the parties by ensuring an even playing field. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Here, the state tort claims arose out of a federal claim, allowing the district court to retain jurisdiction. The district court had original jurisdiction because the parties' CERCLA claims arose under federal law. 28 U.S.C. § 1331. Because BELCO and the Association petitioned for the court to consolidate the cases, the Association cannot unilaterally decide to sever and remove the remaining tort claims to state court. Decision, 10. The Consent Decree is enforceable under CERCLA, thus the district court will continue to exercise jurisdiction over the BELCO action. *Id*. at 18. The Association has sought injunctive relief in connection with the Consent Decree. *Id*. Therefore, dismissing the remaining claims would be inconsistent with the prior remedies sought and supplemental jurisdiction over the state tort claims is appropriate. *Id*.

1. The district court had original jurisdiction over the CERCLA claims and should exercise supplemental jurisdiction over the state claims.

The Association's remaining state tort claims should remain in the district court. Supplemental jurisdiction allows a district court with original jurisdiction to keep all other related claims, including state claims. 28 U.S.C. § 1367. CERCLA section 113(b) provides

federal district courts with exclusive jurisdiction for claims "arising under" CERCLA. 42 U.S.C. § 9613(b). The Association's claims arise under CERCLA, and the remaining issues that the Association will bring are the state tort claims of nuisance and negligence. Decision, 18. Therefore, the district court had original jurisdiction over the parties' CERCLA claims and can choose to exercise supplemental jurisdiction. 28 U.S.C. § 1367. Federal jurisdiction is proper because it would be counterproductive to dismiss the tort claims to state court when the remedies sought arose under CERCLA and the prior claims were briefed and argued in federal court.

Where a substantial amount of money, time, and effort has been put into a case in federal court, dismissing an issue so it may be tried in state court and not electing to retain supplemental jurisdiction would be unfair. *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996). In *Nowak*, the court stated, "If the dismissal of the federal claim occurs late in the action after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction… is not fair or necessary." 81 F.3d at 1191. Here, the Association motioned to dismiss the tort claims so that the claims could be heard in the state court. Decision, 10–11. However, the district court recognized BELCO and the EPA had invested significant time and resources into arguing their cases. *Id*. at 18. The previous three claims have all been tried in federal district court, and the court has addressed the issues related to the Amendment that fell under CERCLA. *Id*. Thus, dismissing the remaining issue would be unnecessary and inefficient because the district court is entirely capable of hearing the state claims.

2. The district court should exercise supplemental jurisdiction because the claims are neither novel nor complex, and New Union state law has been foundational to this case.

The Association's claims are neither a novel nor complex issue of state law and therefore should be heard in federal court. Under supplemental jurisdiction, the district court can choose to

decline extending its jurisdiction if the "claim raises novel or complex issues of State law." 28 U.S.C. § 1367(c)(1). A novel or complex issue presents complicated state law questions that a federal court would find difficult to determine. *Mendoza v. U.S.*, 481 F. Supp. 2d 643, 646–647 (W.D. Tex. 2006). The Association contended that legal issues stemming from the Amendment are matters of state law, and the state tort claims would be better decided in state court. Decision, 10. However, the district court has already resolved issues regarding the CERCLA claims and their relation to the Amendment. The district court, having already heard claims based on the Amendment, should now be familiar with the provisions and guarantees of the Amendment and New Union law. Therefore, it is appropriate for the district court to hear the state claims.

The remaining claims that the Association has brought and seeks to dismiss are matters of state tort law. In general, state tort law claims are neither novel nor complex—particularly those pertaining to nuisance or negligence claims. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743–744 (11th Cir. 2006). Here, dismissing these tort claims so they may be heard in state court would be counterproductive because the district court is able to effectively hear state tort claims and appropriately apply the Amendment. Decision, 18. The tort claims are not the predominant focus of this case. In *Parker*, once a federal claim has been resolved, that state claims remain is insufficient cause for the court to dismiss the claims. 468 F.3d at 744–755. Here, if the court dismisses the remaining claims then it will put the parties on an uneven playing field. *Gibbs*, 383 U.S. at 726. The remaining claims should be kept in the federal court because it would be unfair for the EPA and BELCO to be forced to relitigate in state court. Decision, 18. The Association seeks remedies under federal jurisdiction, specifically an injunction to compel BELCO to remediate the Sandstone Aquifer. *Id*. The state claims arise out of CERCLA, and it is unfair to the parties and inefficient for the courts to dismiss these claims. The district court is

able to hear the remaining state tort claims and apply the state law. *Id*. The matters of state law are neither novel nor complex, thus it is unnecessary to dismiss the remaining claims so they may be heard in state court.

The outstanding state tort claims arise from the same set of facts as the federal claims, and should remain in federal court because they are neither novel nor complex. The court in *Mendoza* held "where the state and federal claims relate to the same set of facts, and the legal claim is not sufficiently complicated, a district court may in its discretion, assume supplemental jurisdiction over the state claims despite one party's contention that the claims are novel or complex." 481 F. Supp. 2d at 646–647. The district court is familiar with the Amendment and the EPA has contended that under the Amendment, the Consent Decree should be reopened. Decision, 14, 18. All parties have litigated prior issues in federal court; it would be a waste of time and resources if the remaining claims were dismissed to be heard in state court because the district court is well-equipped to apply state law to the remaining claims. *Id*. at 18. The outstanding state tort claims that the Association motioned to dismiss, should remain in the federal district court because they are neither novel nor complex. The federal court has the capacity to decide the remaining issues and was correct in exercising supplemental jurisdiction.

X. CONCLUSION

For the foregoing reasons, the EPA respectfully requests that this Court:

(a) Affirm the district court's grant of summary judgment in favor of BELCO, barring the Association from recovering their expenses from sampling, testing, and analyzing Fartown private drinking wells;

(b) Affirm the district's court's grant of summary judgment in favor of the EPA, awarding it compensatory damages for its costs and fines under 42 U.S.C. § 9606(b)(1) for BELCO's noncompliance;

(c) Affirm the district court's grant of summary judgment, in favor of the EPA, finding that the Amendment is a Relevant Standard, and the Unilateral Administrative Order is enforceable against BELCO;

(d) Reverse the district court's grant of summary judgment in favor of the Association, enter summary judgment in favor of the EPA, and find the EPA's determination that BELCO is not required to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law;

(e) Affirm the district court's denial of the Association's motion to dismiss; and

(f) Grant the EPA any such further relief as may be just, proper, or equitable.