NON MEASURING BRIEF
TEAM 32

C.A. No. 22-000677

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee.

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

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

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

Brief of FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered judgment in consolidated cases nos. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). The district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). EPA, BELCO, and FAWS all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeal jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final, and thus appealable. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

STATEMENT OF ISSUES PRESENTED

I. Whether the district court erred in determining that FAWS' costs for sampling, testing, and analyzing well water samples of its members' private drinking water was not reimbursable under CERCLA?

II. Whether the district court erred in upholding EPA's determination that the ERA constitutes an ARAR, which allowed EPA to reopen the Consent Decree and order further remedial action on the UAO, was proper?

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

IV. Whether the district court erred by retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

Residents of Fartown, a small community in the state of New Union, began to notice that their water smelled "off" in 2016. Record at 8. Three years earlier, residents of Centerburg, a town in New Union two miles north of Fartown, also noticed that their water smelled "off" and "sour." R. at 6. Both Fartown and Centerburg sit above the Sandstone Aquifer (Aquifer), which flows downgrade from under Centerburg to under Fartown. R. at 5. In 2015, the Department of Health (DOH) tested Centerburg's public water supply and determined that a chemical called Nitro-Acetate Titanium (NAS-T) was responsible for the smell. R. at 6. An Environmental Protection Agency (EPA) led investigation uncovered that a facility owned by Better Living Corporation (BELCO) was the source of NAS-T, which had been spilled and stored in an unlined wastewater lagoon, migrated through surrounding soil, and entered the Aquifer. R. at 6.

Unlike its neighbor Centerburg, Fartown is a smaller community with a population of 500 residents. R. at 5. Because of the socio-economic conditions in Fartown, it is considered an environmental justice community. R. at 5. While Centerburg is serviced by a centralized water supply, Fartownians use individual wells and pump their water directly from the Aquifer. R. at 5.

I. BELCO's Contamination of the Aquifer

BELCO is responsible for contaminating the Aquifer with NAS-T. R. at 5. BELCO manufactured NAS-T at their factory (the Facility or Site) in Centerburg from 1973 through 1998, and BELCO still owns the Facility. R at 6. NAS-T is a probable human carcinogen. R. at 6. Based on medical studies from the 1990s, EPA adopted a Health Advisory Level (HAL) for NAS-T in drinking water of 10 parts per billion (ppb), which incorporates a margin of error to ensure that level of exposure is non-toxic to humans. R. at 6. There are no other state or federal regulations regarding NAS-T, it is not regulated under the Safe Drinking Water Act, and EPA is not monitoring it as an unregulated contaminant in drinking water. R. at 6. The human nose can

detect NAS-T's sour or stale smell in water at concentrations as low as five parts per billion (ppb). R. at 6.

Prompted by Centerburgers' complaints of sour water, in January 2015 DOH began testing the public water supply for chemical contamination and found NAS-T in the range of 45-60 ppb. R. at 6. DOH notified the residents of Centerburg to cease drinking their tap water, and BELCO immediately began supplying all Centerburgers with bottled water while the state investigated. R. at 6. The New Union Department of Natural Resources referred the remediation to EPA in January 2016. R at 6.

EPA and BELCO entered into agreement in March 2016, where BELCO would continue to provide bottled water to residents of Centerburg while conducting a remedial investigation and feasibility study (RI/FS) to investigate sources of the contamination, assess risk to human health and the environment, and evaluate remedial alternatives for the Site. R. at 6-7. The RI/FS confirmed that NAS-T had migrated to the groundwater and created a plume of NAS-T in the Sandstone Aquifer. R at 6.

BELCO was not directed to remediate the plume of NAS-T because the RI/FS estimated that remediation was not feasible due to time and cost. R. at 7. Instead, BELCO installed three successive lines of monitoring wells. R. at 7. The final five wells were installed approximately one-half mile north of Fartown (one-and-a-half miles south of Centerburg.) R. At 7. When sampled from July 2016 through January 2017, these five wells showed no detectable amounts of NAS-T. R. at 7. However, in January 2018 the final line of wells located one-half mile north of Fartown detected low levels of NAS-T. R at 8. EPA did not direct BELCO to install any additional testing wells. R. at 7.

In June 2017, EPA selected a clean-up plan for the Site through a Record of Decision, EPA entered into a Consent Decree (CD) with BELCO, and BELCO agreed to design and implement the remedy per the Record of Decision. R. at 7. The CD was approved by the court in August 2017. R at 7. While no citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan, or the CD, several Fartownians submitted sworn testimony that the water from their private wells began to occasionally smell "off" beginning in 2016. R. at 7-8.

Per the CD, BELCO installed "CleanStripping" filters to remove NAS-T from Centerburg's public water supply, excavated contaminated soil, and monitored the sampling wells. R at 7. EPA issued BELCO a Certificate of Completion (COC) in September 2018. R. at 8. After issuing a COC, EPA could not order BELCO to further remediate the Site without "reopening" the CD. R. at 7. There are two ways to reopen the CD: (1) when new information shows the clean-up plan is no longer protective of human health or the environment or (2) when a new, more stringent Regulatory Standard is established that the clean-up plan does not satisfy. R. at 7; CD, § 13.3. The CD defines "Regulatory Standards" to include "applicable or relevant and appropriate requirements" (ARARs) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). R at 7; CD, § 1.12.

II. Finding NAS-T Under Fartown

Fartownians asked DOH to test and sample their water after hearing that Centerburg citizens, with whom they share a water supply, were benefiting from a CD between EPA and BELCO to remediate contamination in the Aquifer. R. at 8. In February 2019, DOH tested only five wells, which all came back negative for NAS-T. R. at 8. Three months later, EPA declined Fartownians' request for additional testing, citing the fact that the last line of wells, which sat one-half mile north of Fartown, had not detected NAS-T. R. at 6, 8.

In fact, NAS-T was present in Fartown's water supply. R. at 8. Out of frustration, Fartownians created the group FAWS in December 2019 to spearhead efforts to achieve clean water for all Fartownians. R. at 8. FAWS retained Central Labs to conduct tests of the community's private wells, and nearly 50% of wells tested came back with some level of NAS-T contamination, contradicting DOH's testing just 10 months prior. R. at 8. Out of the 225 wells tested, 54 wells had between 5-8 ppb and 51 had between 1-4 ppb. R. at 8. This testing cost FAWS $21,500, which FAWS paid to Central Labs. R. at 8.

With this information, in May 2020 FAWS again asked EPA to conduct more testing and remediate the plume of NAS-T contaminating Fartownian water by reopening the CD. R. at. 8. EPA again declined to take further action, citing both the low levels of NAS-T and the limited options for reopening the CD. R. at 8.

III. New Union ERA and Legislative History

On November 3, 2020, citizens of New Union passed the Environmental Rights Amendment (ERA), a landmark decision recognizing citizens' fundamental right to a clean, healthy environment. R at 8. The ERA Reads:

> Each and every person of this State shall have a fundamental right to clean air, clean water and to a healthful environment free from contaminants and pollutants caused by humans.

N.U. CONST. art. I, § 7.

Like all New Union constitutional amendments, the ERA passed in the state legislature, was signed by the governor, and passed with a 71% approval rate. R. at 8.

In light of ongoing water contamination issues and the impact of air pollution, the ERA is designed to guarantee protections for New Union residents where existing statutes and regulations are insufficient. Addendum at 9. It acknowledges that every citizen in New Union has a right to know that they and their families can live and grow together in a healthful

environment with clean air and clean water, free from human-caused contaminants and pollutants. Add. at 3. Emphasizing the importance of considering future generations and the consequences of the legislature's failure to protect these resources, the ERA intends to take New Union forward by folding fundamental rights to clean water, clean air, and a healthful environment into their constitution. Add. at 7. In application, the ERA is envisioned to frame an expectation for citizens that the legislature, the judiciary, and the agencies are all working "in concert" to ensure better protection for families, communities, and the environment. Add. at 4.

Drafters of the ERA acknowledge some great tasting water has substances other than H2O in it, but "clean" means healthful to humans, healthful to other animals and their environments, and that no harm will result in consumption of the water. Add. at 4. Water supplies should objectively be perceived as "clean". Add. at 4. Additionally, waters should be free from contamination or pollution caused by humans that would make the water unhealthful to consume or that would harm children and families. Add. at 4-5.

"Healthful" in the context of the ERA encompasses food safety issues such as GMOs, pesticide use on agricultural products, and other food safety concerns. Add. at 5. Citizens should be able to buy fresh produce that is free from contamination–the way nature intended it to be consumed. Add. at 5. The ERA also applies to odors that are sufficiently offensive and impact what the community would consider "clean" air. Add. at 5. Issues like offensive odors from landfills or garbage trucks are viewed as harmful to the community. Add. at 5-6.

Assembly members raised concerns about businesses facing suit under the ERA in situations where contaminants are presently or previously unknown. Add. at 6. Drafters explained that when a substance or contaminant not currently regulated is discovered to cause harm, the ERA fills in the regulatory gap, providing the state time to determine how to regulate

or address the substance or contamination. Add. at 6. While there may still be fear of the impact on businesses, passage of the ERA establishes a level of protection offered to citizens of New Union. Add. at 6. By passing the ERA, the legislature recognizes a fundamental right to clean air, water, and a healthful environment free from contaminants or pollutants caused by humans, "at the time this harm is learned, past, present or future, regardless of intention or knowledge on the part of the business." Add. at 6.

After the amendment passed in January 2021, EPA wrote to DNR asking if they believed the ERA constituted an ARAR for CERCLA purposes. R. at 9. DNR responded stating, "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." R. at 9.

IV. Reopening the Consent Decree

In March 2021, EPA reopened the CD and ordered BELCO to sample and analyze water from 50 private wells in Fartown. R. at 9. EPA cited two reasons for reopening the CD: (1) the 2020 Central Lab results; and (2) the passage of the ERA. R. at 9. EPA ultimately deemed the ERA to be a change in Regulatory Standards under the CD. R. at 9.

EPA relied on the fact that Fartown is an environmental justice community, the possible endangerment including potential carcinogenic effects and the presence of odors from NAS-T to reopen the CD and requested the following response actions be taken: (1) sampling of private wells in Fartown; (2) supplying bottled water to any Fartownian whose well tested positive for NAS-T; and (3) continued monitoring of Fartown wells. R. at 9. BELCO refused to implement the response actions and challenged EPA's request, arguing EPA did not have the legal right to reopen the CD because the ERA was not an ARAR. R. at 9. Despite BELCO's objection, EPA issued a Unilateral Administrative Order (UAO) directing BELCO to conduct their requested response actions. R. at 9.

Before issuing the UAO, FAWS asked EPA to order BELCO to install CleanStripping on residential wells that tested positive for NAS-T or take other remedial actions sufficient to remove NAS-T entirely from their water supply. R. at 9. Emphasizing that the 2019 tests of five wells that detected levels of NAS-T below the applicable HAL, EPA declined to include this requirement in the UAO. R. at 9.

BELCO refused to comply with the UAO, so EPA supplied water to Fartownians with wells that tested in excess of 5 ppb of NAS-T and continued to monitor those wells. R. at 10. EPA's sampling showed approximately 55% of well water samples did not detect NAS-T, 25% of well water samples detected levels of NAS-T in the 1 to 4 ppb range and 20% of well water samples detected levels of NAS-T in the 5 to 8 ppb range, high enough that the parties agree a human nose could detect a sour or stale smell. R. at 6, 10.

V. Proceedings Below

Plaintiff's EPA and FAWS both filed actions, which were consolidated by the district court. R. at 10. EPA seeks to recover costs incurred in Fartown and for penalties for BELCO's violation of the UAO. R. at 7. BELCO answered, arguing that because the ERA cannot properly be considered an ARAR, EPA did not have the right to reopen the CD, and thus the UAO was without legal foundation. R. at 10. FAWS intervened in the BELCO Action and asserted a claim against EPA challenging the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), arguing it failed to compel BELCO to provide CleanStripping filtration systems on FAWS' members' private wells. R. at 7, 10.

Separately, FAWS and eighty-five individual plaintiffs from Fartown filed an action against BELCO. R. at 10. The complaint's first cause of action is a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on testing and analysis. R. at 10. FAWS'

complaint further alleges that BELCO's contamination of the Aquifer constituted negligence and a private nuisance under New Union state law. R. at 10.

All parties filed timely motions for summary judgment. Based on the administrative record, the district court granted summary judgment in favor of BELCO with respect to reimbursement of FAWS' expenses in testing; in favor of EPA with respect to its determination to reopen the CD and issue the UAO; in favor of FAWS as to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and the Court denied FAWS' motion to dismiss the remaining state law claims. R. at 18. This appeal follows.

SUMMARY OF THE ARGUMENT

FAWS is entitled to recover $21,500 from BELCO as response costs under CERCLA. FAWS' investigation was a necessary action taken in response to an actual and real threat to human health or the environment. Investigative testing is a remediation effort that is consistent with the National Contingency Plan (NCP). The tests were not duplicative of EPA's efforts because prior testing programs were insufficient, and residents of Fartown, an environmental justice community, were motivated by a desire to know whether their water was contaminated.

EPAs decision to reopen the CD and order further remedial action in the UAO after determining the ERA constituted an ARAR should be upheld because the ERA satisfies all necessary elements for a state ARAR. The ERA is properly promulgated because it applies generally to all citizens and is legally enforceable. It is more stringent than federal standards because it guarantees a broad fundamental right to citizens of New Union. The ERA is relevant and appropriate because it specifically targets pollutants and contaminants caused by humans. Finally, the ERA was timely identified by EPA shortly after its passage.

EPA's interpretation of "clean water" cannot be given deference because it is unreasonable given that NAS-T is a human-made contaminant, which the ERA prohibits. EPA must require BELCO to install filtration systems on Fartownian wells, instead of only supplying bottled water, in order to provide Fartown with clean water, clean air and a healthful environment as is fundamentally guaranteed by the ERA.

The remaining state law claim should be dismissed without prejudice as the only remaining claim in this action. Parties have not invested substantial time or money litigating the remaining state law claims, so it is not unfair to dismiss the claim without prejudice, allowing FAWS to bring the action in state court. To rule on FAWS' tort claims, the court must interpret the impact that the recently adopted ERA has on negligence and private nuisance claims, which is a novel issue of state law that should be left to the state courts.

STANDARD OF REVIEW

The Court of Appeals reviews a district court's decision on cross-motions for summary judgment de novo; construing all facts and drawing all reasonable inferences in favor of the party against whom the motion under consideration was filed. *Kemp v. Liebel*, 877 F.3d 346 (7th Cir. 2017). Review of grants of summary judgment on APA claims is also de novo, and the court "review[s] the administrative record directly, according no particular deference to the judgment of the District Court.'" *Roberts v. U.S.*, 741 F.3d 152, 157- 58 (D.C. Cir. 2014) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir. 2002)). Subject-matter jurisdiction is a matter of law and is also reviewed de novo. *Rajasekaran v. Hazuda*, 815 F.3d 1095, 1098 (8th Cir. 2016).

ARGUMENT

I. FAWS Is Entitled to Recover $21,500 from BELCO as Response Costs Under CERCLA Because FAWS Can Establish Prima Facie Elements Required for Recovery and Investigation Costs Were Both Necessary and Consistent with the NCP.

The $21,500 that FAWS paid to test whether Fartownians, members of an environmental justice community, were drinking contaminated groundwater is reimbursable under CERCLA. CERCLA is a remedial statute "designed to encourage prompt and effective cleanup of hazardous waste sites" by "assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010). Under CERCLA, a non-governmental party is entitled to bring a private cost recovery action against parties responsible for the release of a hazardous substance by establishing (A) the four prima facie elements required for recovery, (B) that the costs incurred were necessary to address an actual and real threat to human health, and (C) that the action was consistent with the National Contingency Plan. *Forest Park Nat. Bank & Tr. v. Ditchfield*, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012); *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1003 (9th Cir. 2010).

A. FAWS has a prima facie case for recovery under CERCLA because BELCO is responsible for a facility that released a hazardous substance, and FAWS was forced to incur response costs.

The costs FAWS incurred because of the BELCO facility's release of NAS-T into the Aquifer meet the four elements required for a prima facie case for cost recovery under CERCLA. (1) The BELCO site is a "facility" as defined by CERCLA, (2) BELCO is a responsible party, (3) BELCO released NAS-T, which is a hazardous substance, and (4) FAWS has incurred costs in response to the release or threatened release of NAS-T. *See Rolan v. Atl. Richfield Co.*, 427 F. Supp. 3d 1013, 1020 (N.D. Ind. 2019).

The site where BELCO released NAS-T is a "facility," and BELCO is the owner and responsible party. See 42 U.S.C. § 9607(a)(1). CERCLA defines "facility" broadly as any site or area where a hazardous substance is located, including pipes, storage containers, ponds, and lagoons. 42 U.S.C. § 9601(9). The undisputed record indicates that NAS-T was spilled on the ground and stored in an unlined lagoon on the facility's property. The parties do not dispute that BELCO has owned the property in Centerburg since at least 1973 and remains the current owner.

CERCLA defines "hazardous substance" by reference to select federal authorities including the Clean Water Act, Clean Air Act, RCRA, and TSCA. *Id*. Additionally, section 102 of CERCLA requires EPA to promulgate a list of "hazardous substances" that may present "substantial danger to the public health or welfare or the environment." 42 U.S.C. § 9602(a). NAS-T is a known probable human carcinogen, and EPA adopted a HAL for NAS-T indicating that it considers it a hazardous substance under CERCLA. Additionally, it is undisputed that BELCO released NAS-T into the environment by "spilling, leaking . . . leaching . . . or disposing" it into the environment, which includes any "ground water [or] drinking water supply[.]" 42 U.S.C. § 9601(22); 42 U.S.C. § 9601(8).

Finally, for BELCO to be liable under CERCLA section 107(a), FAWS must have "incurred" costs. 42 U.S.C. § 9607(a)(4)(B). FAWS, an organization made up of Fartownian residents, was solely responsible for the $21,500 paid to Central Labs.

B. FAWS' investigative costs are recoverable as a "necessary cost of response" because they funded testing of untested wells when "upstream" monitors indicated NAS-T may be migrating.

For response costs to be "necessary," plaintiffs must establish that an actual and real public health threat exists prior to initiating a response action. *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994). "Necessary" costs cannot be duplicative of state or federal agency actions, and they must be "necessary to the containment and cleanup of hazardous

releases." *U.S. v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997) (citing *U.S. v. Hardage*, 982 F.2d 1436, 1448 (10th Cir.1992)). Additionally, costs must be incurred in response to a threat to human health or the environment and be necessary to address the threat. *Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 705 (6th Cir. 2006) (holding that a theoretical threat is not enough and there is no liability for costs when plaintiff has ulterior motives for investigating). Finally, a plaintiff cannot be expected to wait until their water is unsafe to take responsive actions. *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 935 (6th Cir. 2004).

i. FAWS' response costs were not duplicative because they uncovered new information relevant to remediation.

Costs are considered "duplicative" if they (1) do not seek to uncover new or different information as an EPA action or (2) occur at the same time as an EPA action. *Louisiana-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993). Investigative costs may be considered duplicative when they are incurred after EPA has initiated a remedial investigation. *Id*.

FAWS' response action–contracting Central Laboratories to test residential wells for NAS-T–was not duplicative of EPA's actions because EPA had not initiated testing or remedial investigation efforts for Fartown's groundwater when the tests were conducted. Not only did EPA not initiate a remedial investigation into the presence of NAS-T in Fartownians' water supply, EPA also declined FAWS' direct requests to investigate the wells in Fartown, which Fartownians had noted smelled off. FAWS had no reason to believe that EPA was planning to investigate the extent to which Fartown residents' wells were contaminated with NAS-T. This distinguishes FAWS' claim from the plaintiffs in *Louisiana-Pacific* whose costs were found not

recoverable because they were explicitly informed that EPA was planning to eventually conduct an investigation. *Id*.

Fartown's water supply had not been sufficiently investigated for NAS-T, and additional testing was needed to determine the extent of the contamination. *See Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1114 (E.D. Mo. 2016) (finding tests were duplicative and unnecessary when they "were not conducted to discover new contamination or to delineate with a greater degree of scientific accuracy and precision the existing contamination"). While EPA required BELCO to investigate Centerville groundwater, EPA refused the possibility that NAS-T could be contaminating water consumed by Fartownians, despite the fact that residents' water smelled off and NAS-T was detected in the final line of wells closest to Fartown, suggesting the plume may be migrating.

ii. FAWS' decision to pay for testing was motivated by a desire to know if their water was contaminated.

"Necessary" costs must be closely tied to the "actual cleanup" of the property, which means the actions that incurred the costs assisted with eventual remediation and cleanup efforts and were not conducted solely in support of future litigation efforts. *Id*.; *Walnut Creek Manor, LLC v. Mayhew Ctr.*, LLC, 622 F. Supp. 2d 918, 929 (N.D. Cal. 2009).

FAWS' actions were taken to "assist with and help plan the eventual remediation and cleanup efforts" and they were "closely tied to the actual cleanup," not merely for litigation. *Walnut Creek,* 622 F. Supp. 2d at 929; *Wilson,* 209 F. Supp. 3d at 1114 (finding that costs associated with the assistance of plaintiff's legal claims in anticipation of litigation were not "closely tied to the actual cleanup" of the site.) In *Forest Park*, the court found that costs associated with the investigation of a migrating plume of perc, a statutorily recognized hazardous substance, qualified as an "an actual and real threat to human health or the environment." *Forest*

Park, 881 F. Supp. at 977. Similarly, FAWS was acting on complaints from residents that their water smelled "off" and evidence that the plume of NAS-T was migrating their direction, suggesting an actual and real threat that Fartown wells were contaminated.

Finally, unlike the plaintiffs in *Wilson Rd.,* whose costs were motivated by litigation, FAWS spent $21,500 to determine whether Fartown residents' water was contaminated with NAS-T and was motivated by frustration, not eventual litigation.

iii. FAWS' costs were necessary regardless of whether they detected NAS-T.

Investigative costs are included under CERCLA's definition of "response" and "removal" actions and includes "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." *Forest Park*, 881 F. Supp. 2d at 977 (quoting 42 U.S.C. § 9601(23)). The court in *Forest Park* pointed to CERCLA's statutory language when concluding that modest investigative costs were *necessary* to determine the possible threat of a contamination plume in groundwater. *Forest Park*, 881 F. Supp. 2d at 977-78. BELCO and EPA point out that the eventual existence of NAS-T is not relevant, and FAWS agrees. In fact, even if all of the wells came back negative for NAS-T, FAWS would still be eligible for recovery. When the release of NAS-T occurred, the potential for contamination existed, so some response costs will "almost always be reasonable" to ensure that water remains safe. *Vill. of Milford*, 390 F.3d at 935 (holding that investigative costs were reasonable when, without further study, a town would not know whether their water might become unsafe to drink in the future). Fartownians knew that significant efforts had been undertaken just north of them in Centerburg to remediate the contamination, so it was reasonable of them to conclude there was a chance the downstream groundwater was also contaminated.

C. Assessing the extent of NAS-T contamination in drinking water situated downstream from a known source is consistent with the National Contingency Plan.

FAWS' decision to assess the status of Fartownian drinking water falls directly in line with the NCP as a response and removal action under CERCLA. To recover investigative costs under CERCLA, along with establishing that the costs were necessary, a non-governmental party must *also* establish that the costs were consistent with the NCP. *Forest Park*, 881 F. Supp. 2d at 977. Response costs are considered consistent with the NCP "if the action, when evaluated as a whole, is in substantial compliance" with the NCP. 40 C.F.R. § 300.700(c)(3)(i). Under the NCP, when a hazardous substance is released, appropriate removal actions can be based on threats to humans, contamination of drinking water, and conditions that may cause migration of the hazardous substance. 40 C.F.R. § 300.415. Additionally, "EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site." 40 C.F.R. 300.430(a)(1)(iii)(F). Specifically, in situations where restoration of an aquifer contaminated by a plume of pollutants is *not* practical, "EPA expects to prevent further migration of the plume, prevent exposure to the contaminated groundwater, and *evaluate further risk reduction*." *Id*. (emphasis added).

By refusing to test a sufficient number of wells in Fartown, EPA shirked its duty to "evaluate further risk reduction." FAWS filled this void. FAWS' self-funded testing program evaluated further risk reduction, in line with the NCP. FAWS is an organization formed by the public after residents could smell that something was off in their water and saw their neighbors' water quality remediated. Under the NCP, a site investigation involves "sufficient sampling, analysis and data collection to provide reliable information on the nature, extent, and amount of contamination, the potential exposure routes, likelihood of exposure via those pathways, and the risk of harm from the contaminants." *Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp.*,

748 F. Supp. 373, 387 (E.D. N.C. 1990). FAWS testing groundwater downstream of a potentially migrating plume constitutes sufficient sampling and data collection; EPA's plan that failed to account for migration and input from Fartownians is not sufficient.

Meaningful public participation is integral to ensuring proper completion of CERCLA-quality cleanup. 40 C.F.R. § 300.700(c)(6); *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001). However, EPA did not involve any residents of Fartown during the creation of the CD with BELCO, which was focused on remediation in Centerburg. In response, FAWS was created by a frustrated group of Fartownians who wanted to have their concerns heard and ultimately find out whether their water contained contaminants. As an environmental justice community, EPA should have made a concerted effort to open communication pathways with the residents of Fartown.

Even if the investigation was not considered consistent with the NCP, courts are split over this requirement. *Compare Vill. of Milford,* 390 F.3d at 934 (holding that consistency with the NCP is not required for recovery of monitoring and investigation costs), *with Bd. of Cnty. Comm'rs of Cnty. of La Plata, Colorado v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1115 (D. Colo. 2011) (holding that "response costs" include costs of investigating release and must be consistent with NCP). A plaintiff may still state a prima facie case for recovery even if investigatory costs are not found to be consistent with the NCP. *Marriott Corp. v. Simkins Indus., Inc.*, 825 F. Supp. 1575, 1583 (S.D. Fla. 1993) (holding investigatory costs need not be consistent with NCP in order to state prima facie recovery action under CERCLA).

II. EPA's Decision to Reopen the Consent Decree and Issue a UAO Based on Their Determination That the ERA Constituted an ARAR Should be Upheld Because it Was Properly Promulgated, More Stringent than Federal Standards, Legally Applicable, and Timely Identified.

Under CERCLA, ARAR stands for "applicable or relevant and appropriate requirements" and is used to determine cleanup goals, select remedies, and implement actions to address contamination issues. 42 U.S.C. § 9621; 40 C.F.R. § 300.5. Remedial actions must attain ARARs to ensure implementation of remedies are protective of human health and the environment. 42 U.S.C. § 9621(d). CERCLA is designed to harmonize with state ARARs that are more stringent than federal ARARs. *U.S. v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1418 (6th Cir. 1991). State environmental standards constitute ARAR standards if they are: (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified.

Courts note that EPA's interpretation of what constitutes an ARAR must be given deference "according to its persuasiveness." *See U.S. v. Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Courts also look at "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead Corp.,* 533 U.S. at 219.

A. The ERA is properly promulgated because it was enacted by the New Union Legislature as a self-executing amendment to the state constitution and applies generally to all New Union citizens.

Courts define proper promulgation under CERCLA as a measure or amendment "imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Akzo*, 949 F.2d at 1440. General applicability is understood as "laws or rules promulgated by state legislatures or agencies that are imposed on

all citizens of a particular state." *Id*. at 1440-41. In determining whether regulatory standards are legally enforceable, courts state that regulatory standards are not constitutionally vague if they are 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." *Id*. "Even if a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria for state ARARs." *Id*. at 1442. EPA has recognized that general requirements with no implementing regulations can be enforceable ARARs. *Id*.

i. The ERA applies generally to all New Union citizens and does not require further regulations to be legally enforceable.

The ERA is generally applicable because it grants all citizens of New Union a fundamental right to clean air, clean water, and a healthful environment. The ERA was passed by the New Union legislature, signed by the governor, and passed by citizens in the 2020 election with a 71% approval rate. This is the same promulgation process used for all New Union constitutional amendments. As such, the ERA generally applies to all citizens of New Union.

The ERA is legally enforceable because it is a self-executing amendment and does not require further implementation of regulations. The amendment is intended to function as a safety net for citizens when current environmental laws fall short in protecting the newfound fundamental rights, as is the case with the NAS-T contamination. Additionally, the ERA is legally enforceable because it was drafted with sufficient definiteness such that ordinary people can understand the conduct prohibited under the ERA. The ERA generally, but clearly, targets contaminants and pollutants caused by humans such as NAS-T. Although this is a broad restriction, it is not ambiguous. Any argument that claims ordinary people could not understand what is prohibited under the ERA grossly undermines the intelligence of New Union citizens.

ii. The ERA is properly promulgated because it provides a clear goal of protecting citizens of New Union.

Despite BELCO's contention that the ERA requires further regulation to be legally enforceable, even in situations where a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria. *See Akzo,* 949 F.2d at 1442. The ERA was enacted out of growing concern about ongoing water contamination and air quality pollution. The legislature specifically highlighted the importance of clean drinking water and the need for additional constitutional environmental protections, specifically targeting contaminants caused by humans. Additionally, the senate report explains that existing statutes are insufficient to protect people from exposure to unclean or unhealthful air and water. The New Union legislature had a clear goal in mind when it granted their citizens this fundamental right.

B. The ARAR is more stringent than any federal standard because it is broad in scope, no federal standards grant citizens a fundamental right to clean environmental resources, and it creates a safety net to protect citizens.

For a state standard to constitute an ARAR, it must be, "more stringent than any Federal standard, requirement, criteria, or limitation . . . ." 42 U.S.C. § 9621(d)(2)(A)(ii). When comparing state and federal standards, courts state that "[w]here no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." *Akzo*, 949 F.2d at 1443 (citing *Proposed Rule,* 53 Fed.Reg. at 51435). Original drafters of the statute explained that "more stringent" state requirements include "any State requirement where there is no comparable Federal Requirement." *Akzo*, 949 F.2d at 1443.

While many federal environmental laws target contamination and set goals to protect the environment, no federal standard grants citizens a fundamental right to clean air, clean water, and a healthful environment free from contaminants and pollutants caused by humans.

Resultantly, it creates a state standard that is "more stringent" than any federal standard because (1) there are no federal standards that grant US citizens a fundamental right to these resources, (2) the record shows that NAS-T is not regulated under the Safe Drinking Water Act, and (3) EPA is not monitoring it as an unregulated contaminant in drinking water. Additionally, The ERA creates a more stringent standard because it applies to all contaminants and pollutants caused by humans, not just those considered to be hazardous as defined by federal standards. This makes the New Union ERA broader in scope than any federal ARAR because existing federal ARARs apply only to specific contaminants and pollutants with set federal regulatory standards.

BELCO argues that the ERA cannot be deemed more stringent than any federal environmental standards because it mirrors the first criteria to be analyzed pursuant to the NCP, which is "overall protection of human health and the environment." *See Sealy Conn. Inc. v. Litton Indus.*, 93 F. Supp. 2d 177, 184 (D.C. Conn. Feb. 9, 2000). However, the ERA encompasses more than just overall protection of human health and the environment. It grants a fundamental right designed to guarantee clean air, clean water, and a healthful environment–a protection much higher than the consideration of overall protection of human health and the environment.

The ERA is specifically designed to work as a broad safety net where current standards fall short in protecting citizens' rights. NAS-T is not currently regulated under CERCLA or the Safe Drinking Water Act, and EPA is not monitoring it as an unregulated contaminant in drinking water. The New Union Legislature justified the passage of the ERA because "on occasion, the existing statutes and regulations are insufficient to protect the people from exposure to unclean or unhealthful air and water." A state's decision to grant their citizens a

fundamental right to clean resources and a healthful environment creates a stricter standard because no federal ARARs currently grant citizens a similar fundamental right, and if the ERA is not implemented when there is no federal or state regulation in place, it is essentially powerless.

C. A state law constitutes an ARAR when it is "relevant and appropriate" or "legally applicable" to a remedial action for a hazardous substance release.

Legally applicable requirements are explained as standards promulgated under federal or state law that specifically address a hazardous contaminant at a CERCLA site. 40 C.F.R. § 300.5. In contrast, "relevant and appropriate requirements" are standards promulgated under federal or state law that address problems or situations sufficiently similar to those encountered at a site such that use is well suited to that site. *Id*. While the New Union ERA may not specifically address a hazardous contaminant, it is nevertheless relevant and appropriate because it was enacted to protect citizens from unregulated hazardous pollutants and contaminants, specifically those caused by humans.

The ERA is relevant and appropriate given that the ERA was drafted with the intent to cover unregulated hazardous material "caused by humans" and protect citizens when current environmental laws fall short. The record shows that NAS-T is not naturally occurring and was manufactured by BELCO, making application of the ERA relevant and appropriate.

BELCO argues that the ERA is not "relevant or appropriate" because it does not "address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site." *Franklin,* 240 F3d at 544. This argument ignores the legislative intent behind the ERA, which explains that the ERA was designed to fill the regulatory gap to ensure no one suffers from harm while the state acts to address the newly discovered, unregulated contaminant. This is directly applicable to the situation in Fartown. While NAS-T is not presently regulated by federal standards such as the Safe Drinking Water

Act, it is a known probable human carcinogen. It is also clear that the NAS-T plume inside the Sandstone Aquifer was not anticipated. The ERA prevents lapses like this to protect New Union citizens.

Finally, while BELCO argues 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," because it is "relevant and appropriate" it can constitute an ARAR. *Id*. (citing 40 C.F.R. § 300.5). The ERA need not be both "relevant and appropriate" and "legally applicable."

D. The ERA was timely identified by EPA and DNR.

The final requirement for a State environmental standard to constitute an ARAR is that it be timely identified. 42 U.S.C. § 9621(d). Agencies are required to identify potential ARARs and communicate them in a timely fashion. 40 C.F.R. § 300.515(d)(1). Shortly after its passage in January 2021, EPA consulted with DNR on whether ERA constituted an ARAR. DNR answered stating the ERA should constitute an ARAR where it provides guidance consistent with CERCLA and is not inconsistent with any state or federal regulations. Shortly after, EPA reopened the CD on the basis that the ERA constituted an ARAR. Given this, the ERA was timely identified as an ARAR. Thus, the ERA constitutes an ARAR because it meets all requirements under 42 U.S.C. § 9621(d).

III. EPA's Decision Not to Require BELCO to Install Filtration Systems to Remove NAS-T from Fartown Wells Was Arbitrary, Capricious, and Contrary to Law Because the Decision Ignored the ERA's Definition of Clean Water, Clean Air, or a Healthful Environment.

The approval of the ERA established a broad and strict standard for citizens: clean water, clean air, and a healthful environment free from human-caused contaminants and pollutants. N.U. CONST. art 1, § 7. After FAWS discovered 105 wells contaminated with NAS-T, EPA

nevertheless refused to require BELCO to install filtration systems to remove this human-caused contaminant from residents' water supply, arguing that '"clean water' does not necessarily mean water free from *any* contamination," that low levels of NAS-T were acceptable, and that the problem could be remedied by providing bottled water. R. at 16. EPA's decision contradicts the standard created by the ERA and the facts on the record.

Where a challenge is made to an EPA agency decision under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), courts review the agency decision to 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). When evaluating agency decisions, courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The standard of review is narrow–a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the agency. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

A. EPA's finding that clean water does not mean water free from all contaminants is contrary to the ERA's purpose and legislative intent of the amendment.

EPA argues that clean water does not necessarily mean water free from *any* contamination. This is contrary to the ERA's exact language, which plainly states "free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. The record indicates that NAS-T is a human-caused contaminant, and as the district court stated: "[t]his is precisely the situation meant to be covered by the ERA." R. at 13. EPA's interpretation of clean water is therefore not entitled to deference because it is unreasonable given that it is contrary to the purpose and intent of the ERA.

The purpose and language of the amendment is not ambiguous, but even if it were, EPA can look to the legislative intent to decipher the meaning of "clean." New Union legislators clearly explained that "clean" is an objective standard. "Clean" also "certainly means healthful to human beings," and "healthful means that it will do no harm to consume that water." Add. at 5. Amendment sponsors recognized that the term clean, "doesn't mean that the water is free [of] any or all substances besides H2O… But [the substances] should not harm you." Add. at 4. Specifically, "clean would mean, for example, water that is free of contamination or pollution caused by humans that would make the water unhealthful or harmful to consume." Add. at 5.

Fartown water is not objectively clean when it contains a probable human carcinogen. First, "sour" or "stale" smelling water that is contaminated with a human produced chemical cannot objectively be perceived as clean. From an objective standpoint, a reasonable person does not drink, cook, bathe, or clean using water with a bad smell and think that it is "clean." Nor do they drink or bathe with water known to be contaminated with a chemical that causes harm at high levels and think that it is "clean." Second, this water is harmful to Fartownian citizens, whether or not the wells test above 10 ppb. The harm or injury takes the form of environmental injustice and indecency. To ask an Environmental Justice community to accept hazardous living conditions–a standard below what other citizens in their state are afforded–is unjust and unfair.

While EPA points to the low levels of contamination when arguing Fartown water is "clean," studies on the effects of NAS-T are extremely limited. It is known that NAS-T is a hazardous substance and exposure has probable carcinogenic effects. The HAL for NAS-T was adopted in 1995 and is based on studies conducted in the mid-1980's. These studies are now over 40 years old. While the HAL incorporates a margin of error to ensure that levels of exposure are non-toxic to humans, this margin of error should not be relied on. These outdated studies and the

strict standard created by the ERA means even minimal exposure to NAS-T is potentially unhealthful, violating the ERA.

Finally, EPA attempts to reason that requiring water entirely free from any contamination would invalidate other permits under the Clean Air Act and Clean Water Act, as well as other federal regulatory schemes that allow some "safe" levels of contamination in discharges. However, the ERA is designed to work as a safety net, filling in where regulations have previously fallen short. FAWS is not arguing that you cannot safely discharge with a permit under the ERA, because here, the NAS-T contamination was the result of an unpermitted and illegal discharge by BELCO's negligent operational practices.

B. Bottled water is an insufficient solution under the ERA, and EPA must require CleanStripping systems on all Fartown wells or another remedy that sufficiently removes NAS-T from residents' wells.

The bottled water provision of the UAO fails to meet the ERA's standard by limiting the intended scope of the amendment. EPA requiring CleanStripping only for wells that reach a threshold and providing bottled water to other impacted households cannot sufficiently address the contamination because: (1) even at low levels, the presence of NAS-T in the water violates the ERA; (2) the water supply in Fartown is used for multiple purposes besides drinking and the associated odor impacts air quality; (3) evidence shows the contamination levels may increase as the plume migrates; and (4) all Centerburgers were afforded filtration for the same issue.

EPA has authority to order private parties to abate actual or potential releases of hazardous substances in order to prevent imminent and substantial endangerment. 42 U.S.C. § 9606. Any party who fails to comply with UAOs without sufficient cause can be held liable to the federal government for three times the costs incurred by the Superfund as a result of non-compliance. 42 U.S.C. § 9607(c)(3). When determining whether a CD (or other EPA required remediation order) is "reasonable," courts have considered the following: the nature/extent of

hazards; the degree to which the remedy will adequately address the hazards; possible alternatives for remedying hazards; and the extent to which the decree furthers the goals of the statute. *Akzo*, 949 F.2d at 1436 (citing *Cannons Engineering Corp.*, 720 F. Supp. 1027, 1038 (D. Mass. 1989)). The most important of these "reasonableness" factors is "the decree's likely effectiveness as a vehicle for cleansing." *Akzo*, 949 F.2d at 1437. Courts have held that in evaluating the decree, it is not their place to determine the best possible settlement that could have been obtained but only whether it is fair, adequate, and reasonable. *Id*. at 1436, *see Durrett v. Housing Auth*., 896 F.2d 600, 603 (1st Cir. 1990).

i. Bottled water cannot ensure a healthful environment and clean air when water is used for many purposes.

"Healthful" means "that it will do no harm to consume that water," and encompasses food safety issues. Add. at 5. Fartown is a rural community, and many residents likely rely on well water to grow produce. Residents should not be required, nor expected, to grow crops with NAS-T contaminated water or with bottled water. Adding a known probable human carcinogen to the food you grow clearly violates the intent behind the ERA: "[i]f you [are] able to buy fresh produce and the produce is without contamination in the way that nature intended it to be consumed, it will be healthful." Add. at 5. Explained above, there is limited research on long-term effects of NAS-T, including effects on food, livestock, and contact with human skin. The purpose of the amendment is to have healthful food, water, and environment be the norm for the state of New Union; the NAS-T contamination in Fartown is creating the opposite and bottled water is not a sufficient remedy.

Furthermore, Fartown water produces a "sour" or "stale" smell about town, and a right to "clean air" is included in the ERA. Foul smelling air cannot objectively be considered "clean air." Bottled water cannot create clean air–only filtering the water will.

Finally, regardless of the HAL or other effects of NAS-T, the ERA specifically addresses pollutants and contaminants caused by humans, which NAS-T is, creating a blanket protection for all New Union citizens. Therefore, all wells that detect even small amounts of NAS-T should be equipped with CleanStripping filters in accordance with citizens fundamental right to water free from human caused contaminants.

ii. The Aquifer flow-evidence demonstrates that contamination levels may continue to rise, and BELCO could be liable for future remediation.

The record demonstrates that the downgradient location of Fartown will cause the contamination to grow over time. *See Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1147-48 (M.D. Fla. 2020) (noting that an upward gradient causes water to flow through the Site in the opposite direction which does not support an imminent and substantial endangerment claim). Fartown sits two miles south of Centerburg. In January 2015, Centerburg wells tested at 40-65 ppb, six times the HAL. As of January 2017, the five wells closest to Fartown showed no detectable amounts of NAS-T. While BELCO was not required to remediate the plume because of the time and cost, the RI/FS required them to excavate the soil at the Site, install filtration in Centerburg's central water supply, and conduct monthly sampling of the monitoring wells installed during the investigation.

In January 2018 there were two low-level detections of NAS-T in the final line of wells– those closest to Fartown. In February 2019, DOH tested five private water wells in Fartown, but did not detect NAS-T. In December of 2019, Central Labs took three samples each from 75 private wells in Fartown, which showed 51 wells had concentrations of 1 to 4 ppb NAS-T and 54 wells had detections of NAS-T in the 5 to 8 ppb range. Because BELCO did not remediate the NAS-T plume within the aquifer, the NAS-T contamination is likely still migrating south, evidenced by a ten-month period where "downstream" testing wells which had not previously

detected NAS-T began detecting low levels of the contaminant. Because the plume is unmitigated, NAS-T levels will continue to increase over time, rising above the HAL and causing further harm to the citizens of Fartown. If the contamination gets worse in the future, the ERA was designed to hold businesses liable for remediation, past, present, or future, regardless of the intention or knowledge of the business. This is the level of protection New Union offers to its citizens by enacting this amendment, and it would be in BELCO's best interest to implement a solution that remediates both present and future harm.

iii. CleanStripping technology was provided in neighboring Centerburg while wells in Fartown, an environmental justice community, also tested positive for NAS-T.

CleanStripping technology was used to remedy contamination in the neighboring town of Centerburg, but the same technology was denied to Fartown residents. Fartown is an environmental justice community receiving an insufficient solution that only puts a Band-Aid on the problem instead of addressing the root of the issue. While EPA may argue that remediation in Centerburg required CleanStripping because of higher levels of NAS-T, Fartown should not be left to manage the same contamination problem without an efficient and comprehensive solution. As an Environmental Justice community, Fartown's need for remediation must be viewed cumulatively with existing environmental stressors.

BELCO points to the cost of installing CleanStripping technology on the impacted wells in Fartown as being economically infeasible. Remedial actions under CERCLA must be "cost-effective"; determined by evaluating (1) long-term effectiveness and permanence; (2) reduction of toxicity, mobility, or volume through treatment; and (3) short-term effectiveness. 40 C.F.R. § 300.430(f)(1)(ii)(D). A remedy is cost-effective if its costs are proportional to its overall effectiveness. *See Id*. Courts have upheld higher costs for removal actions when the benefits result in permanence, reduction of mobility, and volume. *See Franklin*, 240 F.3d at 546 (finding

that $30,000 in cost savings was insignificant when compared to benefits achieved by removing as much contamination as possible). Here, the financial burden of providing filters for household wells pales in comparison to the estimated $45 million that it would cost to fully clean the Sandstone Aquifer of the NAS-T plume.

IV. The Remaining State Law Claims Should Be Dismissed Because It Requires Interpretation of the Recently Adopted ERA and Parties Have Yet to Undergo Extensive Litigation Efforts.

Federal Courts *may* exercise supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, the power to hear state claims "need not be exercised in every case in which it is found to exist." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Among other reasons, federal courts may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction or if the claim raises a novel or complex issue of State law. 28 U.S.C. § 1367(c). Either of the above factors are sufficient to give the district court discretion to dismiss supplemental state law claims. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006).

The court's authority is discretionary. 28 U.S.C. § 1367; *see Gibbs*, 383 U.S. at 726. When deciding whether to continue exercising jurisdiction over supplemental state law claims after dismissing the related claims over which it had original jurisdiction, the court may consider factors like "judicial economy, convenience, fairness, and comity." *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996). A court can appropriately retain jurisdiction over state law claims after federal claims were dismissed when there has been a "substantial expenditure in time, effort, and money preparing the dependent claims." *Id*. at 1192 (quoting *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir.1994)). However, a court may abuse its discretion

if it maintains jurisdiction over a supplemental claim that involves a "novel question of state." *Robison v. Via*, 821 F.2d 913, 925 (2d Cir. 1987).

First, the parties have not undergone substantial expenditure of time and effort litigating the remaining state law claims. Second, the remaining state claims involve a novel question of state law. For these reasons, the court should dismiss the remaining state law claim without prejudice.

A. Parties have not invested substantial time or money litigating the state law claims so it is not unfair to dismiss the claim without prejudice, allowing FAWS to bring the action in state court.

District courts are "strongly encouraged" to decline supplemental jurisdiction when all federal claims are dismissed before trial. *Miller*, 424 F. Supp. 3d at 1152-53. At every stage of the litigation, the court should consider the values of judicial economy, convenience, fairness and comity when deciding whether to continue exercising jurisdiction over supplemental state claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). When federal law claims drop out of a lawsuit in the early stages and only state-law claims remain, the federal court should ask whether the balance of the factors indicates that a case belongs in state court and, if so, decline jurisdiction by dismissing the case without prejudice." *Id*.

Typically, when federal-law claims are eliminated before trial, "the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id*. In *Carnegie*, the Court upheld a federal district court's decision to dismiss and remand plaintiff's state law claims after six months of discovery explaining that "because it could dismiss an action from which all federal claims had been deleted…it could also remand such an action to state court." *Id*. 358. In *Miller*, the court declined to exercise supplemental jurisdiction over remaining state law claims involving the duty Florida municipalities owe to their citizens regarding environmental torts. *Miller,* 424 F. Supp. 3d at 1152. The *Miller* court emphasized that state

courts should be the final arbitrators of state law and "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id*. at 1152-53. Meanwhile, the court in *Purgess* found that the district court did not abuse its discretion by continuing to exercise supplemental jurisdiction after parties had spent "years preparing" for trial and the jury had heard evidence and was ready to deliberate. *Purgess*, 33 F.3d at 138. Likewise, in *Raucci*, the court properly weighed the factors when it exercised jurisdiction after parties had completed discovery and were ready for trial. *Raucci v. Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990).

The court should take note that the parties are far from being ready for trial–they have not even started discovery for the state law claims. BELCO and EPA overstate the amount of litigation that has occurred. Unlike in *Purgess* and *Raucci*, where a trial was in progress or quickly forthcoming, the litigation over FAWS' state law claims is in its infancy. The majority of the parties' efforts have been dedicated to the federal CERCLA claims, so a dismissal of the state law claims is not particularly inconvenient or unfair for the parties.

By dismissing the remaining state law claims without prejudice, the court will avoid a needless decision of state law and promote comity and justice by ensuring a "surer-footed reading of applicable law." As in *Miller*, the state law claims of negligence per se and private nuisance involve a duty owed to Fartown citizens regarding environmental torts. The New Union Courts should be the final arbitrators of these claims to promote justice between the parties and establish a "surer-footed" reading of the duty established by the ERA.

Finally, the court need not be concerned with the statute of limitations of the state law claims. *See Carnegie,* 484 U.S. at 358 (noting that a remand is preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has

determined that it should relinquish jurisdiction over the case). By bringing the state law claims along with its CERCLA claims, FAWS ensured that the statute of limitations for the state law claims was tolled, allowing them to bring the claims in state court at a later date.

B. To rule on FAWS' tort claims, the court must interpret the impact that the recently adopted ERA has on negligence and private nuisance claims.

Courts readily dismiss supplemental state law claims that remain after all federal claims have been dismissed when the state law claims concern "novel or complex" issues of state law. *Id*. at 373. The term "novel" as used in U.S.C. section 1367(c) does not just mean new and can mean "interestingly new or unusual" *Favela v. City of Las Cruces ex rel. Las Cruces Police Dep't*, 431 F. Supp. 3d 1255, 1276 (D.N.M. 2020). An issue is novel when it involves the interpretation of a state constitution. *Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir. 1997). The interpretation of a state constitution, especially on a matter that a state court had not yet considered, is particularly important to the state. *Favela,* 431 F. Supp. 3d at 1276.

In *MediGrow*, the court dismissed state law claims related to the state's medical cannabis regulatory scheme because medical cannabis is still considered illegal by the federal government. *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F. Supp. 3d 364, 376 (D.C. Md. 2020). Similarly here, the federal government does not have an equivalent constitutional right to a clean and healthy environment, suggesting that the state is better equipped to resolve this question.

In *Parker*, the court of appeals exercised supplemental jurisdiction over damages relating to claims of negligence per se and nuisance against a junkyard owner in violation of the Clean Water Act, Resource Conservation and Recovery Act, and violations of state environmental statutes. *Parker,* 468 F.3d at 735. The decision to exercise jurisdiction over the state claims was founded on the fact that liability and damages for the state law claims were fully tried in district

court, and a new trial on damages alone did not raise novel or complex issues of state law. *Id*. at 743-44. Here, the federal district court has not addressed the state law claims, and the parties have not even started discovery. Additionally, this will be the first time a case in New Union applies the ERA to claims of tort claims.

New Union's adoption of the ERA creates new standards of duty for tort claims involving negligence and public nuisance. While state tort claims are typically "not considered novel or complex[,]" the impact that this new constitutional amendment will have on tort claims has not yet been addressed by the courts, state or federal. *See Id*. at 743. The New Union state court is better equipped to answer the question of how the ERA impacts the duty element of both negligence and nuisance claims. For example, the state court must be allowed to determine the extent to which the ERA creates statutory prohibitions that might be used to establish negligence per se and nuisance per se. The ERA was enacted to protect the health and safety of New Union residents by addressing contaminants caused by humans, but should a party that spills hazardous material that eventually migrates to the groundwater be considered a per se violator of their duty? Additionally, is FAWS considered a party meant to be a protected member under the ERA? Whether or not the ERA alters New Union tort law should be left up to the New Union courts. The court noted that it does not see a "reasonable chance" that ERA will alter tort claims, but this conclusion is not based on any actual analysis of these essential questions. R. at 18. Finally, while the court did address issues related to the newly adopted ERA that fell under the umbrella of CERCLA, the analysis required to determine the impacts of the ERA on state negligence and private nuisance actions are separate, novel and yet unresolved issues.

CONCLUSION

This Court should reverse the district court's determination that FAWS is not entitled to reimbursement for investigative costs under CERCLA. This Court should affirm the district court's order upholding EPA's UAO directing BELCO to take additional investigation and response actions based on the ERA constituting as an ARAR. The Court should affirm the district courts order vacating EPA's UAO directive that BELCO need only provide bottled water to Fartown. Finally, this Court should reverse the district court's denial of FAW's motion to dismiss the remaining state court claims without prejudice.