NON-MEASURING BRIEF
TEAM # 31

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, et al.,
Defendant-Appellee-Cross Appellant,

-and-

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

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

Brief of Appellee-Cross Appellant, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

On June 1, 2022, the United States District Court for the District of New Union entered summary judgment in consolidated cases No. 17-CV-1234 and No. 21-CV-1776. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702 as the cause of action arises out of a question of federal law and is an appeal of Environmental Protection Agency ("EPA") actions. Fartown Association for Water Safety ("FAWS"), Better Living Corporation ("BELCO"), and EPA filed timely Notices of Appeal as required by Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals over any final decision from the United States District Court for the District of New Union under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Is the district court's determination that costs incurred by FAWS in sampling, testing, and analyzing samples of its members' private wells are not reimbursable under CERCLA proper?

II. Did the district court err in its holding that EPA's determination that the ERA constitutes an ARAR was proper, and correspondingly, that reopening of the Consent Decree was legal?

III. Did the district court err in concluding that, despite the existence of New Union ERA, EPA's determination that BELCO is not required to install filtration systems in Fartown was arbitrary, capricious, or contrary to law?

IV. Is the district court's determination to retain jurisdiction over FAWS' remaining state law tort claims proper?

STATEMENT OF THE CASE

A. CERCLA

The Compressive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*., as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), PL 99–499 (1986), together hereinafter referred to as "CERCLA," required the President to draft and publish a National Contingency Plan. 42 U.S.C. § 9605. The National Contingency Plan, hereinafter referred to as "NCP," was drafted by EPA, which "provide[s] the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1. The NCP provides the standards and procedures for the "remedial" and "removal" actions authorized by CERCLA for situations"[w]hen there is a release of a hazardous substance into the environment; or [w]hen there is a release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare of the United States." 40 C.F.R. § 300.400.

B. The New Union Environmental Rights Amendment

The State of New Union passed an Environmental Rights Amendment ("ERA") to the state's constitution on November 3, 2020. R. at 8. The ERA reads, "[e]ach and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. I, § 7. The sponsors of the ERA debated the topic thoroughly in the State of New Union Assembly. Addendum at 3-6.

C. The Contamination

In 1972, BELCO patented a sealant coating that is used to prevent corrosion. R. at 5. The company referred to the product as "LockSeal." *Id.* LockSeal is a combination of liquid Nitro-Acetate Titanium ("NAS-T") and a non-toxic "activation agent." *Id.* BELCO manufactured the chemicals needed to create LockSeal at a factory in Centerburg, New Union from 1973 through 1988. *Id.* at 6. In 1995, EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). *Id.* This adoption incorporated a "significant margin of error to ensure that level of exposure is non-toxic to humans." *Id.* Besides the HAL, there are no other state or federal regulations regulating the use of NAS-T. *Id.*

Residents of Centerburg began noticing an "off" smell of their water in 2013. *Id.* The Centerburg Department of Health ("DOH") tested the water in 2015 and found that the Centerburg Water Supply ("CWS"), which pumps water from the Sandstone Aquifer, contained 45 to 60 ppb of NAS-T. *Id.* The DOH advised Centerburgers to stop drinking water from the CWS and BELCO voluntarily provided all residents affected with bottled water. *Id.* The New Union state officials, citing their lack of expertise, referred the investigation and remediation to EPA in January 2016. *Id.*

Following the voluntary provision of bottled water, BELCO continued its compliant behavior. *Id.* BELCO and EPA entered into an agreement in March 2016 to continue the provision of bottled water, investigate the cause and extent of the contamination, and evaluate proposed cleanup remedies. *Id.* BELCO identified that the NAS-T entered the soil through sporadic spills that migrated to the groundwater, creating a "plume of NAS-T" in the Sandstone Aquifer. *Id.* Through 2017, BELCO installed multiple lines of monitoring wells between Centerburg and Fartown. *Id.* at 7. The wells closest to Fartown did not detect any NAS-T. *Id.*

Upon these findings, EPA issued a Proposed Plan and brought a cost recovery action against BELCO. *Id.* BELCO remained complaint throughout the process and immediately entered into a Consent Decree ("CD") to implement the remedy selected by EPA. *Id.* The United States District Court for the District of New Union approved and entered the CD in August 2017. *Id.* Citizens from neither Centerburg nor Fartown objected throughout this process. *Id.* The CD explicitly set forth only two grounds upon which the CD could be reopened: "[w]here 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 [w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." R. at 7 (citing CD, § 13.3). "[T]he Consent Decree defines Regulatory Standards to include, among other things, "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." R. at 7 (citing CD, § 1.12).

BELCO continued its efforts to remediate the contamination, installing and maintaining a water filtration system known as "CleanStripping" to remove NAS-T at the CWS, excavating soils contaminated with NAS-T from around the abandoned lagoon at the factory, and conducting monthly sampling of the monitoring wells installed during the investigation. R. at 7-8. This was everything that EPA determined to be required and what was agreed upon in the CD. *Id.* In January 2018, there were two detections of low levels of NAS-T (less than 6 ppb) in the monitoring wells closest to Fartown. *Id.* at 8. EPA determined that the low levels of NAS-T were not enough to stop the issuance of a Certificate of Completion to BELCO. *Id.*
Fartownians, now members of FAWS, complained to the DOH, leading to the DOH testing their water in 2019. *Id.* The DOH however did not detect any NAS-T. *Id.* These residents then asked EPA to order further testing in Fartown. *Id.* EPA denied this request citing the non-detections in

nearby monitoring wells. *Id.* FAWS was then formed by one hundred residents of Fartown. *Id.* FAWS retained Central Laboratories, Inc. ("Central Labs") to test their private wells for an out-of-pocket cost of $21,500. *Id.* These tests concluded that there were low levels of NAS-T in some wells in Fartown. *Id.* EPA refused to reopen the CD based upon these results. *Id.*

In March 2021, citing the results of FAWS' privately contracted testing and the ERA, EPA reopened the CD and ordered BELCO to conduct additional testing of wells in Fartown. *Id.* at 9. EPA claimed to have the authority to reopen the CD because it considered the new ERA to be an ARAR. *Id.* At this point, after being compliant with EPA for around six years and having received a Certificate of Completion, BELCO challenged EPA's demands. *Id.* EPA issued a Unilateral Administrative Order ("UAO") directing BELCO to sample private wells in Fartown, provide bottled water for households with NAS-T levels of 5 ppb or greater, and install CleanStripping filtration systems in wells with NAS-T levels exceeding 10 ppb. *Id.* BELCO refused, and EPA assumed these tasks. *Id.* at 10. In EPA's own testing, no Fartown well has tested above 8 ppb of NAS-T. *Id.*

D. The Proceedings Below

This appeal stems from two consolidated cases involving contaminated groundwater in the State of New Union. R. at 2. The first case (the "BELCO Action") began with EPA bringing a cost recovery action against BELCO for the Centerburg remediation. R. at 7. FAWS filed and was granted a motion to intervene in the BELCO Action to assert a claim against EPA, arguing that EPA's UAO was arbitrary and capricious under the Administrative Procedures Act ("APA"), 5 U.S.C. 706(2)(A). R. at 2. The second case (the "FAWS Action") was filed by FAWS and 85 individual plaintiffs from Fartown, asserting causes of action for CERCLA cost recovery against BELCO and state law claims of negligence and private nuisance. *Id.*

The United States District Court for the District of New Union ruled on cross motions for summary judgment, mostly revolving around EPA's determinations regarding BELCO's responsibilities, costs for investigation and remediation, the New Union ERA, and FAWS' motion to dismiss their remaining state law claims. *Id.* The district court granted summary judgment in favor of BELCO regarding reimbursement for FAWS' investigative expenses, in favor of EPA regarding its determination to reopen the CD and issuance of the UAO, in favor of FAWS as to vacating EPA's determination that CleanStripping technology was not required for Fartownian's wells, and denied FAWS' motion to dismiss remaining state law claims. *Id*. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court properly held that the testing costs incurred by FAWS for the analysis of private wells are not reimbursable under CERCLA as a response cost. FAWS failed to prove that these costs were necessary and consistent with the NCP. *Forest Park Nat. Bank & Tr. v. Ditchfield*, 881 F.Supp.2d 949 (N.D. Ill. 2012). CERCLA defines response costs as "the costs of investigation *and* remedying the effects of a release or threatened release of a hazardous substance into the environment." *Young v. U.S.*, 394 F.3d 858, 863 (10th Cir. 2005). FAWS failed to make any effort to remedy the effects of the release of NAS-T into private well water, rendering the investigation costs incurred not reimbursable under CERCLA.

Further, the costs paid to Central Labs were duplicative of work already performed by EPA. "Generally, investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by EPA, are not considered necessary because they are duplicative of the work performed by EPA." *U.S. v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1272 (E.D. Ca. 1997) (citation omitted) (internal quotation marks omitted). During the

2016 investigation in Centerburg, the wells closest to Fartown showed no detectable amounts of NAS-T. R. at 7. Basing its determination on this fact, EPA did not instruct nor require BELCO to install any additional wells in Fartown. *Id.* Because the costs incurred by FAWS in hiring Central Labs were duplicative of the work previously done by EPA, FAWS' claim fails on the merits.

Moreover, the clean-up performed by FAWS does not rise to the level of CERCLA-quality clean-up required for cost recovery claims. FAWS did not incur any costs relating to an actual clean-up rising to the level required by the NCP. "A CERCLA-quality cleanup results if the response action protects human health and the environment through the utilization of permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible." *Young*, 394 F.3d at 864. FAWS did not make any effort to protect human health and the environment beyond hiring Central Labs to undergo testing. This was not a permanent solution. Consequently, the district court correctly determined that the costs incurred by FAWS are not reimbursable under CERCLA.

However, the district court erred when it determined that the New Union ERA constituted an ARAR for the purposes of re-opening the CD. The ERA does not satisfy any of the requirements to be considered an ARAR. 42 U.S.C. § 9621(f)(2)(B). The ERA is not legally applicable nor relevant and appropriate. *Id.* The ERA is not legally applicable as it does not "specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site." *Id*. It is additionally not relevant nor appropriate because it pertains to ensuring citizens' right to clean water. The water of the Fartownians is objectively clean and therefore the ERA is not relevant nor appropriate. Consequently, the district court erred in determining that the ARAR is legally applicable or relevant and appropriate.

Additionally, the ERA was not properly promulgated, was not more stringent than federal standards, and was not timely identified by the New Union. *Id.* A state statute is properly promulgated when it is general applicability and is legally enforceable. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991). The ERA is of general applicability, but not legally enforceable. The district court erred when it determined that the ERA is self-executing and therefore legally enforceable. Additionally, the ERA is too vague to be enforceable without supplemental regulations. The ERA cannot be considered to be more stringent than the federal regulations as they convey the same goals. Finally, the ERA was identified by EPA and not the State of New Union. The state officials responded stating that, "*EPA should identify the ERA as an ARAR* where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." R. at 9 (emphasis added). The regulations require that the ARAR be identified by the state, not EPA and thus the ERA should not have been determined to be an ARAR. For these reasons, the district court erred in determining that the ERA constituted an ARAR, and therefore this Court should determine that EPA did not have the authority to reopen the CD.

Further, since the district court erred in its holding that the ERA is an ARAR, BELCO and EPA challenge the district court's decision to vacate the portion of the UAO that requires BELCO to provide bottled water rather than another remedial action or filtration. R. at 17. In the alternative, if this Court finds that the ERA is an ARAR, it should reverse the district court's decision because the district court substituted its judgment for that of EPA and "clean water" under the ERA does not mean water free from any contaminants. Under the APA, 5 U.S.C. § 706(2)(A), when an EPA enforcement is challenged, the court must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004) (quoting 5 U.S.C. § 706(2)(A)). Further, when making this determination, the court must investigate the facts that EPA relied upon when making its decision and "not substitute its judgment for that of the administrator." *Kennecott Corp. v. E.P.A.*, 684 F.2d 1007, 1013 (D.C. Cir. 1982).

The district court based its holding on the meaning of the ERA, ignoring other parts of EPA's administrative recording including EPA's response to FAWS' request for CleanStripping in their residential wells. This went against the deference that EPA is entitled to and was improper. Additionally, the district court's reasoning in the application of what "clean water" means in the ERA is flawed as the Fartown water is safe and is below the NAS-T HAL. This Court should reverse the district court's decision to vacate the portion of the UAO that only required BELCO to provide bottled water for the Fartownians.

Lastly, the district court properly determined that retention of FAWS' remaining state tort law claims best serves judicial efficiency. The resolution of the federal claims does not require the district court to dismiss the state tort law claims. *Nowalk v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996). Rather, the district court has the discretion to exercise supplemental jurisdiction and this Court should evaluate whether the district court abused its discretion. *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994). When analyzing if the retention of jurisdiction over state law claims is permissible, this Court should weight the factors of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

The district court reasoned, "that a tremendous amount of work has gone into these cases in this Court and that there are efficiencies to be had in trying the case here . . . ." R. at 18. While the district court emphasized that judicial economy favors retention of the state law claims, the

factors of convenience, fairness, and comity also support the district court's decision. FAWS argues that the state tort law claims of nuisance and negligence involve novel and complex issues of state law. *Id.* However, state tort claims of negligence and nuisance are generally not considered to be novel or complex. *Parker v. Scrap Metal Processors, Inc*., 468 F.3d 733, 743 (11th Cir. 2006). Additionally, since the ERA does not create any new causes of action, the district court can easily apply New Union's settled state tort law. Therefore, this Court should find that the district court's decision to retain jurisdiction over the state tort claims was not an abuse of discretion.

This Court should affirm the district court's grants for summary judgment in favor of BELCO and reverse the district court's grants for summary judgment in favor of FAWS and EPA and enter summary judgment in favor of BELCO. Finally, this Court should provide deference to the U.S. District Court for the District of New Union's decision to retain jurisdiction over the supplemental state tort law claims.

STANDARD OF REVIEW

This Court exercises de novo review over a district court's decision on cross-motions for summary judgment. *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 540 F.3d 640, 643 (7th Cir. 2008). With "cross summary judgment motions, [the appellate court] construe[s] all inferences in favor of the party against whom the motion under consideration is made." *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996). The nonmoving party's version of any disputed fact is presumed correct. *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 456 (1992). Additionally, this court exercises de novo review of the district court's interpretation of CERCLA. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326 (2d Cir. 2000); *United Tech. vs. Browning-Ferris Ind.*, 33 F.3d 96, 98 (1st Cir. 1994). The exercise

of supplemental jurisdiction is at the district court's discretion. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Under this standard, this Court must provide substantial deference to the lower-court's decision and only evaluate "whether the district court abused its discretion." *Purgess,* 33 F.3d at 138.

ARGUMENT

I. FAWS' costs incurred to investigate groundwater contamination are not reasonable nor reimbursable, and the district court properly denied its cost recovery claim.

The testing costs incurred by FAWS were neither necessary nor consistent with the NCP, therefore BELCO is not liable for reimbursement of the $21,500 paid to Central Labs. To seek recovery of costs, FAWS 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, et al. v. Atl. Richfield Co., et al.*, 427 F.Supp.3d 1013, 1020 (N.D. Ind. 2019) (quoting *Sycamore Indus. Park Assoc. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008)). BELCO is still not liable for the testing costs because FAWS failed to prove that they are necessary and consistent with the NCP. *See Forest Park Nat. Bank & Tr.*, 881 F.Supp.2d 949.

A. BELCO is not liable for the CERCLA recovery costs because FAWS did not take any action to contain the release of, or clean up the NAS-T.

"CERCLA authorizes the EPA to act, consistent with the National Contingency Plan ("NCP"), to remove . . . hazardous substances, pollutants, or contaminants necessary for protection of the public health or welfare or the environment." *Rolan*, 427 F.Supp.3d at 1020 (citing 42 U.S.C. § 9604(a)(1)). Further, "a plaintiff bears the burden of proving any response costs were necessary and consistent with the NCP." *Young*, 394 F.3d at 863 (citing *United States v. Hardage*, 982 F.2d 1436, 1447 (10th Cir. 1992)). CERCLA defines response costs as "the

costs of investigating *and* remedying the effects of a release or threatened release of a hazardous substance into the environment." *Id.* (citation omitted). Here, FAWS is only seeking $21,500 in costs for the investigation performed by Central Labs. R. at 8. After these costs were incurred, there was no further action taken by FAWS to remedy the effects of the NAS-T levels. *Id.*

In March 2020, FAWS received the results from Central Labs. *Id.* The results varied from the three samples taken of 75 private wells, but all fell under the HAL of NAS-T levels of 10 ppb. *Id.* Thereafter, in May 2020, FAWS wrote to EPA requesting that the CD be reopened and for further investigation. *Id.* Generally, "a response cost must be necessary to the containment *and* cleanup of hazardous releases." *Young*, 394 F.3d at 863. (citing *Hardage*, 982 F.2d 1447). Between March 2020 and May 2020, FAWS failed to undertake remediation efforts regarding the release of NAS-T in its wells. R. at 8. Therefore, it did not take on a cost that was necessary for both the containment *and cleanup* of the release of NAS-T. Furthermore, FAWS hired Central Labs to perform the testing *after* EPA denied the request to require BELCO to conduct more testing. *Id*. In denying this request, EPA cited the lack of NAS-T found in the DOH testing of Fartownian wells. *Id.*

"These costs are necessary if they are incurred in response to a threat to human health or the environment and they are necessary to address that threat." *Rolan*, 427 F.Supp.3d at 1025 (citation omitted). At the time these costs were incurred, there was no threat to human health or the environment in Fartown necessitating the testing done by Central Labs. NAS-T is not regulated on either the state or federal level aside from the HAL issued by EPA in 1995. R. at 6. As previously discussed, under the HAL, 10 ppb of NAS-T exposure is non-toxic. *Id.* The levels of NAS-T detected in wells closest to Fartown in 2018 were at extremely low levels compared to those detected in Centerburg in 2015. *Id* at 6, 8. The NAS-T levels in Centerburg were between

45 and 60 ppb before the investigation was referred to EPA. *Id.* These levels were significantly above the HAL. Conversely, the wells closest to Fartown showed no detectable NAS-T in 2017, leading to EPA's determination that no additional actions by BELCO were necessary. *Id.* at 7. Simply because NAS-T is detectable by smell does not mean that there is a hazard to human health or an environmental risk. In fact, NAS-T is detectable by sour taste/smell at levels of 5 ppb, which is within the HAL threshold. R. at 6.

The Tenth Circuit in *Young*, "recognized costs cannot be deemed necessary to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination." *Young*, 394 F.3d at 863 (citation omitted). Here, there is a clear absence of a nexus between the cost of the Central Labs testing and an actual effort to respond to the NAS-T contamination. Because of this, FAWS' cost recovery claim fails on its merits.

B. The testing costs incurred by FAWS were initiated after EPA's initial investigation and were not authorized by EPA, making them duplicative of work already performed by EPA.

FAWS cannot recover costs "if [Central Labs'] work was duplicative of the EPA's Investigation and was conducted in preparation for litigation." *Rolan*, 427 F.Supp.3d at 1022. "Generally, investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by EPA, are not considered necessary because they are duplicative of the work performed by EPA." *Iron Mountain Mines, Inc.*, 987 F.Supp. at 1272 (citation omitted). Between July 2016 and January 2017, BELCO installed additional lines of monitoring wells near Fartown. R. at 7. The last of the wells were installed approximately half a mile north of Fartown, and when tested, showed no detectable amounts of NAS-T. *Id*. Hence, EPA did not instruct BELCO to install more wells during this investigation. *Id*. Therefore, the

investigation costs incurred by FAWS were duplicative of work already done by EPA and were not authorized.

Further, the reimbursement costs covered by CERCLA "[do] not include reimbursement for expenses incurred solely in preparation for litigation unless they significantly benefited the entire cleanup effort . . . ." *Rolan*, 427 F.Supp.3d at 1024. In *Rolan*, the plaintiffs consulted with Carlson Environmental Consultants to determine what to do in response to the leak of lead and arsenic in the soil. *Id.* at 1020. There, plaintiffs paid a retainer to Carlson Environmental Consultants as a "response cost" shortly before filing their federal lawsuit. *Id.* at 1023. However, the court found that "plaintiffs [had] not designated evidence from which a finder of fact could conclude that they [were] entitled to recoup . . . fees through a CERCLA recovery action." *Id.* at 1024.

Here, FAWS retained Central Labs in 2019, after EPA twice denied opening an investigation of possible NAS-T in Fartownian water. R. at 8. Fartownians submitted sworn testimony stating that "water from private wells began to occasionally smell 'off' since at least 2016." *Id.* Even then, FAWS did not request a sampling from DOH until becoming aware of the investigation and entry of the CD in Centerburg. *Id.* Set forth above, EPA on *two* occasions denied opening an investigation into the Fartownian water: the first following the investigation performed by the state DOH and the second after FAWS had already incurred the Central Labs testing costs. *Id.* Similarly, as in *Rolan*, FAWS has not provided any evidence from which a reasonable fact finder could conclude that they are entitled to recover the Central Labs testing costs under CERCLA. Additionally, in joining BELCO's motion, EPA argued that even if the testing by Central Labs revealed trace amounts of NAS-T, "fishing expeditions by untrained

laypersons would hamper its ability to conduct orderly investigations and enforcement of CERCLA cleanups." R. at 12 (internal quotation marks omitted).

The hiring of Central Labs by FAWS amounts to nothing more than an attempt to join in an investigation that had already been resolved. As argued by EPA, "the ERA had not yet been adopted" when FAWS undertook the testing. R. at 12. "[B]ecause a plaintiff must prove . . . that the costs incurred in response were both necessary and consistent with the NCP, . . . these requirements prevent a plaintiff from recovering the costs incurred in instituting a needless and expensive monitoring study." *Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1112 (E.D. Mo. 2016) (citation omitted). "Monitoring and assessment costs are needless and thus not recoverable where such efforts are 'duplicative of work already performed' to monitor and assess contamination." *Id.* The ERA did not exist at the time of EPA's decision and the assessment costs were duplicative of the work already performed at the monitoring wells.

C. The actions performed by FAWS did not rise to the level of CERCLA-quality cleanup.

As was the case in *Young*, FAWS did not incur costs relating to cleanup that rose to the level of CERCLA-quality cleanup required by the NCP. *Young*, 394 F.3d 858. To recover costs, FAWS' "response action must be in substantial compliance with 40 C.F.R. § 300.700(5)-(6) *and* result in CERCLA-quality cleanup." *Id.* at 864. "A CERCLA-quality cleanup results if the response action protects human health and the environment through the utilization of permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible." *Id.* The court in *Young* found that the costs incurred by the plaintiffs "[were] 'classic examples' of preliminary steps taken in response to the discovery of the release . . . . " *Id.* The court defined preliminary steps to include "site investigation, soil sampling, and risk assessment." *Id.* Here, the only action taken by FAWS was the hiring of Central Labs to test well

water in Fartown. R. at 8. FAWS undertook testing for which "there was no need because there was no scientific evidence supporting further testing." R. at 12. Even after receiving results from Central Labs, FAWS failed to take any action to create a permanent solution, alternative treatment, or resource recovery. *See* R. at 8. Even if this Court were to assume, as the court did in *Young*, that "the costs they incurred could be properly classified as 'response costs,'" and that there was a nexus between those costs and the clean-up FAWS' claim still fails because they "were neither necessary to the containment and cleanup of hazardous releases nor consistent with the NCP." *Young*, 394 F.3d at 864. This Court should find that FAWS' cost recovery action fails on the merits because the costs incurred were not related to containment of the NAS-T, were duplicative of EPA's investigation, and were not CERCLA-quality standard clean-up.

II. The New Union Environmental Rights Amendment does not constitute an ARAR and therefore EPA had no basis to re-open the consent decree.

EPA's determination that New Union's ERA constitutes an ARAR was incorrect. Consequently, the consent decree was unjustly reopened and BELCO cannot be required to provide bottled water to Fartownians affected. Under CERCLA, if a state environmental requirement or standard, such as the New Union's ERA, is considered an applicable or relevant and appropriate requirement ("ARAR") the remediation must comply with the state requirement or standard. 42 U.S.C. § 9621(d). A requirement or standard constitutes an ARAR if it is "(1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified [by the State]." *Akzo Coatings of Am., Inc.*, 949 F.2d at 1440 (citing 42 U.S.C. § 9621). The ERA was not legally applicable nor relevant and appropriate. Even if this Court was to determine that the ERA was, it was not properly promulgated, is not more stringent than federal standards, and was not timely identified by the State of New Union.

A. The ERA is not legally applicable nor relevant and appropriate.

Finding that state laws like the ERA are legally applicable or relevant and appropriate would eviscerate CERCLA. The Superfund facilitates efficient removal and remedial actions by providing incentives for Potentially Responsible Parties ("PRPs") to be cooperative with government efforts. *See* H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2841 (providing that "[t]hese provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups"). The Superfund provides the incentive of a semblance of finality for PRPs. If state legislation like the New Union ERA is considered to be an ARAR, this semblance of finality would be destroyed. PRPs would not be incentivized to enter into consent decrees knowing that they can satisfy all of EPA's requirements and in the end, if another substance is found that was not previously considered harmful, EPA could reopen the consent decree. Finding that the ERA is an ARAR would disincentivize PRPs from behaving as BELCO had done for the past six years: compliant and cooperative. If this Court was to conclude that the determination that the ERA is an ARAR was proper, PRPs would no longer be incentivized to enter into consent decrees with EPA, eviscerating CERCLA and having ripple effects in contaminated water across the nation.

1. The ERA is not legally applicable.

The ERA is not legally applicable because it does not "specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site." 40 C.F.R. § 300.5. The New Union ERA "can be read as limiting the right of government to interfere with the people's right," *See Com. by Shapp v. Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 205 (1973), 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.

Here, the ERA does not satisfy any of the rudiments of what makes a potential ARAR legally applicable. The ERA does not *specifically* address a hazardous substance, pollutant, contaminant, remedial action, location, nor circumstance found at a CERCLA site. The ERA does not *specifically* address anything. The ERA was written as a gap-filling provision to attempt to give the judiciary and administrative agencies the ability to regulate contaminants and pollutants not yet deemed hazardous to humans. Addendum at 6. Without supplemental regulation the courts and administrative agencies are left without a basis to enforce this provision. Unlike other similar state provisions, it does not provide a statement regarding enforcement. *E.g.*, Pa. Const. art. I, § 27.

Even if this Court was to determine that the ERA language was designed for problems like that at the Centerburg facility, the provision would not be legally applicable to this situation as the water of the Fartownians is "clean." During the testimony regarding this provision, one of the sponsors of the NU ERA stated:

> [w]hat is appropriate and desirable for a public water supply involves other chemicals, other substances. But they should not harm you. They should not do injury to your young children, to your wife or to your family in any way. They should be objectively perceived as "clean." That's what this means.

Addendum at 5. What the sponsor is describing here is the water of the Fartownians. The intent behind the ERA was not to create some sort of right to pure H2O, but to create a right to safe water. *Id*. Here, the water of the Fartownians is safe. At the levels it is reported in the wells of Fartownians, it will not harm any residents. The HAL for NAS-T incorporated a significant margin of error when enacted. R. at 6. "[N]o Fartown wells have tested above 8 ppb." *Id.* at 10. The level of NAS-T in the water in Fartownian wells will not harm families in any way. The water of the Fartownians if objectively "clean." Therefore, the ERA is not legally applicable to the CERCLA site.

2. The ERA is not relevant nor appropriate because it does not address problems or situations similar to those encountered at the CERCLA site.

"Relevant and appropriate" requirements are "those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations . . . while not 'applicable' . . . address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." 42 U.S.C. § 9621(d)(2)(A). "EPA reasonably interprets CERCLA's reference to a level or standard of control to be directed at those environmental laws governing how clean is clean—that is, the level or degree of cleanup required to remedy various types of toxic contamination." *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1527 (D.C. Cir. 1993) (internal quotation marks omitted).

The ERA is not "relevant and appropriate" because the ERA does not govern "how clean is clean." The ERA is not relevant because the ERA does not "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." 42 U.S.C. § 9621(d)(2)(A). The ERA pertains to ensuring citizens' right to clean water; which as stated above, is not applicable in this situation. The ERA provides no levels or standards determining to what level or degree of remedial actions are required. To find that the ERA is "relevant and appropriate" to the situation at the BELCO site would be to vastly expand the meaning of the ERA.

B. <u>Even if the Court finds that the ERA was legally applicable or relevant or appropriate, the ERA does not constitute an ARAR because it was not properly promulgated, not more stringent, and not timely identified by the state.</u>

1. The ERA was not properly promulgated.

Under EPA's guidance, the word "promulgated" as used in the statute is defined as those "requirements [that] are laws imposed by State legislative bodies and regulations developed by State agencies that are of general applicability and are legally enforceable." EPA, Superfund

Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987).

The ERA is a law of general applicability, but is not legally enforceable. The district court erred in determining that the ERA is "self-executing." R. at 14. A self-executing constitutional amendment is one that is "in itself it needs no further legislation to put it in force." *Davis v. Burke*, 179 U.S. 399, 403 (1900). However, the Court delineated that, "[w]hen it lays down certain general principles, as to enact laws upon a certain subject . . . it may need more specific legislation to make it operative." *Id*. The Court added that an amendment is self-executing "only so far as it is susceptible of execution." *Id.* Here, the ERA is not self-executing because it is not enforceable without specific legislation to make it operative.

Historically, most constitutional environmental rights provisions have not been considered to be self-executing. *See* Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 Harv. Envtl. L. Rev. 333, 361 (1993). However, when the provision contains a specific right, without further discussion to the expansion of governmental power, it has been stated to be able to be read as self-executing. *Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. at 200. The Pennsylvania Supreme Court elucidated that the first part of the state of Pennsylvania's environmental protection amendment (which has language similar in nature to that of the State of New Union) "can be read as limiting the right of government to interfere with the people's right to 'clean air, pure water . . . ." *Id*. The court deemed the Pennsylvania ERA to not be self-executing upon comparison with other non-self-executing environmental protection provisions from across the country which increase the power of government. *Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. at 200.

The New Union ERA "can be read as limiting the right of government to interfere with the people's right," *Id.*, 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. When considering the legislative intent of the amendment, it becomes clear that this provision was intended to go beyond limiting the right of government interference, but to allow for environmental protection in situations where current state laws do not apply. During the testimony of the New Union assembly, one of the sponsors of the bill stated:

> I would say that this amendment certainly would help protect our citizens if, for example, our agencies discover something, or a private entity creates something new that ends up causing harm to our citizens. That is to say, if there is any substance or contaminant that is not currently regulated, and it is discovered at some point in the future to cause some type of harm, to us, to our children, to our environment, then this amendment would fill that gap and help to ensure that no one suffers until such a time as a law is passed to encompass that scenario or substance... This amendment will serve to allow the courts – or an agency, if the authority to speak to such a situation is properly that of an agency - to apply a framework giving us peace of mind and a healthful environment while we - you and I and our colleagues - engage to try to enact new laws to regulate or address the substance or contamination.

Addendum at 6. This statement illustrates how the New Union ERA was intended to expand the powers of government. The ERA gives the judiciary and the administrative state of New Union greater authority to act when the legislature has not acted. Therefore, the ERA is not a self-executing provision.

In addition to not being a self-executing provision, the ERA is too vague to be considered legally enforceable without additional regulations or legislation. "According to EPA, in order for potential state ARARs to be legally enforceable they must be issued in accordance with state procedural laws or standards and contain specific enforcement provisions or be otherwise enforceable under state law." *Akzo Coatings of Am., Inc.*, 949 F.2d at 1441 n.31 (citation omitted) (internal quotation marks omitted).

There are no enforcement provisions in the ERA. The noble sponsors of the bill can note that they seek to expand the authority of courts and administrative agencies in ensuring clean water and air, but that does not mean that the amendment accomplishes these goals without further legislation or regulation. It is unclear from both reading the amendment itself, or the corresponding legislative history, whether the ERA simply limits the right of government to interfere with the people's right, "clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans" or as to whether this amendment creates some duty of third parties to ensure that every citizen's right to water free from matters considered pollutants now, or in the future, is not infringed upon.

If one was to consider the ERA as an enforceable law, the standards enforced are too vague for enforcement. "A standard is not constitutionally vague if it is drafted with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Akzo Coatings of Am., Inc.*, 949 F.2d at 1442 *(*citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). An ordinary person would not be able to understand what is prohibited from the language of the ERA. What is "clean water?" What is a "healthful environment?" What does it mean to be "free from contaminants and pollutants?" Without extreme costs, can water be completely free from pollutants? Ordinary people cannot determine what conduct is prohibited without supplemental action.

Therefore, because the New Union ERA is not self-executing and not legally enforceable, it was not "properly promulgated" and thus not an ARAR.

2. The ERA is not more stringent than federal regulations.

The ERA cannot be deemed more stringent than any federal environmental standards, as the language of the ERA mimics the first criterion to be analyzed pursuant to the NCP by a remediating party when determining viable alternatives. "Where no Federal ARAR exists for a

chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988) (codified at 40 C.F.R. §300). The NCP's regulatory language states that "EPA's primary consideration in CERCLA response actions is that remedies be protective of human health and the environment." *Id.*

Here, the ERA cannot be considered to be more stringent than the federal regulations as they convey the same goals. CERCLA actions under the NCP, must be protective of human health and the environment. *Id.* The ERA provides that at the state level, citizens have access to a clean and healthful environment. N.U. Const. art 1, § 7. To say that the regulations in place under the NCP and CERCLA are not comparable to the ERA, is to say that being protective of human health and the environment and ensuring citizens access to a clean and healthful environment are not synonymous. Therefore, this Court should find that the ERA is not more stringent than the CERCLA regulations and thus not an ARAR.

3. New Union did not identify the ERA as an ARAR, therefore the ERA cannot be considered an ARAR.

The ERA does not constitute an ARAR because it was not "identified to the President by the State in a timely manner." 42 U.S.C. § 9621(2)(A)(ii). Under CERCLA, nonwaivable ARARs are defined as "any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is [omitting requirements explained above] . . . and that has been identified to the President *by the State* in a timely manner. 42 U.S.C. § 9621(d)(2)(A)(ii)(emphasis added). "*Only* those potential ARARs *identified by the State* in a timely manner need to be considered." Guidance on the Consideration of ARARs During Removal Actions EPA/540/P-91/011, 13 (Sept. 1991) (emphasis added). This guidance

additionally states that it is not the responsibility of EPA on-scene coordinators "to search for State ARARs." *Id.* at 20. The removal program under CERCLA is "designed to prevent, stabilize, and/or mitigate environmental and human health threats quickly, and the [EPA officials] need not: 1) expend resources examining volumes of State regulations; or 2) delay the start of completion of a removal action because the State has not identified ARARs." *Id*.

Here, New Union officials never identified the ERA as an ARAR. In January of 2021, EPA wrote to the New Union DNR, inquiring whether the New Union ERA constituted an ARAR. R. at 6. The New Union officials responded stating that, "*EPA should identify the ERA as an ARAR* where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." *Id.* (emphasis added). The statute does not call for EPA to identify ARARs. 42 U.S.C. § 9621(2)(A)(ii). The New Union officials attempted to dispatch their role of identifying state ARARs to EPA. The statute does not state that an ARAR "may" be identified by the state. *Id*. The statute identifies the elements of what constitutes a potential State ARAR and includes that the potential ARAR is to be "identified by the State." *Id*. Therefore, following the requirements set forth in 42 U.S.C. § 9621(d) and following EPA Guidance on the Consideration of ARARs, the ERA cannot be considered to be an ARAR since officials of New Union failed to identify the ERA as an ARAR.

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

When an EPA enforcement order under the APA, 5 U.S.C. § 706(2)(A), is challenged, courts determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation*, 540 U.S. at 496-97; *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012). "[T]he Court's review is limited to whether the EPA's UAO is supported by the administrative record and not whether the EPA's decision is the

correct one." *U.S. v. City of New Orleans*, 86 F. Supp. 2d 580, 584 (E.D. La. 1999). An UAO is considered arbitrary and capricious when EPA "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." *U.S. v. E.I. du Pont de Nemours & Co.,* 341 F. Supp. 2d 215, 253 (W.D. N.Y. 2004).

A. The district court substituted its judgment for that of EPA.

"In reviewing substantive challenges, a court may reverse only those actions found arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; though the court must engage in a searching and careful inquiry into the facts, it *may not substitute its judgment for that of the administrator*." *Kennecott Corp.*, 684 F.2d at 1013 (emphasis added). When considering EPA decisions under the APA, the "court is principally concerned with ensuring that EPA has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made, that EPA's decision was based on a consideration of the relevant factors, and that EPA has made no clear error of judgment." *Bluewater Network v. E.P.A.*, 370 F.3d 1, 11 (D.C. Cir. 2004) (citation omitted) (internal quotation marks omitted). "Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Alaska Dep't of Env't Conservation*, 540 U.S. at 496-97 (citation omitted) (internal quotation marks omitted).

Here, the district court substituted its judgment for that of the EPA administrator. Rather than considering whether EPA examined the relevant data, articulated a satisfactory explanation for its action, or that EPA's decision was based on a consideration of the relevant factors, the

district court focused on its determination of the meaning of the ERA. R. at 16-17. The court stated:

> [t]his is precisely the situation meant to be covered by the ERA, as discussed above. What "clean water" means in other contexts is best left to the State or to EPA's regulatory framework, but EPA's conclusion here that it does not mean the removal of illegally discharged chemicals that can be perceived by smell and may be toxic at higher levels is arbitrary, capricious and contrary to law.

R. at 16. The district court did not discuss EPA's response to FAWS' request, which is part of the EPA's administrative record. In response to FAWS' request for BELCO to install CleanStripping at each residential well that had tested positive for NAS-T or take other remedial actions sufficient to remove NAS-T entirely from their water supply, EPA cited FAWS' 2019 results and EPA's own sampling results found no wells in Fartown testing above the HAL for NAS-T, denying their request. R. at 8.

B. The ERA cannot be considered an ARAR so it cannot be relied upon to require remedial measures.

The decision of EPA was not arbitrary nor capricious because the agency did not have the authority to reopen the consent decree. Because the ERA cannot be considered an ARAR, EPA could not rely on it to require BELCO to take remedial action. As discussed in the previous section, the ERA cannot be considered an ARAR under the NCP and CERCLA. Therefore, for EPA to require remedial measures from BELCO based upon the ERA, would be a truly arbitrary and capricious decision.

C. Even if this Court finds that the ERA is an ARAR, "clean water" under the ERA does not mean water free from any contamination.

In the legislative record for the ERA, one of the sponsors stated that the ERA explicitly does not require water to be free from any non-water substance. Addendum at 5. The legislator stated that it was "desirable and appropriate" for water to involve other substances, so long as they do not harm or injure. *Id.* This is the current state of the water found in the wells of the

Fartownians. The ERA was not created to require higher standards than federal laws that involve the regulation of pollution in water sources. The goal was to attempt to create some mechanism for ensuring that people have access to water that is safe to drink. *Id*.

The water of the Fartownians is safe. At the levels it is reported in the minority of wells of Fartownians that showed some level of NAS-T, residents will not be harmed in any way by the substance's presence. Following the HAL, the level of NAS-T in the water will not cause any harm or injury to the residents of Fartown. The ERA was not intended to regulate situations like this. EPA cited the low levels of NAS-T found in the wells of the Fartownians and EPA's own findings when they responded to FAWS' request. R. at 8. The district court erred when they overstepped their authority, overlooking the administrative record of EPA and ignoring the legislative record of the new ERA, placing their own judgment above that of the administrator. Therefore, the district court erred when it concluded that EPA's decision was arbitrary and capricious and thus this Court should find that EPA's decision was lawful.

D. FAWS has not introduced evidence to support the conclusion that such a costly remedy was necessary.

To install CleanStripping systems on the private wells of Fartownians would cost as much as $4,500 per well. R. at 16. This is an extremely costly remedy when no evidence has been introduced by FAWS that their water is harmful for drinking, watering plants, showering or other uses. *Id*. EPA would have been acting arbitrarily and capriciously if they required BELCO to install these systems and there was no evidence in the administrative record that the levels of NAS-T contained in said wells has or will have the potential to be harmful. If EPA was to require such a costly remedial action from BELCO, with no factual basis warranting such a remedy, it would have been without a basis in law and capricious. Therefore, the district court

erred in ruling that EPA acted arbitrarily and capriciously, when the administrative agency had no basis for ruling otherwise.

IV. The district court was correct in retaining jurisdiction over FAWS' state law claims of negligence and private nuisance under 28 U.S.C. § 1367.

A federal court may adjudicate state law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case of controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). State law claims that "derive from a common nucleus of operative fact" as the federal law claims satisfy this requirement. *Gibbs*, 383 U.S. at 725. Here, the state and federal claims arose from the same operative facts: BELCO's contamination of the Sandstone Aquifer. R. at 6.

The Supreme Court has recognized that supplemental or "pendent jurisdiction is a doctrine of discretion, not a plaintiff's right." *Gibbs*, 383 U.S. at 726. Since a district court has discretion over the exercise of supplemental jurisdiction, the circuit court's "review is limited to whether the district court abused its discretion." *Purgess*, 33 F.3d at 138. The district court may decide to decline jurisdiction over related state law claims when:

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). However, the resolution of original jurisdiction claims alone is not enough to require a district court to dismiss the state law claims. *Nowalk*, 81 F.3d at 1191. Rather, this Court should weigh the factors of judicial economy, convenience, fairness, and comity when reviewing if the retention of the state law claims was proper. *Cohill*, 484 U.S. at 350; *Nowalk*, 81 F.3d at 1191. These factors ordinarily favor the dismissal of the state law claims after the elimination of the federal law claims. *Cohill*, 484 U.S. at 350. But this case is anything but

typical. *See Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (holding that even though the federal law claims were resolved on summary judgment, dismissal of the state law claims would have been improper). Here, the balancing of factors leans greatly toward the retention of FAWS' state law claims of negligence and private nuisance. Therefore, the district court properly exercised its discretion in retaining jurisdiction over FAWS' state law claims.

A. Judicial economy favors the retention of the state law claims because of the court's familiarity with the facts since the opening of the CD on June 30, 2017, and the court's continuous jurisdiction in enforcing the CD.

Even though the federal claims were dismissed before trial and expert discovery regarding damages for the state law claims has yet to begin, that is not enough to overcome the district court's familiarity with the complex facts of the case. R. at 11, 18. While the district court generally will decline to exercise its jurisdiction over the remaining state law claims after dismissing all the federal claims, it is not required. *Nowalk*, 81 F.3d at 1191. In *Nowalk*, the district court wrongly dismissed Nowalk's claim for lack of subject matter jurisdiction rather than for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). *Nowalk*, 81 F.3d at 1191. The *Nowalk* court reasoned that since the judge presided over the case for approximately two years at the time the decision was rendered and dismissed the federal claim close to the trial, the retention of the state law claims was proper. *Id.* at 1192.

Here, the U.S. District Court for the District of New Union has been grappling with the aquifer clean-up since June 30, 2017, when the BELCO action was filed. R. at 7. Even though the FAWS action, which included the state law tort claims, was not brought until August 30, 2021, the district court has already expended considerable judicial resources in gaining familiarity with the matter. R. at 10. The district court has held domain over the remedial actions occurring at the Centerburg facility since the establishment of the CD in 2017 when the district

court took public comment and approved the CD after "determining it to be fair and reasonable." R. at 7. The district court has been trying to resolve the aquifer clean-up for over four years, double the time the judge presided over the *Nowalk* case. *See Nowalk*, 81 F.3d at 1192. Therefore, the district court is familiar and already acquainted with the Sandstone aquifer remediation and should be allowed to resolve the remaining state law claims.

Further, CERCLA claims discovery ended on December 30, 2021. R. at 11. *See Ackerman v. Nat'l Prop. Analysts, Inc.*, 887 F.Supp. 494, 510 (S.D.N.Y. 1992) (holding to retain jurisdiction over the plaintiff's state law claims after the dismissal of all federal claims even though discovery did not start). While expert discovery on damages may be needed for the state tort claims, the district court has already expounded significant resources familiarizing itself with the facts of the matter including the materials from the CERCLA discovery. R. at 18. By dismissing the state law claims without prejudice, the parties and state court would expend additional resources and time refiling and reprocessing the case. *Cohill*, 484 U.S. at 353. Therefore, to conserve judicial resources the district court should be allowed to apply its expertise to efficiently resolve the state law claims.

B. Convenience for the parties favors the retention of the state law claims because of judicial preference in trying all claims in a single forum.

The district court has been integral in enforcing the CD through the BELCO action. R. at 7, 10. Courts have found that generally, it is most convenient for the parties for all claims to proceed in one forum. *Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1152 (M.D. Fla. 2020) (citation omitted). Here, the District Court for the District of New Union's involvement in the Sandstone aquifer contamination will not end just because the motions for summary judgment on the federal law claims were granted. Not only have proceedings since 2017 all occurred in the district court, but in the future, the district court may need to intervene as an enforcer for the

UAO if this Court fails to reverse the district court's decision that EPA had the authority to reopen the CD. R. at 15. Therefore, it would be inconvenient for the parties and the judiciary to separate the state law claims when they arose out of the same event. Present and future convenience for the parties lies in trying the state law claims in the district court.

C. Fairness to all litigants favors the retention of the state law claims to prevent duplicative litigation and forum manipulation.

It would be unfair to BELCO and EPA if FAWS was to get their desired relief of the remediation of the aquifer and the installation of CleanStripping from the state court after being denied relief on summary judgment by the district court and directly from EPA. R. at 9, 16-17. Having the state court rehash issues that were addressed under federal law is likely to cause multiplicity in litigation. *Parker*, 468 F.3d at 746. Additionally, a plaintiff's expectation in resolving federal and state law claims together may influence the court in favor of retaining supplemental jurisdiction. *Parker*, 468 F.3d at 747. Supplemental jurisdiction is proper when a plaintiff would expect to have all their claims brought together. *Gibbs*, 383 U.S. at 725. Retention of the state law claims will prevent inconsistencies with the current determinations held by the district court and EPA.

Here, FAWS expected that their state and federal law claims would be tied together, especially since there is a preference for exercising supplemental jurisdiction when federal environmental claims such as CERCLA are tied with state law claims of nuisance. *Parker*, 468 F.3d at 746-47. Additionally, FAWS' stated intention for bringing the state law claims in the action was to toll those claims so they could be later brought in state court. R. at 10. Even though FAWS should have expected that the federal and state law claims would be resolved in the district court, they have attempted to manipulate the forum to achieve their desired result: the remediation of the aquifer. *See Cohill*, 484 U.S. at 357 (noting that the court should consider the

plaintiff's attempts to manipulate the forum). Therefore, FAWS' attempt to prevent the state law claims from being litigated in federal court to receive a more favorable outcome should be considered by this court. Allowing FAWS to relitigate many of the same underlying issues in state court will create inconsistency, reward forum manipulation, and result in unfairness for BELCO and EPA.

D. Comity favors the retention of the state law claims due to the unique federal interest in consistently resolving these claims, despite FAWS' assertion that they are novel or complex issues.

Since FAWS' claims of negligence and private nuisance are closely tied to EPA's authority and federal policy, the exercise of supplemental jurisdiction over these claims is especially strong. Generally, "[n]eedless 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 the applicable law." *Gibbs*, 383 U.S. at 726. This value is highlighted by 28 U.S.C. § 1367(c), providing that a district court may decline supplemental jurisdiction when state law claims are deemed novel or complex. "Generally, state tort claims are not considered novel or complex." *Parker*, 468 F.3d at 743. Furthermore, the *Gibbs* Court recognized that there may "be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *Gibbs,* 383 U.S. at 727.

FAWS' claims of private nuisance and negligence are not considered novel or complex as they are state tort law claims. *Parker*, 468 F.3d at 743-44 (explaining that federal court authority has held that negligence and nuisance are not considered novel or complex issues of state law). Additionally, the New Union's ERA application and interpretation are minimal, even in the context of negligence per se. R. at 15. The complex issue of whether the ERA is an ARAR plays no role in the determination of liability and damages regarding the start law claims. *Id.*

Lastly, the New Union ERA does not create any new causes of action and therefore would not have any impact on FAWS' state tort law claims. Since the ERA will not substantially alter the tort claims of negligence nor private nuisance, as they are settled law, it cannot be said that these claims are novel or complex.

Federal policy and abstention principles can persuade a district court to dismiss or retain state law claims. *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 346, 369 (D. Md. 2020). For instance, the federal government has the policy to abstain from making decisions that may affect state law cannabis schemes. *Id.* at 372. However, federal policy towards state cannabis schemes and environmental law are vastly different. *Compare MediGrow*, 487 F.Supp. 3d at 372 *with State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1040-41 (2d Cir. 1985). As evidenced by the creation and continuation of EPA, the federal government has a strong interest in the consistency of environmental law. *See Shore Realty Corp.*, 759 F.2d at 1040 (explaining that CERCLA was intended to fill gaps in federal laws on hazardous cleanup and compensation). Furthermore, "[t]he exercise of pendent jurisdiction in CERCLA claims is favored" over state law claims of negligence, nuisance, and property damage because "[b]oth the federal and state law claims derive from a common nucleus of operative fact, and therefore, should be tried in the same proceeding." *INX Intern. Ink Co. v. Delphi Energy & Engine Mgmt. Sys.*, 943 F.Supp. 990, 997 (E.D. Wis. 1996). With a preference for state law claims to be brought in conjunction with CERCLA claims, there is a strong federal interest regarding the consistency of the application of environmental law that outweighs New Union's interest in adjudicating simple state tort law.

Lastly, with the potential for FAWS' state law claims to override EPA's authority in the remediation of the aquifer, the district court has a unique interest in retaining jurisdiction to

prevent the evisceration of EPA's primary jurisdiction over the remediation. R. at 18. FAWS is seeking damages in the form of payment of the private well testing costs, the loss of use and enjoyment of their property, their diminished property values, and punitive damages, installation of CleanStripping on Fartown residential wells that test positive for NAS-T, and remediation of the Sandstone Aquifer. R. at 10. However, many of these remedies were already rejected by EPA or dismissed by the district court. R. at 9, 13.

Before issuing the UAO, EPA rejected FAWS' request to order BELCO to install CleanStripping in the resident's private wells that tested positive for NAS-T and rejected the request for remedial actions to remove NAS-T from the aquifer. R. at 9. If the injunction is granted in state court, it would greatly undermine EPA's authority opposing the interests of federal policy. In addition, the district court granted summary judgment in favor of BELCO regarding the payment of FAWS private well testing as recovery costs under CERCLA. R. at 18. While the district court may find the costs reimbursable under state law, the district court has already completed *substantial discovery* regarding Central Labs' testing costs. R. at 11.

Given the strong federal interest in settling these state law claims to prevent inconsistencies and the factors which favor retention, judicial economy, convenience, and fairness to the litigants, this Court should find that the district court did not abuse its discretion in retaining the state law claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decisions as to the reimbursement of FAWS' expense in testing and the retention of jurisdiction over the state tort law claims. Additionally, this Court should reverse the district court grants of summary judgment as to its determinations that the New Union ERA constitutes an ARAR for the purposes of

reopening the CD and that UAO should require BELCO to install filtration systems in favor of BELCO.