TEAM # 41

Non-Measuring Brief

C.A. No. 17-CV-1234
CONSOLIDATED WITH
C.A. No. 21-CV1776

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BETTER LIVING CORPORATION
Plaintiff-Appellant-Cross Appellee
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee-Cross Appellant,
&
FARTOWN ASSOCIATION FOR WATER SAFETY, et al.
Plaintiff-Appellant-Intervenor Plaintiffs-Appellant-Cross Appellees.

ON APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of FARTOWN ASSOCIATION FOR WATER SAFETY, et al.
Plaintiff-Appellant-Intervenor Plaintiffs-Appellant-Cross Appellees.

Table of Contents

Table of Authorities

Cases:

State Law:

Regulations:

Rules:

STATEMENT OF JURISDICTION

The United States District Court for the District Court of New Union had jurisdiction to hear this case pursuant to 28 U.S.C. § 1331 because the actions brought by Fartown Association for Water Safety (FAWS) and the United States Environmental Protection Agency (EPA) against Better Living Corporation (BELCO) pertain to a federal question governed by federal law. Namely, the consolidated cases pertain to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), codified at 42 U.S.C. § 9601 *et seq*. Additionally, the court exercised initial supplemental jurisdiction over FAWS' state law tort claims under 28 U.S.C. § 1367.

Under 28 U.S.C. § 12921, the United State Court of Appeals for the Twelfth Circuit has jurisdiction to review "appeals from all final decisions of the district courts of the United States," and rulings on summary judgement constitutes a reviewable final decision. *See, e.g., Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015). BELCO, EPA, and FAWS timely filed appeals after the District Court's order upholding EPA's Unilateral Administrative Order (UAO), pursuant to Fed. R. App. P. 4.

STATEMENT OF THE ISSUES

I. Under 42 U.S.C. § 9607(a)(4)(B), plaintiffs who are private, nongovernmental entities like FAWS must demonstrate that their costs of responding to hazardous pollution were necessary and consistent with the national contingency plan in order to be reimbursable by the party responsible for the pollution under CERCLA. Additionally, the costs must not be duplicative of EPA's response efforts. Are the costs incurred by FAWS in sampling, testing, and analyzing well water samples of

its' members private drinking water wells reimbursable as response costs under CERCLA?

II. Federal courts have determined that a state environmental requirement constitutes a state Applicable or Relevant and Appropriate Requirement (ARAR), which CERCLA requires that remedial actions must comply with, if it is (1) properly promulgated, (2) timely identified, (3) more stringent than federal standards, and (4) legally applicable or relevant and appropriate. Does the state of New Union's Environmental Rights Amendment (ERA) constitute an ARAR under CERCLA, such that EPA's reopening of the Consent Decree ordering further remedial action by BELCO in the UAO on the basis of the ERA's enactment was proper?

III. The Supreme Court's decision in *Skidmore* interpreting the Administrative Procedure Act (APA) establish that agency judgements on how to to interpret a statue as applied to informal rulemaking such as the UAO should be given deference insofar as they have the power to persuade based on the record, the agency's reasoning, and prior agency decisions. Is EPA's determination that BELCO is not required to install water filtration systems in Fartown despite the existence of the ERA impermissibly arbitrary, capricious, or otherwise contrary to law such that it violates the APA and should be vacated?

IV. Under 28 U.S.C. 1367(c), district courts have discretion to decline exercising supplemental jurisdiction over a state law claim if the claim raises a novel or complex issue of state law or the district court has dismissed all claims over which is has original jurisdiction. Should the District Court retain jurisdiction over FAWS'

remaining state tort law claims after resolving the federal claims, and is choosing to do so an abuse of discretion?

STATEMENT OF THE CASE

I. Statement of Facts

a. CERCLA. The issues presented concern the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), codified at 42 U.S.C. § 9601 *et. seq*. The overarching goals of CERCLA are to promote the timely cleanup of hazardous waste sites and ensure the costs of that cleanup are borne by those responsible. 42 U.S.C. § 9604(a)(1). Per CERCLA, remediation of contaminated resources must meet all Applicable or Relevant and Appropriate Requirements (ARARs). 42 U.S.C. §9621(d). To that end, the United States Environmental Protection Agency (EPA) is tasked with administrating CERCLA and overseeing all required remediation efforts by polluters as an executive agency under the President. 42 U.S.C. § 9604.

b. BELCO's Pollution with the Chemical NAS-T. The instant dispute concerns contamination of an aquifer in the State of New Union affecting the availability of clean drinking water for the town of Centerburg and the rural, environmental justice community of Fartown. R. at 5. The Sandstone Aquifer runs under both towns, flowing from Centerburg (where residents receive tap water from the publicly owned Centerburg Water Supply (CWS) to Fartown where private wells at residents' home pump water for all household uses. *Id*.

Better Living Corporation (BELCO) owns a property in Centerburg where it manufactured NAS-T, a toxic chemical carcinogen used in its industrial sealants, from 1973-1998. R. at 5-6. Soil testing done in 2016 reveals that during this time, BELCO spilled NAS-T

periodically and negligently stored waste and stormwater in an unlined lagoon on the property, creating a plume of NAS-T in the groundwater of the Sandstone Aquifer. R. at 6. The Centerburg Department of Health (DOH) first received complaints of water that smelled "sour" or "off" from residents in 2013. *Id*. Testing prompted by these complaints revealed the presence of NAS-t in concentrations of 45 to 60 ppb in the CWS, and on September 17, 2015, DOH instructed Centerburg residents to cease drinking tap water immediately. *Id*. Any concentration of NAS-T above 10 parts per billion (ppb) is toxic to humans, and the chemical causes a sour or stale smell even at lower concentrations, and residents began relying on BELCO to provide bottled water for drinking. *Id*. A line of monitoring wells was installed in 2016 and 2017 that did not show the presence of NAS-T near Fartown, but individual Fartownians submitted sworn testimony that they periodically began to detect a smell akin to that from NAS-T from their private well water during that time period. R. at 7-8.

c. EPA's Response to BELCO's Pollution. EPA first adopted a Health Advisory Level (HAL) for NAS-T in 1995. R. at 6. Based on DOH findings in Centerburg, the New Union Department of Natural Resources (DNR) opened an investigation into BELCO's pollution and referred remediation to EPA on January 30, 2016. *Id*. In March 2016, EPA began enforcing an agreement that BELCO would continue to supply Centerburg with bottled water and would evaluate options to remedy the NAS-T pollution. *Id*. The aforementioned monitoring wells were installed in threes lines along the aquifer in an attempt to measure the plume of NAS-T, but EPA allowed BELCO to cease monitoring efforts about half a mile north of Fartown after a single set of samples returned without detectible NAS-T. R. at 7. EPA and BELCO completed a remedial investigation and feasibility study (RI/FS) that concluded remediating the source of the pollution

in the aquifer plume itself would take too long and be too expensive. *Id*. Instead, they entered a Consent Decree under which BELCO would 1) install and maintain CleanStripping water filtration on the CWS; 2) excavate all contaminated soil from the lagoon pollution site; and 3) conduct monthly monitoring samples at the previously installed line of wells. *Id*. BELCO successfully completed the soil excavation and CleanStripping installation in 2017. R. at 8. Ignoring test results showing NAS-T in the monitoring wells closest to Fartown in January of 2018, EPA granted BELCO a Certificate of Completion (COC) in September of that year that prematurely ended the company's remedial obligations. *Id*.

Still suffering from the odorous presence of NAS-T, a group of Fartownians requested EPA order BELCO to conduct further testing in the town in May 2019. Id. EPA declined but cited as their reasoning the negative tests for NAS-T in wells *outside* Fartown. R. at 8. Frustrated, a group of about 100 citizens formed FAWS and paid a private firm, Central Labs, $21,500 out of their own pockets to sample 75 private wells for toxic chemicals in the city in early 2020. *Id.* Of 225 samples taken, 51 showed concentrations of 1 to 4 ppb of NAS-T and 54 showed NAS-T in the 5-8 ppb range, but even with this evidence EPA declined to take any action, noting that the Consent Decree could only be reopened under two conditions, one of which is "where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." R. at 7-8.

Thankfully for Fartownians, the citizens of New Union passed the Environmental Rights Amendment to the State Constitution of New Union on November 3, 2020, guaranteeing that "each and every person shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST.

art. I, § 7; R. at 8. After consulting with DNR, EPA determined that the ERA is an Applicable or Relevant and Appropriate Requirements (ARAR) under CERCLA and therefore a change in Regulatory Standards. R. at 9. EPA reopened the Consent Decree, directing BELCO to collect and analyze samples from fifty private wells in Fartown, supply bottled water to any Fartownian whose well tested positive for the presence of any NAS-T, and continue monitoring Fartown's wells. *Id.* BELCO refused to comply, and on June 24, 2021, EPA was forced to issue a Unilateral Administrative Order (UAO) directing 1) sampling of 50 private wells selected by EPA each month; 2) providing monthly bottled water for any well with NAS-T concentrations between 5 and 10 ppb; and 3) install CleanStripping on any well with NAS-T concentrations over 10 ppb. *Id.* Despite their previous decision to supply bottled water to all Fartownians whose wells had any NAS-T, EPA refused FAWS' request to install CleanStripping on all Fartown wells contaminated by NAS-T. R. at 9.

BELCO's refusal to comply with the UAO forced EPA to provide the required monthly bottled water to Fartownians affected by BELCO's pollution beginning in July 2021, and 45% of Fartown wells samples continued to show contamination by NAS-T during that time. R. at 10.

II. Nature of the Proceedings

EPA moved to recover costs incurred in Fartown by BELCO's noncompliance, as well as penalties for the company's bad faith, on August 2, 2021. *Id*. On August 30, 2021, FAWS filed a motion to intervene in that action, and FAWS along with 85 individual Fartownians filed an action, as well as a New Union state tort claim for BELCO's negligence and creation of a private nuisance. *Id*. FAWS seeks: 1) recovery costs under CERCLA of the well testing FAWS was forced to fund; 2) BELCO's installation of CleanStripping on all Fartown wells testing positive

for any NAS-T; 3) remediation of the plume in the Sandstone Aquifer; 4) damages for loss of use and enjoyment of property and diminished property values; and 5) punitive damages for BELCO's exercise of bad faith. *Id*. On December 30, 2021, all three parties moved for summary judgement on the CERCLA claims, and FAWS moved to dismissing the remaining state law claims without prejudice should the federal claims be resolved by motion. R. at 11.

a. The Response Cost Dispute. The District Court properly noted that response costs must be "necessary," including not duplicative of EPA's response to a source of pollution and in furtherance of remediation and eventual cleanup, in order to be reimbursable by the polluter under CERCLA. R. at 11. BELCO alleges that FAWS' testing was not necessary at the time it occurred in 2019 since the 2016 and 2017 testing revealed no NAS-T near Fartown. *Id*. FAWS counters that given the detections of NAS-T near Fartown in 2018, Fartownians had a right to know about their exposure regardless of whether EPA ultimately would have ordered the requested remedial actions, and therefore the additional testing was necessary. *Id*. EPA further contends that laypersons should not be empowered to conduct their own testing as a matter of public policy, and that FAWS testing was not necessary because the ERA providing the legal basis for its reasonableness had not yet been enacted. R. at 12. Noting that FAWS has other remedies at law to recover damages outside of CERCLA, the District Court found that FAWS testing costs were not necessary and therefore not reimbursable. R. at 12-13.

b. The ARAR Dispute. FAWS joins EPA in arguing that the ERA was properly identified as an ARAR under CERCLA, and therefore FAWS' claim seeking additional remediation measures through the UAO has a sufficient legal basis to be granted. R. at 13. BELCO argues that the ERA is not an ARAR because it was not promulgated by a state

legislature or state agency regulation, not more stringent than existing environmental standards, does not specifically address pollution at a CERCLA site, and is not a sufficiently measurable standard to enforce. R. at 13-14. The District Court sided with EPA and FAWS in finding that the ERA was properly promulgated and grants a fundamental right more protective than existing environmental standards. R. at 14-15.

c. The "Arbitrary and Capricious" Dispute. FAWS contends that EPA's decision that CleanStripping only needs to be installed on Fartown wells with over 10 ppb of NAS-T is arbitrary and capricious and therefore should be vacated. R. at 15. EPA ignored the evidence on the record in making this determination that violates EPA seeks to maintain the current UAO as compliant with the "clean water" requirement of the ERA, and that its decision of how to interpret the amendment is entitled to deference. R. at 16. BELCO reasserts its argument that the ERA is not an ARAR, and CleanStripping is too expensive to be a reasonable remedy when in their eyes no harm has been shown. *Id*. The District Court sided with FAWS, finding that EPA's decision not to install CleanStripping on all wells was arbitrary, capricious, and contrary to the law of the ERA. R. at 16-17.

d. The Supplemental Jurisdiction Dispute. FAWS contends that the negligence and nuisance actions should be dismissed since all federal issues have been resolved on motion and the state law claims involve novel and complex issues of state law. R. at 18. BELCO and EPA argue that for the sake of efficiency and consistency the claims should remain in federal court. *Id*. The District Court sided with EPA and BELCO, retaining jurisdiction over all claims. *Id*.

e. Issues on Appeal. All parties appealed from the District Court's order. In sum, the District Court denied FAWS' motion for summary judgement that their response costs are

reimbursable under CERCLA, granted EPA's motion for judgement for costs and penalties, and ordering BELCO to comply with the UAO, granted FAWS' motion to vacate the portion of the UAO requiring only bottled water rather than filtration to remove NAS-T from Fartown's wells, and denying FAWS motion to dismiss the state law claims without prejudice.

STANDARD OF REVIEW

The standard of review for summary judgements in CERCLA cases is de novo. *Carson Harbor Vill., Ltd. V. Unocal Corp*. 270 F.3d 863, 870 (9th Cir. 2001). The District Court's exercise of supplemental jurisdiction should be reviewed for abuse of discretion. *See Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist*., 31 F.3d 89, 103 (2d Cir. 1994).

SUMMARY OF THE ARGUMENT

The District Court incorrectly held that: 1) the costs Fartown Association for Water Safety (FAWS) incurred in sampling and analyzing Fartown residents' private wells were not reimbursable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a response cost; and 2) FAWS' motion to dismiss the remaining state court claims should be denied and the federal district court should retain supplemental jurisdiction over those state law claims after deciding the federal issues. However, the District Court correctly held that: 1) the United States Environmental Protections Association's (EPA's) Unilateral Administrative Order (UAO) directing Better Living Corporation (BELCO) to take additional investigative and response actions must be upheld based on EPA's determination that the New Union Environmental Rights Amendment (ERA) constitutes a new Applicable or Relevant and Appropriate Requirement (ARAR) under CERCLA; and 2) EPA's determination

that BELCO is not required to install water filtration systems on Fartown residents' private wells must be vacated as arbitrary and capricious.

First, FAWS' testing efforts are legitimate response costs to BELCO's pollution and are reimbursable under CERCLA. They were necessary even at the time they were undertaken and even though the situation in Fartown requires long-term monitoring, and they are not duplicative of EPA's efforts. Additionally, the testing is directly connected to remedial action itself, and presented new information that EPA considered and placed on the record as indeed it should have. Additionally, FAWS' testing was consistent with the National Contingency Plan (NCP) and was done to compel BELCO to expand its monitoring in conjunction with the apparent expansion of the plume of NAS-T pollution the company created.

Second, FAWS' motion to dismiss the remaining claims should be granted once federal issues have been decided so the issues governed by state tort law can be properly decided in state court. The District Court abused its discretion in refusing to do so since FAWS' claims are novel questions of state law concerning the interpretation and application of the ERA. Additionally, precedent in distinguishing cases from other federal circuits and relevant factors including fairness, judicial economy, convenience, and comity weigh in favor of dismissing these claims without prejudice at this early stage in the judicial proceedings.

Third, the ERA is an ARAR under CERCLA, and EPA's UAO directing BELCO to continue its remediation actions to address the pollution of Centerburg and Fartown by NAS-T must be upheld. Not only is the ERA an ARAR, but it also establishes a new more stringent standard that BELCO must expand its remediation efforts to comply with. The ERA was properly promulgated, is generally applicable, and is legally enforceable. Additionally, it is

relevant and appropriate to the specific CERCLA site of BELCO's NAS-T contamination in Fartown and therefore a sufficient legal basis for EPA to reopen the Consent Decree.

Finally, EPA's determination that BELCO is not required to install water filtration systems private wells in Fartown is arbitrary and capricious and deserves no deference. Informal agency actions deserve deference only to the extent the agency's reasoning is persuasive, considering the evidence on the record, the agency's prior and subsequent decisions, and the thoroughness and validity of the reasoning. EPA ignored BELCO's tests detecting the presence of NAS-T near Fartown and FAWS' tests proving NAS-T's presence within the town itself, and they agency contradicts its own position that filtration is not necessary in its determination that providing bottled water to Fartownians is merited. BELCO disregards evidence of the harm NAS-T is causing Fartownians and provided no legal basis for its argument that installing CleanStripping is an unreasonable remedy. Both parties' reasoning is entirely unpersuasive and undeserving of any deference.

ARGUMENT

A. FAWS response cost was 'necessary' under § 9706(a)(4)(B) and are excluded from the 'consistent with the National Contingency Plan' requirement

I. FAWS response cost was necessary because it was not duplicative of any EPA actions, and attempts to respond to environmental contamination

For a private, nongovernmental party to recover response costs under 42 U.S.C. § 9607(a)(4)(B), the plaintiff must demonstrate that the response costs 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). For a court to find that a private parties response action is 'necessary,' the court must find that the action was not 'duplicative' of the work performed by

the EPA." *U.S. v. Iron Mountain Mines, Inc.,* 987 F.Supp. 1283, 1272 (E.D. Ca. 1997). An action may be 'duplicative' if it is simultaneous to an EPA action and does not seek new information. *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.,* 811 F.Supp. 1421, 1425 (E.D. Ca. 1993). Response costs are also necessary if there is a "nexus between the alleged response cost and an actual effort to respond to environmental contamination." *Young v. United States*, 394 F.3d 858, 863–65 (10th Cir.2005). As a matter of statutory interpretation, response costs are more likely to be considered 'necessary' when they "clearly contemplate only the cleanup of toxic substances from the environment" in an action consistent with CERCLA's definition of 'removal.' *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233 (M.D. Pa. 1990) quoting *Coburn v. Sun Chem. Corp.*, No. CIV. A. 88-0120, 1988 WL 120739 (E.D. Pa. 1988).

The *Ambrogi* court was asked to decide if costs associated with long term medical monitoring of lead poisoned victims could be considered 'necessary' under the § 9601(23) definition of 'response.' The plaintiffs argued that the phrase "actions as may be necessary to prevent, minimize, or mitigate damage to the public health" necessarily included medical monitoring costs as they related directly to the matter of minimizing the damage to the public. The court relied on the second half of the definition, in relevant part: "the term includes, in addition, without limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation, etc." *Id*. at. 1247

Relying on *Coburn* precedent, the court utilized ejusdem generis to conclude that "the overall definition, including the 'such actions' phrases, should logically be confined to activities of the same kind." It follows that 'necessary' costs can only be those which "contemplate the

cleanup of toxic substances." *Ambrogi* (quoting *Coburn* at 7-8). On this basis, the court found that Ambrogi's medical monitoring costs were not 'necessary' and thus not recoverable.

'Necessary' response actions should not be "'duplicative' of the work performed by the EPA." *U.S. v. Iron Mountain Mines, Inc.,* at *1272.* An action is 'duplicative' if it occurs simultaneous to an EPA action and does not seek new information. *Louisiana-Pacific Corp. v. Beazer Materials & Servs.,* at *1425 (E.D. Ca. Jan. 27, 1993)*. In *Iron Mountain Mines*, the operator, Rhône–Poulenc, sought to recover response costs from their "modeling of water hydrology…above the confluence of Spring Creek." *U.S. v. Iron Mountain,* at 1271. Simultaneously, the EPA was considering enlarging the Spring Creek dam and conducting their own modeling of the exact same site. Rhône–Poulenc submitted a data request letter from the EPA to demonstrate that their modeling was distinct. Rejecting this, the court said the EPA's interest "does not establish that Rhône–Poulenc's efforts were distinct from EPA's." *Id,* at 1272. Because the defendant's modeling occurred at the same time as the EPA's and sought the same information regarding the same site, the court found the costs to be duplicative and not 'necessary'.

Similarly, in *Louisiana-Pacific Corp*, the plaintiffs and the EPA were in settlement negotiations, which, upon failing, spurred the EPA to inform the plaintiffs of their intent to investigate the site. Prior to the EPA beginning its investigation, the plaintiffs conducted their own, which it does not dispute was "essentially the same" as the EPA's intended investigation. The court concluded that because the EPA informed Louisiana-Pacific of their own investigation of the same contaminated site, the plaintiff's investigation was "duplicative and thus unnecessary." *Louisiana-Pacific,* at *1425*.

Additionally, response costs are 'necessary' when there is a connection with an "actual effort to respond to environmental contamination." *Young v. United States*. Bearing on this consideration is when the response cost "clearly contemplate[s] only the cleanup of toxic substances from the environment" such that is comports with the statutory definition of 'removal.' *Ambrogi quoting Coburn*

In *Young v. U.S.*, the plaintiffs bought a parcel of land next to a remedially cleaned Superfund site. The plaintiffs sought a cost recovery action under 42 U.S.C. §9607(a) to recover for the cost of hiring consultants to assess the property, which had confirmed the presence of hazardous substances. The court points to the factual record that the plaintiffs have "abandoned their property and do not intend...to clean up the contamination." *Id,* at 861. The court concludes that the investigative costs were not 'necessary' because "the costs were not tied in any manner to the actual cleanup of hazardous releases.

Similarly, in *Ambrogi v. Gould*, the plaintiffs filed a recovery action to recover the response costs for "air, water, soil testing, medical surveillance, costs of cleanup, investigative expenses…attendance at public meeting…and the loss of the beneficial use." *Ambrogi*, at *1243*. The court severed the response costs, finding that some were within the scope of recoverable damages and others were not. Noting that "the purpose of the legislation would preclude recovery of costs for matters which did not facilitate the prompt...cleanup of a hazardous waste site," the court found that only those actions which facilitated a "'removal in terms of CERCLA'" would be necessary. Thus, the plaintiffs could recover for actions such as the air, water, and soil testing, but could not recover for medical surveillance, organizational expenses such as attending meetings, and the economic loss of gardens. *Id,* at *1249-1250*

A primary consideration of 'duplicativeness' is timing. For FAWS costs of contracting Central Labs to test 75 Fartown wells to not be 'duplicative,' it must not be simultaneous to the EPA action and should seek to uncover new information. See*, U.S. v. Iron Mountain, Louisiana-Pacific Corp.* Here, the factual record bears out that FAWs actions were neither simultaneous to any EPA action nor seeking the same information the EPA sought. After the EPA declined to order BELCO to conduct more substantial testing in Fartown, citing the "multiple non-detects and low numbers," residents formed FAWS and contracted with Central Laboratories, Inc. ("Central Labs") to test their private wells. These tests proved conclusive: of the 225 samples taken from 75 private wells in Fartown, 105 of them (47%) contained NAS-T. (R. at. 5).

The response costs associated with Central Labs is facially not duplicative because it does not occur at the same time as the EPA's own actions; in fact, upon the EPA issuing the COC to BELCO in September of 2018, BELCO no longer had any responsibility to further test their monitoring wells outside of Fartown. The remedial investigation was completed, hence the issuance of the COC. Central Labs testing occurred in December of 2019 and cannot be considered simultaneous to any EPA action.

Unlike the twin investigations into the hydrology of the Spring Creek in *U.S. v. Fire Mountain*, FAWs actions do not seek to uncover the same information as the EPA investigation and cannot be found to be unnecessary. The EPA investigation was to determine the extent of the NAS-T contamination, and the two defendants believed they had found it. The Central Labs investigation came after multiple detections of NAS-T were found, and thus the purpose of this investigation was to determine, in fact, how far into Fartown the NAS-T plume had now migrated. Additionally, the testing conducted by Rhône–Poulenc in *U.S. v. Fire Mountain*

concerned the exact same site that the EPA was testing. Here, the scope of Central Labs testing is entirely different than the testing done by BELCO at the direction of the EPA. While BELCO tested *monitoring* wells installed, at the closest, half a mile from Fartown, Central Labs testing occurred within Fartown itself, and broadly tested the residents *private* water supplies.

Unlike the soil testing done in *Young v. U.S.*, the testing done by FAWS/Central Labs does have a "nexus between the alleged response cost and an actual effort to respond to environmental contamination." *Young v. United States*. Unlike *Young*, FAWS does intend to "respond to environmental contamination." A critical step in determining the necessary response is the testing which determines the extent of the contamination.

BELCO and the EPA argue that at the time of Central Labs testing, no scientific evidence showed there was a need to test. This is plainly contrary to the scientific facts of the case. The facts demonstrate that, one year after the EPA's CD driven testing by BELCO of the monitoring wells (which initially found no NAS-T), the monthly testing did in fact discover levels of NAS-T. Despite these scientific confirmations of spreading contamination, the EPA broadly described the positive tests with a brushstroke of "multiple non-detects and... low numbers found" and issued their COC, relieving BELCO of their monthly testing responsibility.

BELCO argues that this proves that the testing by Central Labs was unnecessary. With the EPA broadly misconstruing the results of the testing, it seems more likely that the testing was actually very necessary. The District Court determined that "all indications are that FAWS conducted the tests at the time to try to prove liability of BELCO." (pg. 9) This was an unfortunate error. The parties agree that "the BELCO facility is the only possible source for

NAS-T." (pg. 9) As such, FAWS is not trying to 'prove' BELCO's liability – BELCO's liability has already been proven. FAWS testing was done to determine the extent of the contamination. After their testing demonstrated that NAS-T was moving subterraneously southward into Fartown residents' private wells, FAWS initiated this reasonable action to recover the costs associated with this vital testing. The tests done by FAWS were 'necessary' response costs based on the factors distinguishing this case from the caselaw, in that FAWS testing was not 'duplicative' and there was a sufficient 'nexus' between the response costs and an actual effort to respond to environmental contamination.

II. FAWS Response Costs were Consistent with the National Contingency Plan.

For a private party plaintiff to recover under CERCLA, they must demonstrate that their response costs were "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Notwithstanding this statutory requirement, courts have found that initial investigative costs may be recovered from 'covered persons' within § 9607(a)(4)(B), noting that "the detailed NCP provisions governing other response actions cannot reasonably be applied to preliminary monitoring and evaluation of a release." *Artesian Water Co. v. Gov't of New Castle Cnty.*, 659 F. Supp. 1269 at 1294 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988). Furthermore, "a plaintiff seeking investigative costs incurred prior to the response action must claim those 'initial' costs and present 'evidence showing divisible amounts of damages." *Pierson Sand & Gravel, Inc. v. Pierson Tp.*, 89 F.3d 835 at 6 (6th Cir. 1996), quoting *County Line Inv. Co. v. Tinney*, 933 F.2d 1508 at 1515 (10th Cir. 1991). The *Pierson* court points out, however, that "[o]nly 'initial' or 'preliminary' investigative costs may be recovered despite failure to comply with the NCP. Any

costs incurred *after* [emphasis added] a cleanup has begun are recoverable only if incurred consistent with the NCP." *Pierson Sand & Gravel, Inc.*

The court in *Artesian* was asked on a summary judgement motion whether certain response actions were consistent with the NCP. As a threshold matter, the defendants conceded that the consistency with the NCP requirement for recovery of response costs does not include "preliminary monitoring and evaluation of a release." *Artesian Water Co. v. Gov't of New Castle County* at 1294. The court then granted a partial summary judgement in favor of the plaintiffs, limited only to recovering expenses incurred in monitoring and evaluating the extent of the released hazardous materials. In *Pierson*, the court looked to previous case law. Relying on *County Line Inv. Co.*, the court said that while the plaintiffs may have incurred the type of investigative costs recoverable despite noncompliance with the NCP, they "made no separate claim for them and failed to present any separate evidence...of those costs." *Pierson Sand & Gravel, Inc.* at 6. When the plaintiffs thereafter attempted to show costs, the court, for procedural and efficiency reasons based on the posture of the case, declined.

The investigative costs of FAWS mimic those granted by the court in *Artesian*. Artesian incurred "$60,000 for monitoring and evaluating the impact…of the release of hazardous substances from the Site," which the court deemed recoverable notwithstanding their noncompliance with the NCP. Here, FAWS seeks to recover "$21,500 for the testing and analysis" of 75 private wells in Fartown, expenses incurred in evaluating the impact of the NAS-T release from the BELCO facility. Because the EPA had refused to compel BELCO to test within Fartown, when Central Labs conducted a widespread test of Fartown wells, it was done in a preliminary manner to evaluate the extent of the NAS-T plumes migration. Based on the

precedent found in other circuit cases, FAWS investigative costs paid to Central Labs should be deemed recoverable notwithstanding their noncompliance with the NCP.

Like the plaintiffs in *Pierson* and *Artesian Water Co.*, FAWS contracted Central Labs to conduct preliminary *monitoring*, necessarily to *evaluate* the extent of the NAS-T plume's migration into Fartown ("testing and analysis." (pg. 7). However, unlike the plaintiffs in *Pierson*, and consistent with *Artesian*, FAWS did make these specific costs a separate claim. (pg. 7). FAWS did present "evidence showing divisible amounts of damages." *Pierson Sand & Gravel, Inc.* at 6. FAWS comprises of 100 members, and Central Labs was contracted by FAWS and 85 other private individuals. FAWS clearly denotes the cost as being $21,500; these damages are easily divisible.

In summation, the response costs incurred by FAWs and the private individuals in contracting with Central Labs are both "necessary" and "consistent with the National Contingency plan" under 42 U.S.C. § 9607(a)(4)(B). The response costs were 'necessary' because they were not duplicative of any ongoing EPA actions, and because they related to an "actual effort to respond to environmental contamination" in that they were done to compel BELCO to expand its testing into Fartown. While BELCO argues that the response costs were unnecessary, citing the EPA's COC, the COC paints the results of BELCO's monthly testing with a broad brush, despite positive NAS-T results indicating its migration. The presence of NAS-T in monitoring wells just half a mile from Fartown should have led the EPA to direct BELCO to conduct more testing. It did not, and the COC relieved BELCO of any monitoring responsibilities. Thus, Fartown residents undertook their own response costs of investigating the extent of the NAS-T plume, which was done under a broader umbrella of attempting to respond

to a release of hazardous substances. These response costs were vitally "necessary" under 42 U.S.C. § 9607(a)(4)(B) and should be recoverable.

Furthermore, notwithstanding the compliance with the NCP, FAWS response costs are recoverable under §9607(a)(4)(B) based on the caselaw at present. Various circuits have found that "preliminary monitoring and evaluation of a release" do not need to comply with the NCP to be recoverable, if they are filed as a separate claim and show divisibility of damages. FAWS complied with these exclusionary requirements; first, the testing was clearly for the purposes of preliminarily monitoring and evaluating the NAS-T release, specifically the extent of its migration south from the BELCO facility into Fartown. Secondly, FAWS filed this recovery action separate from its other claims and provided the numbers necessary to make divisibility of damages easy. FAWS response costs are 'consistent' with the NCP in their utilization of an exclusion adopted through binding Circuit Court decisions to allow for preliminary investigative costs to be recoverable notwithstanding compliance with the NCP. The district court erred in finding that the response costs were not 'necessary;' the decision should be overturned and FAWS response costs be found recoverable under 42 U.S.C. §9607(a)(4)(B).

B. **The District Court Did Not Err in Upholding the EPA's Determination That the ERA Constitutes an ARAR and Therefore Reopening of the Consent Decree Was Proper.**

The District Court properly upheld the EPA's determination that the new Environmental Rights Amendment (ERA) constitutes an Applicable or Relevant and Appropriate Requirement (ARAR) because the ERA is properly promulgated, more stringent than federal standards, and legally applicable or relevant and appropriate. The Consent Decree between BELCO and the EPA allows reopening of the Consent Decree where "new, more stringent Regulatory Standards

are established that the clean-up plan does not satisfy." R. at pg. 4. The primary question is whether the ERA properly meets the requirements of an ARAR. When examining this issue, the Court notes that 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.*, 65 S.Ct. 161 (1944). Because the ERA meets all the requirements to constitute an ARAR, FAWS respectfully asks this Court to uphold the district court's ruling that the ERA is an ARAR, permitting EPA to reopen the Consent Decree.

I. The ERA Meets All Standards Necessary to be and ARAR

CERCLA requires that a remedial action must comply with more Applicable or Relevant and Appropriate Requirements (ARARs). *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1418 (6th Cir. 1991). A state environmental requirement constitutes a state ARAR if it is (1) properly promulgated, (2) timely identified, (3) more stringent than federal standards, and (4) legally applicable or relevant and appropriate. *Id*. at 1440. FAWs and the EPA contend that the New Union Environmental Rights Amendment (ERA) is an ARAR, while BELCO argues that the ERA is not an ARAR because it is not properly promulgated, more stringent than federal standards, not legally applicable, and not relevant or appropriate. BELCO does not contest that the ERA was timely identified. R. at pg. 10-11. The ERA was properly identified as an ARAR because the ERA is properly promulgated, more stringent than federal standards, and legally applicable or relevant and appropriate.

II. The ERA was Properly Promulgated

CERCLA requires that an ARAR must be properly promulgated. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991); 42 U.S.C. § 9621(d)(2)(A)(ii). EPA Interim Guidance defines promulgated as "laws imposed by State legislative bodies and regulations developed by State agencies that are of general applicability and are legally enforceable." 52 Fed.Reg. 32495, 32498 (Aug. 27, 1987); *State of Ohio v. U.S. E.P.A.* 997 F.2d 1520, 1527 (D.C. Cir. 1993); *United States v. Akzo Coatings of Am.*, 949 F.2d at 1440.

a. **The ERA is Generally Applicable**

An ARAR must be generally applicable on its face to be an ARAR. *State of Ohio v. U.S. E.P.A.*. 997 F.2d 1520, 1528 (D.C. Cir. 1993). "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1871 (2021). However, "if such generally applicable standard is not applied consistently, then the standard may be waived..." *State of Ohio v. U.S. E.P.A.*, 997 F.2d at 1528. In Garamendi, the court contrasts generally applicable "blue sky laws" with a regulation that "effectively singles out" only policies by European companies meeting specific requirements. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425-26.

The ERA is generally applicable because it provides a right enforceable against any person responsible for discharge of contaminants or pollutants into water, rather than specifically singling out any one polluter or site for regulation. N.U. CONST. art. I, § 7. The ERA has no mechanism for exemptions, providing no opportunity for discretionary application of the law. *Id*. Additionally, there is no indication that the ERA has been applied inconsistently. Unlike the

blue-sky laws in Garamendi, this ERA is generally applicable because it does not single out any one type of party.

b. **The ERA is Legally Enforceable**

A law is legally enforceable where it is not unconstitutionally vague. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1441 (6th Cir. 1991). A law is not unconstitutionally vague when it provides "with sufficient definiteness that ordinary people can understand what conduct is prohibited and does not encourage arbitrary and discriminatory enforcement." *Id*. at 1441. "[A] facial challenge [to a statute asserted to be constitutionally vague] is ineffective if the statute has a 'plainly legitimate sweep.'" *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *United States v. Comstock*, 627 F.3d 513, 518 (4th Cir.2010)). A standard need not provide "specific numerical standards, or any implementing regulations at all," to be enforceable. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1442 (prohibiting discharge into waters of state any substance 'which is or may become injurious' to public health or other concerns). Though not controlling, the Michigan Court of Appeals has held the standard of "odor" in agency rules governing landfill location to not be impermissibly vague. *Michigan Waste Sys. v. Department of Natural Resources*, 147 Mich.App. 729, 739–40, 383 N.W.2d 112 (1985).

Similar to the anti-degradation law in Azko, the ERA is not impermissibly vague because its grant of a general right to water free of contaminants caused by humans fairly warns that all persons are prohibited from discharging a substance that causes water to be *not* clean or the environment to be *not* free of contaminants. The broad grant of the right to clean water and a healthful environment "free from contaminants and pollutants caused by humans" is a plainly legitimate sweep over all discharge of contaminants and pollutants into water. The ERA is

sufficiently broad as to not encourage arbitrary or discriminatory enforcement. Additionally, the ERA's requirement of an environment "free from contaminants and pollutants caused by humans" is far easier for the ordinary person to understand than the consideration of odor as a factor in landfill location.

IV. The ERA is More Stringent Than Federal Standards

To constitute an ARAR, a standard must be more stringent than federal standards in regulating discharges or cleanup requirements. "Where no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." Proposed Rule, 53 Fed.Reg. at 51435. In Akzo, Michigan's broad antidegradation law, which provided that the quality of ground water in all usable aquifers shall not be degraded from local background ground water quality as the result of a discharge, was more stringent than specific federal standards providing minimal standards. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1443 (6th Cir. 1991).

The ERA is more stringent than federal standards because it creates a broader, fundamental right to clean water than that which exists under federal standards. Like the antidegradation law in Akzo's prohibition on degradation of background water quality, the ERA's grant of water free from contaminants caused by humans is a broad prohibition that is more stringent than minimal federal standards set by CERCLA and the Consent Decree. These federal standards can be considered minimal because the Consent Decree explicitly allows the matter to be reopened to incorporate new, more stringent state standards that are not satisfied by the existing cleanup plan. R. at pg. 4.

BELCO argues that the ERA essentially mirrors the first factor of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP): "overall protection of human health and the environment." However, the ERA goes further in mandating both clean water and a "healthful environment free from contaminants or pollutants caused by humans." N.U. CONST. art. I, § 7. Where federal standards including the NCP allowed the EPA to ignore detectable levels of NAS-T up to 10 parts-per-billion (ppb) because they are not dangerous to human health, the ERA is much broader in demanding water to be clean and the environment to be *free* of contaminants and pollutants caused by humans. Thus, the ERA is an ARAR because it is more stringent than federal standards.

V. The ERA is Legally Applicable or Relevant and Appropriate

ARARs must be legally applicable or relevant and appropriate. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

a. The ERA is Legally Applicable

Applicable requirements are standards "that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001) (citing 40 CFR 300.5). In Akzo, Michigan's antidegradation law was legally applicable because it prohibited the degradation of groundwater as a result of discharge, where a polluter's remedial action constituted discharge of toxicants into groundwater. Like Akzo's antidegradation law, the ERA prohibits human discharge that would make water not free of contaminants or pollutants. The ERA specifically addresses the circumstance of water that is not "free of contaminants or pollutants" at BELCO's CERCLA site. Because the ERA

specifically addresses the circumstance of "water free of contaminants or pollutants caused by humans," at the CERCLA site and BELCO has caused the circumstance of water *not* free of contaminants, the ERA is legally applicable to the cleanup action.

b. The ERA is Relevant and Appropriate

"Relevant and appropriate" requirements are standards that "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F3d 534, 544 (6th Cir. 2001) (citing 40 CFR 300.5). A generally applicable ARAR can be relevant and appropriate, because accompanying regulations can provide specific enforcement. *Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1527 (D.C. Cir. 1993). The NCP provides a guideline for determining whether a standard is relevant or appropriate. 40 CFR 400.300(g)(2). To determine relevance and appropriateness, the following comparisons, where pertinent, shall be made: purpose, medium, actions, variances, location, type and size, and potential use. In Akzo, the court examines the factors of environmental media (groundwater), the type of substance (injurious), and the objective of potential ARAR's (protecting aquifers from degradation) to find that the state regulation is relevant because it pertains to the conditions at the CERCLA site. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1446 (6th Cir. 1991).

The ERA must be relevant or appropriate because comparison of all pertinent factors, not just those analyzed in Akzo, suggests that the ERA is very relevant and appropriate to the CERCLA cleanup action. The purpose of the ERA is to ensure "water free of contaminants... caused by humans"; the purpose of the CERCLA action is to address water that is not free of contaminants caused by humans. The medium regulated by the ERA includes water and the

environment; the medium contaminated at the CERCLA site is water in and around the surrounding environment. The actions regulated by the ERA include discharge of contaminants into water in the environment; the remedial actions at the CERCLA site address a discharge of BECLO's contaminants into the groundwater. The type of place regulated by the ERA includes anywhere a person may enjoy clean water; the type of place affected by the release is a place where people would enjoy otherwise clean water from their private wells and the type of place affected by the CERCLA action contains the groundwater normally enjoyed. The ERA considers the widespread use of clean water by the public; the widespread use of clean water has been severely affected by the contaminants present in the water because residents can no longer drink their well water.

C. EPA's Determination that BELCO is Not Required to Install CleanStripping on Fartown's Private Wells Is Arbitrary, Capricious, and Contrary to Law.

FAWS respectfully requests this Court uphold the district court's determination that EPA's decision not to direct BELCO to install CleanStripping or another filtration system on the private wells of Fartown residents where tests show a presence of NAS-T under 10 ppb is arbitrary, capricious, and contrary to the law. The stated purpose of CERCLA is to promote the timely cleanup of hazardous waste sites and ensure the costs of that cleanup are borne by those responsible. 42 U.S.C. § 9604(a)(1). EPA's explanation of the decision runs counter to that purpose, counter to the evidence before the agency, and counter to reasonable consideration of relevant factors. As a result, it is arbitrary, capricious, and contrary to the law established by the Environmental Rights Amendment (ERA) and deserves no deference under the standard established by the Administrative Procedure Act (APA) and Supreme Court precedent

established in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), which FAWS feels should be the standard used in this case as opposed to the Chevron standard. This Court should compel EPA to reconsider its decision not to require BELCO to bear the cost of installing water filtration on any Fartown well where NAS-T is present.

I. "Clean Water" As Guaranteed by the Environmental Rights Amendment (ERA) Means Free of Any Detectible NAS-T.

Under the ERA, Fartown residents are constitutionally entitled to a "healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. By EPA's own admission, the ERA is an applicable or relevant and appropriate requirement (ARAR) under CERCLA. It is a new, more stringent Regulatory Standard that prior efforts to clean up NAS-T do not satisfy, and therefore BELCO is required to comply with it. CD § 13.3; CD § 1.12. While EPA contends that requiring water entirely free from NAS-T is inconsistent with so-called "safe" levels of pollutants allowed under federal regulatory schemes, the New Union Constitution creates a higher bar that must be complied with. EPA's failure to do so makes its actions contrary to law.

The lower court properly held that BELCO's careless discharges of NAS-T were never permissible under any regulatory scheme but rather are an illegal discharge of toxic chemicals that continue to plague our communities long after BELCO's departure. *Fartown Ass'n for Water Safety v. Better Living Corp*. at 16. EPA may be understandably cautious to order the installation of CleanStripping due to cases where their decision to furnish filtration was declared arbitrary and capricious after over 5,000 pages of administrative record showed no evidence that anyone was drinking from contaminated water. *See In re Bell Petroleum Servs*., 3 F.3d 889, 905-

6 (1993). Fartown's plight is clearly distinguished from that case, however, since NAS-T has been detected in private drinking wells that supply not only families' primary source of drinking water but also their water for bathing, dishwashing, gardening, and other household uses. In fact, EPA implicitly acknowledges that water completely free of NAS-T is an appropriate standard for consumption by Fartown's families by including the requirement of provision of monthly bottled water in the Unilateral Administrative Order (UAO). As discussed below, this is not a viable solution in the long term and water filtration to render Fartown's wells free of NAS-T is required.

II. EPA's Determination Not to Require BELCO to Install Water Filtration in Fartown is Not Entitled to Skidmore Deference.

According to controlling precedent, challenges to the remedies established in EPA orders of compliance such as EPA's UAO to BELCO fall under the Administrative Procedure Act (APA). *Sackett v. EPA*, 566 U.S. 120, 131 (2012). Section 5 U.S.C. 706(2)(A) of the APA establishes that reviewing courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004).

Additionally, while there is no controlling precedent from the New Union Federal Circuit, the Supreme Court has held that when reviewing agency informal agency decision making, deference should only be given to their interpretation of a statute to the extent that their reasoning is persuasive based on the "thoroughness evidenced in their consideration, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those factors

which give them power to persuade." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Whereas the standard of deference established by the Supreme Court in *Chevron* applies to decisions issued through the formal rulemaking process as agencies exercise their authority delegated by Congress, the *Skidmore* standard of deference applies to less formal sources of agency direction such as guidance documents, policy statements, legal briefs, etc. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-44 (1984); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This includes EPA's interpretation of the ERA as not requiring wholly uncontaminated water as expressed in their UAO excusing BELCO from installing CleanStripping in Fartown, since it was not issued through the formal notice-and-comment rulemaking process. In this case, EPA's reasoning is wholly unpersuasive and there is not "substantial evidence in the record to support EPA's decision." *United States v. Akzo Coatings of Am*., 719 F.Supp. 571, 581 (1989).

In *Genuine Parts Co. v. EPA*, the DC Circuit Court of Appeals held that EPA's decision to treat two polluted underground plumes as one aquifer for purposes of CERCLA cleanup was arbitrary and capricious because the agency relied on evidence that apparently contradicted their position. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 307 (2018). Similarly, in the case at bar EPA has ignored BELCO's detection of 5 and 6 ppb of NAS-T in the line of monitored wells closest to Fartown in January 2018, which clearly indicated that the plume of polluted water was expanding and threatening water supplies beyond the original scope of the pollution in Centerburg. Instead, EPA has relied on other tests that came back negative, completely disregarding the positive results above and those found in tests funded by FAWs in March 2020. EPA cannot simply "ignore evidence undercutting its conclusion" when that evidence is on the

record. *Genuine Parts Co*. at 308. Indeed, when new evidence is available it is not arbitrary or capricious for EPA to change its prior position as to the appropriate remedy. *United States v. Akzo Coatings of Am*., 719 F.Supp. 571, 586-7 (1989).

III. The Harm of Even Low Levels of NAS-T Outweighs the Burden of Installing Filtration on BELCO.

BELCO alleges that the infiltration of their toxic chemical NAS-T into Fartown residents' private property is not harmful. This bold assertion is clearly contradicted by the abundant testimony of Fartownians enduring sour tastes in their drinking water and stale smells in their showers and other potable water uses even when the chemical is present in low levels, as evidenced in FAWS's tort claims of nuisance. Because these nuisances are constant and perpetual, the negative psychological and potential long-term health effects of consumption and exposure to this toxic chemical should not be underestimated. The fact that NAS-T is present in even more life-threatening concentrations in Centerburg does not mean BELCO can escape its responsibility for harming the health, enjoyment, and property values of Fartownians. EPA likewise acknowledges the harm caused by NAS-T in its reopening of the consent decree and requiring BELCO to provide bottled water to wells between 5 and 10 ppb and to sample 50 private wells selected by EPA each month.

Additionally, BELCO has not presented any evidence that CleanStripping is the only or cheapest viable option for effective water filtration. Even if it did, in evaluating the cost effectiveness of CERCLA remedies that are ARAR-compliant, courts consider the overall effectiveness of remedial alternatives compared to the cost, and "CERCLA does not mandate the selection of the most cost-effective cleanup alternative." *United States v. BNSF Ry. Co*., 2020

WL 9048798 (2020). BELCO has failed to show that the cost of installing water filtration on each Fartown well contaminated by NAS-T would be less than the cost of providing monthly bottled water to those families in perpetuity, or that bottled water is an ARAR-compliant remedy. In fact, a remedy can be ruled appropriate even if the costs are so exorbitant that there is a risk EPA will not be able to recover all the costs from the liable parties. *U.S. v. Akzo*, 719 F.Supp. at 587-88. In this case, BELCO has no legal argument that it should not bear the cost of installing CleanStripping on all wells contaminated by NAS-T.

IV. Bottled Water is an Insufficient Remedy for Fartown.

EPA's choice of monthly bottled water as a remedy for wells with NAS-T between 5 and 10 ppb and of no remedy for wells evidencing the presence of NAS-T under 5 ppb is insufficient. Aside from the environmental unsustainability of bottled water generally, requiring BELCO to provide this remedy keeps the company permanently enmeshed with the community, and Fartown's citizens permanently dependent, rather than empowering residents with a long-term solution under their control. Indeed, embedded in CERCLA is a preference for remedies that are permanent. *United States v. Akzo Coatings of Am.*, 719 F.Supp. 571, 576 (1989).

As recently as 2021, the First Circuit Court of Appeals has upheld EPA's determination in a consent decree that a polluter must install water filtration on a groundwater source so contaminated that it might never be a viable source of potable water, overruling a lower court that previously found this determination arbitrary and capricious. *See Emhart Indus. v. United States Dep't of the Air Force*, 988 F.3d 511, 523-4. If such extensive and expensive measures

can be required for groundwater that *might* serve as drinking water, then surely water filtration is an appropriate remedy for private well water that already sustains an entire town.

D. The District Court Must Exercise Its Discretion to Dismiss FAWS' Pending State Tort Claims Without Prejudice

Under 28 U.S.C. 1367(a), district courts have supplemental jurisdiction over "pendant claims" of state law related to claims of original jurisdiction that form part of the same case or controversy under Article III of the United States Constitution. However, under 28 U.S.C. 1367(c), courts may decline to exercise supplemental jurisdiction over a state law claim if the claim raises a novel or complex issue of state law or the district court has dismissed all claims over which is has original jurisdiction. Notably, the statute does not require that both conditions be satisfied, but here both are. Accordingly, the District Court abused its discretion in refusing to dismiss FAWS' state law torts claims without prejudice.

While negligence and nuisance claims are not novel in themselves, their application under the ERA is a case of first impression in New Union, especially concerning the application of an ARAR under CERCLA. *See MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 375-76 (refusing to exercise supplemental jurisdiction over state claims concerning the intricacies of a new state regulatory scheme for medical marijuana). FAWS' claims are properly resolved by the New Union community in local state courts that need to build a body of case law concerning this new constitutional amendment.

Additionally, in some circuits the established practice is to dismiss state supplemental claims without prejudice once all federal claims have been resolved. *See, e.g. Harris v. City of Chicago*, 665 F.Supp.2d 935, 960 (N.D. Ill. 2009) (dismissing all state claims prior to trial).

Even in circuits without this policy, district courts generally insist on retaining jurisdiction over state claims only when substantial proceedings have taken place prior to dismissal of the federal claims and the remaining state law claims involve no novel legal questions, reasoning that dismissal is inappropriate if the court has expended too much effort to acquaint itself with the facts and issues of the case. *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1191-92. As in Harris, the instant case is easily distinguishable from others in which federal claims were dismissed too late in the procedural process for state claims to be efficiently moved to state court. *See Purgess v. Sharrock*, 33 F.3d 134, 138-39 (retaining supplemental jurisdiction over state claims when federal claims were not dismissed until all evidence from both sides had been presented to the jury at trial, the jury was ready to begin its deliberations, and the parties had spent several years preparing for trial, reasoning that dismissal of pendant claims at this stage would not be fair to the parties); *see also Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (exercising supplemental jurisdiction over state claims where discovery had been completed, the court had decided three dispositive motions, the case was ready for trial, and the state law claims involved settled municipal liability doctrine). By contrast, FAWS' claims involve novel questions of state law. The federal claims granting original jurisdiction in federal court where resolved at the earliest possible stage through dismissal upon motions for summary judgement. No trial date has been set, and discovery is ongoing especially with regard to expert testimony regarding appropriate damages under the state law torts claims.

Courts weigh a number of factors in determining whether to exercise their discretion in retaining supplemental jurisdiction over state claims, including "judicial economy, convenience, fairness, and comity." *Nowak*, 81 F.3d at 1191. FAWS' position is that granting its request to

dismiss its state law claims without prejudice will not harm any of these interests and indeed will further some of them. While EPA fears a ruling in state court could create inconsistencies with federal law, state courts frequently consider potential interactions with agency law in deciding whether to grant injunctive relief and are fully able to navigate the required balancing of interests. Issues governed by local law should be handled locally. Discovery is substantially incomplete with respect to FAWS;' state law claims, and in the interests of convenience and comity a state court is the appropriate fact-finder to further judicial economy and convenience to the parties. BELCO and EPA did not incur substantial expenditures of time, effort, and money in preparing for trial before their federal claims were resolved, and dismissal of FAWS' pendant claims will not cause any unfair prejudice to them at this early stage in the proceedings. In summary, BELCO's and EPA's arguments against dismissal of FAWS state claims fall flat, and this Court should find that the District Court abused its discretion in refusing to dismiss these claims without prejudice.

Conclusion

Upon the foregoing, FAWS respectfully requests that this Court remand the District Court's ruling that the costs incurred by FAWS in sampling, testing and analyzing well water samples are not reimbursable under CERCLA costs. FAWS also requests that this Court uphold the District Court's ruling that the ERA constitutes an ARAR allowing the EPA to reopen the Consent Decree. Additionally, FAWS requests this Court remand the District Court's decision to vacate as arbitrary and capricious the EPA's determination that BELCO is not required to install filtration systems. Finally, FAWS requests that this Court strike the District Court's decision to retain jurisdiction over the remaining state law tort claims as a violation of judicial discretion.