Team 4

C.A. No. 22-000677

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, Judge Douglas Bowman.

Brief of Appellee, BETER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

On June 1, 2022, the United States District Court for the Court of New Union entered summary judgment in consolidated cases No. 17-CV-1234 and 21-CV-1776. The District Court had subject matter jurisdiction over the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") claims under 28 U.S.C. § 1331 (federal question), and over the associated state law claims under 28 U.S.C. § 1367 (supplemental jurisdiction). The United States Environmental Protection Agency ("EPA"), Fartown Association for Water Safety ("FAWS"), and Better Living Corporation ("BELCO") all filed appeals from the District Court's judgment. 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 United States District Courts. This is an appeal from the District Court's disposition of all parties' claims.

STATEMENT OF ISSUES PRESENTED

I. Are the costs incurred by FAWS in sampling, testing, and analyzing water samples of its members' private drinking water wells reimbursable as response costs under CERCLA?

II. Is EPA's determination that the ERA constitutes an ARAR and EPA's subsequent reopening of the Consent Decree based on that ARAR proper?

III. Is EPA's determination that BELCO is not required to install filtration systems in every Fartown well despite the existence of the ERA arbitrary, capricious, or contrary to law?

IV. Is it proper for the district court to retain jurisdiction over the remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

A. The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provides a comprehensive regulatory framework for cleaning up sites contaminated with hazardous waste and preventing contamination of future sites by assigning liability to parties involved. *See* 42 U.S.C. § 9601. EPA is responsible for implementing the Act and may authorize two types of actions under CERCLA: (1) short-term actions taken to address releases or threatened releases that require a prompt response ("removal actions") and (2) long-term actions that permanently and significantly reduce the risk of release of hazardous substances ("remedial actions"). 42 U.S.C. § 9601(23).

EPA is authorized to remove and remediate contaminants whenever there is a release of any contaminant "which may present an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604. EPA may conduct the response itself and seek to recover costs from the Potentially Responsible Parties ("PRPs") in a subsequent cost-recovery action, can compel PRPs to perform the cleanup themselves through either administrative or judicial proceedings, or can enter into a settlement with PRPs to perform all or portions of the work. *Id*. In addition, EPA's actions must be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which provides procedures for efficient, coordinated, and effective response to releases of hazardous substances, pollutants, and contaminants. 40 C.F.R. § 300.3.

The Hazardous Substance Superfund ("Fund") provides financing for cleanup and enforcement actions, including contracts or arrangements to oversee and review the conduct of remedial investigations and feasibility studies. 42 U.S.C. § 9611(c)(8). The intent of the Fund is to allow for cost-recovery actions through the reimbursement of private party expenses in certain

specified situations. 42 U.S.C. § 9611. Here, the issues relate to costs incurred and obligations associated with investigating and remediating contamination under CERCLA and to what extent those obligations and rights are altered considering the recently enacted New Union Constitutional Environmental Rights Amendment (ERA). N.U. CONST. art. I, § 7.

B. EPA's Decision to Reopen the Consent Decree and BELCO's Challenge to the Agency Action

Centerburg is a town of approximately 4,500 residents in the State of New Union ("New Union"). Record at 2. Fartown is home to around 500 residents who live about six miles South of Centerburg, and the small town is an environmental justice community. *Id*. The Sandstone Aquifer ("Aquifer") is located about 300 feet below both Centerburg and Fartown. *Id*. Groundwater in the Aquifer moves downgradient in a southerly direction, meaning water from the Aquifer moves from Centerburg towards Fartown. *Id*. Residents of Centerburg receive their tap water from Centerburg Water Supply ("CWS"), a publicly owned source. *Id*. CWS pumps its water supply from the Aquifer and treats the water before distributing the water to Centerburg residents. *Id*. Residents in Fartown, on the other hand, are not connected to CWS, and instead have private drinking water wells in each person's home that retrieves water directly from the Aquifer. *Id*.

Better Living Corporation ("BELCO") used to manufacture a product known as LockSeal that is used to keep water out of industrial pipes and machinery. *Id*. at 2-3. Producing LockSeal involves combining Nitro-Acetate Titanium ("NAS-T") with a powdered non-toxic activation agent to form a solid at room temperature. *Id*. at 3. From 1973-1998, BELCO produced LockSeal at a factory ("Site") in Centerburg before moving production to a new factory in the Northern part of the state. *Id*. BELCO still owns the Site and uses the premises for storage and training activities. *Id*.

In the mid-1980's, a variety of medical studies showed NAS-T to be a probable human carcinogen. *Id.* In 1995, EPA adopted a Health Advisory Level ("HAL") of 10 parts per billion ("ppb") in response to these medical discoveries. *Id.* NAS-T produces a sour or stale smell at concentrations as low as 5ppb, but the EPA's 10ppb HAL incorporates a significant margin of error to ensure that exposure is not toxic. *Id.* Due to its scarce usage, NAS-T is not subject to other state or federal regulations other than EPA's HAL; the chemical is not regulated under the Safe Water Drinking Act nor does EPA regulate NAS-T as an unregulated contaminant in drinking water. *Id.*

In 2013, Centerburg residents began complaining to the Centerburg County Department of Health ("DOH") about their water smelling "sour" or "off." *Id.* In January 2015, DOH responded to these complaints by testing the public water supply. *Id.* DOH's testing determined that CWS's water contained between 45-60ppb NAS-T. *Id.* By September 2015, DOH instructed Centerburg residents to stop drinking tap water from CWS. *Id.* In response, BELCO began voluntarily supplying effected residents with bottled water while the investigation was handed off to the State Department of Natural Resources ("DNR"). *Id.* In September 2015, DNR began the investigation, but due to a lack of resources and expertise, the state agency referred the investigation to the EPA on January 30, 2016. *Id.*

In March 2016, EPA and BELCO entered into an agreement that required BELCO to continue supplying bottled water to Centerburg residents. *Id.* The agreement also stipulated that BELCO would investigate the cause and extent of the NAS-T contamination. *Id.* BELCO concluded its investigation and, through a remedial investigation and feasibility study ("RI/FS"), agreed to evaluate proposed cleanup remedies. *Id.* Pursuant to the RI/FS, BELCO investigated the sources of the contamination, assessed risk to human health and the environment, and evaluated

remedial alternatives for the Site. *Id*. BELCO's investigation found that NAS-T entered the soils from sporadic spills and from an unlined lagoon used to store wastewater and stormwater in the 1980s and early 1990s. *Id*. The contamination eventually migrated to the groundwater, creating a plume of NAS-T in the Aquifer. *Id.*

From July 2016 through January 2017, BELCO also investigated the extent of the plume under EPA oversight by installing three successive lines of monitoring wells progressively further from Centerburg and closer to Fartown. *Id.* at 4. BELCO installed the final five wells approximately half a mile north of Fartown, or 1.5 miles south of Centerburg. *Id.* BELCO found no detectable amounts of NAS-T in any of the five wells. *Id.* Based on these findings, EPA did not require BELCO to install any additional monitoring wells based on the belief that the monitoring wells had reached the end of the NAS-T plume. *Id.* BELCO recommended in the RI/FS that there should be no remediation of the plume, but rather excavation of the soils at the Site to remediate the contamination. *Id.* BELCO recommended excavating the soil rather than remediating the plume because direct remediation of the NAS-T plume by pumping and treating the water in the Aquifer would take decades and cost over $45 million. *Id.* In other words, direct remediation of the plume is not feasible. *Id.*

In June 2017, EPA published a Record of Decision ("ROD") that is essentially a cleanup plan for the Site. *Id.* EPA published the ROD after considering the public comments to the Proposed Plan that considered the RI/FS findings. *Id.* At the end of June 2017, EPA brought a cost recovery action against BELCO (the "BELCO Action"). *Id.* Immediately after, EPA and BELCO entered into a Consent Decree ("CD") that stipulated that BELCO will design and implement the remedy in EPA's ROD. *Id.* In August 2017, the District Court for the District of New Union approved and entered the CD after considering public comments and finding that the CD is fair

and reasonable. *Id.* Residents of both Centerburg and Fartown failed to object to the RI/FS, the Proposed Plan, or the entry of the CD. *Id.*

Under the CD, EPA is required to issue BELCO a Certificate of Completion ("COC") upon completion of the cleanup. *Id.* Further, the CD stipulates that once EPA issues the COC, EPA is not permitted to require BELCO to further remediate the Site unless EPA "reopens" the CD. *Id.* There are only two scenarios where EPA is allowed to 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. The CD defines "Regulatory Standards" to include "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." *Id.* at § 1.12.

The CD states that BELCO will receive the COC from EPA once BELCO: (1) installs and maintains a water filtration system called CleanStripping to remove NAS-T at the CWS well, (2) excavates the contaminated soil from the Site, and (3) conducts monthly sampling of the monitoring wells installed during BELCO's investigation. *Id.* During autumn 2017, BELCO completed the soil excavation and also installed CleanStripping at the CWS well. *Id.* at 5. BELCO continued to monitor the wells with the only notable detections of NAS-T occurring in January 2018 when BELCO detected that the two wells closest to Fartown contained 5 and 6 ppb respectively. *Id.* In September 2018, EPA issued BELCO the COC citing the fact that most of the wells contained no contamination, and the two wells that did have contamination were below the HAL.

Shortly after EPA issued the COC, Fartown residents complained that their water has been smelling "off" since 2016 and requested that DOH sample and test private Fartown wells for NAS-

T contamination. *Id.* In February 2019, DOH obliged the resident's request and tested five private drinking water wells in Fartown, but none of the wells detected any NAS-T. *Id.* Dissatisfied with the findings, Fartown residents requested EPA order BELCO to conduct further testing. EPA declined to grant the resident's request. *Id.* Frustrated with EPA, approximately 100 Fartown residents formed the Fartown Association for Water Safety ("FAWS") and retained Central Laboratories, Inc. ("Central Labs) to conduct further testing of the Fartown wells. *Id.* In March 2020, FAWS paid Central Labs $21,500 to gather 225 samples. *Id.* Although some of the samples had minimal traces of NAS-T, none of the samples contained contamination above 10ppb. In May 2020, FAWS requested EPA to reopen the CD, but EPA declined based on the fact that no wells were contaminated above the HAL. *Id.*

On November 3, 2020, New Union Amended its Constitution to include the Environmental Rights Amendment ("ERA"). *Id.* The amendment was passed by the state legistlature, signed by the governor, and included as a ballot measure. *Id.* The ERA provides that "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. In January 2021, EPA asked DNR whether the state agency believed the ERA constitutes an ARAR for CERCLA purposes. *Id.* at 6. DNR replied by stating that "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." *Id.*

In March 2021, EPA reopened the CD and ordered BELCO to sample and analyze water from 50 private wells in Fartown. *Id.* EPA decided that the ERA and Central Labs test results were sufficient grounds to reopen the CD. *Id.* BELCO challenged EPA's decision to reopen the CD, arguing that EPA has no legal basis for such action. *Id.* On June 24, 2021, EPA issued a Unilateral

Administrative Order ("UAO") over BELCO's objection directing BELCO to conduct the following response actions:

1. Sample 50 private wells in Fartown, selected by EPA, each month.
2. For any well where sampling shows NAS-T concentrations between 5 ppb and 10 ppb, supply such households with sufficient monthly bottled water for each resident until testing reveals levels of 4 ppb or lower.
3. For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install CleanStripping filtration on the well.

FAWS had requested EPA to impose additional requirements on BELCO in the UAO including a requirement that BELCO install CleanStripping at each residential well that had tested positive for NAS-T or to take other remedial actions sufficient to remove NAS-T entirely from their water supply. *Id.* EPA, however, declined to require BELCO to do so. *Id.*

In July 2021, in response to BELCO's refusal to comply with the UAO, EPA began monitoring Fartown wells that tested above 5ppb for NAS-T and also began supplying bottled water to impacted residents. *Id.* at 6. To this day, no Fartown well has tested above 8ppb. *Id.* On August 2, 2021, EPA made a motion in the BELCO Action seeking to recover the agency's costs incurred in Fartown and for penalties stemming from BELCO's violation of the UAO. *Id.* BELCO submitted an answer that argued that because the ERA cannot properly be considered an ARAR, EPA did not have a legal foundation for which to reopen the CD. *Id.*

C. Proceedings Below

On June 30, 2017, EPA filed an action seeking to recover costs against BELCO, in which FAWS intervened, and on August 30, 2021, FAWS and 85 plaintiffs filed an action seeking to recover costs, while alleging negligence and private nuisance under New Union state law. Record at 4, 7. The district court consolidated these cases at the parties' joint request. *Id*. at 7.

In June of 2017, EPA brought a cost recovery action against BELCO, after which BELCO and EPA entered into a Consent Decree ("CD"). *Id*. at 4. After taking public comment, this Court approved and entered the CD determining it to be fair and reasonable. *Id.* BELCO complied with the CD and after multiple non-detects and low levels of NAS-T in BELCO's monitoring wells, in September 2018, EPA issued a Certificate of Completion ("COC") to BELCO. *Id*. at 5. In March 2021, EPA reopened the CD citing FAWS' testing results and the passage of the ERA and ordered BELCO to sample and analyze 50 private Fartown wells. *Id*. at 6. EPA then issued a Unilateral Administrative Order ("UAO"), requiring BELCO to continue sampling and monitoring Fartown wells, and providing bottled water to Fartown residents. *Id*. BELCO refused to comply with the UAO. *Id*. at 7.

In August 2021, EPA made a motion to recover costs incurred in Fartown and for penalties for BELCO's violation of the UAO. *Id*. In the same month, FAWS filed a motion to intervene in the BELCO action and to assert a claim against EPA. *Id*. FAWS challenged the UAO as arbitrary, capricious, and contrary to law because it failed to compel BELCO to install filtration systems on Fartown's private wells. *Id*. At the same time, FAWS and 85 plaintiffs from Fartown filed an action against BELCO to recover costs for testing and analysis of Fartown's private wells. *Id*. FAWS alleged that BELCO's contamination of the Aquifer constituted negligence and a private nuisance under New Union state law. *Id*.

All three parties filed timely motions for summary judgment, with FAWS additionally moving to dismiss remaining state law claims without prejudice should the CERCLA claims be resolved by motion. *Id*. at 8. The district court granted summary judgment to BELCO on FAWS' claim for response costs ruling they are not "necessary" under CERCLA and therefore are not reimbursable. *Id*. at 15. The court granted summary judgment to EPA as to EPA's costs and

penalties against BELCO for BELCO's failure to comply with the UAO, ordering BELCO's compliance with the UAO going forward. *Id*. The court granted summary judgment to FAWS, vacating the portion of the UAO requiring only bottled water rather than other remedies, such as filtration, to remove NAS-T from Fartown wells. *Id*. The court denied FAWS' motion to remand the matter to state court to resolve FAWS' state law claims of nuisance and negligence. *Id*. This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court did not err in ruling FAWS' sampling, testing, and analyzing are not reimbursable as response costs under CERCLA. The plaintiffs must prove the site is a facility, the defendant is a responsible party, there has been a release or there is a threatened release of hazardous substances, and the plaintiff has incurred costs in response to the release or threatened release. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). Additionally, FAWS must still prove that the costs incurred were "necessary" and "consistent with the national contingency plan. *G.J. Leasing Co., Inc. v. Union Elec. Co.,* 54 F.3d 379, 386 (7th Cir. 1995).

FAWS is unable to prove that the costs are necessary because FAWS' actions were duplicative of EPA's response actions, did not relate to the actual cleanup of contamination, and were "mere oversight" of BELCO's obligations to remediate the NAS-T plume. *See Young v. U.S.,* 394 F.3d 858, 863 (10th Cir. 2005). Not only did FAWS complete the same testing that EPA and BELCO had already completed, but FAWS' testing took place well after EPA had initiated and completed the remediation investigation. Additionally, FAWS' testing was used only to push EPA to order BELCO to conduct further testing and install filtration on Fartown's private wells, rather than for actual cleanup.

The District Court erred in reaffirming EPA's determination that the ERA constitutes an ARAR for several reasons. First, the ERA was not "properly promulgated" because the ERA does not contain specific enforcement provisions and is therefore not legally enforceable. Second, the ERA is redundant of federal standards because the NCP requires the lead agency to assure an implemented remedy is protective of human health and the environment. 42 U.S.C. § 9621(d). Third, the ERA is neither "applicable" nor "relevant and appropriate" because the ERA is neither specific to NAS-T nor the Site. Finally, the ERA was not identified in a timely manner because the ERA was adopted after this Court approved and entered the CD after taking public comment and determining the CD to be fair and reasonable. Further, EPA's determination that the ERA constitutes an ARAR under CERCLA is unpersuasive because EPA did not thoroughly consider remedial alternatives when it directed BELCO to take additional investigation and response actions in the UAO. Moreover, EPA provided no explanation for its directives to BELCO in the UAO, which are inconsistent with EPA's earlier adoption of the HAL.

Next, the District Court erred in determining that BELCO is not required to install filtration systems in Fartown because of the ERA. EPA's decision is not arbitrary, capricious, or contrary to law because both FAWS' and BELCO's sampling results found no wells in Fartown testing above the HAL for NAS-T. These claims are reviewed under the arbitrary and capricious standard where a reviewing court must hold unlawful and set aside agency actions, 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)(2012). An agency accused of acting arbitrarily and capriciously must be able to articulate a satisfactory explanation for an action based on an examination of the relevant data. *Islander E. Pipeline Co. v. Conn. Dep't of Env't Prot.*, 482 F.3d 79, 94-95 (2d Cir. 2006). When an agency action is "the product of reasoned decision making,"

and is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," the court must uphold the agency action. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

EPA properly refused FAWS's request to require BELCO to install CleanStripping in all Fartown wells because doing so would unfairly burden BELCO and there is no basis to reopen the Consent Decree. EPA declined FAWS' request to require filtration on each residential well that had tested positive for NAS-T because sampling results by both FAWS and EPA found no wells in Fartown testing above the HAL for NAS-T. EPA's decision not to require BELCO to install CleanStripping in every Fartown well is not arbitrary and capricious because EPA relied solely on factors identified by Congress, considered all an important aspect of the problem, acted consistent with the evidence, and acted in such a way that a difference in viewpoint or agency expertise could plausibly have caused the outcome. *State Farm*, 463 U.S. at 43. Therefore, EPA's decision to refuse FAWS' request to install CleanStripping in Fartown wells should be upheld.

Finally, BELCO requests that this Court retain jurisdiction over FAWS' remaining state law tort claims because substantial proceedings have taken place and the remaining nuisance and negligence claims do not raise novel or complex issues of state law.

STANDARD OF REVIEW

Review of grants of summary judgment on Administrative Procedures Act ("APA") claims are reviewed *de novo*, and the court "review[s] the administrative record directly, according no particular deference to the judgment of the [d]istrict [c]ourt.'" *Roberts v. United States*, 741 F.3d 152, 157- 58 (D.C. Cir. 2014) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C.

Cir. 2002)); *see also Supreme Oil Co. v. Metro. Transp. Auth.*, 157 F.3d 148, 151 (2d Cir. 1998). Summary judgment is proper where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A motion to remand is reviewed *de novo* and the party that removed the case to federal court bears the burden of establishing federal subject matter jurisdiction. *Vill. of Oakwood v. State Bank & Tr. Co.*, 539 F.3d 373, 377 (6th Cir. 2008).

An agency's decision must be vacated if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004) (citing *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974) ("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.'"). A reviewing court must hold unlawful and set aside agency actions, 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)(2012).

A district court may use its discretion to exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). In deciding whether to retain jurisdiction over pendent state law claims, district courts are to consider factors such as "judicial economy, convenience, fairness, and comity." *See, e.g., Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994)).

ARGUMENT

I. FAWS' sampling, testing, and analyzing is not reimbursable as response costs under CERCLA.

CERCLA establishes that potentially responsible parties ("PRPs") can be liable to private parties for response costs incurred by those private parties. *See* 42 U.S.C. § 9607(a)(4). The plaintiff seeking recovery of response costs must prove four elements: (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. *Ericsson*, 546 F.3d at 850; *Env't. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149,1152 (9th Cir. 1989); *United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1378-79 (8th Cir. 1989).

Here, the site is a "facility" under CERCLA because the Site is where a hazardous substance, NAS-T, has been deposited and disposed. 42 U.S.C. § 9601(9)(B). BELCO's production of LockSeal introduced NAS-T into the Aquifer, and that makes BELCO a responsible party. It is undisputed that NAS-T has contaminated the Aquifer. FAWS' payment of $21,500 to Central Labs are response costs incurred in response to the release of NAS-T into the Aquifer. There are more statutory requirements, however, that a plaintiff must prove to show that they are entitled to recoup response costs from the responsible party. In addition to the above requirements, any non-governmental plaintiff must show that any costs incurred in responding to the release were "necessary" and "consistent with the national contingency plan." 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); *Union Elec.,* 54 F.3d at 386. A plaintiff's actions are necessary if the actions are not duplicative of EPA's response actions, actually relate to the cleanup of the contamination, and are not "mere oversight" of another party's cleanup actions. *United States v. Iron Mountain Mines, Inc.,* 987 F.Supp 1263,

1272 (E.D. Cal., 1997); *Young*, 394 F.3d at 863; *Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.,* 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. 2016).

The response costs incurred by FAWS in contracting with Central Labs to test Fartown's wells are not necessary for three reasons. First, FAWS' testing was not necessary because the testing is duplicative of the work performed by EPA and BELCO. Second, the costs incurred by FAWS are not closely tied to the actual cleanup of NAS-T as BELCO has already completed the cleanup and received a Certificate of Completion ("COC") from EPA. Last, FAWS' costs were not incurred to plan and assist with the eventual remediation and cleanup of NAS-T. Instead, FAWS incurred the costs to oversee BELCO's legal obligation to remediate a property.

A. Central Labs' testing of Fartown wells is duplicative of BELCO and EPA's 2017 tests.

FAWS is not entitled to recover the expenses for Central Labs' testing because the testing is duplicative of BELCO's 2017 tests. Only the US government, a State, or an Indian Tribe can recover "all costs" incurred relating to removal or remedial actions. 42 U.S.C. § 9607(a)(4)(A). Since FAWS is not a sovereign government, but rather a private group of Fartown residents, FAWS can only recoup expenses that are "necessary" to the removal or remedial actions. 42 U.S.C. § 9607(a)(4)(B). If costs are incurred after EPA has initiated a remedial investigation and the private party's actions are "duplicative" of work performed by the EPA, those incurred costs are not "necessary." *Iron Mountain Mines*, 987 F.Supp at 1272; *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Cal. 1993)*. Not only did EPA initiate a remedial investigation on January 30, 2016, but EPA also entered into the CD with BELCO in August 2017, issuing the COC over a year later in September 2018 – all before Central Labs reported test results in March 2020.

For a response action to be "necessary" the action cannot be duplicative of the EPA or state agency's response to or remedy of the release of the substance in question. *Iron Mountain Mines*, 987 F.Supp. at 1272. Actions may be "duplicative" if they occur after EPA had already informed the private parties that it would be conducting its own investigation. *See*, *e.g., Louisiana-Pacific Corp.*, 811 F.Supp. at 1425. FAWS' testing is duplicative and not necessary because the action took place well after EPA had informed private parties that it would conduct its own investigation with chances for public comment on procedures such as the RI/FS and CD, and because FAWS did not seek to uncover information different than or above and beyond that of EPA. The information FAWS sought was the level of NAS-T in the Aquifer underlying Fartown and Centerburg, which the EPA had already determined with BELCO's assistance. Additionally, the information provided does not go above and beyond that of the EPA. Rather, the information demonstrates safe levels of NAS-T which never exceeded EPA's already established HAL.

A response action is necessary if it responds to an actual and real threat to human health or the environment. *See Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 906 (5th Cir. 1993) (holding that a party's actions are not necessary where the action fails to reduce or eliminate a public threat); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001). FAWS may argue that Central Labs' testing is not duplicative because Central Labs tested private residential wells in Fartown rather than the monitoring wells that BELCO had installed in 2016 and 2017, but the fact remains that the testing conducted did not find NAS-T at levels above and beyond those of EPA, rather the testing detected safe levels of NAS-T that would have no adverse impacts.

Other Circuit Courts of Appeals have agreed that private monitoring of an individual's health is not a valid response cost under CERCLA. *Syms v. Olin Corp.*, 408 F.3d 95, 105 (2d Cir.

2005). CERCLA allows for a private party to recover costs when the monitoring is done to prevent contact with hazardous substances, not merely to detect future disease based on prior exposure to hazardous substances. *Id.* Here, FAWS' payment of $21,500 to Central Labs did not reduce or eliminate the NAS-T contamination. Rather, Central Labs' results merely confirmed what EPA and BELCO had already known: there is no NAS-T contamination above 10ppb in Fartown wells. *See Id*. Central Labs conducted tests in Fartown wells only to detect future diseases, not to prevent contact with NAS-T. Thus, FAWS' payment to Central Labs is not recoverable under CERCLA because Central Labs' is duplicative of BELCO's and EPA's 2017 tests.

B. Central Labs' testing is not closely tied to the actual cleanup of NAS-T.

The costs incurred by FAWS are not necessary because the costs are not closely tied to the actual cleanup of NAS-T. Response costs are "necessary" only if the costs are closely tied to the *actual cleanup* of hazardous releases. *Young,* 394 F.3d at 863; *Ellis v. Gallatin Steel Co.,* 390 F.3d 461, 482 (6th Cir. 2004); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 549 (6th Cir. 2001). Costs cannot be deemed "necessary" to cleanup of hazardous releases unless some nexus exists between the alleged response cost and an actual effort to respond to environmental contamination. *Young*, 394 F.3d at 863. In *Young*, the Tenth Circuit held that the costs of surveying a plaintiff's property are not response costs and attempting to recoup costs for such surveys "stretches the statutory language entirely too far." *Id.*

Here, FAWS and Central Labs are trying to recover costs for actions similar to those in *Young. See Id.* Central Labs tested the wells located on the plaintiff's property, just like the plaintiff in *Young*. *See Id.* The tests conducted by Central Labs only sought to reveal that NAS-T is present in Fartown wells. The tests did nothing to actually clean up any detected contamination. Rather, FAWS paid Central Labs in the hopes of discovering information that would convince EPA to

force BELCO to continue remediation of NAS-T beyond the limits established by EPA's previous actions in the CD and COC. The record establishes a history of FAWS' requests to EPA to order BELCO to provide remediation to the residents of Fartown, but notably absent are any efforts by FAWS to install filtration systems themselves in the wells of Fartown's residents. Additionally, by the time FAWS recruited Central Labs to test private wells in Fartown, BELCO had already completed the remediation of the NAS-T plume according to EPA's orders and procedures, and EPA had already granted the COC to BELCO. All that the Central Labs tests showed is what EPA already knew, namely that there are no Fartown wells contaminated with more than 10ppb of NAS-T.

Therefore, FAWS' costs paid to Central Labs are not necessary because there is no connection between Central Labs testing of Fartown wells and the actual cleanup of the NAS-T contamination.

C. Central Labs' testing is merely oversight of BELCO's cleanup obligations.

FAWS' costs were not incurred to plan and assist with the eventual remediation and cleanup of NAS-T and were instead incurred for the purpose of overseeing BELCO's legal obligation to remediate a property. In order for a plaintiff to recover costs under CERCLA, there must be some evidence that the costs were incurred to plan and assist with the eventual remediation and cleanup. *See Wilson Road Dev't Corp.*, 209 F.Supp.3d at 1114-15 (ruling the plaintiffs testing only sought to confirm information already known and not to begin "removing or remediating the contamination in the years following those tests."). The costs cannot be incurred merely for "overseeing another private party's legal obligation to [remediate] a property." *Id.* at 1113.

Similar to *Wilson Road*, Central Labs' testing only sought to confirm or deny information already known by EPA regarding whether there is NAS-T contamination in Fartown wells. *See id*.

Additionally, FAWS only sought to oversee BELCO's legal obligation to remediate the NAS-T plume because FAWS' goals in testing for NAS-T were to compel BELCO to install CleanStripping in Fartown's wells, regardless of whether the plume was considered to be underneath Fartown by EPA and prior legal proceedings. FAWS did not plan to install CleanStripping or provide water to Fartown residents themselves, but rather worked towards convincing EPA to compel BELCO to action in various ways: asking EPA to order BELCO to conduct further testing, asking EPA to reopen the CD and order further investigation and remediation of the plume, and requesting EPA to order BELCO to install CleanStripping at each individual well that tested positive for NAS-T.

Congress did not intend for CERCLA to provide a private party with a cause of action against a responsible party for reimbursement of the party's expenses in retaining an environmental consultant for oversight purposes without direct involvement in the responsible party's remediation and detoxification efforts. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 298-99 (3d Cir. 2000). Recoverable expenses must be "closely tied to the actual cleanup." *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994). The record reflects, however, that FAWS had no intention of contributing to direct remediation and rather hoped to force and oversee BELCO's further "remediation" of the NAS-T plume. For these reasons, FAWS' $21,500 expenditure is not reimbursable as a response cost under CERCLA.

II. EPA improperly ordered further remedial action because the ERA does not meet CERCLA's definition of an "applicable or relevant and appropriate requirement" and thus EPA had no basis for reopening the CD.

EPA has the authority to reopen the Consent Decree where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy. A state environmental standard constitutes a state ARAR to which the remedy must comply if it is (1)

properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. 42 U.S.C. § 9621(d); *United States v. Akzo Coating of Am.,* 949 F.2d 1409, 1440 (6th Cir. 1991).

EPA erred in characterizing the ERA as an ARAR for several reasons. First, the ERA was not "properly promulgated" because the ERA does not contain specific enforcement provisions and is therefore not legally enforceable. Second, the ERA is redundant of federal standards because the NCP requires the lead agency to assure an implemented remedy is protective of human health and the environment. 42 U.S.C. § 9621(d). Third, the ERA is neither "applicable" nor "relevant and appropriate" because the ERA is neither specific to NAS-T nor the Site. Finally, the ERA was not identified in a timely manner because the ERA was adopted after this Court approved and entered the CD after taking public comment and determining the CD to be fair and reasonable.

Further, EPA's determination that the ERA constitutes an ARAR under CERCLA is unpersuasive. EPA did not thoroughly consider remedial alternatives when it directed BELCO to take additional investigation and response actions in the UAO. Moreover, EPA provided no explanation for its directives to BELCO in the UAO, which are inconsistent with EPA's earlier adoption of the HAL.

A. The ERA does not contain specific enforcement provisions that make it legally enforceable.

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." EPA, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance,* 52 Fed.Reg. 32495, 32498 (Aug. 27, 1987) [hereinafter *Interim Guidance*]. *See also Akzo Coating of Am.,* 949 F.2d at 1440. "A

standard is not constitutionally vague if it is 'drafted with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 1441 (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)).

Here, the ERA is not legally enforceable absent further implementing regulations because it is unclear what constitutes "unclean" water and to what degree an unregulated substance is sufficiently offensive to warrant regulation. Unlike the HAL that EPA adopted for NAS-T, which establishes a clear threshold of 10 ppb, the ERA does not provide any measurable standard for any specific situation, including the remediation at issue here. Moreover, the plain language of the ERA invites wide interpretation. N.U. CONST. Art I, § 7 (guaranteeing "a healthful environment free from contaminants and pollutants caused by humans"). The ERA thereby "encourages arbitrary and discriminatory enforcement" because the amendment invites wide interpretation by citizens to enact new laws to regulate or address any unregulated substances. *See Akzo Coating of Am.,* 949 F.2d at 1441. FAWS argues that the language, purpose, and intent of the ERA suggest the amendment was intended to be "self-executing," meaning that no further legislation or regulation is required to make it effective. As New Union legislators have acknowledged, however, it is unclear how the ERA would protect residents "where those regulatory gaps exist." N.U. CONST. Art I, § 7. It is therefore impossible to objectively define "clean water" because any threshold established for any unregulated substance can be controverted by citizens who have a participatory expectation and right under the ERA.

Even if citizens were inspired to enact new laws to regulate or address contamination under the ERA, New Union is not equipped to regulate or enforce human-made contaminants absent further implementing regulations. In 2016, DNR referred the investigation and

remediation to EPA due to a lack of resources and expertise. It is therefore unlikely that the ERA, absent further enforcement provisions, could regulate substances in a manner that does not encourage arbitrary and discriminatory enforcement.

B. The ERA merely echoes the first criteria of the National Contingency Plan.

The NCP requires the lead agency to select remedies that are protective of human health and the environment. 42 U.S.C. § 9621. Here, the ERA does not impose more stringent standards than those required under CERCLA because it essentially mirrors the first criteria to be analyzed pursuant to the NCP by a remediating party when determining viable alternatives. *See Sealy Conn. Inc. v. Litton Indus.,* 93 F.Supp.2d 177, 184 (D. Conn. 2000). FAWS contends that the ERA is more stringent than federal standards because it ensures there is no lapse in situations where there is new, unregulated substance. Without specific provisions to clarify what the New Union citizens consider "clean air, clean water and a healthful environment," the ERA, however, merely restates the first criteria of the NCP to ensure the "overall protection of human health and the environment." 42 U.S.C. § 9621.

C. The ERA is not "relevant and appropriate" to the remedial action selected.

EPA regulations provide that a state environmental law is "relevant and appropriate" when it addresses problems or situations sufficiently similar to those encountered at the CERCLA site and that the law's use is well suited to the particular site. 40 C.F.R. § 300.5 (defining "relevant and appropriate requirements"). In addition, EPA guidance states that actual ARARs are site-specific and depend on the specific chemicals at a site, the particular actions proposed as a remedy, and the site characteristics. Interim Guidance at 4.

The ERA was promulgated to enable citizens to participate in enacting laws that address new, unregulated contaminants. Thus, the ERA was developed as a response to situations involving new, unregulated contaminants, however, the amendment is not "relevant and

appropriate" within the meaning of CERCLA because it is not site-specific and does not articulate particular actions to address new substances such as NAS-T.

D. The ERA did not allow sufficient time to avoid delay or duplication of effort in the remedial process.

Even if the ERA is found to be properly promulgated, more stringent than federal standards, and relevant and appropriate, "[s]tates are required by CERCLA to identify state ARARs 'in a timely manner,' that is, in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." Interim Guidance at 5. States involved in remedial and enforcement responses are required to communicate potential federal and state ARARs and, as appropriate, other pertinent advisories, criteria, or guidance to be considered. 40 C.F.R. § 300.515(d). Further, states that desire to have the remedial action conform to a certain standard, requirement, criteria or limitation are required to intervene in the action *before the entry of the CD.* 42 U.S.C. § 9621(f)(2)(B). Communications on ARARs should begin during the early scoping of the RI/FS. 40 C.F.R. 300.515(d)(2) and (h)(2).

In addition to performing the RI/FS, the remediating party must also provide for public comment and community relations. 40 C.F.R. § 300.155. This Court approved and entered the CD after taking public comment and determining it to be fair and reasonable. Further, none of the citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan, or the entry of the CD. New Union did not communicate the ERA as a new regulatory standard and did not communicate the state's desire to have the remedial action conform to the ERA during ongoing negotiations between EPA and BELCO regarding the RI/FS, the Proposed Plan, or the entry of the CD. The CD is therefore entitled to deference here. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992) (holding that "[w]here. . . the consent decree is the result of settlement negotiations between a federal administrative agency and a private entity, [the consent

decree] is entitled to 'twofold deference,' i.e., [the court] must defer first to "the agency's expertise and the voluntary agreement of the parties in proposing the settlement," and second to "the informed discretion of the trial court in approving the settlement.")

E. EPA's determination that the ERA constitutes an ARAR under CERCLA is unpersuasive and is therefore not entitled to deference.

EPA's interpretation of what constitutes an ARAR under CERCLA must be given deference "according to its persuasiveness." *See United States v. Mead Corp.,* 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)). The weight accorded to an administrative determination "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." *Mead Corp.,* 533 U.S. at 219.

Here, EPA's determination that the ERA constitutes an ARAR was not thorough because it failed to consider how the assertion of a "fundamental right" would be enforced. In addition, EPA provided no explanation for its determination that the ERA constitutes an ARAR. There is no new information demonstrating the need for further remediation based on non-detects and low levels of NAS-T below the HAL.

Finally, EPA's determination is squarely inconsistent with its earlier pronouncements and adoption of the HAL. 42 U.S.C. § 9621(d)(4)(E) allows a state requirement to be waived when "the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State." Here, EPA has consistently denied FAWS' request for further testing and remediation based on a lack of data showing that levels of NAS-T below 10 ppb could compromise human health. From 2017 to 2020, EPA declined multiple requests by FAWS to conduct additional

testing for NAS-T in Fartown's private wells, citing the low levels of NAS-T and the limited reopener provisions in the CD. EPA first issued the COC to BELCO in September 2018 because of the multiple non-detects and low numbers found in BELCO's monitoring well test. Then, in 2019, EPA denied FAWS' request to order BELCO to conduct further testing in Fartown because DOH had tested five private drinking water wells in Fartown and did not detect NAS-T. Again, in 2020, EPA declined FAWS' request to reopen the CD and order further investigation of their wells, because none of the samples from Central Labs' testing of 75 private wells in Fartown exceeded the HAL of 10 ppb for NAS-T in drinking water. EPA's determination is therefore unpersuasive and should be rejected under *Skidmore*.

III. EPA's refusal to require CleanStripping is not arbitrary, capricious, or contrary to law because both FAWS' and BELCO's sampling results found no wells in Fartown testing above the HAL for NAS-T.

Where a challenge is made to an EPA enforcement order under the APA, courts must determine whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004); *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012). The scope of review under the "arbitrary and capricious" standard is narrow, and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Nevertheless, the agency must examine the data relevant to the agency action and articulate a satisfactory explanation for the action including a rational connection between the facts found and the choice made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). The rational connection requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc.,* 419 U.S. at 286. Where the agency has failed to provide even that minimal level of analysis, however, the agency's action is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A); *State Farm,* 463 U.S. at 42-43. In reviewing the agency's explanation for its

action, courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Bowman Transp. Inc.*, 419 U.S. at 285.

An agency accused of acting arbitrarily and capriciously must be able to articulate a satisfactory explanation for an action based on an examination of the relevant data. *Islander E. Pipeline Co.*, 482 F.3d at 94-95 (citing *State Farm*, 463 U.S. at 42-43). In reviewing that explanation, courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *State Farm*, 463 U.S. at 43. When an agency action was "the product of reasoned decision making," and is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," the court must uphold the agency action. *Id.* at 42.

EPA's decision to deny FAWS' request to compel BELCO to install CleanStripping in Fartown wells is not arbitrary, capricious, or contrary to law because EPA's decision is the product of reasoned decision making and is rational based on the relevant facts and circumstances. EPA properly refused FAWS's request to require BELCO to install CleanStripping in all Fartown wells because doing so would unfairly burden BELCO and there is no basis to reopen the CD. The UAO's orders are arbitrary and capricious because they unfairly burden BELCO without giving an explanation for why there needs to be further remediation. Further, as discussed above, BELCO argues that the ERA does not constitute an ARAR, so there is no basis for EPA to reopen the Consent Decree. Therefore, this court should reverse the District Court's finding.

A. There is no new information to suggest that EPA's clean-up plan is no longer protective of human health or the environment, so this court should prevent EPA from reopening the CD.

EPA may reopen the CD when new information previously unavailable or known to EPA is revealed that shows the clean-up plan is no longer protective of human health or the environment. FAWS, however, has not introduced any evidence that EPA's interpretation of what constitutes "clean water," which would allow for low levels of NAS-T, would compromise Fartown residents' fundamental right to clean water.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e.g., Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.,* 545 U.S. 967, 981–982 (2005); *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.,* 467 U.S. 837, 863–864 (1984). When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Id.* Although an agency can change existing policies, the agency must provide reasons for the change in policies. *See id.* A well-reasoned change in policy is not arbitrary and capricious simply by virtue of reflecting a change. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

EPA declined FAWS' request to require filtration on each residential well that had tested positive for NAS-T because sampling results by FAWS and EPA found no wells in Fartown testing above the HAL for NAS-T. Thus, EPA did not act arbitrarily in refusing to require BELCO to install CleanStripping in each residential well in Fartown testing below 10 ppb.

EPA's determination that BELCO is not required to install filtration systems in Fartown was not arbitrary, capricious, or contrary to law because, as discussed in Issue Two, the ERA does

not constitute an ARAR, so the EPA should not reopen the Consent Decree and require BELCO to further remediate the NAS-T in Fartown wells. As discussed in Issue 2, the ERA is neither legally applicable nor relevant and appropriate. Therefore, the ERA cannot constitute an ARAR. The ERA cannot require BELCO to further remediate the NAS-T contamination in Fartown since EPA has already issued BELCO a Certificate of Completion and the Consent Decree is closed. Even if this court determines that the ERA to constitutes an ARAR and allows EPA to reopen the CD, EPA's decision not to require BELCO to install CleanStripping in every Fartown well is not arbitrary and capricious because the decision is the product of well-reasoned decision making made by experts within the agency.

B. EPA's decision to deny FAWS' request to require BELCO to install CleanStripping at each Fartown well that tested positive for NAS-T is based on reason.

Review under the arbitrary and capricious standard is narrow, and agency decisions must be upheld if they are "the product of reasoned decision making." *State Farm*, 463 U.S. at 43. An agency decision is arbitrary and capricious if the agency relied on factors other than those identified by Congress in making the agency's decision, failed to consider an important aspect of the problem, acted contrary to the evidence before the agency, or acted so implausibly that a difference in viewpoint or agency expertise could not have caused the outcome. *Id*. The reviewing court should not attempt to make up for such deficiencies and may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

First, EPA did not rely on factors other than those identified by Congress. CERCLA instructs the EPA to consider the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required. 42 U.S.C. § 9621(a). Congress further instructs the EPA that remedial actions in which

treatment permanently and significantly reduces the volume, toxicity, or mobility of the contaminant are to be preferred over remedial actions not involving such treatment. 42 U.S.C. § 9621(b)(1). Requiring BELCO to install CleanStripping in every Fartown well would require BELCO to spend significantly more money for operation and maintenance costs. Installing CleanStripping in Fartown wells would cost BELCO hundreds of thousands of dollars. Although installing CleanStripping in every Fartown well may significantly reduce the volume and toxicity of NAS-T, doing so would be superfluous because NAS-T is only rarely detected in trace amounts in Fartown wells and installing CleanStripping would not be an economically efficient way to protect Fartown residents. Since EPA considered all relevant factors, including cost efficiency, in refusing to require BELCO to install CleanStripping to every Fartown well, EPA's decision is not arbitrary and capricious.

Second, EPA did not fail to consider an important aspect of the problem. FAWS may argue that EPA did not take into account the fact that Fartown is an environmental justice community, the possible endangerment to Fartown residents, and the presence of odors caused by NAS-T in Fartown wells. EPA, however, considered all these factors in its decision to reopen the CD. Although the CD should not have been reopened because the ERA does not constitute an ARAR, the fact that EPA cited these exact reasons for reopening the CD shows that EPA did not fail to consider any important aspect of the problem. Thus, EPA decision is not arbitrary or capricious for failure to consider an important aspect.

Even if EPA can reopen the CD, EPA is entitled to deference because its decision not to require CleanStripping is supported by the evidence. A court should uphold EPA's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law. 42

U.S.C. § 9613(j)(2). Courts should not substitute the court's own judgement for that of the EPA; the court should give deference to EPA's decision because "the choice of a particular cleanup method is a matter within the discretion of the EPA." Determining the appropriate removal and remedial action involves specialized knowledge and expertise, so the choice of a particular cleanup method is a matter within the discretion of the EPA. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 748 (8th Cir. 1986).

Third, EPA did not act contrary to the evidence before the agency. EPA's decision not to require BELCO to install CleanStripping in every Fartown home is consistent with the evidence available to the agency. Neither BELCO and EPA's testing in Fartown wells nor Central Labs tests showed any contamination in Fartown above the HAL. FAWS argues that EPA did not consider the trace amounts of NAS-T identified by Central Labs in 2017. EPA, however, noted in its administrative record that the agency did, in fact, consider the minimal levels of NAS-T identified by Central Labs. EPA did not oblige FAWS' request because the NAS-T identified by Central Labs are all below the HAL of 10ppb. Furthermore, the Fartown wells where Central Labs detected NAS-T only contained a few isolated instances where NAS-T was found in excess of 5ppb, well below the EPA's HAL. Therefore, EPA's decision not to require CleanStripping in every Fartown well is consistent with the evidence. Accordingly, EPA's decision is not arbitrary and capricious for this reason.

Fourth, EPA did not act so implausibly that a difference in viewpoint or agency expertise could not have caused the outcome because of the decision. *See State Farm*, 463 U.S. at 43. EPA's administrative record details the specific reasons why EPA decided to exclude installation of CleanStripping in every Fartown well. Under the UAO, BELCO is only required to install CleanStripping in Fartown wells that exceed the HAL of 10ppb. Further, the UAO still requires

BELCO to collect samples from 50 Fartown wells each month and supply water to households whose wells have more than 5ppb of NAS-T. Also, under the UAO, BELCO is required to install CleanStripping for wells that have more than 10ppb of NAS-T. Therefore, FAWS' request to install CleanStripping in every Fartown well would be superfluous since EPA already requires BELCO to take reasonable measures to make sure each Fartown well is not contaminated above the HAL of 10ppb.

In sum, EPA's decision not to require BELCO to install CleanStripping in every Fartown well is not arbitrary and capricious because EPA relied solely on factors identified by Congress, considered all an important aspect of the problem, acted consitent with the evidence, and acted in such a way that a difference in viewpoint or agency expertise could plausibly have caused the outcome. *State Farm*, 463 U.S. at 43. Therefore, EPA's decision to refuse FAWS' request to install CleanStripping in Fartown wells should be upheld.

IV. This Court should retain jurisdiction over FAWS' remaining state law tort claims because substantial proceedings have taken place and the remaining nuisance and negligence claims do not raise novel or complex issues of state law.

District courts are to consider factors such as "judicial economy, convenience, fairness, and comity" in deciding whether to retain jurisdiction over pendent state law claims upon dismissal or resolution of federal claims over which the district court has original jurisdiction. *Nowak*, 81 F.3d at 1192 (citing *Purgess*, 33 F.3d at 148). A district court may exercise discretion in retaining jurisdiction where substantial proceedings had taken place prior to the dismissal of the federal claims and where the remaining state law claims involved no novel legal questions. *See, e.g., Nowak*, 81 F.3d at 1191-92 (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). Dismissal of a federal claim late in the action "after there has been substantial

expenditure in time, effort, and money in preparing the dependent claims" is neither fair nor necessary. *See Purgess*, 33 F.3d at 138.

District courts have exercised supplemental jurisdiction under less compelling circumstances than those in this case. *See, e.g., id.* at 137-39. There, the Second Circuit held that the district court did not abuse its discretion by exercising supplemental jurisdiction because "the parties and the court had spent years preparing for this trial in federal court; the jury had heard evidence for several days and was ready to begin its deliberations; and it would have been wasteful to subject this case to another full trial before a different tribunal." *Id.* at 139. EPA first began investigating the cause and extent of the NAS-T plume in 2015 and BELCO has since adhered to EPA's articulated process for assisting in the identification and implementation of appropriate remedial actions, which then moved the District Court to approve and enter the CD in 2017, following no objections from Fartown or Centerburg residents. *See* 40 C.F.R. § 300.430. In addition, the parties completed discovery on the CERCLA claims in 2021. Therefore, it follows that this Court should exercise supplemental jurisdiction over the BELCO Action to enforce the CD and retain the state law claims to avoid inconsistencies that otherwise may arise.

Finally, FAWS' remaining tort claims do not raise novel or complex issues of state law. State tort claims are generally not considered novel or complex. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). The court in *Parker* held that a new trial on damages does not raise novel or complex issues of state law because the case involved only state tort claims once liability had been determined. *Parker*, 468 F.3d at 744. Here, the legislative history and wording of the ERA suggest that the amendment would engage New Union citizens in a process to enact laws where regulatory gaps exist; the ERA, however, would not necessarily raise novel or complex issues of state law. *See* Record at 12. Thus, even if this Court were to reaffirm EPA's use

of the ERA as an ARAR, absent specific provisions, the ERA does not substantially alter the determination of damages arising from FAWS' nuisance and negligence claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of summary judgment in favor of BELCO regarding costs incurred by FAWS' sampling, testing, and analysis. This Court should reverse the district court's grant of summary judgment to EPA allowing EPA to reopen the CD and issue the UAO, and also reverse the District Court's grant of summary judgment to FAWS requiring BELCO to install filtration in all of Fartown's private wells. Lastly, this Court should affirm the District Court's denial of FAWS' motion to remand.