CA. No. 13-1246

UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Plaintiff-Appellant-Cross Appellee,
v.
BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

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

-and-

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,
Plaintiffs-Appellants,
v.
BETTER LIVING CORPORATION,
Defendant-Appellee.

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

Brief of Appellants, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of the Order of the United States District Court for the District of New Union, granting summary judgment in favor of Better Living Corporation, the Environmental Protection Agency, and the Fartown Association for Water Safety, each in part. R. 1. The district court had proper subject matter jurisdiction to hear the case under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, et seq. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C § 1291.

QUESTIONS PRESENTED

I. Whether FAWS' testing costs were reasonable and reimbursable under CERCLA?

II. Whether the New Union Environmental Rights Amendment was properly held to be an Applicable or Relevant and Appropriate Requirement that required reopening the Consent Decree?

III. Whether the Environmental Protection Agency's decision to refuse installation of water filtration systems in Fartown was arbitrary and capricious?

IV. Whether the district court should have dismissed FAWS' state law claims after it resolved the federal jurisdiction anchor claim?

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STATEMENT OF THE CASE

Factual History

In the early 1970s, the Better Living Corporation ("BELCO") caught a whiff of inspiration. That was the year that it patented a technological advance in sealant coating called LockSeal. R. at 2. LockSeal is created by adding a toxic chemical called NAS-T to a non-toxic activation chemical. R. at 2. For about 30 years, BELCO manufactured both NAS-T and the non-toxic activation chemical at a facility (the "BELCO Site" or the "Site") in Centerburg, New Union. R. at 3. NAS-T entered the soil, and ultimately an aquifer providing Centerburg's drinking water, from sporadic spills and an unlined lagoon used to store wastewater and stormwater at the Site. R. at 3. Both the NAS-T deposited in the unlined lagoon and the NAS-T spilled at the Site eventually creeped into an underground aquifer that services both Centerburg, where the BELCO Site is located, and nearby Fartown. R. at 2-3. Fartown is essentially downriver from Centerburg in that the water in the aquifer underneath Centerberg will eventually flow under Fartown. R. at 2.

Nearly 8 years before any residents of Centerburg or Fartown even noticed the presence of NAS-T in their water supply, the Environmental Protection Agency ("EPA") began to grow concerned about its possible cancerous effects. R. at 3. In response to the chemical's potential toxicity to humans, the EPA established a Health Advisory Level ("HAL") for NAS-T of 10 parts per billion ("ppb"). Op at 3. NAS-T concentrations that rise above 10 ppb may result in carcinogenic effects. Even when present in concentrations as low as 5 ppb, however, water contaminated with NAS-T may have a "sour or stale" smell. R. at 3.

Centerburgers first noticed NAS-T's signature scent in their water in 2013. R. at 3. The Centerburg Department of Health found concentrations of the chemical between 45 and 60 ppb

in the city's water supply shortly thereafter. R. at 3. As a result, Centerburgers stopped drinking their tap water, and BELCO voluntarily supplied them with bottled water. R. at 3. The EPA, at the bequest of the New Union Department of Natural Resources, began an investigation into the causes of the NAS-T contamination. R. at 3. Fartown residents, on the other hand, began noticing a strange smell emanating from their water in 2016. R. at 5.

In 2016, BELCO and the EPA agreed that BELCO should continue supplying drinkable water to affected Centerburg residents while it investigated how NAS-T had entered the city's water supply. R. at 3. BELCO's investigation eventually led them to discover the unlined lagoon and occasional NAS-T spills as the underlying problem. R. at 3. To further investigate possible cleanup remedies for the plume, BELCO undertook a Remedial Investigation and Feasibility Study (RI/FS). R. at 4. The RI/FS involved installing a series of wells from Centerburg to just outside of Fartown. R. at 4. In 2017, samples from the wells closest to Fartown showed no discernable amounts of NAS-T. R. at 4.

A permanent remedy for the plume proved too costly under the RI/FS. R. at 4. BELCO insisted that pumping water out of the aquifer to clean it would cost $45 million, and instead suggested that it could install a water installation system on Centerburg's central water supply and excavate the affected soil. R. at 4. The EPA agreed to this remedy, and after taking public comment on this course of action, initiated a recovery action against BELCO (the "BELCO Action") and immediately thereafter filed a Consent Decree ("CD"). R. at 4. Under the CD, BELCO would move forward with its plan to install its CleanStripping water filtration system in Centerburg and remove the contaminated soil. R. at 4.

Once BELCO had successfully completed its remedy plan pursuant to the CD, the EPA would issue a Certification of Completion ("COC"). R. at 4. Once the EPA issued the COC, it

would only be able to reopen the CD and require further remedial action if (1) it received new information showing that the cleanup was no longer effective or (2) a more burdensome standard was established that the existing remedy failed to meet. R. at 4. The CD explained that an Applicable or Relevant and Appropriate Requirement ("ARAR"), as that term is defined under CERCLA, would count as a more burdensome standard. R. at 4.

Shortly after the district court approved the CD, Centerburg Water Supply became the proud new owner of a CleanStripping water filtration system, and the BELCO Site was freed from its contaminated soil. R. at 5. BELCO continued to monitor the wells it had installed during its RI/FS and had two notable detections of the toxic chemical occurring in early 2018 in the two wells closest to Fartown. R. at 5. Because these two detections were at 5 and 6 ppb respectively, the EPA determined that BELCO had substantially completed its cleanup and issued the COC. R. at 5.

Residents of Fartown had not sat idly by as these remedies were put into place. A group of Fartown residents had petitioned the Centerburg Department of Health ("DOH") to test their water as well. R. at 5. When the DOH's tests on a handful of wells showed nothing, the Fartown residents turned to the EPA to conduct more in-depth testing. R. at 5. The EPA declined to act. R. at 5. Motivated by the EPA's failure to act, roughly 100 Fartown residents formed the Fartown Association for Water Safety ("FAWS") and sought lab testing at their own expense. R. at 5. The FAWS' testing was much more expansive than the DOH testing, with multiple samples from 75 private wells. R. at 5. The results were also quite different than those found by the DOH. FAWS' testing showed detectable levels of NAS-T from 5 to 8 ppb in 54 samples and nearly half of all samples collected showing some level of NAS-T contamination. R. at 5. In total, FAWS paid $21,500 for the more extensive testing. R. at 5.

After learning the results of their private testing, FAWS residents returned to the EPA to ask that the CD be reopened. R. at 5. FAWS was specifically asking for further investigation into the contamination it had discovered in Fartown wells and more remediation of the source of the contamination – i.e. the NAS-T plume. R. at 5. Once again, the EPA declined to act. R. at 5.

Six months later, the legislature of New Union changed everything. Prior to the general election that year, the New Union legislature voted to add a green amendment to the ballot, and New Union citizens voted overwhelmingly in favor of it. R. at 5. The Environmental Rights Amendment ("ERA"), as it was called, granted every citizen of New Union a fundamental right to water free from contamination. R. at 5.

The passage of the ERA prompted the EPA to reopen the CD in order to analyze Fartown's water supply. R. at 6. The EPA had determined that the ERA constituted an ARAR that warranted renewed cleanup efforts. R. at 6. Additionally, the EPA noted in its administrative record the FAWS test results, that Fartown constitutes an environmental justice community, that Fartown residents were encountering a potential carcinogen in their drinking water, and that contaminated water had an off-putting odor. R. at 6.

Following its reopening of the CD, the EPA conducted additional testing on Fartown wells and supplied Fartown residents with bottled water. R. at 6. FAWS responded by requesting that the EPA order BELCO to install its CleanStripping water filtration system on affected Fartown wells. R. at 6. The EPA refused to order installation of CleanStripping on any wells that showed contamination below the HAL. R. at 6. At the same time, the EPA attempted to hand over its remedial actions (i.e. monitoring wells and supplying bottled water) to BELCO, but BELCO refused, arguing that the EPA had no right to reopen the CD. R. at 6. In response to BELCO's refusal, the EPA issued a Unilateral Administrative Order ("UAO") requiring BELCO

to comply and take over the additional cleanup. R. at 6. The order required BELCO to supply bottled water to affected households until monitoring tests showed NAS-T levels had subsided to 4 ppb or lower or, conversely, to install CleanStripping on any wells that showed NAS-T levels above the HAL. R. at 6. Again, BELCO refused. R. at 6.

Because BELCO was unwilling to comply with the UAO, the EPA supplied Fartown residents with bottled water and moved in the BELCO Action for reimbursement for its cost of doing so. R. at 7. FAWS, frustrated by the EPA's refusal to order installation of CleanStripping, intervened in the BELCO Action under the Administrative Procedures Act. R. at 7. Concurrently, FAWS and other Fartown residents brought state law claims against BELCO (the "FAWS Action") for its alleged liability in contaminating the aquifer and FAWS' resulting testing costs. R. at 7.

Procedural History

On August 30, 2021, FAWS moved to intervene in the BELCO Action to bring a claim against the EPA. R. at 7. The district court granted FAWS' motion on September 24, 2021. R. at 7. FAWS and other individual plaintiffs from Fartown simultaneously filed the FAWS Action against BELCO in the district court. R. at 7. The FAWS Action asserted both a right to recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and allegations that BELCO had violated New Union state negligence and nuisance laws. R. at 7. The United States District Court for the District of New Union exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331 and retained supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. R. at 7. The district court consequently consolidated the BELCO Action and FAWS Action. R. at 7.

STANDARD OF REVIEW

This appeal arises from the district court's grant of summary judgment, which addresses a question of law. An appellate court reviews the grant of summary judgment de novo, applying the same legal standard as a district court. E.g., *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). Facts are viewed in the light most favorable to the nonmoving party, but only when those facts are subject to a genuine dispute. *Scott v. Harris*, 550 U.S. 372, 380 (2007). Summary judgment is appropriate when the non-moving party is unable to show a genuine issue of material fact. Fed. R. Civ. P. 56(c).

SUMMARY OF THE ARGUMENT

The district court in this case was unnecessarily inconsistent in its findings. To start, the district court incorrectly found that FAWS' testing costs fell outside of CERCLA. Further, while the court properly recognized that FAWS and Fartown residents were entitled to remedies following the passage of the ERA, it stopped short of acknowledging the ERA as a novel state law. As a result the district court improperly retained subject matter jurisdiction when judicial economy mandated otherwise.

In finding in favor of BELCO with regard to FAWS' testing costs, the lower court neglected to recognize necessity as it is defined under the law. Expenses are necessary under CERCLA when they are tied to cleanup efforts. While CERCLA provides a number of provisions getting to that final truth, the reality is that expenses are reimbursed as necessary when the individual or entity incurring them can show that they are part of the overall cleanup effort. In other words, CERCLA is designed to make sure that the EPA can maintain its quality control over cleanup efforts while still allowing potentially responsible parties ("PRPs") and private parties some freedom to make cost-effective decisions. Indeed, the agency's ability to

control when and how those cost-effective decisions take place is at the heart of the EPA's argument in this case.

Even if the EPA is entitled to priority when it comes to remedial decision making, that factor is inapplicable in this case. FAWS made its decision to take remedial actions at a time when the EPA had declined to do anything. FAWS chose to monitor the hazardous substance traveling down-aquifer after the EPA had concluded that the cleanup of the BELCO Site was complete. The EPA had relinquished its control of the matter by granting BELCO a premature certificate of completion.

When the EPA realized its error and, pursuant to both the FAWS test results and the passage of the ERA, reopened the Consent Decree, it was acting in accordance with CERCLA requirements. Helpfully, the district court correctly found in both FAWS and the EPA's favor on this point. The ERA was indeed an ARAR that required additional cleanup measures to protect Fartown residents' health. Of course, the EPA favors this finding as well because this returns the case to the realm of the EPA maintaining control over cleanup. Admittedly, because of its status as a federal agency, the EPA deserves due deference for its findings, especially when those findings are entitled to the force of law.

Even when the EPA acts with the full force of the law, however, courts ought to examine the agency's underlying justification. The EPA may have correctly found that the ERA was an ARAR, but its decisions to withhold water filtration systems from Fartown residents was unreasonable and arbitrary. The EPA asks this Court to distinguish between water that is clean and water that is *clean* clean. The district court appropriately rejected this argument and correctly found in favor of FAWS and Fartown residents' argument that water filtration systems should have been included in the UAO.

In the end, the district court could have neatly decided the aforementioned issues and remanded the case to state court for a decision in line with those mentioned above. Instead, the district court improperly retained supplemental jurisdiction over the state law claims brought in the FAWS Action. These state law claims largely focused on the ERA and its impact on BELCO's liability to Fartown residents. New Union is one of only four states with an Environmental Rights Amendment. Its very rareness creates a novel legal issue, and its newness creates a legal issue for which state courts are the proper proving ground.

For these reasons, summary judgment in favor of BELCO in the first issue in this case and deciding in favor of the EPA in the fourth issue in this case was improper. This Court should reverse the district court's rulings and remand FAWS' state law claims to New Union state court.

ARGUMENT

This Court should reverse the district court's ruling on reimbursable costs under CERCLA § 9607 and its ruling on supplemental jurisdiction in favor of FAWS. Similarly, this Court should uphold the district court's finding that the ERA constituted an ARAR and its holding that the EPA's Unilateral Administrative Order was arbitrary and capricious.

I. FAWS is Entitled to Recovery in Federal Court under CERCLA and in New Union State Court under the New Union Environmental Rights Amendment

Congress enacted CERCLA to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and cleanup of inactive hazardous waste disposal sites." CERCLA, Pub.L. No. 96–510, 94 Stat. 2767 (1980). In other words, CERCLA has a dual purpose: "to clean up hazardous waste sites and impose the costs of such cleanup on parties responsible for the contamination." *Young v. U.S.*, 394 F.3d 858,

863 (10th Circ. 2005). *See also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996).

A. BELCO is Liable for FAWS' Testing Costs Because the Costs Were Reasonable and Reimbursable under CERCLA

In addition to liability imposed by the federal government, CERCLA provides that PRPs can be liable to private parties, so long as those private parties are not also PRPs, for the costs the private parties incur in responding to the release of hazardous substances. 42 U.S.C. § 9607. When a private party seeks recovery of those costs, it must show 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. Atlantic Richfield Co., et al.*, 2019 WL 542905, at *5 (N.D. Ind. Oct. 22, 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). Further, a nongovernmental party must show that its response costs were "necessary" and "consistent with the national contingency plan." *Id* (citing *Cty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir. 1991)).

The court below accurately stated that the answer to the question of whether FAWS' expenses were reimbursable comes down to whether they were necessary and consistent with the National Contingency Plan ("NCP"). The expense incurred while testing the wells was necessary because the EPA had concluded its investigation into neighboring Centerburg but had declined to investigate in Fartown. Moreover, the costs were consistent with the NCP because they were closely tied to actual cleanup efforts.

1. <u>FAWS' testing costs were necessary</u>

FAWS conducted testing that was necessary to facilitate the actual cleanup of NAS-T. To understand how costs are deemed "necessary," we must first understand what constitutes a

"response." CERCLA defines "respond" and "response" to mean "remove, removal, remedy, and remedial action," along with related enforcement activities. 42 U.S.C. § 9601(25). "'Remove' or 'removal' mean the cleanup or removal of released hazardous substances from the environment." 42 U.S.C. § 9601(23). The relevant provision further defines "remove" or "removal" to include: "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substance." *Id*. Necessary actions under CERCLA therefore include actions designed to monitor, assess, or evaluate the status of a released hazardous substance. *See Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012).

The Tenth Circuit famously described the "necessary" requirement as a "useful deterrent that prevents plaintiffs from charging the expense of a property upgrade to defendants by undertaking significant costs to completely eliminate any contamination when more modest measures would make the site safe." *G.J. Leasing Co., Inc. v. Union Elec. Co.*,54 F.3d 378, 386 (7th Cir. 1995). Additionally, several circuit courts have held that a response cost is only "necessary" if the cost is closely tied to an actual cleanup effort. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004) (explaining only work that is "closely tied" to actual cleanup may constitute a necessary response cost); *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 297 (3d Cir.2000) (holding response costs were not necessary because they did not pertain to a remedial or removal action on the contaminated property); *Amoco Oil Co. v. Borden, Inc*., 889 F.2d 664, 669–70 (5th Cir.1989) (explaining that "[t]o justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment.").

On the other hand, several district courts have granted CERCLA claims for reimbursement of "investigative costs" incurred by a party assessing a release of hazardous

waste. *See, e.g.*, *City of Gary v. Shafer*, 2009 WL 1605136 at *15 (N.D.Ind. June 2, 2009); *Cont'l Title Co. v. Peoples Gas Light and Coke Co.*, 1999 WL 753933 at *3 (N.D.Ill. Sept. 15, 1999). While investigative costs associated with monitoring and assessment have been upheld, courts have largely declined to grant reimbursement requests when the investigative costs were incurred in preparation for litigation or when they duplicate remedial actions taken by the EPA. *See Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005). *See also Rolan, et al.*, 2019 WL 5429075, at *8. A response action may be considered duplicative if it occurs at the same time as the EPA's remedial investigation or actions. *See, e.g.*, *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Ca. 1993).

The present case is a textbook example of response in the form of monitoring, assessing, and evaluating the release of a hazardous substance. Residents of Fartown, after noting the EPA's decision to conclude its testing half a mile north of Fartown's border, came together as FAWS to assess whether their water wells were affected by NAS-T. R. at 5. Based on the inclusive language of the provision defining "removal" actions, CERCLA was designed to reimburse private parties in precisely this sort of situation.

Forest Park Nat. Bank & Trust v. Ditchfield out of Illinois presents an analogous case. The plaintiffs there were also threatened by a hazardous chemical in their water supply, and the court aptly stated that it "readily found [their] investigative costs 'necessary' to help determine the magnitude of the threat presented…*particularly given the residential nature of the property*." *Ditchfield*, 881 F. Supp.2d at 978 (emphasis added).

Ditchfield also involved questions of whether Forest Park National Bank's response actions were duplicative of the EPA's investigation, but there, like here, EPA had declined to investigate the property in question when the plaintiff incurred its expenses. 881 F. Supp.2d at

975. The EPA's investigation here and its remediation plan concluded half a mile away from Fartown. R. at 4. Like the property owners in *Ditchfield*, FAWS members conducted their removal action – i.e. assessing the level of hazardous substance in their water – on a piece of property that was not the subject of an EPA investigation. Furthermore, the EPA had concluded its investigation of the Centerburg water supply by the time that FAWS came to test its wells, so FAWS actions were not duplicating an ongoing EPA remedial course of action. R. at 5.

2. FAWS' testing costs were consistent with the National Contingency Plan

Section 9607 of CERCLA states that a PRP is liable for private party response costs only to the extent that such costs are "consistent with the national contingency plan." 42 U.S.C. § 9607. Private parties seeking reimbursement under CERCLA must therefore prove that their costs were "consistent with" the NCP as a prima facie element of their private cost recovery action. *Rolan, et al.*, 2019 WL 5429075, at *5 (N.D. Ind. Oct. 22, 2019) *5 (citing *Tinney*, 933 F.2d at 1512).

CERCLA does not provide explicit guidance on how private parties must comply with the NCP. The NCP regulations, however, provide "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in *substantial* compliance with the applicable requirements [under the regulations], and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i) (emphasis added). The use of the word "substantial" in the regulation indicates "response actions will not be considered inconsistent with the NCP based on immaterial or insubstantial deviations from the NCP." 40 C.F.R. § 300.700(c)(4); *see also Sealy Conn. Inc. v. Litton Indus.*, 93 F.Supp.2d 177, 186 (D.C. Conn. 2000). Substantial compliance is sufficient because "[i]t was Congress' intent that CERCLA be

construed liberally to accomplish [its] goals," *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir.1999).

The applicable requirements under the NCP regulations include provisions that are "potentially applicable to private party response actions," such as required documentation, a requirement that a RI/FS be conducted, and a period for public comment on the chosen remedial action. 40 C.F.R. § 300.700(c)(5)-(6). Any action taken pursuant to a CD is considered consistent with the NCP. 40 C.F.R. § 300.700(c)(3)(ii).

Additionally, any response cost that is consistent with the NCP must result in a "CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i). A "CERCLA-quality cleanup" means that 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 858, 863 (10th Circ. 2005). *See also Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir.2001).

Here, the actions taken by FAWS are largely consistent with the NCP because they mirrored actions undertaken pursuant to a CD and sought permanent solutions to the maximum extent possible. While FAWS itself was not subject to the CD, the actions it undertook in response to the release of NAS-T are consistent with those taken by BELCO pursuant to the CD. BELCO had installed testing wells as part of its RI/FS, and it continued this testing pursuant to the CD. R. at 4. Ultimately, FAWS was seeking installation of a permanent solution to the hazardous substance in the water supply in the form of CleanStripping. R. at 5. That BELCO rather than FAWS conducted the RI/FS and entered into the CD from which this remedial action sprang is a semantic consideration. The NCP regulations require substantial compliance with the

NCP, and here FAWS substantially complied by engaging in a response action that was consistent with actions taken pursuant to a CD.

B. The EPA was Required to Reopen the Consent Decree because the Environmental Rights Amendment is an Applicable and Relevant or Appropriate Requirement

Under its terms, the Consent Decree in this case was subject to reopening if the EPA found that a previously unidentified Applicable and Relevant or Appropriate Requirement ("ARAR") existed under state law. R. at 4. Section 9621 of CERCLA states that when a PRP's chosen remedy involves leaving a hazardous substance onsite, the remedial action taken to contain it must meet any identified ARARs before it will be considered complete. 42 USC § 9621(d)(2)(A). Identification of ARARs "allows for the determination of cleanup goals, remedy selection and implementation." 42 USC § 9621(d)(1). This portion of CERCLA specifically requires that a PRP's chosen remedial action attain (or waive) ARARs to ensure that the chosen remedy is "protective of human health and the environment." *Id*.

While CERCLA does not expressly define ARARs, it does say that State environmental laws and regulations constitute ARARs under the statute if they are: (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. 42 USC § 9621(d)(2). The EPA is obligated to identify and apply ARARs to all CERCLA sites. EPA, Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot.

When a federal agency comes to a decision on whether a regulatory standard has been met, it must be given deference "according to its persuasiveness." *United States v. Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.*, 65 S.Ct. 161 (1944)). How much deference an agency's determination must get depends on "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." *Id*. In *Chevron*, the Supreme Court explained that where congressional intent indicates that an agency's decision should have the force of law, courts must accept the agency's decision unless it is unreasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984). Even when Congress has not expressly delegated authority on a particular question, federal agencies responsible for applying a statute make all kinds of interpretive choices by necessity, and "while not all of those choices bind judges to follow them, they may influence courts facing questions the agencies have already answered." *Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore.*, 65 S.Ct. 161 (1944)).

1. The ERA was properly promulgated

According to the EPA, "promulgated" as used in Section 9621 of CERCLA refers to "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *US v. Akzo Coating of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991) (citing 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 Supreme Court has stated that a State law of general applicability will not be 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." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). Moreover, a statute may be drafted with sufficient definiteness even if the language of the statute is broad enough that what falls within its bounds will change over time. *Id*; *see also Akzo Coating*, 949 F.2d at 1440. Finally, a law is generally applicable where it "regulates the

universe of entities that participate" in a given market. *Reno v. Condon*, 528 U.S. 141, 151, 120 S. Ct. 666, 672 (2000).

The district court in this case correctly deferred to the EPA's decision to acknowledge the ERA as an ARAR that allowed for the reopening of the Consent Decree in effect at the BELCO site. Even if the court had not deferred to the EPA's decision, the court properly pointed out that the ERA was "properly promulgated" because it was enacted by the New Union legislature initially. R. at 5. The ERA was also legally enforceable as soon as it was enacted because it was passed by the legislature with the intent that it would be "self-executing." 113 NU Assembly. Rec. A10377 (statement of Rep. Wright). Finally, the ERA applies to every person of the State of New Union and by extension applies to any entity or person who might contaminate air or water in the state. N.U. Const. art. I, § 7. In other words, the ERA's reach is general; it applies to the universe of entities that participate in any market that may result in air or water pollution.

2. The ERA is more stringent than federal standards

A more stringent requirement, according to Senator Mitchell, who helped author Section 9621 of CERCLA, "includes any State requirement where there is no comparable Federal requirement." 132 Cong.Rec. S 14,915 (Oct. 3, 1986). That is, a more stringent requirement may also exist when there is "no comparable federal statute or rule" that "broadly regulates" the hazardous substance at issue. *Akzo Coating*, 949 F.2d at 1443.

There are no federal laws or regulations that expressly apply to NAS-T. R. at 3. The chemical is likewise not covered under the Safe Drinking Water Act. *Id.* In other words, even the broad regulatory power of the Safe Drinking Water Act does not apply to this particular substance. In Azko Coatings, the Sixth Circuit correctly found that even when the Safe Drinking Water Act did cover the hazardous substance, a broad state law could still exist as an ARAR

when the state law applied to "any substance." 949 F.2d at 1443. The ERA reaches every person who lives in New Union and requires that their water be free from contamination and pollution. The ERA is undoubtedly more stringent than federal standards because there are no applicable federal standards in the present case.

3. The ERA is relevant and appropriate

CERCLA designates a difference between an applicable standard and a relevant or appropriate standard. An applicable standard is one that legally applies to the "hazardous substance or pollutant or contaminant concerned." 42 USC § 9621(d)(2)(A). A relevant or applicable standard, on the other hand, is one that is "relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance." Id. The NCP regulations further define "relevant and appropriate requirements" as:

> Those cleanup standards, standards of control, and other substantive requirements… that, while not "applicable" to a hazardous substance, pollutant, contaminant… address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

40 C.F.R. § 300.5.

While the parties agree the ERA fails to meet the standard of an applicable requirement, it remains relevant and appropriate given its broad applicability. The ERA is particularly relevant in situations involving unregulated contaminants like NAS-T. NU Sen.Rep. No. A02137 at 1. The amendment was designed to provide a safety net for situations like the one that occurred at the BELCO site and is a relevant and appropriate standard to apply for that reason. Id.

The Environmental Rights Amendment in this case was properly promulgated by the New Union legislature, is more stringent than non-existent federal standards regarding NAS-T, and is relevant and appropriate given its broad applicability. Furthermore, this Court should defer to the EPA's determination that the ERA is an ARAR for the BELCO site because the EPA was

implicitly authorized by Congress to make such a call. For these reasons, the EPA's Unilateral Administrative Order was properly authorized.

C. The EPA Arbitrarily and Capriciously Refused to Require BELCO to Install Water Filtration Systems in Fartown Wells

When a federal agency like the EPA acts, its decision will remain final unless the issue can be judicially reviewed pursuant to the statute giving it authority to act or the Administrative Procedure Act ("APA"). 5 U.S.C. § 704. The APA allows a reviewing court to determine, among other things, whether the action was arbitrary and capricious. 5 U.S.C. § 706(2)(A). However, the party seeking such review must show (1) the action is a "final" agency action, (2) they have no alternative remedies that they can seek in court, and (3) the court is authorized, under the statute in question, to review the agency's administrative actions. 5 U.S.C. § 704. The parties have stipulated that the CD and UAO represent final agency actions, so the remaining question is whether they can be judicially reviewed and whether they were arbitrary and capricious. R. at 8.

1. The EPA's refusal to require water filtration systems is reviewable under the Administrative Procedures Act.

To determine "[w]hether and to what extent a particular statute precludes judicial review," courts should look beyond the statute's express language. *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450 (1984). The Supreme Court has found that the APA, creates a "presumption favoring judicial review of administrative action," albeit one that "may be overcome by inferences of intent drawn from the statutory scheme as a whole." Id., at 349, 104 S.Ct. 2450. This Court need not consider the statutory scheme as a whole, though, because CERCLA explicitly states when judicial review of remedial actions selected by the EPA may occur. 42 U.S.C. § 9613.

Under Section 9613 of CERCLA, aggrieved parties may only challenge cleanup remedies after they have been implemented. 42 U.S.C. § 9613(h). Section 9613 also provides five exceptions to this limitation. 42 U.S.C. § 9613(h)(1)-(5). One of these exceptions is for actions under Section 9659, which includes citizens suits against the United States government or federal agencies. 42 U.S.C. § 9659. Furthermore, the Supreme Court has stated that challenges to EPA compliance orders are reviewable under the APA. *See Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004).

The EPA's actions in this case can be judicially reviewed under the judicial review exception embodied in Section 9613(h)(5). This exception allows for review of actions undertaken pursuant to Section 9659, which creates a private right of action for individuals to assert a claim that any person or organization is violating the standards and regulations set forth in CERCLA. 42 U.S.C. § 9659. FAWS intervened in the BELCO Action to assert its Section 9659 right to claim that the EPA had failed to meet the standards set forth under CERCLA, pursuant to the APA. The district court thus correctly applied the arbitrary and capricious standard when reviewing the EPA's action.

2. The EPA's refusal to require water filtration systems was arbitrary and capricious

The "arbitrary and capricious" standard is narrow. To review a decision under this standard, Courts must avoid substituting their judgment for that of the agency and cannot come up with their own reasons for the agency's actions. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 463 U.S. 29; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947). The agency must be able to give an objectively satisfactory explanation for its action including a "rational connection between the facts found

and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–246 (1962). An agency rule is ordinarily considered arbitrary and capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

The lower court here correctly determined that the EPA's decision to supply bottled water rather than CleanStripping to Fartown residents was arbitrary and capricious.

The district court here also correctly found that the EPA's action was indeed arbitrary and capricious. In considering whether the EPA had offered an objectively satisfactory explanation for its action, the lower court pointed out that the EPA's distinction between "water entirely free from contamination" and "water free from contamination" was one without a difference. R. at 13. Further, the court properly noted that the ongoing contamination of Fartown residents' water wells is not the result of a carefully regulated and permitted discharge. R. at 13. The EPA has notably declined to regulate NAS-T beyond the HAL, and the hazardous chemical does not fall under the Safe Drinking Water Act either. R. at 5.

The EPA's contention that water contaminated by NAS-T in concentrations below the HAL is clean water also "entirely fail[s] to consider an important aspect of the problem.". *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. While the contamination becomes toxic at or above the HAL, it still has a noticeable effect on daily human life below that level. At concentrations as low as 5 ppb, water contaminated with NAS-T gives off a sour or stale smell. R. at 3. In fact, the EPA recognized these negative effects, along with NAS-T's potential carcinogenic effects, in its administrative record prior to reopening the CD. R. at 6. Fartown residents may be able to avoid drinking sour water, but their bodies and clothes will still be contaminated by its smell given the

EPA's current remedial action. This Court should find, as the lower court did, that the EPA's decision to provide bottled water rather than water filtration systems for Fartown residents was arbitrary and capricious.

D. FAWS' State Law Claims Should be Remanded to a State Court Because the ERA Creates Novel Issues in Deciding State Tort Claims

Federal courts 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). Furthermore, "pendent jurisdiction exists whenever there is a claim 'arising under [the] Constitution [or] the Laws of the United States…and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Courts have understood this "one constitutional case" requirement to mean that the federal and state law claims must arise from a common nucleus of operative facts. *See State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir.1985) (citing *Gibbs*, 383 U.S. at 728, 86 S.Ct. at 1140).

Courts need not retain jurisdiction over a state law claim, even when it arises from a common nucleus of facts. "Pendent jurisdiction is a doctrine of discretion," not a mandate. *Gibbs*, 383 U.S. at 728, 86 S.Ct at 1140. Rather than focusing solely on the facts out of which the conflict has arisen, courts should consider "judicial economy, convenience, and fairness to the litigants." Id. The Supreme Court has stated that courts must weigh these factors to avoid unnecessary decisions on state law. Id; *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988).

A court declining pendent jurisdiction may also remand, rather than dismiss, a state law claim. The Supreme Court held that district courts have a wide discretion to remand cases when remand would "best serve the principles of judicial economy, procedural convenience, fairness to

litigants, and comity to the States which underlie the pendent jurisdiction doctrine." *Cohill*, 484 U.S.at 343 (1988). Remand may prove the best option to advance those principles when dismissal would result in an increased expense or time commitment. *Id*. Moreover, whether a case is remanded or dismissed, both parties may use discovery conducted during the federal case to pursue state law claims. *Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152-53 (D.C. Fl. 2020).

The Supreme Court's decisions in *Gibbs* and *Cohill* were later codified in the supplemental jurisdiction statute at issue in this case, i.e. 28 U.S.C. § 1367. When a court's pendent jurisdiction arises under 28 U.S.C. § 1367, the court should exercise jurisdiction unless Section 1367(b) or (c) gives the court discretion to dismiss or remand the claim. Section 1367(c) describes four factors that would entitle a federal court to dismiss a state law claim: (1) when the state law claim involves novel or complex issues of state law; (2) when the state law claim substantially predominates over the federal claim(s); (3) when the district court has dismissed all claims of original jurisdiction; and (4) other exceptional circumstances. 28 U.S.C. § 1367(c). Any of these four factors is sufficient to give a court discretion to dismiss. *See Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). While *Gibbs* and *Cohill* were supplanted by Section 1367, those cases still present relevant factors, such as judicial economy and comity, that courts should consider when deciding whether to retain jurisdiction. Furthermore, state courts are "free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

1. FAWS' state law claims involve novel issues of state law

The Supreme Court's declaration that principles of comity should guide district court's in determining when to cede jurisdiction to state courts are the same principles underlying Section 1367(c)'s "novel or complex litigation" factor. That is, when a state claim involves a novel of complex issue of state law, "principles of comity dictate that the Plaintiff's novel state law claims should be reserved to the [state] courts. *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 376 (D.C. Md. 2020). This factor is especially pertinent when the state law issue involves a new regulatory scheme. *Id*. "Generally, state tort claims are not considered novel or complex." *See, e.g.*, *Myers v. Richland County*, 288 F.Supp.2d 1013, 1018 (D.N.D.2003) (holding breach of contract did not raise novel or complex issues of state law). However, state tort claims that rely on unique legal theories may still fall under Section 1367 as novel or complex legal issues. *See, e.g.*, *Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518 (11th Cir. 2015).

The FAWS Action involves novel legal issues because the ERA is a novel state law. FAWS cause of action against BELCO alleges negligence and private nuisance under New Union State Law. R. at 7. The district court correctly determined that the ERA would have an impact on the FAWS Action. Id at 10. In other words, the district court properly pointed out that the ERA was a dispositive factor in deciding the state law claims in the FAWS Action. Id. The ERA's legislative history also indicates that it applies to the claims brought in the FAWS' Action. The Senate Report shows that the legislature intended for this amendment to cover environmental contamination "at the time [the] harm is learned, past present or future, regardless of intention or knowledge on the part of businesses." 113 NU Assembly. Rec. A10377 (statement of Rep. Wright).

Whether the ERA applies retroactively to actions that occurred before the ERA was enacted but which resulted in contamination afterwards should be left to the state courts of New Union because a state constitutional amendment of this nature is undoubtedly novel. As of 2022, only three states had enshrined protection from environmental contaminants in their constitutions – Pennsylvania, Montana, and New York. *See* Todd Ommen, Environmental rights amendments: Misconceptions and application, ABA (Oct. 28, 2022). Federal courts thus have little experience interpreting these amendments and how they interact with state tort laws. Additionally, New Union's state courts have never interpreted the ERA. Unlike other cases involving questions of settled state or municipal law, the present matter involves a unique legal theory that relies on a recently passed state constitutional amendment to impose tort liability.

2. FAWS' state law claims involve other exceptional circumstances

Supplemental jurisdiction may also be declined when some other exceptional circumstance makes it inappropriate for a district court to retain it. 28 U.S.C. § 1367(c)(4). "The Gibbs factors of judicial economy, convenience, fairness to the parties, and whether all claims would be expected to be tried together are evaluated under section 1367(c)(4)." *Parker*, 468 F.3d at 743-44.

Judicial economy may be best understood as "the conservation of judicial energy" that results from avoiding "multiplicity in litigation." *Rosado v. Wyman*, 397 U.S. 397, 405, 90 S.Ct. 1207 (1970). State courts should not be required to re-litigate issues that have already been argued in federal court, and federal courts should avoid abdicating supplemental jurisdiction when doing so would result in conflicts between state and federal court decisions. *Id*. Likewise, when a plaintiff would ordinarily be expected to try all claims in one setting, courts should continue to exercise supplemental jurisdiction to avoid conflicting results. *See Shore Realty*

Corp., 759 F.2d at 1050. Indeed, the Second Circuit has found that federal environmental claims and state nuisance claims derive from a common set of facts such that they would be expected to be tried together. *Id*. However, the Supreme Court in *Gibbs* suggested that a "surer-footed reading of applicable [state] law" comes from state courts rather than federal courts. 383 U.S. at 726. District courts must therefore weigh whether and to what extent a state law issue has already been argued in federal court and the likelihood that a state court decision would upset a federal court's holding on a related issue.

In addition to involving novel issues of state law, considerations of judicial economy and fairness dictate that the FAWS Action should be remanded or dismissed to state court. Notably, FAWS' state tort claims have yet to be argued in federal court. The lower court here made no determination regarding BELCO's negligence nor whether it was liable under a private nuisance claim. The record of the decision below also shows no signs that the parties have put forth arguments on these topics. The only mention of negligence and nuisance appears in the court's factual and legal background and in its decision on supplemental jurisdiction. R. at 7, 15. Furthermore, any discovery the parties engaged in related to the state law claims would be usable in a state court setting. *Miller*, 424 F.Supp.3d at 1152-53.

FAWS' state law claims are also distinct enough from those brought in the BELCO Action that they would not be expected to be tried together. FAWS' state negligence and nuisance claims derive from a divergence from the facts that led to the BELCO Action. The BELCO Action arose from the EPA's determination of the BELCO Site as a CERCLA site that required cleanup. R. at 4. The EPA's focus in the BELCO Action was on the NAS-T plume affecting the City of Centerburg. Id. Fartown only became enmeshed in the BELCO Action following the passage of the ERA. Id at 6. The legislature's decision to enact the ERA is the

place from which the facts underlying the FAWS Action diverge from those underlying the BELCO Action.

This Court should conclude that the district court erred in retaining jurisdiction because FAWS had not yet argued its state law claims and judicial economy calls for a district court to relinquish supplemental jurisdiction in such a case. Furthermore, this Court should find that because the common set of operative facts has a distinct point of divergence, FAWS would not reasonably have expected all of the claims to be tried together and therefore retaining jurisdiction was inappropriate.

CONCLUSION

The expenses FAWS incurred in testing Fartown wells were reasonable and reimbursable under CERCLA. Furthermore, the ERA constitutes an ARAR that warranted the reopening of the Consent Decree, but it also warranted an order requiring installation of water filtration systems on Fartown wells. Finally, this Court should remand this case to a New Union state court to address FAWS' remaining state law claims that have yet to be argued in federal court.