NON-MEASURING BRIEF
TEAM 38

C.A. No. 22-000677
CONSOLIDATED WITH
No. 17-CV-1234

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

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

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

Brief of Defendant-Appellee-Cross Appellant, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

At the parties' joint request, the United States District Court for the District of New Union, on June 1, 2022, consolidated cases No. 17-CV-1234 and 21-CV-1776. The appellate court has subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals for agency action), and 28 U.S.C. § 1331 (federal question). The United States District Court for the District of New Union exercises original jurisdiction over the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. BELCO, EPA, and FAWS all filed timely Notices of Appeal pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291 and 28 U.S.C. § 1292, which provides courts of appeals jurisdiction over interlocutory orders of the district courts of the United States. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 495-6 (1976). This is an appeal following the issuance of an Order of the United States District Court for the District of New Union.

STATEMENT OF ISSUES PRESENTED

I. Is Better Living Corporation ("BELCO") liable for the costs Fartown Association for Water Safety ("FAWS") incurred in privately sampling, testing, and analyzing well water samples of its members' private drinking water wells and if so, are the costs reimbursable as response costs under CERCLA?

II. Is BELCO required to conduct response actions in Fartown under the Unilateral Administrative Order ("UAO") because EPA determined the Environmental Rights Amendment ("ERA") constituted an Appropriate and Relevant Requirements ("ARAR") under CERCLA and, consequently, reopened the Consent Decree ("CD")?

III. Is BELCO required to install filtration systems in Fartown despite the EPA's decision that BELCO was not required to?

IV. Is BELCO required to litigate FAWS' remaining state law claims in state court, should the District Court resolve all the federal claims, or can the District Court retain jurisdiction over FAWS' claims, thereby allowing BELCO to litigate them in federal court?

STATEMENT OF THE CASE

A. Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, in 1980. *See* Comprehensive Envt'l. Response, Comp., and Liab. Act of 1980, Pub. L. No. 96-510, 94 Stat 2767 (1980). The purpose of CERCLA is to "provide [remediation] for liability, cleanup, and emergency response for hazardous substances released into the environment [in addition to] the cleanup of inactive hazardous waste disposal sites." *Id.*

When the EPA assesses a site as one that requires intervention under CERCLA, the agency engages in a series of steps, many involving the potentially responsible party ("PRP") to conduct the cleanup. Envt'l Prot. Agency, *About the Superfund Cleanup Process*, https://www.epa.gov/superfund/about-superfund-cleanup-process#rifs (last visited Nov. 20, 2022). Relevant here are the Remedial Investigation and Feasibility Study ("RI/FS"), the agency's Record of Decision ("ROD"), the statutory ability to create a CD, and a Certificate of Completion ("COC"). *See id.*; The Order at 1-2.

When the EPA has reason to believe a hazardous release has occurred, the agency may undertake an RI/FS to determine the existence and extent of any release and develop an appropriate response. 42 U.S.C. § 9604(b)(1). The EPA may delegate this investigation to the

party responsible for the release if the EPA determines that the party will conduct the action properly and promptly. *Id*. The EPA will consider the findings and recommended responses resulting from the RI/FS and direct the parties to what actions each party must take in an administrative ROD, which completes the RI/FS process. *See generally Emhart Indus., Inc. v. United States Dep't of the Air Force*, 988 F.3d 511, 518 (1st Cir. 2021). The federal government may also enter into a settlement agreement with the necessary parties to perform a response action(s) consistent with the ROD. 42 U.S.C. § 9622(a). A settlement must then be entered as a CD and "a party who has resolved its liability to the United States under this subsection [will] not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9622(g)(4-5).

B. NAS-T, the investigation, the CD, and Fartown's allegations

Fartown, New Union is a town of approximately five-hundred residents and is located about two miles south of Centerburg, New Union. The Order at 2. The Sandstone Aquifer runs underneath both Centerburg and Fartown. *Id*. Centerburg Water Supply ("CWS") pumps water to supply Centerburg residents, while Fartown residents pump their water from privately owned wells. *Id.*

From 1973 through 1998, BELCO manufactured LockSeal, a durable sealing coating containing Nitro-Acetate Titanium ("NAS-T"), at a facility in Centerburg. *Id.* at 2-3. In 1995, the EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). The Order at 3. The odor and taste of NAS-T is potentially detectable at concentrations as low as 5 ppb. *Id.* While NAS-T is a probable human carcinogen, the HAL includes a significant margin of error to ensure that the level of NAS-T exposure allowed is non-toxic. *Id.*

In January of 2015, testing done by the Centerburg County Department of Health ("DOH") revealed that the CWS contained between 45-60 ppb of NAS-T. The Order at 3. In September of 2015 the DOH alerted residents of Centerburg to the contamination and advised residents to cease drinking their tap water. *Id.* New Union began an investigation which it then referred to the EPA in January of 2016, which led to the RI/FS process. *See id.*

BELCO agreed to provide bottled water to affected homes and cooperate with the RI/FS. *Id.* BELCO also investigated the sources of the NAS-T contamination, the risk it posed to human health and the environment and evaluated means of remediation. The Order at 3-4. The investigations done by BELCO, and the EPA found that NAS-T seeped into the soil and migrated into the Sandstone Aquifer from sporadic spills and a wastewater storage lagoon. *Id.* at 3.

BELCO installed three lines of monitoring wells between Centerburg and Fartown. The Order at 4. The last five of these wells, which were located one and a half miles north of Fartown, showed no detectable amounts of NAS-T. *Id.* BELCO considered the option of a complete remediation of the NAS-T plume in the aquifer, a process rejected due to feasibility and time constraints. *Id.* The EPA concurred. *See id.* The RI/FS process determined that excavation of the soils at the site to remediate the area and the installation of a filtration system in Centerburg would sufficiently remediate the site. The Order at 4. The EPA issued a notice with the Proposed Plan to the public and opened a comment period, and then codified the plan in its ROD. *Id.*

BELCO entered into a CD with the EPA on and around June 17, 2017, after the conclusion of the cost recovery action against BELCO. The Order at 4. BELCO agreed to design and implement the remediation plan in the ROD. *Id.* The District Court reviewed the CD and

approved it on August 28, 2017. *Id.* No citizens of either Fartown or Centerburg objected to any of the above during the notice and comment period. *See id.*

BELCO fully complied with its responsibilities under the CD. *See* the Order at 4. BELCO installed and maintained a "CleanStripping" water filtration system to remove NAS-T from the CWS, excavated soil to remediate the contaminated soil at the facility, and conducted monthly sampling of the monitoring wells. *Id* at 4-5. BELCO completed soil remediation in December of 2017 and the "CleanStripping" system in Centerburg continues to operate. *Id*. The EPA issued BELCO a COC in September 2018. *Id.* at 5.

In February of 2019, citizens of Fartown requested the county to test their drinking water for NAS-T, claiming odors that had existed since before the issuance of the CD. *Id.* The subsequent DOH testing showed no NAS-T contamination in Fartown. *Id.* BELCO's continued monitoring had shown only 5-6 ppb of NAS-T in two samples from the monitoring wells that were one-half mile away from Fartown in January 2018. *See* the Order at 4-5. This level was well within the established HAL for NAS-T. *See id.* at 3. The Fartown citizens requested the EPA order BELCO to conduct further testing in Fartown, but given that there were no abnormal samples from any of the prior tests, the EPA declined. *Id.* at 5.

Fartown residents subsequently formed the Fartown Association for Water Safety and retained Central Laboratories Inc. ("Central Labs") to test two hundred and twenty-five private wells. The Order at 5. None of the samples showed NAS-T present beyond the 10 ppb established by the HAL. *See id.* Fifty-four of the samples showed NAS-T in the 5-8 ppb range while fifty-one of the samples showed NAS-T in the 1-4 ppb range. *Id.* The remaining samples showed no NAS-T present. *Id.* FAWS then requested that EPA reopen the CD. *Id.*

A dominant factor in FAWS' decision to request the EPA reopen the CD was the passage of the ERA to the New Union state constitution on November 3, 2020. The Order at 5. The amendment stated that "each and every person of [the state of New Union] shall have a fundamental right to clean air and clean water and a healthful environment free from contaminants and pollution caused by humans." N.U. CONST. art. I, § 7.

The exact definitions and limits of this amendment were controversial during the legislative hearings prior to the passage of the ERA. *See N.U. Assembly No. A10377, Calendar No. 113* at 6 (N.U. 2020). Some legislators of the New Union counsel argued that the vagueness of the amendment would lead to controversy, while a proponent of the amendment stated that the amendment "would not require further definition in regulation or statute." *Id.*

The EPA initially denied reopening the CD. The Order at 5-6. However, following the passage of the ERA on November 3, 2020, the EPA reopened the CD. *Id.* The EPA made its decision to reopen the CD on the theory that the ERA formed a change to regulatory guidance with an applicable or relevant and appropriate requirement, requiring reconsideration in determining remedial action. *Id.* at 6. The EPA included in the administrative record, the new information used to reopen the CD including the Fartown's privately acquired lab results from Central Labs, the status of Fartown as an environmental justice community, the presence of odors of NAS-T in the Fartown citizen's drinking water, and the possible health effects of drinking the "contaminated" water. *Id.*

BELCO attended a conference at the EPA's request to determine a path forward. The Order at 6. There, the EPA demanded that BELCO supply bottled water to any Fartown household with a positive NAS-T result and continue monitoring the wells. FAWS demanded the installation of filtration systems on Fartown wells. *Id.* BELCO challenged the legality of the

EPA's decision to reopen the CD. *Id.* The EPA issued a UAO directing BELCO to conduct monthly sampling of fifty wells in Fartown, that BELCO supply any household with NAS-T concentrations between 5-10 ppb with bottled water and install the CleanStripping filtration system on any home sampling above 10 ppb. *Id.*

C. Proceedings Below

The EPA made a motion to the District Court on August 2, 2021, to recover its costs incurred in Fartown plus penalties for BELCO's rejection of the UAO. The Order at 7. BELCO asserts that the ERA is not an ARAR that can result in the re-opening of a CD. *Id.* FAWS then filed a motion to intervene on August 30, 2021. *Id.*

FAWS asserts that BELCO was liable for FAWS' well testing cost as a "necessary and consistent" response cost under CERCLA. *Id.* at 8. BELCO argues that this testing was unnecessary, and not subject to recovery under CERCLA. *Id.* The EPA asserts that BELCO was not liable for these costs on policy grounds and consequently moved for summary judgment. *Id.*

BELCO argued that the EPA had no basis to reopen the CD, because the ERA did not constitute an ARAR. The Order at 10. BECLO argued that the ERA was not properly promulgated, was vague, irrelevant to CERCLA, and did not mirror the criteria of the national contingency plan. *Id.* EPA and FAWS disagreed. *Id.* at 10-11.

Based on the EPA's determination that the ERA was an ARAR, FAWS argued that the EPA's decision to not require BELCO to pay for the CleanStripping filtration system was arbitrary and capricious. *Id.* at 12. EPA and BELCO moved for summary judgment on the matter. *Id.* at 13. The District Court resolved all federal claims through summary judgment and chose to retain jurisdiction over the remaining state claims. The Order at 13. BELCO and EPA

concurred with this decision for purposes of consistency. *Id.* at 15. FAWS disagreed, stating that the remaining issues should be resolved in state court. *Id.*

The District Court granted summary judgment in favor of BELCO regarding reimbursement of FAWS for testing expenses. The Order at 15. The District Court granted summary judgment in favor of EPA. *Id.* The court further granted summary judgment in favor of FAWS as to vacating EPA's decision not to require BECLO to install CleanStripping technology at Fartown. *Id.* The court further denies FAWS' motion to dismiss the remaining state law tort claims. *Id.* This interlocutory appeal follows.

SUMMARY OF THE ARGUMENT

First, FAWS is not entitled to recover money from BELCO under CERCLA because FAWS acted outside the scope of what was necessary based on the scientific evidence and national standards for contamination levels at the time of testing. At the time of the investigation, the evidence did not support FAWS conducting further private tests and therefore the Central Lab testing is considered a personal private inquiry outside the scope of CERCLA remedies. Additionally, the amount of NAS-T found in Fartown both by the EPA and FAWS were below the EPA's HAL for NAS-T in drinking water and therefore did not justify further response action by FAWS. FAWS' assertion that their private testing of Fartown's private wells was reasonable was based on non-authoritative evidence, rather than guidance from the EPA grounded in valid results.

Next, BELCO should not be required to conduct response actions in Fartown under the UAO. BELCO argues that EPA should not have reopened the CD because the ERA did not constitute an ARAR under CERCLA. It contends that the ERA did not constitute an ARAR

under CERCLA because the ERA was: (i) not properly promulgated, (ii) not any more stringent than federal standards, (iii) not legally applicable, and (iv) not relevant or appropriate.

The EPA's decision to not require BELCO to install filtration systems in Fartown was not arbitrary and capricious, because the EPA's decision was rationally grounded in the facts before the agency. Because the ERA was not an ARAR, the EPA interpreted CERCLA to determine a course of action. The EPA was allowed to consider facts, including cost, in their remedial measures available, as long as those remedial measures adequately protected human health. The EPA was not required to pick the most protective measure. Because the NAS-T concentrations in Fartown's water are not high enough to harm human health, the EPA appropriately determined that a filtration system was not required.

Lastly, if the District Court resolves all the federal claims, BELCO should not be required to litigate FAWS' remaining state law claims in state court. Instead, the District Court should retain jurisdiction over FAWS' claims and allow BELCO to litigate these claims in federal court. BELCO argues that the District Court should retain jurisdiction over FAWS' remaining state law claims because: (i) substantial proceedings occurred prior to dismissal of the federal claims, and (ii) the remaining state law claims involve no novel legal questions.

STANDARD OF REVIEW

The Court may exercise plenary review over questions certified in an interlocutory review. *Barbato v. Greystone All., LLC*, 916 F.3d 260, 264 (3d Cir. 2019); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). "[A]ppellate jurisdiction applies to the order certified to the court of appeals and is not tied to the particular question formulated by the district court. The court of appeals may not reach beyond the certified order to address other orders made in the case." *Yamaha Motor Corp.*, 516 U.S. at 205. "Findings of fact shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, (1985) (citing FED. R. CIV. P. 52(a)). Courts review conclusions of law de novo. FED. R. CIV. P. 52(a); *see Chesnut v. United States*, 15 F.4th 436, 441 (6th Cir. 2021).

ARGUMENT

I. FAWS is not entitled to recover money from BELCO under CERCLA because FAWS acted outside the scope of what was necessary based on the scientific evidence and national standards for contamination levels at the time of testing.

CERCLA provides that PRPs like BELCO can be liable to private parties like FAWS, who are not PRPs, for any response costs incurred. *See* 42 U.S.C. § 9607(a)(4)(B). To recover the $21,500 FAWS paid to Central Labs for testing of the Fartownian private wells, FAWS must prove that: "(i) the site in question is a 'facility' as defined by CERCLA; (ii) the defendant is a responsible party; (iii) there has been a release or there is a threatened release of hazardous substances; and, (iv) the plaintiff has incurred costs in response to the release or threatened release." *Rolan v. Atlantic Richfield Co.*, 427 F.Supp 3d 1013, 1020 (N.D. Ind. 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008).

A non-governmental plaintiff like FAWS also "must show that any costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan.'" *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012). There is no dispute that the presence of NAS-T in Fartown is due to BELCO's manufacturing and use of "LockSeal" from 1973 to 1998. The Order at 2; *see also* 42 U.S.C. § 9601(9) (defining what a "facility" is). FAWS cannot show that the costs incurred for testing were necessary because the evidence did not support the additional testing and the testing done further supported the EPA's tests that showed that the NAS-T levels were below the national threshold set by the HAL.

A. At the time, the evidence did not support FAWS conducting further private tests and therefore the Central Lab testing is a personal private inquiry outside the scope of CERCLA remediation.

Under CERCLA, PRPs are liable for any "necessary costs of response incurred by any other person consistent with the national contingency plan". 42 U.S.C. § 9601(21)(B). "Necessary costs" are costs that are necessary to the containment and cleanup of hazardous releases. 42 U.S.C. § 9607(a)(4). Costs cannot be necessary absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination. *Id.; see also United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1271 (E.D. Cal. 1997) (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992)). "[C]osts cannot be 'necessary' to the containment and cleanup of hazardous releases 'absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination.'" *Young v. U.S.*, 394 F.3d 858, 862 (10th Cir. 2005).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 652, 663 (2009) (emphasizing the standard for bringing about a cause of action). The residents of Fartown and FAWS acknowledged a clear frustration and belief that the EPA was not acting with due diligence when they retained Central Labs to test their private wells. The Order at 8. Prior to FAWS $21,500 response, both the EPA and BELCO conducted objective investigations that concluded it would be unlikely that any significant or harmful contamination would be present in Fartown. The Order at 6-7. FAWS had no reason to believe that high levels of NAS-T were present in Fartown. *See id.* In February of 2019 the DOH sampled five wells in Fartown for NAS-T contamination and found nothing. The Order at 5. Under EPA oversight, BELCO also investigated the extent of the plume. *Id* at 7. From July of 2016 through January of 2017, BELCO installed three

successive lines of monitoring wells progressively further from Centerburg and closer to Fartown. *Id.* The final five wells are approximately half a mile north of Fartown (1.5 miles south of Centerburg); when sampled, these five wells showed no detectable amounts of NAS-T. *Id.*

Additionally, FAWS' interests were not in the zone of interests that CERCLA intended to protect. To be in the zone of interests of CERCLA, evidence must exist that shows that the response actions were to "assist with and help plan the eventual remediation and cleanup efforts." *See Rolan v. Atlantic Richfield Co.*, 427 F.Supp 3d at 1020 (citing *Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.*, 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. Sept. 16, 2016)); *see also Walnut Creek Manor, LLC v. Mayhew Ctr.*, 622 F.Supp.2d 918, 929 (N.D. Cal. April 16, 2009). Response actions cannot be taken solely to "[oversee] 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. The evidence before FAWS when it retained Central Labs did not support that further testing was necessary. *See* the Order at 6-8. As such, the expensive investigation was a personal inquiry into the plume rather than a remedial action justified by CERCLA.

The residents of Fartown never objected to the RI/FS, proposed plan, or the CD. *Id.* at 7. There was no indication that any further investigation by the EPA was "necessary" or warranted, and all indications are that FAWS conducted the tests at the time to try to prove liability of BELCO and alter EPA's decisions and course of action. As such, when FAWS undertook the testing, it was doing so at its own expense for its own purposes, and not attempting to further any existing investigation or remediation plan. The standard set forth by the courts is predicated on necessity, not on successful testing results. 42 U.S.C. § 9607(a)(4), *see also Iron Mountain Mines*, 987 F.Supp. at 1271. The Court notes that this does not leave FAWS without a remedy, as

FAWS still has common law claims against BELCO available to seek compensation for damages and expenses. The Order at 13.

In short, there was no need for FAWS to further investigate the plume. FAWS' testing was not necessary because the EPA had completed an investigation and installed monitoring wells for further testing. The Central Labs test conducted by FAWS did not meet the standard set forth by CERCLA because it was not done to further assist or help plan remediation/clean-up efforts. FAWS fails to show that it incurred a cost that was necessary as required to state a CERCLA cost-recovery claim.

B. The amount of NAS-T found in Fartown both by the EPA and FAWS were below the EPA's HAL for NAS-T in drinking water and therefore did not justify further response action by FAWS.

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. *Iron Mountain Mines*, 987 F.Supp. at 1272. The actions 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 EPA; or if they occur after the EPA had already informed the private parties that it would be conducting its own investigation. *See Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Cal. 1993). Further, response actions are necessary if they are "closely tied to the actual cleanup of hazardous releases." *Young v. United States,* 394 F.3d 858, 863 (10th Cir. 2005) (emphasis in original) (string citations omitted).

FAWS did not present facts showing that NAS-T was dangerous at the levels found within the town, suggest a new standard, or present evidence that the current standard is dangerous and risks being arbitrary. *See* the Order at 8, 10. A variety of medical studies published in the mid-1980's showed NAS-T to be a probable human carcinogen but accounted

for a significant margin of error in the allowable amount in the groundwater. *Id* at 6. The EPA through the Safe Drinking Water Act sets maximum contaminant levels, as well as treatment requirements for over ninety different carcinogens in public drinking water. Ctr. Disease Control, *Drinking Water*, www.cdc.gov/healthywater/drinking/public/regulations.html#:~:text=The%20Safe%20Drinking%20Water%20Act%20(SDWA)%20was%20passed%20by%20Congress,suppliers%20who%20enforce%20those%20standards (last visited Nov. 20, 2022). Clean drinking water, by New Union assembly standards, is water that is consumable through public water supply without any harm. *N.U. Assembly No. A10377, Calendar No. 113* at 4 (N.U. 2020). New Union was also aware that "clean water" is water that is not harmful to its residents and not necessarily water that is free of all contaminants. *Id.* at 4-5. NAS-T levels below 10 ppb are not harmful and even the level allowed by the HAL accounts for a "significant" margin of error. *Id.* at 4. Thus, FAWS has not incurred "necessary costs" by privately testing the water as "necessary costs" are costs that are necessary to the containment and cleanup of hazardous releases. 42 U.S.C. § 9607(a)(4). Additional testing outside of what the EPA and BELCO had continued to perform was not necessary to the containment or cleanup of a contaminant that was hazardous at the levels prior testing had found.

In both the initial EPA tests and in FAWS Central Lab tests, there was no cause for concern or further remedial action. EPA in 1995 adopted a HAL for NAS-T of 10 ppb in drinking water. The Order at 6. This HAL incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans. *Id.* In the wells that were the closest to Fartown, the EPA concluded low levels of NAS-T (5 ppb and 6 ppb, respectively). *Id.* at 8. Given the multiple non-detections and the low numbers found in this final line of wells, the EPA correctly issued the COC to BELCO in September of 2018. Even if this Court considers the results of the

FAWS Central Lab test, it simply amplifies the small nature of the contamination. The level at which the EPA adopted into the HAL had a significant margin of error. The Order at 6. Ergo, even at 10 ppb, scientists believed that humans would be safe and in issuing that amount they were adding some "padding" to the number to make it higher to ensure the safety of the environment and public health. If this Court agrees to the language in the ERA in considering whether the FAWS testing was necessary, the low level of NAS-T would still meet the standard set forth by New Union. If NAS-T is not toxic at or below the HAL, the parties agree that the human nose can detect NAS-T in water at concentrations as low as 5 ppb, where it produces a sour or stale smell which under CERCLA does not constitute "hazardous". *Id.*; *see also* 42 U.S.C. § 9601(14) (defining "hazardous materials").

Even if one assumes that all parties were aware of what BELCO describes as "trace" amounts of contamination in the Fartown wells, that would not have justified further response actions, including testing, bottled water, and installation of individual, expensive filtration systems on private wells.

II. The EPA should not have reopened the CD and demanded BELCO perform further response actions because the ERA did not constitute an ARAR under CERCLA.

ARARs allow for the determination of cleanup goals, remedy selection, and implementation. The Order at 13. CERLA is designed to accommodate state ARARs more stringent than any federal standard, requirement, criteria, or limitation. *U.S. v. Akzo Coating of Am.*, 949 F.2d 1409, 1418 (6th Cir. 1991); U.S.C. § 9621(d). Under Section 121 of CERCLA, selected remedial actions must attain (or waive) ARARs to assure an implemented remedy is protective of human health and the environment. 42 U.S.C. § 9621(d)(2)(A). According to CERCLA, a state environmental requirement or standard constitutes a state ARAR to which the remedy must comply only if it is: (i) properly promulgated, (ii) more stringent than federal

standards, (iii) legally applicable or relevant and appropriate, and (iv) timely identified. *Akzo*, 949 F.2d at 1440; 42 U.S.C. § 9621(d).

An agency's interpretation of a statute which is contained in an opinion letter, policy statement, agency manual, or enforcement guidelines, all which lack force of law, warrants a level of deference focused on the agency's consideration of the facts. *See Christenson v. Harris Cnty.*, 529 U.S. 576, 587 (2000). An agency's statutory interpretation contained in such formats should receive the *Skidmore* deferential standard. *See Christenson*, at 587 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Under this standard, applicable interpretations are "'entitled to respect,' but only to the extent that those interpretations have the power to persuade." *Id.* The weight given to an agency's interpretation under *Skidmore* "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *U.S. v. Mead Corp.*, 533 U.S. 218, 219 (2000).

A. The ERA did not constitute an ARAR Under CERCLA because it was not properly promulgated, not more stringent than federal standards, not legally applicable, and not relevant or appropriate.

The CD, as discussed previously, dictated that the EPA was not permitted to order BELCO to further remediate the Site without the EPA "reopening" the CD. The Order at 7 (citing the CD, § 13.3). The CD explicitly set forth two grounds upon which the EPA could reopen it. *Id.* First, "[w]here new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment." *Id.* Second, "[w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." *Id.* In Section 1.12, the CD defines regulatory standards

to include, among other things, "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." The Order at 7.

In this case, the EPA reopened the CD for two reasons: (i) the 2020 Central Lab results and (ii) the passage of the ERA to the State of New Union Constitution, which the EPA determined constituted an ARAR under CERCLA and a change in the Regulatory Standards under the CD. The Order at 9. The EPA then issued the UAO, directing BELCO to conduct various response actions in Fartown. As noted above, the ERA reads: "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.

Here, BELCO argues that the ERA did not constitute an ARAR under CERCLA because the ERA was: (i) not properly promulgated, (ii) not more stringent than federal standards, (iii) not legally applicable, and (iv) not relevant or appropriate.

1. *The ERA did not constitute an ARAR under CERCLA because it was not properly promulgated.*

To be considered an ARAR, a state environmental requirement or standard must be properly "promulgated." 42 U.S.C. § 9621(d)(2)(A)(ii). The EPA defines "promulgated" as "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *See* Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987) [hereinafter *Interim Guidance*]; *see also* Preamble, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8841 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.400(g)(4) (2020)). State advisories, guidance, or other non-binding policies, as well as standards that are not of general application, cannot be considered properly promulgated under CERCLA. *Interim Guidance* at 32498.

A state environmental requirement or standard cannot be legally enforceable if it is constitutionally vague. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In *Azko*, the court held that a Michigan anti-degradation law was not constitutionally vague and, consequently, was properly promulgated under CERCLA. 949 F.2d at 1441. The standard in question did not permit anyone "directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or . . . to domestic, commercial, industrial, agricultural, recreational or other uses." *Id.* The Sixth Circuit reasoned that the standard was not constitutionally vague because it was "sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited." *Id.* (citing *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). The Court also noted that a standard is constitutionally vague unless 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." *Azko*, 949 F.2d at 1441 (6th Cir. 1991) (citing *Kolender*, 461 U.S. at 357).

In this case, although it concedes that the ERA is of general applicability, BELCO argues that the ERA is not legally enforceable for two reasons. First, unlike the standard in *Azko*, the ERA here is not sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited. While it provides a "fundamental right" to clean air and clean water and to a healthful environment, the ERA makes no mention at all of any kind of prohibited conduct to ensure this "right." *See* N.U. CONST. art. 1, § 7.

Second, the ERA was not 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. As noted above, the ERA makes no mention of any prohibited conduct. Furthermore, the ERA, as it currently stands, encourages arbitrary and discriminatory

enforcement. The legislative history behind the amendment reveals that lawmakers feared that the ERA was too general and potentially discriminated against businesses. *See N.U. Assembly No. A10377* at 4, 6 (N.U. 2020). One legislator noted that the ERA "creates uncertainty for a business, that upon seeing this amendment, might claim that our state's regulations or the statutory provisions are simply not clear enough." *Id.* at 4. Another legislator stated that the ERA "would create further uncertainty and fear on businesses that could be subject to suit under a law that is not only broadly worded, but that would encompass acts or harm that are not even presently known." *Id.* at 6. Despite these apprehensions from other lawmakers, the ERA's sponsor argued that it "would not require further definition in regulation or statute." *Id.*

Thus, the ERA is not legally enforceable because it is not sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited and was not 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.

2. *The ERA did not constitute an ARAR under CERCLA because it was not more stringent than federal standards.*

42 U.S.C. Section 9621(d)(2)(A)(ii) requires that for a state requirement or standard to apply to a remedial action plan, the standard must be "more stringent than any federal standard, requirement, criteria, or limitation." A state requirement or standard is "more stringent" only when "there is no comparable federal requirement." *Akzo,* 949 F.2d at 1441 (citing 132 Cong. Rec. S 14,915 (Oct. 3, 1986)).

In this case, the ERA was not more stringent than federal standards because there existed a comparable federal requirement. Pursuant to the NCP, the remediating party must conduct a feasibility study and "develop remedial alternatives reflecting the scope and complexity of the remedial action under consideration . . ." *Sealy Connecticut, Inc. v. Litton Indus., Inc.*, 93 F.

Supp. 2d 177, 183 (D. Conn. 2000). After these remediation alternatives are screened, the remediating party is then required to conduct a more detailed analysis on the remaining alternatives. *See id.* In this detailed analysis, the remediating party must consider nine factors, one of which includes the "[o]verall protection of human health and the environment." 40 C.F.R. § 300.430 (2020). Regarding the ERA, legislative history reveals that the purpose of the ERA is "to *protect public health and the environment* ensuring clean air and water, including and not limited to, harms from contaminants and pollutants caused by humans." *N.U. Assembly No. A10377* at 2 (emphasis added). Examining the ERA in light of the NCP shows that the purpose of the ERA essentially mirrors one of the factors a remediating party must already consider when determining viable alternatives.

Further supporting that the ERA was not more stringent than federal standards is that the amendment did not provide any new rights to the citizens of New Union, but instead, simply clarified a right they were already entitled to. In response to a legislator asking whether citizens of New Union had a right to address landfill smell through the ERA, the bill's sponsor noted that they "already have that right." *Id.* at 5. The ERA's bill sponsor went on to state that the amendment "does not alter their right, either proactively or in a regressive way." *Id.* Consequently, the ERA did not provide any right that did not already exist prior to the amendment's enactment or prior to the EPA entering the initial CD.

Therefore, the ERA was not more stringent than federal standards because, under the NCP, a remediating party already had to consider protection of public health and the environment prior to the enactment of the ERA. Additionally, the ERA did not provide any new rights to the citizens of New Union, but instead, simply clarified a right they were already entitled to.

3. *The ERA did not constitute an ARAR under CERCLA because it was not legally applicable.*

The ERA did not constitute an ARAR under CERCLA because it was not legally applicable. The NCP defines "applicable requirements" as "those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site." 40 C.F.R. § 300.5 (2020). In other words, the basic requirement for applicability is that a standard specifically address one of the following factors at a CERCLA site: (i) a hazardous substance, pollutant, or contaminant, (ii) type of remedial action, (iii) location, or (iv) other site-specific circumstance. *See* 40 C.F.R. § 300.5; *see also* Amy L. Du Vall, *Cleanup Processes and Standards of CERCLA and RCRA: Shortcomings and Recommendations*, 4 BUFF. ENVT'L. L.J. 225, 241 (1997). Determining the applicability of a state environmental requirement or standard is "a largely objective comparison to the circumstances at the site." National Oil and Hazardous Substances Pollution Contingency Plan; Proposed Rule, 53 Fed. Reg. 51394, 51436 (Dec. 21, 1988) [hereinafter *Proposed Rule*]. There is little discretion involved in this determination, and a requirement or standard is applicable only if "there is a one-to-one correspondence between the requirement and the circumstances at the site . . ." *Id.* at 51437.

In this case, the ERA is not legally applicable for two reasons. First, the ERA does not specifically address the types of remedial action the EPA ordered BELCO to perform. The NCP defines remedial actions as "those actions consistent with permanent remedy taken instead of, or in addition to, removal action in the event of a release or threatened release of a hazardous substance into the environment . . ." 40 C.F.R. § 300.5. Providing bottled water to individuals affected by a hazardous substance and installing water filtration systems, which the EPA ordered

BELCO to do following the re-opening of the CD, are types of remedial actions. The Order at 9 (citing the UAO, § 3.2); *see also* 40 C.F.R. § 300.5. However, the ERA does not specifically address either of these remedial actions or, for that matter, any other type of remedial action. Instead, the ERA merely states that the citizens of New Union have a "right to clean air and clean water and to a healthful environment," and does not provide any remedial actions that must be taken when this right is infringed upon. *See* N.U. CONST. art. 1, § 7. Second, the ERA is not legally applicable because it does not specifically address NAS-T. *Id.* One could argue that the ERA addresses hazardous substances, pollutants, or contaminants in general since the ERA mentions "contaminants and pollutants caused by humans." *Id.* However, the ERA does not further elaborate on the specific contaminants or pollutants caused by humans that it is meant to address. Most importantly, it makes no mention of NAS-T whatsoever.

Thus, the ERA was not legally applicable because it does not specifically address the types of remedial action the EPA ordered BELCO to perform or NAS-T specifically.

4. *The ERA did not constitute an ARAR under CERCLA because it was not relevant or appropriate.*

The ERA did not constitute an ARAR under CERCLA because it was not relevant or appropriate. If a state environmental requirement or standard is deemed not applicable, it must next be determined whether the requirement or standard is "relevant and appropriate." *Proposed Rule* at 51437. The NCP defines "relevant and appropriate" as:

> [T]hose cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site. 40 C.F.R. § 300.5.

A standard is relevant only if it addresses problems or situations generally pertinent to the conditions at the CERCLA site. *Proposed Rule* at 51437. A standard is not appropriate unless it is well-suited to the CERCLA site. *Id.* Possible factors to consider for the relevant and appropriate determination include the purpose of the standard, the environmental media, type of substance, and the actions or activities regulated by the standard. 40 C.F.R. 300.400.

Here, the ERA is neither relevant nor appropriate. The ERA is not relevant or appropriate because it does not address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site. As indicated previously, the ERA's purpose is "to protect public health and the environment ensuring *clean* air and water, including and not limited to, harms from contaminants and pollutants caused by humans." *N.U. Assembly No. A10377* at 2 (emphasis added). The ERA's bill sponsor provided two possible definitions for the term "clean." *See id.* at 5. One definition for "clean" was "healthful to human beings, healthful to our fellow creatures." *Id.* "Clean" water was defined as "water that is free of contamination or pollution caused by humans that would make that water unhealthful or harmful to consume." *Id.* The term "healthful," which appears in both definitions, is defined as a substance that will "do no harm." *Id.*

Ultimately, despite the definitions provided for "clean" and "healthful," none of them provide any "measurable" standard for any specific situation, including the remediation at issue here. The ERA's bill sponsor, when discussing what constitutes clean water, acknowledged that clean water "doesn't mean that the water is free or any or all substances besides H2O." *Id.* at 4. Consequently, "clean," as used in the ERA, does not provide a "measurable" standard because it cannot be interpreted to mean an environmental media is completely free of contaminants and pollutants caused by humans. Similarly, "healthful" also does not provide a "measurable"

standard. The ERA fails to describe at what concentration a contaminant or pollutant does harm. It could be argued that Health Advisory Levels (HALs) adopted by the EPA provide guidance on when a contaminant or pollutant becomes harmful, or not healthful. However, HALs merely "identify the concentration of a contaminant in drinking at which adverse health effects and/or aesthetic effects are not anticipated to occur . . . ." EPA, *Drinking Water Health Advisories (HAs)*, https://www.epa.gov/sdwa/drinking-water-health-advisories-has (last visited Nov. 19, 2022). HALs do not measure at what concentration a contaminant or pollutant does harm. Subsequently, "healthful," as used in the ERA, does not provide a "measurable" standard because it fails to describe at what concentration a contaminant or pollutant does harm.

Therefore, absent some further legislative or regulatory action by the State of New Union to further define "clean" or "healthful," the ERA does not provide any "measurable" standard for any specific situation, including the remediation at issue here.

The EPA should not have reopened the CD and demanded BELCO perform further response actions based on its determination that the ERA constituted an ARAR under CERCLA. The ERA did not constitute an ARAR under CERCLA because the ERA was: (i) not properly promulgated, (ii) not more stringent than federal standards, (iii) not legally applicable, and (iv) not relevant or appropriate.

III. The EPA's decision to not mandate the installation of filtration systems in Fartown was not arbitrary and capricious because the decision was rationally based in the facts before the agency.

The arbitrary and capricious standard requires an agency to make a decision that is rationally based on the relevant facts available to the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that

account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 497 (2004). A court should leave the agency decision intact unless the agency had relied on factors that Congress did not intend the agency to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that is contrary to the evidence before the agency, or is so implausible that it cannot be explained as a result of different views or expertise within the agency. *Motor Vehicle Mfrs.*, 463 U.S. at 43. The arbitrary and capricious standard is narrow; the reviewing court is "not to substitute its judgment for the agency." *Id.*

To prevail in showing that EPA's action here was arbitrary and capricious, there must be evidence that the EPA violated its statutory duty to carry out the NCP. *See United States v. Ward*, 618 F. Supp. 884, 901 (E.D.N.C. 1985). This review is limited to the record available to the agency at the time the agency acted. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014). The ERA in this case before the agency was not an ARAR and, thus, could not be relied upon to require remedial measures. But, even if the ERA was an ARAR, the EPA's decision was grounded in the information before it and the agency made a rational decision based on that information.

A. The ERA is not an ARAR and cannot be relied upon to require remedial measures.

As fully argued in Section II, the ERA is not an ARAR and cannot be relied upon to require remedial measures. The ERA was not an ARAR because it was not properly promulgated, not more stringent than federal standards, not legally applicable, and not relevant or appropriate. Because the ERA did not mandate additional remedial measures, the EPA was only required to interpret CERCLA and the existing ARARs to determine whether BELCO should be required to install filtration systems or engage in any other remedial actions.

B. The EPA's decision to not require BELCO to install filtration systems was not arbitrary and capricious because the agency made a rational decision based on the facts in the record and is entitled to *Chevron* deference when interpreting CERCLA.

The EPA's decision to not require BELCO to install filtration systems was not arbitrary and capricious because the agency interpreted the language of CERCLA, a statute within their realm of expertise, and then made a decision that was rationally related to facts in the record. An agency is granted "considerable weight" in interpreting the meaning of a statutory scheme it is "entrusted to administer" if a statute is silent or ambiguous on a specific issue. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984). Simply put, a court may not substitute its own interpretation of a statute unless the agency's decision is so arbitrary or capricious that it is contrary to the intent of statute. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. Here, the EPA has not explicitly explained its rationale, but the record provides ample evidence that supports the EPA's reasoning.

Deference to agency decision-making is at its height when the agency is considering a problem of a scientific or technical nature. *City of Taunton v. United States Env't Prot. Agency*, 895 F.3d 120, 126 (1st Cir. 2018). Where an agency is administering and interpreting a complex standard, courts will not disturb the agency's choice unless it falls outside the "zone of reasonableness." *Id.* "[The task of the reviewing court] is the task of searching for errors of procedure, and serious omissions of substantive evidence, not the job of reformulating a scientific clean-up program developed over the course of months or years." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1425 (6th Cir. 1991).

For instance, where the EPA was to impose a limit on the amount of nitrogen that a waste facility was to discharge, a court upheld the EPA's limit because the agency had analyzed facts related to discharge in a fact sheet despite not specifically outlining a causal relationship between

the contamination and potential harms. *Taunton*, 895 F.3d at 131, 136. The EPA's determination that filtration systems were not required in Fartown unless the water contained NAS-T above 10 ppb is the exact type of technical decision subject to this deference.

Here, the EPA considered relevant factors, even if it did not explicitly explain its rationale. The EPA made its decision based on the HAL for NAS-T of 10 ppb. Like in *Taunton*, this reasoning was not explicitly stated by the EPA, but the facts surrounding the EPA's decision can fairly lead an observer to that conclusion. *See* 895 F.3d at 136.

A complete lack of record or supporting evidence suggests an agency decision was arbitrary and capricious. In *Bell Petroleum*, the EPA contended a water supply was contaminated with Chromium beyond the maximum long-term levels allowed by the Safe Drinking Water Act necessitating the installation of an alternate water supply system. *See Matter of Bell Petroleum Servs., Inc*., 3 F.3d 889, 905 (5th Cir. 1993). The court found the EPA's decision to be arbitrary and capricious because the EPA had failed to analyze whether short-term exposure to Chromium presented any danger to humans, or whether the purported solution of an alternate supply would solve that danger. *See id*.

Unlike in *Bell* where the EPA applied limits designed to mitigate long-term concerns to a short-term exposure, here, the EPA applied appropriate guidance for the specific contamination it was faced with. HALs serve to help officers determine what actions are necessary to mitigate health effects, despite not being a legally enforceable standard. Envt'l Prot. Agency, *Drinking Water Health Advisorires (HAs)*, https://www.epa.gov/sdwa/drinking-water-health-advisories-has (last visited Nov. 20, 2022). The HAL also incorporated a "significant margin of error" to ensure that the water is safe. The Order at 3. Here, FAWs has not presented any evidence that

levels of NAS-T above 10 ppb are harmful to human health. The EPA, lacking any further information or standard, could reasonably rely upon the already established HAL.

Had the EPA decided to require a filtration system in this case, it would have been based on the exact decision-making process and flawed logic found in *Bell*. Because the EPA considered relevant information and made a logical and rational decision based in this information, the EPA's decision cannot be arbitrary and capricious.

C. BELCO should not be required to install filtration systems because the cost of the system is excessive and a remedial action can be evaluated for its cost effectiveness.

The EPA rightly determined the cost of the filtration systems to outweigh the effectiveness of removing quantities of NAS-T below 10 ppb from the water. 42 U.S.C § 9621 allows the EPA to consider costs and effectiveness when determining remedial actions. 42 U.S.C § 9621(b)(1). Courts have routinely considered this fact in assessing the reasonableness of a CD. *Akzo*, 949 F.2d at 1438 ("In determining the reasonableness of a consent decree, we must also consider the cost effectiveness of its proposed remedial action."); *See United States v. Hardage*, 982 F.2d 1436, 1444 (10th Cir. 1992). The cost of the filtration systems to BELCO far outweighs the potential benefits to the citizens of Fartown, and the EPA was correct in considering cost in their decision and in determining that BELCO need not install filtration systems.

The EPA can consider cost when it is selecting remedial actions from a variety of options that adequately protect human health or the environment. *State of Ohio v. E.P.A.*, 997 F.2d 1520, 1533 (D.C. Cir. 1993). But cost cannot be used to justify the selection of a remedy that does not protect human health or the environment. *Id.* Where soil remediation had already reduced contamination at a site to a "generally acceptable" level, the court refused to grant a plaintiff's request for costly soil flushing because the EPA's actions had already met CERCLA's mandate. *Id.*

In this case, the EPA can consider cost because the filtration system requested by FAWS represents a choice among many adequately protective measures. Currently, all the Fartown wells contain less than 10 ppb of NAS-T, an amount allowed under the HAL. The Order at 5. As it stands, bottled water is distributed to those residents whose wells contain more than 10 ppb. This is an acceptable remedy that balances the potential for harm against the cost to BELCO. The EPA is not required to choose the most protective remedy, but rather an effective remedy. Requiring filtration systems across these wells would amount to the kind of "overkill" response that the court denied the plaintiffs in *Ohio*. *See State of Ohio*, 997 F.2d at 1533.

The EPA adequately considered the type of contamination it was faced with, appropriate measures to mitigate the contamination, and weighed the cost of various actions that were adequately protective of human health. This shows that the EPA considered the facts before it and made a rational decision based on these facts, thus the EPA's decision was not arbitrary and capricious.

IV. The District Court should retain jurisdiction over FAWS' remaining state law claims and allow BELCO to litigate these claims in federal court.

Congress provides that in any action in which a district court already has jurisdiction over some federal claim, the district court also has supplemental jurisdiction over state law 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). A district court, in its discretion, may decline to exercise supplemental jurisdiction over a state law claim if:

> (1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c).

In determining whether to retain jurisdiction over pending state law claims upon dismissal or resolution of federal claims over which they have original jurisdiction, a district court should consider and weigh in each case, and at every stage of litigation, "the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988).

A. The District Court should retain jurisdiction over FAWS' remaining state law claims because substantial proceedings occurred prior to dismissal of the federal claims and the remaining state law claims involve no novel legal questions.

The District Court, if it resolves all the federal claims in this case, should retain jurisdiction over FAWS' remaining state law claims and allow BELCO to litigate them in federal court. Courts have found a district court's exercise of discretion proper in instances where the district court retained jurisdiction over pending state law claims after federal claims were dismissed, where substantial proceedings had taken place prior to dismissal of the federal claims, and where the remaining state law claims involved no novel legal questions. *See, e.g., Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191-92 (2d Cir. 1996) (upholding discretionary exercise of supplemental jurisdiction over a state contract claim where the court had expended much effort to acquaint itself with the facts and issues of the case); *Rauci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (noting that the federal claims were dismissed after discovery was completed, the court had decided three dispositive motions and the case was ready for trial, and the state claims involved settle municipal liability doctrine).

This doctrine, described as supplemental jurisdiction, is "'a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon University*, 484 U.S.

at 350. Courts review a district court's exercise of supplemental jurisdiction for abuse of discretion. *See Shahriar v. Smith & Wollensky Restaurant Grp., Inc.*, 659 F.3d 234, 243 (2d Cir. 2011).

Here, BELCO argues that, should all the federal claims in this case become resolved, the District Court should retain jurisdiction over FAWS' remaining state law claims for two reasons. First, the District Court should retain jurisdiction because substantial proceedings occurred prior to the dismissal of FAWS' federal claims. Second, the District Court should retain jurisdiction because FAWS' remaining state law claims involve no novel legal questions.

1. *The District Court should retain jurisdiction over FAWS' remaining state law claims because substantial proceedings occurred prior to dismissal of FAWS' federal claims.*

A district court may retain jurisdiction over pending state law claims if dismissal of the federal claims occurs "late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims . . . ." *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994).

Substantial proceedings occur when a case has been pending for a significant amount of time, the parties have participated in significant discovery, and the matter has progressed to the advanced stages of litigation with little left to do before trial. In *Smith v. Amedisys Inc.*, the court held that a district court properly retained jurisdiction over the remaining state law claims because substantial proceedings occurred prior to dismissal of all federal claims. *See Smith v. Amedisys*, 298 F.3d 434, 447 (5th Cir. 2002). The Fifth Circuit reasoned that the instant case had been pending for almost three years, the parties had taken numerous depositions, and the matter had progressed to the advanced stages of litigation with little left to do before trial. *See id.* The Court noted that the district court "devoted many hours to reviewing the parties' memoranda, the

attached exhibits and the record in this case; researching the legal issues involved; and reaching the decisions in its comprehensive summary judgment ruling." *Id.*

Here, substantial proceedings have occurred and, consequently, the District Court should retain jurisdiction over FAWS' remaining state law claims, for a few reasons. First, the cases at issue here have been pending for a significant amount of time. While FAWS only filed their motion to intervene in the BELCO Action a little over a year ago, like the parties in *Amedisys Inc.*, the EPA and BELCO have been engaged in litigation for multiple years. The Order at 7. During these many years, the District Court has engaged in litigation regarding and become familiar with CERCLA, the UAO, and the ERA, which are all crucial to the FAWS' Action against the EPA. The Order at 10.

Second, substantial proceedings have occurred because the parties have participated in significant discovery. Although discovery regarding damages have yet to begin, FAWS has already provided discovery in the form of sworn testimony from Fartownians regarding the water from their private wells. The Order at 8. Furthermore, FAWS has provided the lab results performed by Central Labs, as well as the costs of this testing. The Order at 8. Finally, the District Court should retain jurisdiction over FAWS' remaining state law claims because this matter has progressed to the advanced stages of litigation with little left to do before trial. Like the district court in *Amedisys Inc.*, the District Court here has devoted substantial time to reviewing the parties' memoranda and the exhibits and record, as well as researching the legal issues involved in this case, as evidenced by the Order it issued. This is obvious in the District Court issuing rulings on multiple motions for summary judgment filed by all parties involved. The Order at 11-18.

Thus, for the reasons discussed above, the District Court should retain jurisdiction over FAWS' remaining state law claims because substantial proceedings occurred prior to dismissal of FAWS' federal claims.

2. *The District Court should retain jurisdiction over FAWS' remaining state law claims because FAWS' remaining state law claims involve no novel legal questions.*

Generally, state law tort claims "are not considered novel or complex." *See Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518, 532-33 (11th Cir. 2015) (quoting *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006)). However, courts have found "novel or complex" issues of state law where the remaining state law claims concern "the intricacies of a new state regulatory scheme." *MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 376 (D. Md. 2020).

In this case, FAWS' remaining state law claims are essentially state law tort claims and, subsequently, the District Court should retain jurisdiction over FAWS' action. As noted above, FAWS alleges negligence and nuisance on the part of BELCO. The Order at 10. Negligence and nuisance, in and of themselves, are simple state law tort claims. The determination of damages arising from these two claims need not involve the question of whether the ERA constituted an ARAR under CERCLA. Although FAWS contends that the application and interpretation of the ERA could support a negligence *per se* claim against BELCO, FAWS can already bring such a claim under other existing New Union statutes. *See N.U. Assembly No. A10377* at 5. (where the ERA's bill sponsor noted that citizens of New Union already had the right to address clean water and air prior to the ERA's enactment).

While it could be argued that there exist novel or complex issues of state law here because FAWS' remaining state law claims concern "the intricacies of a new state regulatory scheme," namely the ERA, this argument ultimately fails. As discussed above, the ERA provides

no new rights to citizens of New Union. *Id.* (where the ERA's bill sponsor noted that citizens of New Union already had the right to address clean water and air prior to the ERA's enactment and noted that the ERA does not alter the rights of New Union citizens "either proactively or in a regressive way"). In short, the ERA does not create any new regulatory scheme that the District Court must address. Therefore, for these reasons, the District Court should retain jurisdiction over FAWS' remaining state law claims because FAWS' remaining state law claims involve no novel legal questions.

BELCO also points out that FAWS has sought injunctive relief in connection with its tort claims, including an injunction compelling BELCO to remediate the Sandstone Aquifer. The Order at 10. If the state court were to enter such an order, BELCO argues that this order would be inconsistent with the EPA's prior determinations of the proper remedy and undermine the EPA's primary jurisdiction over remediation of the Site. *See* the Order at 7 (noting that, pursuant to the CD, the EPA must issue a COC to BELCO upon completion of the cleanup). BELCO also notes that the District Court has continuing jurisdiction over the BELCO Action to enforce the CD and, as such, should maintain FAWS' remaining state law claims to avoid any inconsistencies that may arise.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grants of summary judgment in favor of the EPA and FAWS and enter summary judgement in favor of BELCO. Moreover, this Court should affirm the District Court's grant of summary judgment in favor of BELCO.