NON-MEASURING BRIEF
TEAM 37

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

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

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

The United States District Court for the District of New Union entered summary judgment in consolidated cases Nos. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). Fartown Association for Water Safety ("FAWS"), Better Living Corporation ("BELCO"), and the United States Environmental Protection Agency ("EPA") all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015). This is an appeal from a final decision disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED

I. Did the District Court err when 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 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")?

II. Did the District Court err when it upheld EPA's determination that the ERA constitutes an Applicable or Relevant and Appropriate Requirement ("ARAR"), and, accordingly finding that EPA's reopening the Consent Decree ("CD") based on that ARAR and ordering further remedial action in the Unilateral Administrative Order ("UAO") was proper?

III. Did the District Court 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 New Union Environmental Rights Amendment ("ERA")?

IV. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

I. Background

From 1973 until 1998, the defendant, BELCO, manufactured a probable human carcinogen called Nitro-Acetate Titanium (NAS-T) at a factory in Centerburg. R 3.[1] The factory's unlined lagoon sporadically spilled, causing a plume of NAS-T in the Sandstone Aquifer—the water supply for both Centerburg and Fartown. R 2, 3.

NAS-T produces a foul "stale" or "sour" smell at 5 parts per billion (ppb), and per a 1995 EPA Health Advisory Level, NAS-T should not be consumed at 10 ppb. R 3.

By 2013, Centerburg's public water supply smelled "sour" and "off." R 3. In January 2015, the Centerburg County Department of Health (DOH) began testing the water for chemical contamination, revealing NAS-T levels between 45-60 ppb. R 3. The DOH notified the residents of Centerburg to stop drinking tap water, and BELCO began providing bottled water to them. R 3. The New Union Department of Natural Resources (DNR) referred the matter to the EPA. R 3.

Under an agreement with the EPA, BELCO investigated the contamination. BELCO installed three lines of monitoring wells to track the NAS-T plume's progress as it flowed downgradient from Centerburg towards Fartown. R 2-4. The final line of five wells were installed half a mile from Fartown. R 4. Between July 2016 and January 2017, the final line of wells detected no NAS-T. R 4.

In June 2017, the EPA selected a clean-up plan for the old factory site. R 4. The EPA and

[1] References to the record shall be cited as "R [page number]."

BELCO entered into CD, where BELCO agreed to implement the clean-up plan, and after the clean-up was complete, the EPA would issue BELCO a Certificate of Completion (COC). R 4. Under the CD, the EPA cannot order BELCO to further remediate the site without "reopening" the CD. The EPA may reopen the CD:

> 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; R 4. The CD defines regulatory standards to include "applicable or relevant and appropriate requirements under CERCLA" (ARARs). CD, § 1.12; R 4.

Under the CD, BELCO (1) installed a water filtration system called "CleanStripping" on the Centerburg public water supply to remove NAS-T; (2) evacuated soil around the abandoned lagoon; and (3) sampled the monitoring wells each month during the investigation. R 4. In January 2018, tests from two of the wells closest to Fartown showed NAS-T levels of 5 ppb and 6 ppb. R 5. Despite these detections, the EPA issued the COC to BELCO in September 2018.

Fartown residents noticed that their water occasionally smelled "off" since at least 2016. R 5. When they learned about the CD, they requested that DOH test their wells. DOH tested five wells in February 2019, but the results were negative for NAS-T. R 5. In May 2019, concerned Fartown residents requested that the EPA order BELCO to conduct further testing in Fartown. R 5. The EPA refused. R 5.

In December 2019, approximately 100 Fartown residents formed the FAWS, and retained Central Laboratories, Inc. (Central Labs) to test their private wells. R 5. Charging $21,500, Central Labs issued a report in March 2020 showing that of 225 samples, 51 samples showed NAS-T levels of 1-4 ppb, and 54 samples showed NAS-T levels between 5-8 ppb. R 5. Based on the

results, FAWS requested that the EPA reopen the CD, but the EPA refused. R 5.

On November 3, 2020, the citizens of New Union amended their Constitution to include the ERA, which reads:

> 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; R 5. Pursuant to the New Union constitutional amendment process, the Amendment was passed by the New Union legislature, signed by the governor, then included on the general election ballot, where it passed with 71% voter support. R 5.

The EPA asked the DNR whether it believed that the ERA constituted and ARAR, and the DNR replied that the "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 regulation." R 6. New Union does not have a State Memorandum of Agreement regarding ARARs. R 6.

The EPA determined that the ERA constitutes and ARAR and reopened the CD on March 20, 2021. R 6. The EPA included in the administrative record the Central Labs test results; the fact that Fartown is an environmental justice community;[2] the possible endangerment from NAS-T, including its potential carcinogenic effects; and the presence of odors from NAS-T. R 6. In a UAO, the EPA ordered BELCO to: (1) each month, sample fifty private wells in Fartown selected by the EPA; (2) for any well testing between 5-10 ppb of NAS-T, provide the residents with bottled water until the tests reveal levels of 4 ppb or lower; and (3) for any well testing above 10 ppb, install CleanStrip filtration. UAO, § 3.2; R 6-7. BELCO refused, so the EPA began testing the wells and supplying bottled water. R 7. About 45% of the samples test positive for NAS-T, and about 20%

[2] A community "where the population is disproportionately below the poverty line and/or disproportionately belongs to racial or ethnic minority groups. *Sierra Club v. FERC*, 867 F.3d 1357, 1369 (D.C. Cir. 2017).

have levels between 5-8 ppb.

II. Procedural History

On August 2, 2021, the EPA moved to recover costs from BELCO, which BELCO opposed. R 7. On August 30, 2021, FAWS moved to intervene, which the motion judge granted. R 7. FAWS challenged the UAO to the extent that it failed to require BELCO to provide CleanStripping on FAWS' members' private wells. R 7.

On August 30, 2021, FAWS filed an action against BELCO, seeking recovery of the $21,000 cost of the Central Labs tests, and asserting a negligence and private nuisance action under the ERA. R 7.

On December 30, 2021, after completing discovery on the CERCLA claims, all parties in both actions moved and cross moved for summary judgment on all CERCLA claims. R 8. FAWS moved to dismiss the state law claims without prejudice should the CERCLA claims be resolved, which the EPA and BELCO opposed. R 8.

III. Rulings Below

The motion judge: (1) ruled that FAWS' costs incurred for sampling its wells were not reimbursable under CERCLA; (2) upheld the EPA's determination that the ERA constituted an ARAR; (3) vacated as arbitrary, capricious, or contrary to law the EPA's determination that BELCO is not required to install CleanStrip filtration systems; and (4) retained pendant jurisdiction over the state law claims. R 10, 12, 14, 15.

SUMMARY OF THE ARGUMENT

Pollution released by BELCO's old factory threatens the health and comfort of Fartown residents. Since 2016, Fartownians' water has smelled "off," but the DOH sampled only five wells before refusing to take further action. In December 2019, Fartownians formed FAWS and acted—

sampling their wells for NAS-T at a cost of $21,000. These tests were necessary because NAS-T, the suspected source of the smell, is a probable human carcinogen, and the long term effects of even low level consumption are unknown. The tests confirmed what the Fartownians suspected—the NAS-T plume had move downgradient, contaminating their water supply. The tests, designed to direct BELCO remediation efforts, later provided the basis for the EPA to conduct a CERCLA-quality clean up. Because the tests were necessary and consistent with CERCLA, under CERCLA, FAWS should recover the $21,000 cost.

In 2020, New Union adopted the ERA by following the proper procedure for amending the Constitution. The ERA created more stringent requirements for a clean environment, requiring the environment be healthful and free from pollutant and contaminants released by humans. The ERA is applicable to probable human carcinogens like NAS-T because they are not "healthful." The Amendment is self-executing, and it went into effect as soon as the voters passed it. The EPA properly determined that the ERA is an ARAR.

Where the law requires environmental cleanup, CERCLA favors long-term solutions over stopgaps. Here, providing Fartownians with bottled water functions as an incomplete stopgap—insuring temporary clean water for drinking, but failing to provide clean water for cooking, showering, bathing, and cleaning. This stopgap plan is not only contrary to CERCLA, it is insufficient under the ERA, which grants broad protection for clean water. Instead, CERCLA and the ERA require a long term solution, like putting CleanStrip filtration on all Fartown wells.

Applying the ERA to tort law claims presents a novel question of state law that is properly addressed by the New Union courts. The Federal District Court is ill equipped to interpret the Constitutional provision that is both new and complex. If the federal claims are resolved, the state claims should be dismissed without prejudice to allow FAWS to file a state action.

STANDARD OF REVIEW

United States courts of appeal "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Appellate courts review de novo a motion judge's grant of summary judgment, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992), and review a judge's decision to retain jurisdiction over state law claims for an abuse of discretion. *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 906 (7th Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT COSTS INCURRED BY FAWS ARE NOT REIMBURSABLE AS RESPONSE COSTS UNDER CERCLA BECAUSE FAWS ESTABLISHED A PRIMA FACIE CASE FOR RECOVERY.

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, 2767 (1980). CERCLA provides that potentially responsible parties ("PRPs") can be liable to private parties who are not PRPs for response costs incurred by those private parties. 42 U.S.C. § 9607(a)(4)(B).

A prima facie case for CERCLA cost recovery requires a plaintiff to prove: (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. 42 U.S.C. § 9607(a)(4)(A), §9607(a)(4)(B); *see also Rolan, et al. v. Atlantic Richfield Co., et al.,* 2019 WL 542905, at *5 (N.D. Ind. 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.,* 546 F.3d 847, 850 (7th Cir. 2008)). While BELCO concedes that FAWS established the first three elements

of a prima facia case, BELCO contests that FAWS' costs were not response cost under CERCLA. R 12. CERCLA permits private parties to recover from another responsible party for costs incurred in cleaning up hazardous waste sites where the costs are (1) necessary and (2) consistent with the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(B); *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012);*Farmland Indus., Inc. v. Morrison–Quirk Grain Corp.,* 54 F.3d 478, 481 (8th Cir. 1995) ("NCP compliance is a prerequisite for recovery of response costs under CERCLA."). The burden of proof lies with the private party seeking recovery of its costs. *See Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.,* 840 F.2d 691, 695 (9th Cir. 1988); *Ambrogi v. Gould, Inc.,* 750 F. Supp. 1233, 1239 (M.D. Pa. 1990).

A. FAWS' Response Costs In Sampling, Testing, And Analyzing Well Water Samples Of Its Members' Private Drinking Water Wells Were Necessary Under CERCLA.

CERCLA does not define "necessary costs of response," but it does define the terms "respond" or "response" to mean remove, removal, remedy, and remedial action, with all such terms to include enforcement actions related thereto. *See* 42 U.S.C. § 9601(25). The plain definition of necessary is either that it is needed for some purpose or reason; essential; must exist or happen and cannot be avoided; or inevitable. *Necessary*, Black's Law Dictionary (11th ed. 2019). The terms "remove" or "removal" mean the cleanup or removal of released hazardous substances from the environment, or the taking of such other actions as may be necessary to prevent, monitor, evaluate, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. *See* 42 U.S.C. § 9601(23).

Under CERCLA, response costs are necessary for purposes of private cost recovery action when there is a threat to human health or the environment and the response action is addressed to that threat. *See* 42 U.S.C. § 9601*; Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.,* 710 F.3d 946, 961 (9th Cir. 2013)*; Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 867 (9th Cir.

2001); *Regional Airport Auth. of Louisville v. LFG, LLC,* 460 F.3d 697, 703 (6th Cir. 2006). The touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment, and necessity is not obviated when a party also has a business reason for the cleanup. *See Carson Harbor Vill., Ltd.*, 270 F.3d at 867.

Necessary costs are those required to contain and clean up hazardous releases, and include the cost of actual cleanup in addition to costs for investigation, planning, and remedial design. *See* 42 U.S.C. § 9601; *Brooklyn Union Gas Company v. Exxon Mobil Corporation,* 554 F. Supp. 3d 448, 467 (E.D.N.Y. 2021); *APL Co. Pte. v. Kemira Water Sols., Inc.,* 999 F. Supp. 2d 590, 619–20 (S.D.N.Y. 2014). For a response action to be "necessary," it cannot be duplicative of the EPA or state agency's actions responding to or remedying the release of the substance in question. *U.S. v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). The actions may be "duplicative" if they occur at the same time as the EPA's own actions and do not seek to uncover different or more information than the EPA; or if they occur after the EPA had already informed the private parties that it would be conducting its own investigation. *See, e.g., Lansford–Coaldale Joint Water Authority v. Tonolli Corp*., 4 F.3d 1209, 1219 (3rd. Cir. 1993); *Louisiana-Pacific Corp. v. Beazer Materials & Servs.*, Inc., 811 F. Supp. 1421, 1425 (E.D. Cal. 1993); N*orthwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 389, 401 (E.D. Va. 1994); *Central Me. Power Co. v. F.J. O'Connor Co.*, 838 F. Supp. 641, 648–49 (D. Me. 1993).

Agency inaction is not dispositive of the question whether contamination presents an environmental risk worthy of response. *See NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986) (holding that response costs can be "necessary" even though the agency that required cleanup never approved the response actions taken). An actual agency cleanup order is highly relevant and, in some cases, compelling on the necessity question. 42 U.S.C. § 9607(a)*; see also*

Carson Harbor Vill., Ltd., 270 F.3d at 867. In addition, governmental approval is not a necessary prerequisite to recovery in a private CERCLA action. *Allied Corp. v. Acme Solvents Reclaiming, Inc*., 691 F. Supp. 1100, 1112 (N.D. Ill. 1988).

Further, response actions are necessary when they are "closely tied to the actual cleanup of hazardous releases." *Young v. U.S*., 394 F.3d 858, 863 (10th Circ. 2005). There must be some evidence that the response actions were taken to "assist with and help plan the eventual remediation and cleanup efforts." *See Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc*., 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. 2016); *see also Walnut Creek Manor, LLC v. Mayhew Ctr.*, 622 F.Supp.2d 918, 929 (N.D. Cal. 2009).

Finally, 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.,* 209 F.Supp.3d at 1113. However, whether plaintiffs were reasonable in their conduct, or acted in good faith, is not relevant to the inquiry whether investigative costs were "necessary," as required to establish private cost recovery action under CERCLA. 42 U.S.C. § 9607(a)(4)(B).

Here, FAWS' spending to sample, test, and analyze its members' private drinking water wells requires reimbursement for response costs under CERCLA because FAWS' actions are removal actions, which monitor, assess, and evaluate the release or threat of release of NAS-T – a hazardous substance. *See* 42 U.S.C. § 9601(23); 42 U.S.C. § 9601(25). In *Bolin v. Cessna Aircraft Co.*, groundwater testing conducted in connection with contamination by trichloroethylene (TCE) was a "removal" action within meaning of CERCLA and therefore testing costs were potentially recoverable. *See* 42 U.S.C. § 9601(23); *Bolin v. Cessna Aircraft Co.*,759 F. Supp. 692, 711 (D. Kan. 1991). Like *Bolin*, FAWS' testing was a removal action within meaning of CERCLA. *Id.*

These incurred costs were necessary to prevent, minimize, or mitigate damage to the public health or welfare, which may result from a release or threat of release of a hazardous substance. *See* 42 U.S.C. § 9601(23) and 42 U.S.C. § 9601(25).

Moreover, FAWS' response costs are necessary because the response action is directed at the presence of NAS-T in the drinking water supply, a potential a threat to human health and the environment. As early as in 2016, some Fartownians noticed that the water from their private wells began to occasionally smell off. R 3. For people to detect the smell, the NAS-T concentrations in the water is must be least 5 ppb. R 3.The smell caused residents in Fartown to be concerned that the contaminations were too high to be safe. R 3. As a result, the residents immediately requested that DOH sample and test their drinking water for NAS-T contamination. R 3. Because NAS-T can be detected similarly by smell at low levels and health risky levels, without testing and monitoring, there is no way of knowing whether the smell means the water is truly harmful. Even if the NAS-T contamination is as low as 5 ppb, the effect of the smell is still a threat to the environment because the environment is not clean when it stinks. In addition, Because NAS-T is unregulated and unmonitored by the EPA, it is still unknown whether NAS-T has bio-accumulative effects if consumed at low levels over an extended period. *See* R 3; *see also* EPA Bioaccumulation Analysis Workgroup, *Bioaccumulation Testing And Interpretation For the Purpose Of Sediment Quality Assessment*, EPA, https://archive.epa.gov/water/archive/polwaste/web/pdf/bioaccum.pdf (last visited Oct. 29, 2022). FAWS' response action addressed that threat. Monitoring the wells in Fartown helped the EPA to identify the extent of the groundwater contamination. It also provided new information to show that the clean-up plan was no longer protective of human health or the environment, leading the EPA to reopen the CD. R 7. Next, FAWS' necessity is not obviated when

they also have a business reason for the cleanup. *Carson Harbor Vill., Ltd.*, 270 F.3d at 867. threat to both human health and the environment.

FAWS' actions were also not duplicative of EPA and BELCO's work. In the original CD, the EPA required that the town should not have smell levels of NAS-T. R 7. Even though the smell of NAS-T was detected in Fartown as early as when the initial CD was in place, the actions taken by DOH to test the wells did not occur until February 2019, over a year after the end of BELCO's remedial actions in Centerville, and five months after when the certificate of completion was issued. R 5. The smell indicated that contamination from the Sandstone Aquifer reached wells in Fartown. It was not only the "trace" amounts of contamination in the Fartown wells because people smelled it and took it seriously by reporting the issue to the DOH. R 5. Therefore, further testing was needed because the first round of monitoring was in fact incomplete.

The persistent smell and detection of downstream NAS-T in the monitoring wells both supported further testing and demonstrate the necessity of further monitoring work which BELCO should have done. FAWS' testing was justified because the locations that Fartown asked for were never tested before. Even if DOH's test samples did not show any detections of NAS-T, private wells that Fartown was asking for monitoring were downstream from the original contamination, and not associated with the initial monitoring. The different monitoring locations further demonstrate that FAWS' conducts were not duplicative of EPA and BELCO's work because FAWS' testing locations were downstream from the NAS-T plume Centerville and NAS-T could migrate downstream through the groundwater.

Although costs were incurred at the time that EPA was no longer investigating the spread of contamination, the agency inaction is not dispositive of the question whether contamination presents an environmental risk worthy of response. *See NL Indus., Inc.*, 792 F.2d at 898 (holding

that response costs can be "necessary" even though the agency that required cleanup never approved the response actions taken). Here, EPA's inaction is not dispositive because Fartown is downstream from the original contamination site, making the previous cleanup order highly relevant. The CD indicated that EPA required BELCO to clean up NAS-T and nowhere in the town should have smell levels of NAS-T. R 7. Moreover, the CD provided for reopening because NAS-T is a typically unmonitored and unregulated toxic substance, acknowledging that further cleaning or action from BELCO may be necessary in future. R 7. Some Fartownians could still smell the NAS-T after the COC was issued. R 5. Thus, to fulfill EPA's CD, further testing was required. FAWS' costs were necessary because the tests warranted reopening of the CD and new monitoring action to occur in Fartown.

FAWS' response actions were necessary because they were closely tied to the actual cleanup of a hazardous release of NAS-T. FAWS' response actions were closely tied to the actual cleanup of hazardous releases because it helped to identify the existence and magnitude of the NAS-T spread to the groundwater in Fartown. Understanding the contaminations' levels and travel path would help to establish a plan for cleanup. Having a definite area for the spread of the NAS-T plume would also help identify proper remedial methods. Thus, FAWS' response actions were necessary because they were closely tied to the actual cleanup of hazardous releases.

FAWS' response actions were not 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.*, 209 F.Supp.3d at 1113. FAWS' conduct was directly involved in cleanup efforts because it helped identify the existence and extent of the NAS-T in Fartown. FAWS' new information led the EPA

to reopen the CD by showing that the clean-up plan was no longer protective of human health or the environment. R 7.

Moreover, whether FAWS was reasonable in its conduct was not relevant to the inquiry whether investigative costs were "necessary," as required to establish private cost recovery action under CERCLA. *See* 42 U.S.C. § 9607(a)(4)(B). Even if FAWS conduct of sample testing was unreasonable, this is not relevant to determine the necessity of costs.

Hence, FAWS' response costs in sampling, testing, and analyzing well water samples of its members' private drinking water wells were necessary under CERCLA.

B. FAWS' Response Costs In Sampling, Testing, And Analyzing Well Water Samples Of Its Members' Private Drinking Water Wells Were Consistent With National Contingency Plan (NCP) Under CERCLA.

The national goal of the remedy selection process is "to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste" 40 C.F.R. § 300.430(a)(1)(i).

Private cleanup efforts will be "considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements . . . and results in a CERCLA-quality cleanup." *See* 40 C.F.R. § 300.700(c)(3)(i). *See also* 40 C.F.R. § 300.700(c)(4); *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1366–67 (9th Cir.1994). A CERCLA-quality cleanup is (1) "protective of human health and the environment," (2) utilizes "permanent solutions and alternative treatment technologies or resource recovery technologies," (3) is cost-effective, and (4) is selected after "meaningful public participation." *See* 40 C.F.R. § 300.700(c); *see also Franklin County Conv. Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001).

Taken together, FAWS' response costs in sampling, testing, and analyzing well water samples of its members' private drinking water wells evaluated were consistent with NCP. Monitoring groundwater contamination protected public health because it protected all residents in Fartown from drinking or consuming NAS-T contaminated water. FAWS' conduct also further protected the environment by prompting the EPA to reopen the CD and institute a UAO to create a clean environment without any smell in the water. R 6. Identifying the existence and extent of contaminants in the water requires the establishment of permanent solutions and alternative treatment technologies to reduce or eliminate NAS-T levels in the water under the ERA. Monitoring groundwater contamination was a cost-effective as an early alarm system to help prevent unexpected and costly deterioration. The public actively participated in taking this course of action because FAWS was voluntarily formed by approximately 100 Fartownians. R 5.

In summary, FAWS response costs were both necessary and consistent with NCP. FAWS successfully established a prima facie case for response costs against BECLO under CERCLA. The District Court erred when 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.

II. THE DISTRICT COURT PROPERLY UPHELD THE EPA'S DETERMINATION TO REOPEN THE CONSENT DECREE BASED ON A NEW ARAR.

The EPA is entitled to deference regarding interpretations that require technical expertise. *See Lile v. University of Iowa Hospitals and Clinics*, 886 F.2d 157, 160 (8th Cir. 1989). A reviewing court shall 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(2)(A); *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir.1992); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 202 (1st Cir. 1999) An agency determination is arbitrary or capricious

if it "relied on factors which Congress had 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." *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1167 (D.N.M. 2015).

By the plain terms of the statute, remedial actions need to comply to a state's ARARs unless the EPA waives the requirement. 42 U.S.C. § 9621(d). A state environmental requirement or standard constitutes an ARAR if it is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *See* 42 U.S.C. § 9621(d)(2)(A); *United States v. Akzo Coatings of Am., Inc*., 949 F.2d 1409, 1440 (6th Cir. 1991). "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). On review, the court should ensure that the agency has "considered all of the relevant evidence in the record and has acted in the public interest." *Akzo Coatings of Am., Inc*., 949 F.2d at 1426.

When, as here, the EPA has determined that the required characteristics of an ARAR are met, the Court should be deferential to the EPA's expertise. If the ERA is a properly identified ARAR, then the plain terms of the consent decree allowed the EPA to properly reopen it, and the court did not err in holding so.

A. The ERA Was Properly Promulgated Because It Is A State Constitutional Amendment That Is Generally Applicable And Legally Enforceable.

Under CERCLA, a law is "properly promulgated" when it is "imposed by State legislative bodies and regulations developed by State agencies that are of general applicability and are legally enforceable." *Akzo Coatings of Am., Inc.*, 949 F.2d at 1440; 40 C.F.R. § 300.400(g)(4). A law is

generally applicable when it is enacted by the state legislature, imposes obligations on all citizens in the state and it is legally enforceable when it is drafted with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Akzo Coatings of Am., Inc.*, 949 F.2d at 1440-1441. General applicability means that the law was not promulgated specifically for application to CERCLA remedial actions. CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements, 1989 WL 515956, at *65.

Here, the ERA was properly promulgated because it is a constitutional amendment that was passed by the New Union state legislature, signed by the governor, and voted into the state constitution by a 71% margin by the electorate, in accordance with "all Constitutional Amendments in New Union." R 5.

The ERA is generally applicable, because as a Constitutional Amendment, it imposes rights on "[e]ach and every person of this State" and thus provides that there is an obligation on parties like BELCO to not infringe on those rights even beyond the scope of CERCLA actions. N.U. Const. art. 1, § 7. The ERA by its plain language is broadly applicable because creates a general "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.

The ERA is also legally enforceable because the language of the ERA is sufficiently clear: the prohibited conduct is human-caused contamination or pollution of the state's air and water sources. The ERA is like the state law found to be an ARAR in *Akzo* because it provides for broad protection for the public from environmental contamination. There, the statutory language had a general effect, prohibiting the "direct or indirect discharge" of substances into state waters that would injure public health. *Akzo Coatings of Am., Inc.,* 949 F.2d at 1441. the court held that this

was a sufficiently specific standard to be legally enforceable. *Id*. The Court found "no reason to strike down the open-ended provision of this decree." *Id.* at 1437. This amendment should therefore also constitute a specific enough standard to be legally enforceable.

If the ordinary person did not understand what would be prohibited under this law, it would have created uncertainty about the meaning of the amendment. Ballot measures that are sufficiently specific generate broader support because the general public understands them, so the vote would have been much closer if the people of New Union did not understand it. Travis Braidwood, *Why State Ballot Measures Should Use Specific Language if Their Backers Want them to Succeed*, London School of Economics and Political Science (Feb 8, 2019) https://blogs.lse.ac.uk/usappblog/2019/02/08/why-state-ballot-measures-should-use-specific-language-if-their-backers-want-them-to-succeed/ (Last visited Oct 29, 2022).

Even though there was debate about the definitiveness of the language in enacting the ERA, the legislative history provides the intent was to prevent conduct that causes harm to the citizens of New Union and the meaning of the language defined that the prohibited conduct is pollution and contamination that causes harm to the state's air and water. *See generally NU Assembly Nos*. A10377; A10455.

The ERA was properly promulgated by the people and their representatives in the state of New Union. It is broadly applicable and sufficiently clear to be legally enforceable. Thus, it satisfies the first characteristic of a state ARAR under CERCLA.

B. The ERA Is More Stringent Than Any Federal Law Or Standard Because It Creates A "Fundamental Right" To Clean Air And Water In New Union.

There is also no federal law that provides for a "fundamental right" to clean air and water like the ERA does. Where no Federal ARAR exists for a chemical, location, or action, but a State

ARAR does exist, or where a State ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent. 40 C.F.R. § 300; *Akzo Coatings of Am., Inc.*, 949 F.2d at 1443.

The ERA is broader in scope than any federal law or standard because it is not limited to specific pollutants or contaminants like most federal standards are. The Safe Drinking Water Act (SWDA) provides for "maximum contaminant level goals" for specific chemicals in certain public water supplies. 42. U.S.C. §300g-1(b)(1)(A). Similarly, the purpose of the Clean Air Act (CAA) is to encourage pollution prevention with reasonable Federal, State, and local governmental actions, through providing emission standards for certain air pollutants. 42 U.S.C. § 7401(c). The ERA is broader than these laws because requires freedom from health damaging contaminants and pollutants, including those not regulated or identified as harmful yet by the federal government. Legislative Addendum p. 7.

The ERA cleanup standard is more stringent than any federal standards because the guarantee that air and water are "free from contaminants and pollutants caused by humans" requires the elimination of pollutants as a remedy. In contrast, the NCP's requires evaluating remediation under CERCLA by considering the "overall protection of human health and the environment" by "eliminating, reducing or controlling" exposure to contaminants. 40 C.F.R. 300.430(9)(iii)(A). The ERA requires much higher remediation standard to ensure that the State's air and water supply are objectively "free" from contaminants that could damage the health of citizens. This means going beyond "reducing or controlling" exposure. Therefore, the ERA satisfies the second element required to qualify as a State ARAR.

C. The ERA Is Relevant And Appropriate Because NAS-T Is An Unregulated Contaminant That The ERA Was Intended To Provide Protection Against.

Although CERCLA does not define ARARs, it requires that remedial actions result in cleanup that meets the legally applicable or otherwise relevant and stricter state requirements.

Franklin County Conv. Facilities Auth, 240 F.3d at 544; 42 U.S.C. § 9621(d)(2)(A). The identification of relevant and appropriate standards "must be done on a site-specific basis and involves a two-part analysis: (1) determination if a requirement is relevant to the site at issue and (2) determination whether the requirement is appropriate." CERCLA Compliance with Other Laws Manual Part I: Interim Final, 1988 WL 492153, at *3 (hereafter *Compliance Manual)*.

Determining whether a state law is relevant and appropriate involves a comparison of several site-specific factors such as: the characteristics of the remedial action, the hazardous substances present or the physical circumstances of the site, compared with those addressed in the statutory or regulatory requirement. *Id* at *16. Relevant and appropriate requirements include cleanup standards, standards of control and "other substantive environmental protection requirements, criteria or limitations" promulgated under state law. 40 C.F.R § 300.5. They "address problems or situations sufficiently similar to those encountered" so that their use is well suited to the specific CERCLA site. *Id.*

Here, the ERA is relevant because it was designed to address the exact issue presented by the NAS-T contamination of the Sandstone Aquifer. The senate report for the ERA outlined that the amendment's purpose is to create a safety net for the citizens of New Union to fill gaps related to unregulated contaminants to the water and air in the state. Legislative Addendum pp. 6; 9. The ERA pertains to NAS-T because it is an unregulated substance that has been found in the groundwater beneath Centerville and Fartown, and it impacts the objective perception of clean air and water because it has potential carcinogenic effects and produces a sour odor, even at non-toxic levels. R 3.

By creating a broad right to clean air and water, the ERA is also an appropriate standard to the CERCLA site. As previously discussed, the ERA applies to the protection of all water -

including groundwater - in the state of New Union. The ERA is broadly applicable, and type of substance is also potentially harmful to the water supply. The court has stated that such a law is "well suited" to provide for the continued control and removal NAS-T as set out in the consent decree between BELCO and the EPA. *See Akzo Coatings of Am., Inc.*, 949 F.2d at 1446.

The EPA determined that ERA is relevant and appropriate to constitute a new regulation and reopened the consent decree to align their response to this higher standard. There is more discretion in the determination of relevant and appropriate standards because the determination "is site-specific and must rely on best professional judgment." *Compliance Manual supra at *16.* Accordingly, the court should defer to the EPA's expertise.

D. The ERA Was Timely Identified Because New Union Responded Within The Regulatory Time Frame.

Under CERCLA regulations, states are "encouraged" to enter into cooperative agreements or "State Memoranda of Understanding" ("SMOA"). 40 C.F.R. § 300.515(a)(1). Here, the state of New Union does not have an SMOA with the EPA regarding ARARs. R 9. Therefore, the state must comply with the terms of 40 C.F.R. 300.515(h).

In the absence of an SMOA, the EPA must conduct annual consultations with states to "establish priorities and identify and document in writing the lead for remedial and enforcement response." 40 C.F.R. 300.515(h)(1). For timely identification and compliance with ARARs, it is important to have early and continuous coordination between lead and support agencies throughout the remedy selection process. *Compliance Manual supra* at *2. The EPA may be the lead agency when "operating pursuant to a contract or cooperative agreement" executed under CERCLA. 40 C.F.R. § 300.5. "The support agency shall communicate in writing potential ARARs to the lead agency within 30 working days of receipt of the lead agency request for these ARARs." 40 C.F.R. 300.515(h)(2).

Identification of ARARs must be discussed during the remedial investigation and feasibility study. 40 C.F.R. 300.515(h)(2). Best practices, however, provide that this process is "not rigid" so that the EPA and States can be able to adapt, and the process can be incorporated into existing site-specific agreements. James. E. Woolford, *Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status*, Office of Superfund Remediation and Technology Innovation (Oct. 20, 2017) https://semspub.epa.gov/work/HQ/197017.pdf (last visited Oct. 29, 2022).

Here, the ERA could not have been identified during the RI/FS process because it became law three years after. R 7. This should not bar the identification of the ARAR because in the absence of an SMOA, the EPA provided expressly in the consent decree that a "new, more stringent Regulatory Standard" would constitute reopening the consent decree. R 7; CD, §12-13. This agreed upon term should be afforded flexibility per EPA best practices.

In the absence of an SMOA between the federal government and the state of New Union, there are no facts to support that it was an untimely course of action to identify the ERA as an ARAR. The CD, federal regulations, and EPA guidance provide support for an ongoing evaluation of New Union's regulations to determine if they are more stringent. The EPA reached out to the DNR in the January following the election. R 8. On February 14, 2021, the DNR responded, requesting the EPA find the ERA is an ARAR where it is consistent with CERCLA and other state and federal regulations. R 9. This action was deferential to the EPA's expertise because they would be in the best position to make the determination about consistency and compliance with other state and federal laws.

The EPA subsequently reopened the CD upon this determination. Even if the EPA's outreach occurred on the first workday in January (Mon. Jan. 4th, 2021) the deadline for the state

to respond would have been February 16, 2021. *See* 40 C.F.R. 300.515(h)(2). Therefore, the identification of the ARAR was timely according to the regulatory process.

The court should be deferential to the EPA's determination that the ERA is an ARAR because it does not rise to the standard of "arbitrary and capricious" agency action. The EPA was permitted under the terms of the consent decree to reach out and ask if the new law constituted an ARAR. The DNR engaged in a timely, responsive process by deferring to the agency's expertise on whether the ERA constituted an ARAR. As such, the EPA's determination was proper, and the District Court's affirmance was not an abuse of discretion.

E. The Consent Decree Was Properly Reopened Because Its Terms Provided For Reopening Upon New Information And Regulations Including Arars.

To administrate CERCLA, the EPA must work with states to identify laws and additional requirements, so that remedial actions can comply to state and federal law. Thus, a mutually agreed upon reopening provision in the consent decree expressly facilitates this collaboration and ongoing remediation. "Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a); *United States v. State of Colo.*, 990 F.2d 1565, 1576 (10th Cir. 1993); *See also* 42 U.S.C. §9652(d). To hold otherwise would be contrary to the purpose and terms of the statute and against the public interest.

Here, the EPA expressly provides for the condition to reopen a CD understanding that a state may promulgate new ARARs. R 7; CD § 13.3. This isn't an arbitrary provision that only applies in this case because the EPA provides for modification provisions in its Model CERCLA Consent Decree. *See* Don R. Clay, *Model CERCLA RD/RA Consent Decree,* National Service for Environmental Publications, p. 71 (June 21, 1991) https://nepis.epa.gov/Exe/ZyPDF.cgi/91010ZHY.PDF?Dockey=91010ZHY.PDF (last visited Oct.

29, 2022). The terms of the consent decree were approved and entered by the court on August 28, 2017, after public comment and a determination from all parties that it was fair and reasonable. R 7. Thus, parties should be legally bound to adhere to the terms.

The terms clearly provide for grounds for the EPA to reopen under new regulations. *Id*.; CD §12-13. As established above, the ERA constituted a new, more stringent state regulation and was a properly identified ARAR. Under CERCLA, Congress left the construction of environmental relief in the hands of qualified experts, so a reviewing court should not attempt to substitute its judgment for the expertise of EPA officials. *Akzo Coatings of Am., Inc.*, 949 F.2d at 1425. The court should therefore be deferential to the resulting decisions to reopen and uphold the reopening of the consent decree.

III. THE DISTRICT COURT PROPERLY REQUIRED BELCO MUST INSTALL FILTRATION SYSTEMS IN FARTOWN BECAUSE THE ERA REQUIRES A FULL AND PERMANENT REMEDY.

The court must evaluate challenges to an agency's interpretation of a statute that it administers within the *Chevron* deference framework. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 507 (2d Cir. 2017). The court must first determine whether congress has directly spoken to the precise question at issue. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). Where the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 839. "[I]f 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. To determine whether statutory language is ambiguous, the court shall use the tools of statutory construction to ascertain if "Congress had an intention on the precise question at issue" that "must be given effect." *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 846 F.3d at 508, quoting *Chevron*, 467 U.S. at 843 n.9.

Where the intent of congress is ambiguous, a reviewing court shall 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(2)(A); *Sierra Club v. Marsh*, 976 F.2d at 769 citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989); *Airport Impact Relief*, 192 F.3d at 202. An agency determination is arbitrary or capricious when it "relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) 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 or (4) seeks to have its action upheld based on post hoc rationalizations." *Emhart Indus., Inc. v. New England Container Co., Inc.*, 274 F. Supp. 3d 30, 50 (D.R.I. 2017) (internal quotations omitted). Courts also review whether an administrative agency has treated similar cases with "apparent irrational discrimination" and review the EPA's analysis to confirm that it is "rational" and "makes sense." *Id.; Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73,78 (1st Cir. 1993). When a court finds that EPA would still have acted as it did even if the agency considered the new information, then it may proceed to evaluate the consent decree on the administrative record using the arbitrary and capricious test. *Akzo Coatings of Am., Inc.,* 949 F.2d at 1429.

Here, the statute unambiguously provides that the EPA must prioritize remedies for removal of hazardous substances over cost. Even if the EPA's determination is owed some weight, they acted arbitrarily and capriciously by failing to consider a wider range of cost-effective removal standards that could permanently remedy the NAS-T smelly water in Fartown.

A. The EPA's Determination Goes Against the Expressed Intent of Congress Because the Statute is Unambiguous that the EPA Must Prioritize Remedies for Removal of Hazardous Substances.

CERCLA has an unambiguous congressional intent for how the EPA should approach remediation of hazardous substances like NAS-T, and explicitly provided for minimum remediation standards to consider in giving effect to the statute. 42 U.S.C. § 9621. Under CERCLA's statutory cleanup standards, the EPA "shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to *the maximum extent practicable*." 42 U.S.C. § 9621(b)(1) (emphasis added). In assessing alternative remedial actions, the EPA should account for several factors including: "long-term uncertainties" associated with the contamination; the "persistence, toxicity, mobility and propensity to bioaccumulate" of the hazardous substance; "short- and long-term potential for adverse health effects from human exposure"; "long-term maintenance costs"; and the "potential threat to human health and the environment" associated with the remedial method. 42 U.S.C. § 9621(b)(1)(A)-(G). Remedial actions which permanently and significantly reduce the volume, toxicity or mobility of the hazardous substances "are to be preferred over remedial actions not involving such treatment." 42 U.S.C. § 9621(b)(1). Given that providing bottled water indefinitely under the UAO is not something that does anything to remedy the presence or mobility of NAS-T in the Fartown water supply for everything other than drinking, EPA's action fails to give effect to the plain terms of the statute. *Chevron, U.S.A., Inc.*, 467 U.S. at 839.

NAS-T is still being detected in 45% of water samples in Fartown, demonstrating a persistent presence of an unregulated substance that is a probable human carcinogen. R 6; 10. The NAS-T contamination in the water supply produces a smell that is also polluting the air Fartown.

In response to NAS-T contamination in Centerville, the EPA instituted a permanent remedial technology that would remove the remaining NAS-T from the water supply available: CleanStripping filtration systems. Under the plain language of CERCLA, the EPA should have prioritized installing this technology, or another more permanent removal solution in Fartown's contaminated wells over the stopgap solution of providing bottled water.

CleanStripping has been shown to be effective in the case of Centreville's NAS-T water contamination levels, and if used in Fartown, could significantly reduce further downstream volume and mobility of the substance. This is a meaningful, permanent remedial solution to the contamination issue, whereas providing bottled water indefinitely provides nothing but a band-aid solution that is contrary to law. Installing CleanStripping would cost thousands of dollars as opposed to the forty-five million dollars that another permanent solution (pumping and treating the aquifer) would cost. R 7. These are not the only filtration systems on the market and the EPA should have explored the costs associated with other permanent removal solutions that are suitable to use in private wells rather than require the town to deal with the persistent presence of NAS-T in the water and air supply.

By selecting bottled water over a permanent remedial technology, the EPA failed to consider the factors other than cost that should be accounted for under the statute. There is no evidence in the record that the EPA considered the long-term uncertainties associated with NAS-T presence in the water. There also seems to be no interest in evaluating whether it has the potential to bioaccumulate. There has been no rational reason provided by the EPA as to why the residents of Fartown should have to tolerate the persistent smell of NAS-T in the environment while the residents of Centerville do not. The consent decree was reopened in part because NAS-T is unregulated and does pose health a health threat as a potential human carcinogen. While the short-

term effects appear to be below HAL levels, the plume in the Sandstone Aquifer was never fully eliminated, so it is unknown how long future downstream effects could last or what the long term impacts of consuming low levels of NAS-T contaminated water is.

There is nothing that bottled water does to expedite reduction or elimination of the substance from the aquifer or groundwater under Fartown. *See* 42 U.S.C. § 6902 (SWDA seeks to reduce or eliminate hazardous waste as "expeditiously as possible"). Without further remedial action there is no telling how long the town will have to deal with the smell or presence of NAS-T. These factors weigh against a temporary "wait and see" solution like providing bottled water. If the EPA had properly acted in accordance with CERCLA, it should have installed CleanStripping Filtration systems or applied some other cost effective water cleaning method to the contaminated wells. Fartown should not be asked to bear the risks, costs, and smell of NAS-T in their environment indefinitely.

Therefore, the court should affirm because providing bottled water does nothing to reduce or eliminate the persistent presence of toxic NAS-T in Fartown's water supply.

B. The EPA's Determination Not To Use A Filtration System As A Remedy Is Arbitrary, Capricious And Contrary To Law Because It Ignores Requirements Under The ERA, CERCLA And Federal Regulations.

The court should consider that the language in CERCLA is an express delegation of authority to the EPA to "achieve the goals of the statute." 42 U.S.C. § 9615. The applicable regulation in this case does align with a reasonable interpretation of provided cleanup standards under CERCLA. *See* 42 U.S.C. § 9621(b)(1)(A)-(G). In determining remedial action, the EPA is required to consider nine criteria and their relative significance: (1) Overall Protection of Human Health and the Environment; (2) Compliance with ARARs; (3) Long-term effectiveness and permanence; (4) Reduction of toxicity, mobility or volume through treatment; (5) Short term

effectiveness; (6) Implementability (including feasibility and availability of services); (7) Cost; (8) State Acceptance; (9) Community Acceptance. 40 C.F.R. § 300.430(e)(9)(iii). Under this regulation, the first two factors are the "threshold requirements that each remedial alternative must meet to be eligible for selection." 40 C.F.R. § 300.430(f)(1)(i)(A); *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1531 (D.C. Cir. 1993). Thus, the EPA's implementation of this regulation was arbitrary and capricious because it failed to give proper weight to the threshold factors, and potentially overweighed cost against the remaining "primary balancing" and "modifying" criteria. *See* 40 C.F.R. § 300.430(f)(1)(ii).

The EPA argued in District Court that they acted reasonably when they determined bottled water was an appropriate remedy for groundwater contamination and the smell of NAS-T in Fartown. R 14. This decision was arbitrary because it does not comport with the EPA's previous interpretation of an appropriate remedy in response to NAS-T contamination. *See Food and Drug Administration v. Brown and Williamson Tobacco*, 529 U.S. 120, 157 (2000) (where agency assertion represents a "sharp break" with prior interpretation it is entitled to less deference). Bottled water was only provided as an interim solution in Centerville until the resulting consent decree ordered BELCO to install filtration system at the town's water supply source. R 6-7. The filtration system provided a permanent solution that is still in operation in Centerville. R 8. There is no evidence that the smell or presence of NAS-T is still prevalent in Centerville with the continued filtration. If it continues to be appropriate to filter out NAS-T for Centerburg with lower contamination levels, then the same course of action should apply to Fartown's private wells while NAS-T continues to pollute the air and water supply.

The EPA acted inconsistently in Fartown because they have offered bottled water as the long-term remedial solution for those with NAS-T contaminated wells. While the contamination

remains at non-toxic level for consumption, the smell of NAS-T is still detectable and polluting the air in Fartown. This smell negatively influences quality of life and providing bottled water does not resolve the odor issue. There is no way for someone to know whether NAS-T is at a toxic or non-toxic level in the water since the smell can present at both lower and higher concentrations. Providing bottled water and monthly monitoring also offers no resolution to this issue. As discussed above, by choosing bottled water - an option that only increases plastic waste and the potential for pollution in Fartown - over a permanent remedial solution that has already been shown to be effective in removing NAS-T from the water supply, the EPA has ignored the threshold consideration of human health the environment.

The EPA also ignores the second threshold factor of compliance with ARAR's because the UAO disregards the right to clean air and water under New Union's constitution. The EPA's position is unreconcilable because they acknowledge that the ERA is an ARAR that must be complied with under CERCLA yet argue that federal standards should supersede the ARAR. CERCLA sets a floor for environmental protection and state laws which establish more stringent environmental standards are not preempted. 42 U.S.C. § 9621(d)(2)(A); *Akzo Coatings of Am., Inc.*, 949 F.2d at 1454. Therefore, EPA's lack of compliance is not only for arbitrary reasons, but it is also contrary to law.

The EPA acknowledges the ERA as an ARAR and should have made their remedial determinations to comply with its stricter standards. The EPA tried to argue in district court that the ERA does not necessarily mean entirely free. Yet this interpretation has no practical relevance here because the state's legislative intent of the use of the words "clean" in ERA provides that the standard is "objectively perceived as clean." Legislative Addendum p.5.

If citizens of Centerville or Fartown are still smelling a "sour odor" resulting from NAS-T from their water supply, a reasonable person would not objectively perceive the air or water to be clean. If implementing a filtration system reduced the smell of NAS-T in Centerville, then the appropriate course of action would be for the EPA to require a similar permanent cleaning solution for the private wells in Fartown. For this and previously stated reasons, the EPA's remedial determination does not comport with the ERA. Providing bottled water where the smell of NAS-T is prevalent is at minimum a violation of the ERAs broad right to clean air, and therefore is an agency action contrary to law – not entitled to deference from the court.

The EPA's position on appeal is inconsistent with their previous actions in response to NAS-T contamination. The EPA reopened the consent decree acknowledging the impacts from potential health hazards and the new regulation, yet did not choose a remedy that would permanently provide peace of mind, nor healthful water and air to the citizens of Fartown. The UAO remedy is insufficient because it fails to consider threshold criteria, and over-values the primary balancing factors of cost and short-term impacts compared to the factors of reducing mobility and volume, or the permanence of solution. The EPA did not provide sound rationale for this differential response in the District Court, and this court should affirm to not reward improper post-hoc rationalizations for this arbitrary, capricious and illegal remedial determination in the case of Fartown.

IV. THE DISTRICT COURT ERRED IN RETAINING JURISDICTION OVER THE STATE TORT CLAIMS AFTER DISMISSING ALL FEDERAL CLAIMS BECAUSE THERE IS OUTSTANDING EXPERT DISCOVERY, AND THE TORT CLAIMS UNDER THE ENVIRONMENTAL RIGHTS AMENDMENT PRESENT NOVEL STATE LAW QUESTIONS.

A federal court should retain jurisdiction over state law claims only where it will "best accommodate the values of economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988). Where a state law claims present "a novel or complex question

of State law", 28 U.S.C. § 1367(c), the federal court may not retain pendant jurisdiction. *See Wentzka v. Gellman*, 991 F.2d 423, 425 (7th Cir. 1993) (finding that district court judge abused his discretion by retaining state law claims where state law was "unsettled"). See also *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("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"). Similarly, there is a "sensible presumption that if the federal claims drop out before trial, the district court should relinquish jurisdiction over the state-law claims." *Refined Metals Corp. v. NL Indus. Inc.*, 937 F.3d 928, 935 (7th Cir. 2019), quoting *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007). Accord *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (where "the federal claims are dismissed before trial, . . . the state claims should be dismissed as well").

The judge abused his discretion by retaining the state law claims where the claims present novel questions of state constitutional law. When the Environmental Rights Amendment (ERA) provides a remedy for nuisance and negligence, and what remedy is available, are novel New Union constitutional questions. The questions are particularly difficult because the ERA is a short, general provision:

> 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. The Amendment leaves substantial room for judicial interpretation. Furthermore, the questions are mixed questions of complex facts and law that are not easily distilled to a certified question to the New Union Supreme Court. These issues are therefore inappropriate for federal consideration.

Additionally, judicial economy weighs in favor of dismissing the claims. "[I]n 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.*, 484 U.S. at 351. Here, the District Court erred in retaining jurisdiction over the state law tort claims because prior to trial, it "dismissed all claims over which it has original jurisdiction." *Hansen v. Bd. of Trustees of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 607 (7th Cir. 2008), quoting 28 U.S.C. § 1367(c). *See Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 906 (7th Cir. 2007) ("The rationale of the supplemental jurisdiction is economy in litigation, and so a relinquishment of it that clearly disserved economy would be a candidate for reversal").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grants of summary judgment in favor of BELCO and EPA and enter summary judgment in favor of FAWS, where the district court ruled that FAWS' costs incurred for sampling its wells were not reimbursable under CERCLA and retained pendant jurisdiction over the state law claims. This Court should affirm the district court's grant of summary judgment in favor of FAWS, where the district court upheld the EPA's determination that the ERA constituted an ARAR and vacated as arbitrary, capricious, or contrary to law the EPA's determination that BELCO is not required to install CleanStrip filtration systems.