C.A. No. 22-000677

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Plaintiff-Apellant-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 Appellant, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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STATEMENT OF JURISDICTION

Fartown Association for Water Safety ("FAWS") here appeals the decision in 17-CV-1234 and 21-CV-1776 (consolidated cases) from the United States District Court for the District of New Union entered upon by the Honorable Judge Dolman on June 1 2022. 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 12th Circuit has jurisdiction over this appeal. According to 28 U.S.C. § 1291, "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." All orders granting summary judgment are final. Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1694 (2015). This Court granted the appeal to consider the jurisdictional issues raised by the District Court's decision to retain jurisdiction of the state law claims and the resolution of federal law claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

ISSUES PRESENTED FOR REVIEW

Whether the District Court erred when: (1) it determined that costs incurred by FAWS in sampling, testing and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA; (2) it upheld the United States Environmental Protection Agency's ("EPA") determination that the New Union Constitutional Environmental Rights Act ("ERA") constitutes an Applicable or Relevant and Appropriate Requirement ("ARAR"), and, accordingly finding that the EPA's reopening the Consent Decree based on that ARAR and ordering further remedial action in the Unilateral Administrative Order ("UAO") was proper; (3) it vacated as arbitrary, capricious, or contrary to law the EPA's determination that BELCO is not required to install filtration systems in Fartown despite the

existence of the ERA; and (4) it retained jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.

STATEMENT OF THE CASE

A. Centerburg and Better Living Corporation's NAS-T Contamination

In 1973, the Better Living Corporation ("BELCO") began producing a chemical referred to as NAS-T that was used to make a sealant known as "LockSeal," a product which BELCO held the patent. R. at 6. NAS-T was manufactured in Centerburg, New Union from 1973 until 1998, when a new factory was built in northern New Union. *Id*. Even though BELCO moved their factory location, they still claim ownership of the land where the factory once stood. *Id*.

In the 1980's, many medical studies were published showing evidence that NAS-T was a harmful human carcinogen. R. at 6. Because of this, in 1995, the Environmental Protection Agency ("EPA") warned of NAS-T's dangers when they released a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). *Id*. It is important to note, however, that NAS-T has never been regulated under the Safe Drinking Water Act. *Id*.

In 2013, citizens living in Centerburg began noticing a sour smell in their water supply and suspected NAS-T. R. at 6. It is known that humans have the ability to detect NAS-T because of its infamous sour smell. *Id*. Centerburg receives their water from the Sandstone Aquifer, which is located directly beneath Centerburg. R. at 5. The water goes directly from the Sandstone Aquifer to the Centerburg Water Supply ("CWS"), where the water is treated and then distributed to the citizens of Centerburg. *Id*. It is important to note that the CWA is a publicly owned entity. *Id*.

In 2015, after numerous complaints regarding the sour water smell, the Centerburg Department of Health ("DOH") finally began testing Centerburg's water supply. R. at 6. DOH

found that the water taken from the CWS contained between 45 and 60 ppb of NAS-T, much higher than the 10 ppb advisory released by the EPA. *Id.* After making this discovery, the New Union Department of Health ("DOH") informed the citizens of Centerburg to stop using tap water and sought help from the New Union Department of Natural Resources ("DNR"). *Id.* In 2016, this investigation was taken over by the EPA. *Id.*

Upon being informed of the discovery, BELCO supplied bottled water to Centerburgians and began their own investigations. R. at 6. After performing various soil tests and water tests, it was determined that NAS-T was made present in the soil because of NAS-T spills at the BELCO factory while it was still active. *Id.* It was also discovered that there was a lagoon that BELCO utilized to deposit wastewater, and this lagoon, combined with the level of NAS-T in the soil from the spills, created a plume of NAS-T in the Sandstone Aquifer. *Id.* This plume allowed for the contamination of the Centerburgian's water supply. *Id.*

B. Remedial Efforts For Centerburg

Based on the findings of the various investigations, BELCO consented to an agreement with the EPA in March of 2016. R. at 7. As a part of this agreement, BELCO agreed to a remedial investigation and feasibility study ("RI/FS") to discover the extent of NAS-T's damage and to seek out potential methods of clean-up and remediation. *Id.* BELCO also agreed to continue to provide drinkable bottled water to Centerburgians. *Id.*

Following the investigation's completion, it was determined that BELCO was to excavate the soil surrounding the site of the old factory in order to prevent further contamination. R. at 7. It also required BELCO to provide filtration systems for CWS. Finally, the investigation indicated that there was no need to remove the plume from the Sandstone Aquifer. *Id.* In mid-2017, a Record of Decision ("ROD") was created by the EPA that outlined the steps BELCO

was to take in order to clean up the NAS-T. *Id*. After the creation of the ROD, BELCO and EPA created and filed a Consent Decree ("CD"). *Id*. The CD stated that BELCO would follow the EPA's ROD. *Id*. As a part of the CD, BELCO was required to earn a "Certificate of Completion" from EPA upon satisfactory completion of their duties. *Id*. The CD also states that once a COC was given to BELCO, it could not be taken back or reopened. *Id*. Specifically, it stated that the CD can be reposed by the EPA:

> 1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or
>
> 2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

CD, § 13.3. Id. "Regulatory Standards" is defined to include "applicable or relevant and appropriate requirements under CERCLA. CD, § 1.12. *Id*. BELCO was faithful to the CD and completed all of the remediation set forth by the EPA, earning the COC from the EPA in late 2018. R. at 8.

C. Fartown, Better Living Corporation's NAS-T Contamination, and Fartown's Subsequent Actions

A small community known as Fartown is located roughly 2 miles south of Centerburg. R. at 5. Fartown, because of its socio-economic conditions, is known as an "environmental justice community." *Id*. The Sandstone Aquifer, the same aquifer that is directly beneath Centerburg, also runs beneath Fartown. *Id*. Fartown differs from Centerburg, however, because the citizens of Fartown utilize private wells to source their water, while Centerburg utilizes CWS for all of their water processing and supply needs. *Id*.

During 2016 and 2017, while BELCO was still testing water from the Sandstone Aquifer, five wells were installed roughly half a mile from Fartown. R. at 7. There were no traceable amounts of NAS-T found in any of the five wells. *Id*. Based on this information, BELCO was not required to conduct further investigations in this area. *Id*. Beginning in 2016, however, citizens of Fartown stated that on occasion they began noticing a sour smell coming from their water supply. R. at 8. Citizens of Fartown requested testing of their water supply, but because of the five wells near Fartown that showed no traceable amounts of NAS-T, no further action was taken until Fartown requested that the DOH test the water again. *Id*. In 2019, the DOH complied, and their results showed no traceable amounts of NAS-T in the water. *Id*. Fartownions, however, were unsatisfied with this result. Later in 2019, citizens of Fartown requested that the EPA conduct further testing, but their request was denied. *Id*.

In December of 2019, a group of citizens living in Fartown banned together and formed the Fartown Association for Water Safety. R. at 8. The group formed with the goal of furthering the investigation into their water source and hired Central Laboratories, Inc. ("Central Labs") in order to conduct further testing. *Id*. Central Labs took a total of 225 total samples from various private wells in Fartown, and of these samples, 51 showed 1 to 4 ppb of NAS-T and 54 showed 5 to 8 ppb of NAS-T. *Id*. FAWS took these results to the EPA, and the EPA again declined to assist the citizens of Fartown. *Id*.

Finally, in March of 2021, the EPA made the decision to reopen the Consent Decree based on the passage of the Environmental Rights Amendment of the New Union Constitution and required BELCO to further investigate in Fartown. R. at 9. It was also required that BELCO provide bottled water to impacted Fartownians. *Id*. BELCO refused to comply with the EPA's guidelines, and the EPA issued an order, called the Unilateral Administrative Order ("UAO"),

requiring BELCO comply. *Id.* In July of 2021, the EPA supplied bottled water to impacted Fartownians and proceeded with well water sampling finding that "approximately 55% of samples having non-detect levels for NAS-T, 25% in the 1 to 4 ppb range and 20% in the 5 to 8 ppb range." R. at 10.

In August of 2021, FAWS became frustrated with the inaction and filed to intervene in the case between the EPA and BELCO. R. at 10. In September of 2021, this request was granted. Id. FAWS challenged the EPA's use of their Unilateral Administrative Order and requested that BELCO "(1) pay its response costs; (2) install CleanStripping on their private wells that test positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay them damages for the loss of use and enjoyment of their property and diminished property values; and (5) pay punitive damages." *Id*.

D. The Environmental Rights Amendment (Legislative History)

In November of 2020, the Environmental Rights Amendment to the State of New Union Constitution was passed. The ERA states:

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

N.U. CONST. art. I, § 7. This Amendment was passed by the New Union legislature, was approved and signed by the governor, was voted upon during an election by the citizens of New Union, and was then incorporated into the Constitution. R. at 8.

After the Amendment was passed, the EPA inquired to the The New Union Department of Natural Resources ("DNR") as to whether the ERA should be considered an Applicable or Relevant and Appropriate Requirement ("ARAR") under the Comprehensive Environmental

Response, Compensation and Liability Act ("CERCLA"). R. at 9. In response, the DNR stated that "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." Id. There is no State Memorandum of Agreement for ARARs. Id.

E. Proceedings Below

In June of 2017, the EPA brought an action against BELCO for cost recovery. R. at 7. Based on this action, BELCO and the EPA filed the CD where BELCO agreed to remedy the water contamination. Id. This CD was approved by the District Court of the District of New Union. Id.

In August of 2021, the EPA filed a motion in the previous BELCO Action seeking to recover the costs they incurred while taking action in Fartown. R. at 10. The EPA also sought penalties for BELCO's violation of the UAO. Id. BELCO argued that the ERA could not be considered an ARAR, and thus, the Consent Decree could not be reopened by the EPA because the UAO did not have any legal foundation. Id. Upon discovering the motions filed by the EPA, FAWS also filed a motion to intervene in August of 2021. Id. FAWS chose to assert a claim against the EPA challenging the UOA "as arbitrary, capricious and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), to the extent that it failed to compel BELCO to provide CleanStripping filtration systems on FAWS' members' private wells, which FAWS argues is required under the ERA." Id.

At this same time, FAWS also filed an action against BELCO in the District Court for the District of New Union to recover costs incurred during FAWS's investigations, to instal CleanStripping on each Fartown well that showed NAS-T contamination, to remediate the

Sandstone Aquifer, to pay damages for the loss of use and enjoyment of their property and for diminished property values, and finally, for BELCO to pay punitive damages. R. at 10.

In December of 2021, all three parties moved and cross-moved for summary judgment on each of the CERCLA claims. R. at 11. During this time, FAWS also moved to dismiss any remaining state law tort claims. Id. BELCO and EPA opposed FAWS' motion to dismiss. Id.

These motions were partially denied and partially granted by the District Court for the District of New Union. R. at 11. The District Court resolved the federal issues and denied Fartown's motion to dismiss the state law claims. Id.

SUMMARY OF THE ARGUMENT

The District Court erred when it determined that the costs incurred by FAWS in the sampling, testing, and analyzing of water samples from its' members' private drinking water wells were not reimbursable as response costs under CERCLA. What constitutes 'necessary' response costs under CERCLA varies between jurisdictions, however it has been widely held that to be 'necessary' a response cost must be closely tied to the actual cleanup of a hazardous release. Young v. US, 394 F.3d 858, 863 (10th Cir. 2005). Because the costs incurred by FAWS were necessary to monitor, assess, and evaluate the NAS-T contamination and the response costs were closely tied to a cleanup of a release of a hazardous substance, the response costs are 'necessary' and are reimbursable under CERCLA.

The District Court did not err when it maintained the EPA's deference in determining what, when it comes to environmental policy, constitutes an ARAR. Because Congress has not spoken directly on the issue, and because the EPA's interpretation was reasonable and persuasive, the EPA has deference in its interpretation. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218, 219-20 (2001). Further, the District

Court did not err when it permitted the EPA to reopen the Consent Decree based on the EPA's interpretation of the ARAR. This determination can be made because the ERA was properly promulgated, because it is more stringent than federal standards, because it is legally applicable or relevant and appropriate, and because it was identified in a timely manner. United States v. Akzo Coating of America, 949 F.2d 1409, 1440 (6th Cir. 1991).

The District Court did not err when it vacated as arbitrary, capricious, or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA. The language, intent, and purpose of the ERA is to create a fundamental right to clean water and to "a healthful environment free from contaminants and pollutants caused by humans." *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10377* (N.U. 2019-2020). The NAS-T contamination in Fartown is a result of human-caused contamination that resulted from illegal spills or what was left to soak into soils in an unlined wastewater pond; not from a well-regulated and permitted discharge; nor did it come from natural resources that do not require a permit. R at 13. Therefore, the EPA's determination that BELCO is not required to install the CleanStripping filtration technology is unreasonable and contrary to law.

The District Court erred in deciding to maintain jurisdiction over the remaining tort law state claims. While tort claims are not typically considered to be novel and complex, the claims in the case at hand are novel and complex because of their unique nature. Parker v. Scrap Metal Processors, Inc., 468 F. 3d 733, 743-44 (11th Cir. 2006). The Constitution also sets a Due Process requirement, which would not be met if the claims were to be heard in federal court as the discovery process has yet to be completed. U.S. const. amend. XIV, § 2. Therefore, the state law torts claims must remain in state court instead of in federal court.

STANDARD OF REVIEW

Review of grants of summary judgment on Administrative Procedure Act claims is de novo, and the court should review the administrative record with no particular deference to the district court's judgment. Roberts v. United States, 741 F.3d 152, 157-58 (D.C. Cir. 2014) (quoting Holland v. National Mining Association, 309 F.3d 808, 814 (D.C. Cir. 12 2002)). When reviewing an agency decision, "the entire case . . . is a question of law." Marshall Cnty. Healthcare Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993), and the usual summary judgment standard is not applicable. Resolute Forest Products, Inc. v. U.S.D.A., 130 F. Supp. 3d 81, 89 (D.D.C. 2015).

ARGUMENT

I. The District Court erred when it determined that the costs incurred by FAWS in sampling, testing, and analyzing of its' members' private water wells were not reimbursable response costs under CERCLA.

The District Court erred in its determination that the response costs incurred by FAWS were not 'necessary.' The lower court made no finding that the response costs were not tied to the actual cleanup of a release or threatened release of hazardous substances and erroneously considered litigious intent on behalf of FAWS.

Under 42 U.S.C. § 9607(a)(4)(B) (known as "CERCLA"), a potentially responsible party ("PRP") may be held liable to private parties who are not PRPs for response costs incurred by them. R. at 8. A plaintiff seeking recovery of response costs under CERCLA 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; (4) the plaintiff has incurred costs in response to the release or threatened release; and, for non-

governmental plaintiffs, they most show that "costs incurred in responding to the release were necessary and consistent with the national contingency plan." R. at 8.

What constitutes 'necessary' under CERCLA is widely ambiguous. Courts have concluded for response costs to be 'necessary' under CERCLA, it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question, U.S. v. Iron Mountain Mine, Inc., 978 F. Supp. 1263, 1272 (E.D. Ca. 1997); the actions taken may be duplicative if they occur at the same time as the EPA's own actions and do not seek to uncover information different than or above and beyond that of the EPA or if the EPA had already informed the private parties that it would be conducted its own investigation, Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc., 811 F. Supp. 1421, 1425 (E.D. Ca. 1993); response costs are necessary if they are tied to the actual cleanup of hazardous releases, Young v. U.S., 394 F.3d 858, 863 (10th Cir. 2005); and there must be some evidence that the response actions were taken to assist with and help plan the eventual remediation and cleanup efforts, and that the actions cannot be taken solely for the purpose of overseeing another private party's legal obligation to remediate a property without direct involvement in the responsible party's remediation and detoxification efforts, Wilson Road Dev't Corp. v. Fronabarger Conceters, Inc., 209 F.Supp.3d 1093, 1113-1115 (E.D. Mo. 2016).

A. The response costs incurred by FAWS are the type of costs that are typically found to be 'necessary' under CERCLA.

In *Young*, the 10th Circuit concluded that response costs under CERCLA are generally defined as the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance. *Young*, 394 F.3d at 863. For these response costs to be considered 'necessary' they must be closely tied to the actual cleanup of a release or threatened release of a

hazardous substance. *Id*. In *Young,* the Court found that the "classic examples" of response costs undertaken by the Youngs for site investigation, soil sampling, and risk assessment were not closely tied to the cleanup of hazardous materials because the Youngs abandoned their property without employing any cleanup efforts and had testified that they did not intend to spend any more money on the property. *Id.* at 864. In addition to *Young*, Wilson Road Development Corporation v. Fronabarger Concreters also details what kinds of response costs are 'necessary' under CERCLA. 209 F. Supp. 3d 1093 (E.D. Mo. 2016). The Missouri Eastern District Court found that costs incurred from hiring an attorney to identify additional PRPs were recoverable because they supported an actual cleanup effort, however studies taken primarily to advance a party's interests and that are not closely related to an actual cleanup are not recoverable. *Id*. at 1111. The District Court also found that the plaintiff's efforts in this case were not 'necessary' to monitor, assess, and evaluate the contamination of the property because the investigative testing done sought to uncover information already known by all parties involved—that there was contamination on the site. *Id.* at 1115.

FAWS' employment of Central Labs to conduct water sampling of its members' private water wells would similarly fall within the "classic examples" of investigatory response costs because they are substantially similar to the soil sampling and site investigation employed by the Youngs. In contrast to the Youngs' abandonment of their property, FAWS has made no indication of abandoning their use of the Aquifer and had committed personal funds to two investigations to determine if the plume had contaminated their private water wells. FAWS' position is distinctive from that in *Wilson Road* because FAWS' testing sought to uncover information unknown to the parties: the levels of contamination of NAS-T in the Fartown wells. The testing done by the EPA sought to uncover the cause and how far the NAS-T contamination

had spread, and the EPA did not conduct testing of the Fartown private drinking wells, and instead relied on the test results from monitoring wells placed half a mile outside of Fartown. In contrast, the testing done by FAWS sought to identify the levels of NAS-T in their private drinking water. FAWS incurred investigative response costs not to prove that there was contamination but to identify what levels of NAS-T were present in their private drinking wells. The investigation and assessment conducted by Central Labs was not duplicative of the EPA and was 'necessary' to monitor, assess, and evaluate the contamination of their drinking water with NAS-T. Additionally, the sampling, testing, and analyzing of FAWS' private wells are "classic examples" of necessary response costs under CERCLA.

FAWS' position is more closely related to that in Gache v. Town/Village of Harrison, where the Court found that the preliminary investigation of soil and surrounding sediment were 'necessary' for effective remedial cleanup efforts. 813 F.Supp. 1037, 1046 (S.D.N.Y. 1997). The Court reasoned that obtaining preliminary information of the levels of hazardous substances in the soil and sediment seemed "a necessary step" before further action could be taken, and such tests were plainly related to the investigation of the extent of the contamination. *Id*. It is undisputed that the EPA denied a remediation of the Sandstone Aquifer and instead elected to do site-specific cleanup in Centerburg, leaving the Sandstone Aquifer contaminated. The testing done by FAWS to discover the levels of contamination in their private wells is similarly plainly related to the investigation and remediation of the contamination in the Sandstone Aquifer because if FAWS had not conducted their own private testing, the EPA would not have been able to effectively remediate the NAS-T contamination. The sampling, testing, and analyzing of the private water wells was a necessary step for the effective remediation and monitoring of the contamination.

In light of all the facts available from the record, it is clear that the sampling costs incurred by FAWS were 'necessary' and were closely tied to an actual cleanup of a release of a hazardous substance, NAS-T, in the Sandstone Aquifer.

B. The District Court incorrectly considered the litigious intent on behalf of FAWS.

Under *Wilson Road*, the Court noted that analysis of whether costs were 'necessary' under CERCLA is "without regard to a party's ulterior reasons for incurring them." 209 F. Supp. 3d at 1111. Specifically, the Court states that "it is whether the costs are necessary under CERCLA, not the motive for incurring them, that is dispositive." *Id*. In addition, the Court in Ebert v. General Mills, Inc. repeated the idea that investigative costs may be recoverable as removal costs if they are necessary, tied to an actual cleanup of hazardous substances, and not merely for litigation. 48 F. Supp. 3d 1222, 1233 (D.Minn. 2014). The cases establish that such response costs are not recoverable if it is found they were incurred *solely* for litigation purposes, and the record supports no finding that FAWS incurred these costs only to litigate. NAS-T is an identified human carcinogen, the presence of which members could smell in their drinking water. It is reasonable to conclude that FAWS underwent testing because they believed their water– which is taken directly from the contaminated, unremedied Aquifer– was contaminated and posed a possible threat to their health. Even if FAWS has incurred these response costs to prove the liability of BELCO, it was clearly not the sole reason for incurring them. The District Court failed to conclude that the response costs were not tied to an actual cleanup and gave undue weight to their determination that FAWS incurred these costs solely for litigation.

II. The EPA's determination that the ERA constitutes an ARAR was correct and accurate; the EPA should be given deference, and the EPA reopening the Consent Decree based on that ARAR and ordering further action in the UAO was proper.

The District Court did not err when it determined that the ERA should be considered an ARAR based upon the deference that rightfully belongs to the EPA. Because the ERA is considered an ARAR, the EPA's reopening of the Consent Decree was also appropriate, as noted by the District Court.

A. The EPA's interpretation of the ERA should be given deference.

In the 1984 case Chevron, U.S.A., Inc. v. NRDC (*Chevron*), a double-faceted test was created by the Court in order to assist with the interpretation of different statutes. 467 U.S. 837, 842-43 (1984). The first facet addressed under *Chevron* is split into two parts. The first portion of this facet asks "whether Congress has directly spoken to the precise question at issue." *Id*. at 842. Congress has not spoken on the precise issue at question in the case at hand. In fact, during the process of legislation, it was noted that there was no particular definition for the terms within the ERA. *Environmental Rights Amendment Assembly: Hearing on Bill No. A10377* (N.U. 2019-2020) (statement of Maloney). The second part of the first facet states that "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43.

If Congress or legislators have not spoken or addressed the issue, which it has not in this case, then the second facet of *Chevron* comes into play. *Id*. "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Because of the undefined terms of the ERA, which can be considered unambiguous, the EPA has the right to interpret the

Amendment if their interpretation is a "permissible construction of the statute." *Id*. Because the EPA's interpretation of the ERA was a permissible and reasonable construction it should be given deference.

The District Court also concludes that "EPA's interpretation of what constitutes an ARAR under CERCLA is given deference according to its persuasiveness," which is also an accurate conclusion. R. at 10. Persuasiveness can also be a proper reason for allowing deference. The weight accorded to an administrative determination "will depend upon the thoroughness of 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." United States v. Mead Corp., 533 U.S. 218, 219-20 (2001). The legislative history put forth regarding the ERA provides that the ERA was meant to be a self-executing piece of legislation. *Environmental Rights Amendment Assembly: Hearing on Bill No. A10377* (N.U. 2019-2020) (statement of Wright). Because of its self-executing nature, the earlier pronouncements regarding the ERA lead us to believe that the Act is being used as intended. After considering the totality of the circumstances in the situation at hand, the EPA's interpretation of the ERA is persuasive and should thus be given deference.

Therefore, the ERA is a proper ARAR because of the EPA's permissible and persuasive interpretation of the Amendment and thus is applicable in this situation. Thus, the EPA's interpretation should be given deference.

B. The EPA reopening the Consent Decree based on that ARAR and ordering further remedial action in the UAO was proper.

Now that it has been determined that the EPA's interpretation should be given deference, it is important to note, based on this decision, why the EPA reopening the Consent Decree based

on that ARAR and ordering further remedial action in the UAO was proper. According to United States v. Akzo Coating of America, a state environmental standard constitutes a state ARAR to which the remedy must comply if it is: (1) Properly promulgated; (2) More stringent than federal standards; (3) Legally applicable or relevant and appropriate; and (4) Identified in a timely manner. 949 F.2d 1409, 1440 (6th Cir. 1991). The fourth prong of this test is not in contention here. The first three prongs, however, are at issue.

1. A state environmental standard constitutes a state ARAR to which the remedy must comply if it is properly promulgated.

"Properly promulgated" is defined in *Akzo Coating of America* as a measure "imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." 949 F.2d at 1440.

The ERA should be considered an ARAR because it was imposed by state legislative bodies, and through this, it is generally applicable and legally enforceable. The ERA was proposed through proper legislative means, was signed by the governor, and was also voted upon by the citizens of New Union.

It is also worth mentioning that the ERA cannot be made useful if it is not taken at its face value. The District Court and the EPA agree concur. The language of the ERA is made intentionally ambiguous and "self-executing" so that it could be used in situations such as the one at hand. *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10377* (N.U. 2019-2020) (statement of Wright, Bill Sponsor). A standard is not considered to be vague if it contains "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 (1983). The language of

the ERA clearly intends to prohibit individuals from contaminating and polluting air and water. Therefore, the standard set forth in the ERA is not truly vague and the EPA's interpretation of it is reasonable.

Because of all of the actions taken to support the ERA, it should be considered properly promulgated. The nature of the ERA was to be generally applicable. BELCO argues on this first issue that the ERA was not "properly promulgated" because of its ambiguity. This argument, however, proves fruitless since the nature of the ERA was to be inherently generally applicable.

In sum, because of the ERA's legislative history and because it is generally applicable, the ERA should be considered properly promulgated.

2. A state environmental standard constitutes a state ARAR to which the remedy must comply if it is more stringent than federal standards.

The District Court was correct in its determination that the ERA is more stringent than federal standards. Where the ERA specifies that "every person of this State has a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. The specific language here that is important to the case at hand is "fundamental right." The ERA constitutes the aforementioned rights as fundamental rights, and because of this higher, strict standard, it can be constituted more stringent than any set federal standards.

BELCO argues that the ERA should not be considered more stringent than current federal standards. BELCO relies on Conn. Inc. v. Litton Indus. in reaching this conclusion. This case forms a federal environmental standard that extends to the "overall protection of human health and the environment". Conn. Inc. v. Litton Indus., 93 F. Supp. 2d 177, 184 (D.C. Conn. 2000). BELCO is arguing that this standard means the same thing as the standard set forth by the ERA

when it in fact, does not. The "fundamental rights" standard set forth in the ERA is a much higher standard than the "overall protection of human health and the environment" standard set forth in Conn. Inc. v. Litton Indus. 93 F.Supp.2d 177, 184 (D.C. Conn. 2000). A "fundamental right" is much more strict and specific than an "overall protection," and therefore, is more stringent than the ruling federal standard. 93 F.Supp.2d 177, 184 (D.C. Conn. 2000).

The "stringent standards" requirement set for by the ARAR is clearly and fully met in this situation because of the specificity and strictness of the standard required by the ERA.

3. A state environmental standard constitutes a state ARAR to which the remedy must comply if it is legally applicable or relevant and appropriate.

The District Court and the EPA were correct in determining that the ERA is clearly legally applicable, relevant, and appropriate. The ERA states that "Each and every person of this State has a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art 1, § 7.

BELCO's direct actions caused the high levels of NAS-T in the water of many individuals in both Fartown and Centerburg. BELCO is a human run organization, and the result of their actions created harmful contaminants and pollutants when the NAS-T found its way into the water source. Without BELCO's human-lead actions, there would have been no harmful contaminants and pollutants and the people of New Union would have their fundamental right to clean water recognized. The ERA is plainly applicable, relevant, and appropriate regarding the facts of this case and therefore, the standards set forth by the ERA should apply to this situation.

Turning to BELCO, they argue on this final issue that the ERA is not applicable in the case at hand as it does not "specifically address a hazardous substance, pollutant, or contaminant, remedial action, location, or other circumstance found at a CERCLA site." Franklin Cnty.

Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F. 3d 534, 544 (6th Cir. 2001), *citing* 40 C.F.R. § 300.5. The ERA is purposely left without definitions so that it can be widely applicable in a variety of circumstances.R. at 11, *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10377* (N.U. 2019-2020). Therefore, just because the ERA does not address specific types of pollutants or hazards does not mean that it is not applicable. Therefore, facts of the case clearly fall with the purpose of the ERA.

Because the EPA meets the standards for deference of interpretation, and because the ERA meets the set forth by United States v. Akzo Coating of Am. regarding when a state environmental standard constitutes a state ARAR, this court should uphold the District Court's finding that the EPA should be given deference in their interpretation of the ERA, and accordingly, the EPA reopening the Consent Decree based on the ERA being considered an ARAR and ordering further remedial action in the UAO was proper.

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

This court should uphold the District Court's conclusion that the ERA contradicts the EPA's determination that the installation of CleanStripping technology on Fartown's wells is not required under the state ARAR because the EPA's interpretation of the ERA was contrary to the language, intent and purpose of the ERA and thus, was contrary to law. The EPA also agreed that the ERA constituted an ARAR for CERCLA purposes and should order BELCO to perform further remedial action in accordance with the ERA.

The Administrative Procedure Act provides that courts reviewing decisions by administrative agencies–such as the EPA–should "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Reviewing courts will not fill in the blanks on an agency decision, there must be sufficient justification for an action to survive this standard of review. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). This standard is a narrow one, and courts must give deference to a final agency decision by reviewing for clear error; however, the agency must examine the relevant data and create a satisfactory explanation for its action. Sierra Club v. Johnson, 436 F.3d 1269, 1273 (11th Cir. 2006). Where there is not a satisfactory explanation for an agency decision, including a rational connection between the facts found and the choice made, the decision will be found to be arbitrary, capricious, or contrary to law. Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

CERCLA provides that:

> Remedial actions . . . shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be *relevant and appropriate* under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant. . .

42 U.S.C. § 9621(d) *emphasis added*. The EPA itself found, and the District Court agreed, that the ERA constitutes an ARAR and as previously mentioned, the Consent Decree between the EPA and BELCO was appropriately reopened to order further remedial action on BELCO's part. R. at 6, 10. This remedial action should extend to Fartown's private wells because the ERA created a fundamental right to clean water, including water free from human-caused contamination.

A. The language, intent and purpose of the ERA is to create a fundamental right to clean water free from contaminants and pollutants caused by humans and the NAS-T contamination in Fartown is a result of human-caused contamination.

The District Court did not err when it vacated the EPA's determination that BELCO is not required to install filtration systems in Fartown because the contamination of Fartown wells resulted from illegal spills or what was left to soak into soils in an unlined wastewater pond, not from a well-regulated and permitted discharge; nor did it come from natural resources that do not require a permit. It is undisputed that the NAS-T contamination from the Sandstone Aquifer is specifically caused by human activities and is a result of runoff from an unlined lagoon that was previous used to store wastewater and stormwater from the 1980s to the 1990s. R. at 3.

Cases such as Citizens to Preserve Overton Park, Inc. v. Volpe and Alaska Dept. of Env't. Conservation v. EPA provided the starting point for analysis when courts review agency decisions. 401 U.S. 402 (1971); 540 U.S. 461 (2004). When an EPA enforcement is challenged under the Administrative Procedure Act, courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Alaska Dept. of Env't. Conservation v. EPA, 540 U.S. 461, 496-97 (2004). An agency decision will be considered arbitrary, capricious, or contrary to law if, after reviewing the decision, it was not "based on a consideration of the relevant factors" or "there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

In Citizens to Preserve Overton Park, Inc. v. Volpe, the United States Supreme Court reviewed the Secretary of Transportation's authorization of using federal funds for the construction of a six-lane highway through a public park in Memphis, TN. 401 U.S. 402 (1971).

The Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968 prohibited the use of federal funds to finance highway constructions through public parks if a "feasible and prudent" alternative route exists, and where no such alternative is available, the Secretary of Transportation is only allowed to approve construction through parks if plans are designed to minimize harm to the park. *Id*. at 404-406. The Supreme Court held that in order to find that an agency actor's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law, the Court must decide whether the decision was based on a consideration of relevant factors and whether there has been a "clear error of judgment." *Id*. at 416.

In Alaska Dept. of Env't. Conservation v. EPA, the Supreme Court decided that the EPA did *not* act arbitrarily or capriciously in finding that a decision by the Alaska Department of Environmental Conservation was not reasonable. 540 U.S. 461. A zinc mining corporation planned to expand its zinc production at a specific mine, but doing so would add more than 40 tons of nitrogen oxide to the air emissions per year. *Id*. This expansion plan triggered a Prevention of Significant Deterioration requirement pursuant to the Clean Air Act, which provided that major air pollutant emitting facilities needed to be equipped with "the best available control technology." *Id*. at 468. The Alaska Department of Environmental Conservation allowed the corporation to install equipment that would reduce nitrogen oxide emissions by 30% despite there being alternative options that would reduce emissions by 90%.; and at this point the EPA intervened and issued an order preventing the corporation from expanding. *Id*. at 475. The Supreme Court upheld the EPA's determination that the facility's use of equipment that would reduce nitrogen oxide emissions by 30% did not meet the "best

available control technology" requirement because there was no evidence that another option that would reduce emissions by 90% was technically and economically infeasible. *Id.* at 466.

The EPA's decision not to require BELCO to conduct remedial measures beyond providing bottled water is similar to the Secretary of Transportation's decision in *Overton Park* and distinguishable from the EPA's action in *Alaska Dept. of Env't. Conservation*. Like the decision at issue in the Overton Park case, the EPA's determination is not based on relevant factors and it is a clear error of judgment because it fails to take into account the purpose and intent of the ERA. Unlike the EPA's decision in *Alaska Dept. of Env't Conservation*, which was based on the fact that the Alaska Dept. of Env't Conservation did not show evidence that the plan it chose was not technically and economically feasible, the EPA's decision in the case at bar is in direct conflict with the facts on record.

When the EPA determined that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA, it failed to acknowledge the plain meaning and intent of the ERA as provided in the legislative history. The text of the ERA explicitly provides that "Each and every person of this State has a *fundamental right* to clean air and *clean water* and to a healthful environment free from contaminants and pollutants *caused by humans*. N.U. CONST. art. I, § 7, *emphasis added*. Looking past the plain text of the ERA and examining the testimony provided prior to its passing makes even more obvious that the ERA was intended to protect New Union's citizens from "harms caused by un-natural, human-made or human-caused contaminants and pollutants." *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10377* (N.U. 2019-2020). For added emphasis, one would have to look no further than the "Environmental Rights Amendment Assembly Information" and read that the "Purpose or General Idea" of the amendment is to protect public

health and the environment from harms including, but not limited to, contaminants and pollutants caused by humans. *Id*.

Reviewing the facts on record, there is no question that the NAS-T contamination in Centerburg and Fartown is caused by humans, specifically, BELCO. R. at 2. BELCO's own investigation found that the contamination was a result of the use of liquid NAS-T to create LockSeal, BELCO's patented sealant coating, which it manufactured at the facility in Centerburg. R at 2-3. The precise source of the NAS-T contamination was from sporadic spills and an unlined lagoon used for wastewater, which led to NAS-T entering the soil near BELCO's facility and eventually migrated to the groundwater, which created a plume of NAS-T in the Sandstone Aquifer. R. at 3. Based on BELCO's findings in the record, there is no question that NAS-T is a contaminant manufactured by humans, and the effects of creating NAS-T at the facility led to the contamination of Centerburg and Fartown's wells. The ERA provides explicit protections against this kind of contamination, and the EPA's determination that BELCO is not required to install filtration systems in Fartown's wells is a clear error of judgment and in direct conflict with the facts on record; thus rendering the EPA's decision arbitrary, capricious, and contrary to law.

The EPA claims that "clean water" in the context of the ERA does not necessarily mean water that does not contain any contaminants whatsoever, and that requiring water completely be free from any contamination would invalidate numerous permits under the Clean Air Act and Clean Water Act and other regulatory schemes that allow "safe" levels of contamination. R. at 13. Similarly, the EPA argues that its interpretation of how to apply the ERA in the context of CERCLA should receive deference. *Id*. The EPA also contends that the order requiring BELCO

to provide bottled drinking water to the residents of Fartown is a sufficient remedy considering the low amounts of NAS-T in Fartown are below the HAL. *Id*.

While the EPA and its UAO may be entitled to *some* deference in determining what constitutes "clean water," the clear language of the ERA provides that clean water be "free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. To interpret the meaning of the ERA any differently would be unreasonable and contrary to law, especially considering the legislative history and purpose of the bill. *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10377 & Assembly No. A10455* (N.U. 2019-2020) . Testimony from the New Union Assembly prior to the passing of the ERA revealed that the intent for the meaning of "clean air" and "clean water" included air and water that is free from odors that are "sufficiently offensive" and impact what the community would consider "clean." *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10455* (N.U. 2019-2020) (statement of Wright, Bill Sponsor). Here, the presence of the odor from NAS-T in the private wells–which EPA conveniently cited as new information it relied on to reopen the Consent Decree–clearly shows that the residents of Fartown are confronted with odor from a human-created contamination, and merely providing bottled water to affected residents will not decontaminate the water in their private wells.

BELCO claims that the CleanStripping technology is costly and should not be required since FAWS has not provided any evidence of harmful levels of contamination. R. at 13. However, this argument should be rejected because the levels of NAS-T contamination in Fartown are irrelevant in the context of the ERA. As has been expanded upon previously, the ERA constitutes an ARAR that clearly provides a right to water free from any human-caused

pollution and contamination; and the legislative history of the amendment shows there was an intent to include water free from offensive odors[1] in its definition of "clean." *Environmental Rights Amendment Assembly: Hearing on Bill No. A02137 Before the N.U. Assembly No. A10455* (N.U. 2019-2020) (statement of Wright, Bill Sponsor).

The language, intent, and purpose of the ERA creates a fundamental right to clean water free from contaminants and pollutants caused by humans and the NAS-T contamination in Fartown is a result of human-caused contamination. Because of this, this court should uphold the District Court's decision to vacate the portion of the UAO that requires only bottled water rather than filtration or some other remedy that removes NAS-T from Fartown's wells.

IV. The District Court erred in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.

After considering the other issues at hand in this case, only state law claims remain to be decided. A federal court has "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). Here, however, the remaining state law claims should remain governed by the state court, not the federal court. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer footed reading of applicable law." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). Based on this precedent,

[1]Specifically, this bit of testimony was regarding odors in the air of a community near two very large landfills. The amendment's sponsor provided that many citizens would likely feel the odor was harmful and that the government was not "living up to its obligation" to protect those individuals' right to clean air. The sponsor also stated that, "Even odors could be an issue if sufficiently offensive and if they impact what the community would consider 'clear' air." These standards and intentions can easily be applied to the issue Fartown faces regarding its water, as the ERA provides the fundamental right to clean air and water.

the state law claims in this case should be heard by a state court and federal court should be avoided.

Further precedent states that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 35 (1988). The situation at hand should prove no different. Further, "when federal adjudication would unduly intrude upon complex state administrative processes because ... federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern." Martin v. Stewart, 499 F. 3d 364 (4th Cir. 2007). By hearing the state law claims in this instance, "federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id*.

It has been argued that "generally, state tort claims are not considered novel or complex." Parker v. Scrap Metal Processors, Inc., 468 F. 3d 733, 743-44 (11th Cir. 2006). However, the tort claims here differ from typical tort claims. In the case at hand, the tort claims presented involve novel and complex issues that should be handled by the state court. While on the surface level the remaining claims are nuisance and negligence claims, they go much deeper than normal because of the number of individuals impacted and the unique situation in which they have become intertwined. A more local perspective– a perspective of state law– could be invaluable in this situation. In this case, the state interest in the nuisance and negligence tort claims greatly outweigh the federal interest. Therefore, the remaining tort claims should be heard by the state court.

As discussed earlier, the ERA is more stringent than federal standards. This fact is also very important to consider when classifying the remaining torts issues as novel and complex.

Because the state standard set forth by the ERA is more stringent than the federal standard, it should also be considered more novel and complex. The remaining tort claims are clearly issues governed by specific state laws and standards, and therefore, the issues should be heard in state court.

The matter of further discovery also must be discussed. Much discovery, including expert discovery, has not yet begun, and thus the claims should be revered to the state court. Discovery is a necessary part of the legal process, and without it, FAWS's right to due process would be violated. The Due Process Clause of the Fourteenth Amendment states that "no person shall be "deprived of life, liberty or property without due process of law." U.S. CONST. amend. XIV, § 2. By denying proper discovery, the court runs the risk of individuals not receiving their procedural due process.

BELCO and the EPA argue that by dismissing the claims, you undermine the efficiency and work of the court system. In their argument, the District Court also mentions the need for courtroom efficiency. One cannot, however, value efficiency over ensuring that a claim is being heard in the proper venue. BELCO, the EPA, and the District Court also all rely on the argument that nuisance and negligence claims are not novel and complex. In many situations, this may be the case. However, the nuisance and negligence claims in this case are much more complex than the average tort claim, and thus are novel and complex.

The remaining state law claims should be heard by the State Court in order to ensure proper venue for the issues because of the interest the state has in determining the outcome of the claims. It is also important to consider the potential due process violation if proper discovery is not completed. Further, while it is important to recognize and respect the court's time and the efficiency they are attempting to maintain, valuing the overall importance of venue takes

priority. Therefore, based on the aforementioned reasoning, the District Court erred in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims and the remaining claims should be heard in the proper State Court.

Conclusion

For the aforementioned reasons, this court should reverse the District Court's order that costs FAWS incurred in sampling and analyzing residents' private drinking water wells are not reimbursable under CERCLA as a response costs and the District Court's denial of its motion to dismiss the remaining state court claims. This court should uphold the District Court's order upholding the EPA's UAO directing BELCO to take additional investigation and response actions based on the EPA's determination that the New Union ERA constitutes an ARAR under CERCLA and the District Court's order vacating as arbitrary, capricious and contrary to law EPA's determination that BELCO is not required to install filtration systems on Fartown residents' private wells.