NON-MEASURING BRIEF
TEAM 42

C.A. No. 21-000123

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 Appellant, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." Further jurisdiction regarding the removal of an action to federal court is pursuant to 28 U.S.C. § 1441. The issue on appeal from the United States District Court for the District of New Union comes from the Fartown Association for Water Safety ("FAWS") seeking an interlocutory appeal from the district court's order considering the resolution of the federal law claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

FAWS appeals from the district court's order that costs incurred in sampling and analyzing FAWS members' private drinking water wells are not reimbursable under CERCLA as a response cost, and the district court's denial of its motion to dismiss the remaining state court claims and retaining supplemental jurisdiction over those claims. A notice of appeal was timely filed by FAWS pursuant to FED. R. APP. P. 4.

STATEMENT OF THE ISSUES

Issue 1

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

Issue 2

Whether the district court erred when it upheld EPA's determination that the New Union Environmental Rights Amendment (the "ERA") constitutes an Applicable or Relevant and Appropriate Requirement ("ARAR"), and, accordingly finding that the United States

Environmental Protection Agency's ("EPA") reopening the Consent Decree ("CD") based on that ARAR and ordering further remedial action under the Unilateral Administrative Order ("UAO") was proper.

Issue 3

Whether the district court erred when it determined that costs incurred by FAWS in sampling, testing and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERLCA.

Issue 4

Whether the District Court erred when it vacated as arbitrary, capricious, or contrary to law EPA's determination that Better Living Corporation ("BELCO") is not required to install filtration systems in Fartown despite the existence of the ERA.

STATEMENT OF THE CASE

I. Statement of Facts

A. The Source and Discovery of Contamination

The city of Fartown is a rural community of approximately 500 residents in the State of New Union, about two miles south of the city of Centerburg of approximately 4,500 residents. Order at 2. Fartown qualifies as an environmental justice community based on socio-economic conditions. *Id*. The Sandstone Aquifer (the "Aquifer") is an underground body of water that lies about 300 feet below both towns, moving downgradient from Centerburg to Fartown. *Id*.

In 1972, BELCO patented a sealant coating used to prevent corrosion called "LockSeal," made by combining a chemical called NAS-T and a non-toxic "activation agent." BELCO manufactured NAS-T at a factory (the "Facility" or "Site") in Centerburg from 1973 to 1998. *Id*. at 3. In the mid 1980s, NAS-T was found to be a probable human carcinogen. *Id*. In 1995, the

EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"), which incorporates a significant margin of error to ensure that level of exposure is non-toxic. *Id*. The human nose can detect NAS-T in water at concentrations as low as 5 ppb where it produces a sour smell. Order at 3.

In 2013, Centerburgers complained to the Centerburg County Department of Health ("DOH") that their water smelled sour, and in 2015, the DOH tested the public water supply determining that the water contained between 45 and 60 ppb of NAS-T. *Id*.

B. The Investigation

In March 2016, EPA and BELCO entered into an agreement that BELCO would commence an investigation of the contamination and begin providing citizens of Centerburg with bottled water. *Id*. This process, known as the remedial investigation and feasibility study ("RI/FS"), investigated the sources of the contamination, assessed health risks, environmental risks, and evaluated remedial alternatives. *Id.*

BELCO determined NAS-T entered soils from sporadic spills and from an unlined lagoon that was used to store wastewater and stormwater in the 1980s and early 1990s. *Id*. The contamination eventually migrated to the groundwater and created a plume of NAS-T in the Aquifer. Order at 3.

From July 2016 through January 2017, BELCO installed three successive lines of monitoring wells from Centerburg progressing towards Fartown, with a final five wells installed half a mile north of Fartown. *Id.* at 4. At this time, the final five wells showed no detectable amount of NAS-T and the EPA did not direct BELCO to install any additional wells. *Id*. The RI/FS recommended no remediation of the plume, but instead excavation of the soils at the Site to remediate the source and the implementation of filtration of Centerburg's water system. *Id.*

According to BELCO, remediation of the plume by pumping and treating the water would take decades and cost over $45 million, and therefore was not feasible. *Id*.

In June 2017, based on public comments received after the EPA issued a Proposed Plan, the EPA selected a clean-up plan known as a Record of Decision ("ROD") and brought a cost recovery action against BELCO ("BELCO Action"), immediately after which BELCO and the EPA entered and filed a CD. *Id*. Pursuant to the CD, BELCO agreed to design and implement the remedy in the ROD, which the district court approved and entered on August 28, 2017. Order at 4. No citizen of Fartown or Centerburg objected to the RI/FS, Proposed Plan, or the entry of the CD. *Id.*

Upon completion of the cleanup, EPA would issue BELCO a Certificate of Completion ("COC"). The CD dictates upon issuing the COC that EPA is not permitted to order BELCO to further remediate the Site without the EPA "reopening" the CD. *Id.* There are two grounds for which the EPA can reopen the CD where "(1) 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) 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, among other things, ARARs under CERCLA. CD, § 1.12.

Following the CD, BELCO (1) installed and maintained a water filtration system known as "CleanStripping" to remove NAS-T at Centerburg's public water well; (2) excavated soils contaminated with NAS-T around the abandoned lagoon at the Site; and (3) conducted monthly sampling of the monitoring wells installed during the investigation. Order at 4. The CD did not require further remediation of the plume. *Id.*

In September 2017, CleanStripping was installed on Centerburg's public water well and in December 2017, the soil excavation was completed. *Id. a*t 5. In January 2018, two detections of NAS-T in the final line of wells closer to Fartown were found at levels of 5 ppb and 6 ppb. *Id*. Tests continued without further detection in the final line of wells. Q&A 3. Nevertheless, the EPA issued the COC to BELCO in September of 2018. Order at 5.

C. Contamination of Fartown's Private Wells

Citizens of Fartown submitted sworn testimony to the district court that, since 2016, they noticed the water from their private wells began to smell "off". *Id*. When they became aware of BELCO's investigation and the CD, they immediately requested DOH to sample and test their own drinking water for NAS-T contamination. *Id.* In February 2019, the DOH tested five of these private wells but did not find NAS-T. *Id*. In May 2019, Fartownians asked the EPA to order further testing of the wells, but the EPA declined citing the non-detects. *Id*.

In December 2019, approximately 100 Fartownians formed FAWS and retained Central Laboratories, Inc. ("Central Labs") to test their private wells, paying Central Labs $21,500 for the testing. *Id*. Central labs took three samples each from 75 private wells, and in March 2020, found varying results: 120 wells showed no detectable levels of NAS-T, 51 showed concentrations of 1 to 4 ppb, and 54 showed concentrations of 5 to 8 ppb. Order at 5. In May 2020, FAWS wrote to the EPA again, citing the results and asking them to reopen the CD, order further investigation, and remediate the plume of contamination. *Id*. On June 10, 2020, the EPA responded by declining to take action, citing the low levels of NAS-T and limited reopener provisions in the CD.

On November 3, 2020, the citizens of New Union passed the ERA. *Id.* This amendment was passed by the legislature, signed by the governor, and included in the 2020 election as a

ballot measure. *Id.* The ERA reads: "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7.

D. Reopening the Consent Decree

In January 2021, the EPA wrote to the New Union Department of Natural Resources ("DNR") to inquire whether the ERA constitutes an ARAR under CERCLA. Order at 6. The DNR responded stating, "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is no inconsistent with any state of federal regulations." *Id*. New Union does not have a State Memorandum of Agreement regarding ARARs.

On March 20, 2021, the EPA deemed the passage of the ERA, combined with the Central Labs results, to be a change in the Regulatory Standards under the CD, and reopened the CD. *Id*. The response actions demanded by the EPA included sampling private wells in Fartown, supplying bottled water to any Fartownian whose well returned positive results for NAS-T, and continued monitoring of the wells. *Id*. EPA held a conference to get BELCO to agree to these tasks, but BELCO challenged EPA's demand and argued that the ERA did not legally constitute as an ARAR, therefore the CD could not be reopened. *Id.*

FAWS submitted a written request for the EPA to order BELCO to install CleanStripping at each residential well that tested positive for NAS-T or take remedial actions to remove NAS-T entirely from their water supply. *Id.* The EPA declined this request, citing that no wells had been found to contain NAS-T above the HAL. Order at 6.

On June 24, 2021, the EPA issued the UAO, directing BELCO to: (1) sample 50 private wells selected by the EPA each month; (2) for any well that shows NAS-T concentrations between 5 ppb and 10 ppb, supply household with bottled water until testing revealed 4 ppb or

lower; and (3) for any well showing concentrations exceeding 10 ppb, install CleanStripping filtration systems on the well. *Id.*

BELCO refused to comply with the UAO, so the EPA began supplying water to Fartownians whose well tested positive for NAS-T over 5 ppb and monitoring those wells monthly. *Id*. at 7. EPA's sampling showed 55% of wells having non-detect levels for NAS-T, 25% in the 1–4 ppb range, and 20% in the 5–8 ppb range. *Id*.

II. Procedural History

On August 2, 2021, EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and additional penalties for BELCO in violation of the UAO. *Id.* BELCO answered arguing the ERA could not be an ARAR, the CD could not be opened, and the UAO had no legal foundation. *Id*.

On August 30, 2021, FAWS filed a motion to intervene in the BELCO Action to assert a claim against the EPA which the court granted on September 24, 2021. Order at 7. In the motion, FAWS challenge the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) ("APA"), because it failed to compel BELCO to providing CleanStripping systems to FAWS' members' private wells. *Id.*

On the same day, FAWS and individual plaintiffs from Fartown filed a separate action against BELCO in the district court ("FAWS Action"). *Id.* The first cause of action was a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on testing the wells. *Id.* FAWS also complained BELCO's contamination of the Aquifer constituted negligence and a private nuisance under New Union State law. *Id.* FAWS asked the Court to order BELCO to: (1) pay its response costs; (2) install CleanStripping on their private wells that test positive for NAS-

T; (3) remediate the Sandstone Aquifer; (4) pay FAWS damages for the loss of use and enjoyment of their property and diminished property values; and (5) pay punitive damages. *Id.*

All members of FAWS reside in New Union, BELCO is a Delaware corporation with their principal place of business in New Union. *Id.* The district court exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. Order at 7. The Court consolidated the BELCO Action and FAWS Action at the parties' joint request. *Id.* FAWS expressly stated in its complaint that it brought the FAWS action to the district court due to the pendency of the BELCO Action, the Court's jurisdiction over the CERCLA claims, and the desire to avoid any contentions of claim splitting. *Id.* FAWS additionally made clear that it intends to seek dismissal of its state law claims once the CERCLA claims are resolved so it can litigate in state court. BELCO answered in the FAWS Action and the parties completed discovery on the CERCLA claims only. *Id.* at 8.

On December 30, 2021, all three parties moved and cross-moved for summary judgement on the CERCLA claims, with FAWS additionally moving to dismiss any remaining state law claims without prejudice. *Id*. BELCO and EPA opposed FAWS' motion to dismiss. *Id.*

The district court granted summary judgment in favor of BELCO with respect to reimbursement of FAWS's expenses in testing; in favor of EPA with respect to its determination to reopen the Consent Decree and issue the UAO; and in favor of FAWS with respect to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells. The Court denied FAWS' motion to dismiss the remaining state law claims. *Id. a*t 15.

SUMMARY OF THE ARGUMENT

The court should affirm summary judgment of the district court's decision to uphold EPA's determination that the ERA constituted an ARAR and should affirm the ruling vacating EPA's determination that BELCO is not required to install filtration systems in Fartown as arbitrary, capricious, or contrary to law. Additionally, the court should reverse the ruling of the district court determining costs incurred by FAWS in testing their private drinking water wells are not reimbursable response costs under CERCLA and should reverse the ruling in retaining jurisdiction over state law tort claims after resolving the federal claims.

First, the district court improperly retained jurisdiction over FAWS' remaining state tort law claims after resolving the federal claims. The district court improperly denied remand for the tort claims to state court because the claims have the potential to interfere with decisions made in the BELCO Action and EPA's continued oversight at the Site. This theory contradicts the plain language of §113(h) of CERCLA and ignores the Supreme Court's holding in *Atlantic Richfield Co. v. Christian* barring federal courts from reviewing all legal challenges to ongoing CERCLA cleanups. Additionally, after resolving the federal claims with summary judgement, the district court should have remanded the tort claims since they involve "novel and complex" issues of state law and advanced discovery has not even started on these claims.

Second, the district court properly exercised its discretion in determining that the ERA, as a constitutional amendment establishing a fundamental right, constitutes an ARAR because it was properly promulgated, establishes a fundamental right more stringent than any present federal standards, and applies particularly to the contamination of NAS-T as an unregulated contaminant.

Third, the district court erred when finding that FAWS' costs were not reimbursable because such initial, investigative sampling, testing and analysis were necessary to determine the ultimate threat posed by the NAS-T plume in the Aquifer. Despite the EPA no longer investigating the spread of NAS-T contamination, FAWS could conduct assessments that could be deemed necessary if closely tied to the actual, and eventual cleanup. FAWS' investigation costs were closely tied to the actual cleanup because the costs were not to enrich FAWS members' properties or for litigation purposes, but were instead for the purpose of revealing a possible need for eventual cleanup action. FAWS' investigations resulted in significantly benefitting the entire NAS-T cleanup efforts, and therefore should be deemed necessary.

Finally, FAWS contends that the EPA's UAO should compel BELCO to install CleanStripping on residential wells in Fartown testing below 10ppb. The EPA has determined the ERA as an ARAR thus FAWS agrees with the district court's ruling that the agency's failure to do so is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 496–97 (2004).

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The Court of Appeals applies a de novo standard of review to a district court's grant of summary judgment and construes the evidence in the light most favorable to the non-moving party. *See, e.g.*, *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 117 (2d Cir. 2010). Summary judgment is appropriate when the non-moving party is unable to show a genuine issue of material fact. FED. R. CIV. P. 56(c).

ARGUMENT

I. The District Court Erred in Retaining Jurisdiction of FAWS' Remaining State Law Tort Claims Because § 113(h) Bars Jurisdiction, The Claims Raise "Novel and Complex" Issues of State Law, and Common Law Factors Weigh in Favor of Remand.

A. §113(h) bars federal courts from reviewing challenges to CERCLA cleanup plans.

The district court erred in reasoning that because FAWS' tort claims, "have the potential to interfere with decisions made in the BELCO Action and EPA's continued oversight at the Site" the court should retain jurisdiction over the claims. Order at 15. FAWS has sought injunctive relief in connection with its tort claims, including an injunction compelling BELCO to remediate the Aquifer, going beyond EPA's own cleanup plan of filtration. The remedies sought by FAWS present a challenge to the remedial actions under the Consent Decree and therefore §113(h) of CERCLA, addressing the jurisdiction of federal courts in reviewing remedial challenges, must be considered.

§113(b) of CERCLA provides federal district courts with "exclusive original jurisdiction over all controversies arising under" CERCLA, and §113(h) strips federal courts of jurisdiction "to review any challenges to removal or remedial action," 42 U.S.C. § 9613(b), (h).

The district court contradicted §113(h) when it held the injunctive relief compelling BELCO to remediate the aquifer gave it reason to retain jurisdiction because the tort claims are challenges to remedial actions under the Consent Decree. When relevant tort claims arise under state law and not CERCLA, state courts have jurisdiction to review clean-up plans stricter than the EPA's. The Supreme Court further clarified this rule in *Atlantic Richfield Co. v. Christian* when it held a federal court in Montana must remand state tort claims seeking injunctive relief to Montana state courts. In *Atlantic,* landowners near the site of a former copper smelter, which the EPA had ordered to be cleaned up under CERCLA, brought action against the site owner

asserting tort claims for trespass, nuisance, and strict liability seeking restoration damages for a plan that went beyond the EPA's own cleanup plan. *Atlantic Richfield Co v. Christian*, 140 S. Ct. 1335, 1342 (2020). The court considered whether the common law claims for restoration, which conflicted with the EPA's own remedy, were jurisdictionally barred challenges under 42 U.S.C. § 9613 of CERCLA. *Id.* at 1364. The court found, since tort claims arise under state law and not CERCLA, that state courts have jurisdiction to review challenges to EPA remedies. *Id.* at 1347.

In this case, the common law claims arise under New Union state law, not CERCLA. Like the Montana landowners' remediation plan in *Atlantic*, FAWS injunction seeking remediation of the Aquifer goes beyond the EPA's own cleanup plan, and § 113(h) removes federal court jurisdiction over all cleanup challenges and gives the New Union state courts the right to retain jurisdiction.

As the *Atlantic* court aptly stated: "CERCLA sought to add to, not detract from, state law remedial efforts. It endorsed a federalized, not a centralized, approach to environmental protection." *Id*. at 1367. Congress did not intend CERCLA to strip states of their sovereign ability to implement their own cleanup plans, but rather to enhance state efforts. *Id*. By retaining jurisdiction over the tort claims, the court is doing exactly what CERCLA did not intend by stripping New Union of their sovereign ability to implement their own remedial plans.

B. ERA may substantially alter "novel and complex" tort claims.

The ERA states that citizens of New Union have a right to "clean water . . . free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. Read plainly, the ERA prohibits any amount of NAS-T in drinking water, not just an amount below the HAL. The ERA, is intended to cover any unregulated, harmful contaminants caused by humans. S. REP. NO. A02137, at 10 (N.U. 2019) [hereinafter Senate Report]. The courts of New Union will need to

interpret the ERA when analyzing the tort claims to determine what duties the ERA imposed on public officials, citizens, and corporations. Analyzing FAWS's state law claims under the ERA will make it an issue of first impression. *See Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir. 1997) (concluding an issue was novel, because it involved interpretation of the state constitution and a new state statute).

Courts have considered claims to be novel and complex when they address issues of first impression or of constitutional magnitude. *See, e.g.*, *Fielder v. Credit Acceptance Corp*., 188 F.3d 1031, 1037–38 (8th Cir. 1999) (affirming a district court's decision to decline to exercise jurisdiction under § 1367(c)(1) when the claims involved "complex substantive and remedial issues of first impression"). The *Fielder* court held any issues of state law that state courts have yet to provide any guidance on should not be resolved in federal court. New Union has not had the chance to interpret the ERA in case law and like *Fielder*, the district court has no guidance from New Union case law.

C. The weight of judicial economy, convenience, fairness, and comity must be properly balanced.

The district court improperly weighed the common law factors of judicial economy, convenience, fairness, and comity because it considered how much work went in to resolving the federal claims instead of recognizing that the state claims are still in the early stages of litigation. In determining whether a district court improperly refused to relinquish jurisdiction over pendent state law claims, courts look to the statutory factors set forth by 28 U.S.C. § 1367(c), and to the common law factors. *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). The Supreme Court recognized these common law factors as "judicial economy, convenience, fairness, and comity" and asserted these should be weighed at every stage of litigation. *City of Chicago v. Int'l*

Coll. of Surgeons, 522 U.S. 156, 173 (1997). Courts have used applied factors in a balancing test to determine whether district courts abused their discretion. *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008).

First, judicial economy and convenience favor remand to New Union's state courts. Courts have retained jurisdiction of state claims after federal claims have been dismissed when discovery was completed on the state claims. *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (discovery was completed, the case was ready for trial, and the state law claim involved settled law). Expert discovery on FAW's state law claims has not started. Additionally, discovery on state law claims has not begun, so remand would not cause any financial inconvenience to the parties because they would not have to duplicate any of their previous efforts or expenses. *See Mendoza*, 532 F.3d at 347. Additionally, all the witnesses and evidence will be in Centerburg and Fartown.

Second, fairness weighs in favor of remand to state court. FAWS expressly stated in its complaint and motions that it brought the FAWS action due to the pendency of the BELCO Action and to avoid any contentions of claim splitting. Order at 7. FAWS has been clear that it intended to seek dismissal of its tort claims once the CERCLA claims were dismissed. *Id*. It would also be unjust to New Union for the federal government to attempt to interpret New Union's constitution rather than the state itself.

Finally, the factor of comity points towards remand. The doctrine of comity urges courts to, "defer action on causes properly within the court's jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Rhines v. Weber*, 544 U.S. 269, 274 (2005). Comity demands that the "important interests of federalism" be respected by federal courts, which are

courts of limited jurisdiction and "not as well equipped for determinations of state law as are state courts." *Mendoza*, 532 F.3d at 588–89. Again, the federal CERCLA claims were resolved. *See Carnegie–Mellon*, 484 U.S. at 351 (when the federal claims are eliminated early in litigation the district court has "a powerful reason to choose not to continue to exercise jurisdiction").

In conclusion, the district court abused its discretion in retaining jurisdiction because the federal claims were resolved, discovery hasn't begun for the tort claims, the claims involve novel and complex issues of state law, and § 113(h) bars jurisdiction reviewing any challenges to remedial plans.

II. The ERA Constitutes an ARAR Because it was Properly Promulgated, is More Stringent than Federal Standards, and Applies to NAS-T Contamination.

The district court properly exercised its discretion in determining that the ERA, as a constitutional amendment establishing a fundamental right, constitutes an ARAR because it was properly promulgated, establishes a fundamental right more stringent than any present federal standards, and applies particularly to the contamination of NAS-T, which is not regulated under the Safe Drinking Water Act. Order at 3. The district court opinion regarding EPA's decisions for hazardous waste concerns, such as determining an ARAR, is reviewed under an arbitrary and capricious standard. 42 U.S.C. § 9613; *see United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1425 (6th Cir. 1991).

For a state environmental standard to constitute an ARAR, it must be "(1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." *Akzo*, 949 F.2d at 1440 (6th Cir. 1991); 42 U.S.C. § 9621(d) (the fourth element, "timely identified," is undisputed in this case). The district court properly gives deference to EPA's interpretation of an ARAR under CERCLA "according to its

persuasiveness." *United States v. Mead Corp.*, 533 U.S. 218, 219–20 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Although EPA's interpretation of determining ARARs has been suggested for some deference under the *Chevron* framework, because EPA's actions here are not under formal rulemaking, but rather for an active remediation, a modified deference standard stipulated under *Mead* should be imposed. *See United States v. Fort Lauderdale*, 81 F. Supp. 2d 1348, 1351, n.5 (S.D. Fla. Dec. 28, 1999); *see also United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1235–36 (9th Cir. 2005) ("we impose a modified deference standard affording respect to the EPA's informal interpretations"). Regardless of whether *Chevron* is determined to be relevant, the current interpretations are not ambiguous because they have largely been regulated and enforced, which is detailed in this section. For EPA's interpretation to be "persuasive," the court can weigh 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*, 533 U.S. at 219.

A. The ERA is properly promulgated because it has general applicability and is sufficiently specific.

The district court correctly determined that the ERA is properly promulgated because it is imposed on all citizens of New Union and provides fair warning and sufficient definiteness of what chemicals or substances are prohibited. "Promulgated" has been interpreted and enforced to mean "standards [that] are of general applicability and are legally enforceable." 40 C.F.R. § 300.400(g)(4); *see Ohio v. EPA*, 997 F.2d 1520, 1527 (D.C. Cir. 1993).

Beyond state legislatures and governor ratification weighing into the enforceability of the ERA, a standard is specific enough to be enforced if there is a reasonable understanding of what conduct, or in this case, contaminant, is prohibited. *See Colten v. Kentucky*, 407 U.S. 104, 110

(1972); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For example, in *Akzo*, the disputed state standard stipulated that it would "be unlawful . . . to discharge . . . any substance which is or may become *injurious* to the public health, safety, or welfare . . . ." *Akzo*, 949 F.2d at 1440 (emphasis added). The court held that such a standard was "sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited." *Id.* at 1441 (quoting *Colten*, 407 U.S. at 110). The court explained that even though the meaning of what was "injurious" may have changed over time (since 1929), due to the need to govern a wide range of conduct, vagueness challenges are rejected for laws prohibiting actions of "misconduct." *Id.*

Similarly, in this case, the ERA is written to govern a wide range of conduct, which it would classify as misconduct, specifically concerning "contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. The right to be "free" from such contaminants and pollutants, although far-reaching, is sufficiently specific particularly when reviewing the contamination of NAS-T. *Id.* BELCO knows of NAS-T's toxicity to humans, so the ERA, as an amendment regarding contaminants, reasonably puts BELCO on notice that the ERA will regulate NAS-T contamination. Furthermore, the legislature discussed "free" as meaning "objectively perceived as 'clean'" with "clean" meaning "healthful[, or not harmful to consume,] to human beings . . . [and] our fellow creatures in the environment." Senate Report, at 5–6. The legislature also intended, "as with all fundamental rights," for it to be "self-executing" without "further definition in regulation or statute." *Id.* at 7. Such a novel amendment, that seeks to codify a fundamental right and seeks to protect it from a wide range of harmful conduct, should be allowed lenience as it was intended, especially in a case where the contaminant in question is undisputedly harmful.

B. The ERA is more stringent than federal standards because it establishes a fundamental right covering unregulated contaminants.

The district court properly determined that the ERA is more stringent than federal standards because it establishes a fundamental right that covers unregulated contaminants, such as NAS-T. A state ARAR has been considered more stringent "[w]here 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[.]" National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988) (codified at 40 C.F.R. pt. 300). Furthermore, one of the authors of CERCLA's ARAR section, when debating the meaning of "more stringent," explained that it "includes any State requirement where there is no comparable Federal requirement." 132 CONG. REC. S28,426 (Oct. 3, 1986) (statement of Sen. Mitchell).

In this case, there is no federal ARAR that regulates NAS-T, whereas the ERA, as a right, is intended to cover unregulated, harmful contaminants. Senate Report, at 10. The ERA further goes beyond the common CERCLA "protection of human health and the environment" by providing for water that is "free" from contaminants rather than "safe" levels that may still contain, and not be "free" of contaminants, as exemplified by EPA's UAO. *See Sealy Conn. Inc. v. Litton Indus.*, 93 F. Supp. 2d 177, 184 (D.C. Conn. Feb. 9, 2000); N.U. CONST. art. I, § 7; Order at 6. Instead of allowing low, nontoxic levels of contaminants, the ERA protects from contaminants that "poison[]," "cause[] disease or convulsion," and emit "odors . . . if sufficiently offensive and if they impact what the community would consider 'clean.'" Senate Report, at 6–7. The intent of the legislature was to create a more stringent, fundamental right than what current environmental statutes existed, and the people of New Union made their overwhelming voice in support of this more stringent, broad right. Order at 5 (71% voting in favor of the ERA). To

disallow the ERA to have authority over unregulated contaminants would greatly narrow the intentions of New Union's congress and its people.

C. The ERA is relevant and appropriate because it remediates unregulated contaminants like NAS-T and is well suited for all contaminants and pollutants "caused by humans."

The district court properly determined that the ERA is applicable and relevant because it can be used for broad application regarding all human-made harmful contaminants or pollutants, which would encompass virtually all superfund sites. In order for a standard to be relevant and appropriate, it must "address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site." 40 C.F.R. § 300.5.

In this case, the ERA, covering both regulated and unregulated harmful contaminants and pollutants, is well suited to address this particular CERCLA site, which is contaminated by an unregulated contaminant, NAS-T. If a part of the New Union Constitution that mandates all persons to have a right to clean water, free from contaminants caused by humans, is not identified as an ARAR to a hazardous material contaminating water supplies, the court would render this new right of the people to a narrow, if not inexistent, application.

III. FAWS' Response Costs Were Necessary and Assisted with EPA's Eventual Remediation and Cleanup Efforts.

The district court erred when finding that FAWS' costs were not reimbursable because such initial, investigative sampling, testing and analysis were necessary to determine the ultimate threat posed by the NAS-T plume in the Aquifer. This Court reviews a district court's statutory interpretation of the compensability of response costs under CERCLA de novo. *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000).

CERCLA stipulates that any potentially responsible party ("PRP") can be liable to any person who has incurred "necessary costs of response." 42 U.S.C. § 9607(a)(4)(B). The private plaintiff seeking recovery of response costs must prove that: "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and, (4) the plaintiff has incurred costs in response to the release or threatened release." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1269 (10th Cir. 2017) (citing *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005)). In this case, only the fourth element regarding incurred response costs is disputed. What is defined as a "response" under CERCLA includes "removal[s]" that "may be necessary to monitor, assess, and evaluate the release *or threat of* release of hazardous substances . . . ." 42 U.S.C. § 9601(23), (25) (emphasis added).

A. FAWS' costs were necessary because they were not duplicative, and instead, were initial assessments of NAS-T contamination.

The district court erred in holding that FAWS' investigatory response costs were not necessary because, despite the EPA no longer investigating the spread of NAS-T contamination, FAWS could conduct assessments that could be deemed necessary by the "threat of" hazardous contamination. 42 U.S.C. § 9601(23). In order for an investigatory response cost to be "necessary," the investigation cannot be duplicative of the EPA's actions responding to or remedying the release of the substance in question. *See United States v. Iron Mountain Mines, Inc*., 987 F. Supp. 1263, 1272 (E.D. Cal. Oct. 28, 1997). Generally, investigative costs are duplicative if they are incurred after the EPA has initiated a remedial investigation. *United States v. Hardage*, 750 F. Supp. 1460, 1511–17 (W.D. Okla. Aug. 9, 1990). However, courts have generally found investigative costs, when they are not duplicative, to be necessary to help

determine the entire threat of a contamination. *Forest Park Nat'l Bank & Tr. v. Ditchfield*, 881 F. Supp. 2d 949, 978 (N.D. Ill. July 24, 2012). Such preliminary information on possible contamination must take place before any further action can be properly taken, therefore it is a necessary step in the cleanup process. *Gache v. Town of Harrison*, 813 F. Supp. 1036, 1046 (S.D.N.Y. Feb. 9, 1993).

In this case, it is undisputed that FAWS' investigations were novel and initial in Fartown compared to any previous EPA investigation. The final monitoring wells were the closest assessments to Fartown, yet they were half a mile north of the Town. Order at 4. The only assessments in Fartown prior to those by Central Labs were those by the DOH, which tested only five wells compared to Central Labs' testing of three samples each from seventy-five wells. Order at 5.

Rather than duplicative, FAWS' investigation was novel and necessary because it sought to determine the complete magnitude of the threat from the NAS-T plume in the Aquifer. For example, in *Ditchfield*, the EPA and the PRP entered into a cleanup agreement that did not address the threat of contamination on the plaintiff's nearby property via a groundwater plume of perc. *Ditchfield*, 881 F. Supp. 2d at 957, 961. The plaintiff had their property assessed, which came back positive for contamination. *Id.* at 958. The court found that such a threat by the perc plume, particularly given the residential nature of the threat, warranted such investigative costs as "necessary." *Id.* at 978. Similarly, in this case, despite the EPA entering into an agreement that did not encompass cleanup of Fartown water, FAWS members had reason to investigate the magnitude of the threat by NAS-T to their water after it began to smell sour and "off," an indication of concentrations of NAS-T. Order at 3, 5. *Ditchfield* depicts how a cleanup

agreement, although established at the time of the plaintiff's investigations, does not preempt recovery of response costs.

Moreover, the monitoring wells half a mile away from Fartown picked up trace amounts that, although not indicating unhealthy levels, could reasonably indicate a threat of higher levels elsewhere. In this case, such reasonable indications proved to be accurate after the Central Labs assessment. In fact, the EPA recommends that when using monitored natural attenuation remedies, like the monitoring wells in this case, such remedies should have contingency measures in instances when "contaminants are identified . . . outside of the original plume boundary." Office of Solid Waste and Emergency Response, *Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites*, EPA, at 24 (Apr. 21, 1999), https://www.epa.gov/sites/default/files/2014-02/documents/d9200.4-17.pdf. FAWS' investigation served as a trigger of a contingency measure necessary beyond the initial monitoring actions, and was warranted in light of a potential threat to their residential water supplies.

B. FAWS' costs were necessary because they were closely tied to the actual cleanup efforts and were conducted for eventual remediation rather than litigation or personal gain.

The district court erred in holding that FAWS' investigatory response costs were not necessary because private cleanup actions could still be held as necessary if closely tied to the actual, and eventual, cleanup efforts. Investigative costs, in order to be recovered, must not only be necessary, but "closely tied to the actual cleanup" and not merely for litigation purposes. *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994); *Ebert v. Gen. Mills, Inc.*, 48 F. Supp. 3d 1222, 1232 (D. Minn. Sept. 4, 2014). Such necessary response costs, to be "closely tied to the actual cleanup," must be consistent with the National Contingency Plan ("NCP"), and result in a

"CERCLA-quality cleanup." *Key Tronic Corp.*, 511 U.S. at 820; 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(3)(i). Response costs incurred will not be considered "inconsistent with the NCP" based on immaterial or insubstantial deviations from the NCP. 40 C.F.R. § 300.700(c)(4). Furthermore, "merely for litigation" refers to litigation-related expenses that are generally barred from recovery because they were solely for litigation and not for the purpose of future cleanup. *See Young*, 394 F.3d at 865. ("While costs for initial investigation and monitoring might be compensable if linked to an actual effort to contain or cleanup an actual or potential release of hazardous substances, costs incurred solely for litigation are not."). Other, non-litigation recovery costs, with a purpose for potential future cleanup, do not allow a court to analyze the party's motive for incurring such expenses. *See Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1111 (E.D. Mo. Sept. 16, 2016).

In cases where investigatory costs were not "necessary," expenses were for litigation or property improvements rather than for the purpose of an eventual cleanup, and they were vague, unsupported costs for limited, insufficient investigations. *See e.g.*, *Young*, 394 F.3d at 861–62 (conducting an abbreviated investigation with no intention for further cleanup); *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995) (charging the expense of a property upgrade to completely eliminate any contamination when more modest, yet safe, measures would have sufficed); *Wilson Road Dev. Corp.*, 209 F. Supp. 3d at 1102–03 (incurred unexplained invoices for a limited soil investigation). Furthermore, such costs were not consistent with the NCP when they did not result in an eventual CERCLA-quality cleanup. *See e.g.*, *Walnut Creek Manor, LLC v. Mayhew Center, LLC*, 622 F. Supp. 3d 918, 930 (N.D. Cal. Apr. 16, 2009).

In this case, FAWS' investigation costs were closely tied to the actual cleanup because the costs were not to enrich FAWS members' properties or for litigation purposes, but were

instead for the purpose of revealing a possible need for eventual cleanup action. FAWS members, before incurring costs, initially complained to the DOH to investigate Fartown's water because it was smelling "sour" or "off." Order at 5. However, because DOH's investigation was limited (only five drinking water wells tested), FAWS members retained Central Labs to do a more extensive test in the hopes that it might lead to cleanup of contamination in Fartown. *Id.* Central Labs' assessments and costs are clear and point to a thorough investigation that the EPA relied upon in reopening its CD. *Id.* at 6.

These circumstances vary from in *Young*, where plaintiffs bought property that was generally known to be adjacent to a superfund site, but they had not reviewed any public materials about the site or environmental tests on the property. *Young*, 394 F.3d at 861. Upon purchasing the land for less than its appraised value, the plaintiffs conducted an abbreviated site investigation, which found hazardous substances. *Id.* After this finding, the plaintiffs abandoned their property with no intent to spend more money to clean up the contamination. *Id.* at 861–62. The court found these actions to appear to be for undertaking litigation. *Id*. at 866. In contrast, FAWS members remain in their residences, living with contaminated water every day, and have sought litigation only after inadequate cleanup measures to protect FAWS members from contamination.

FAWS' investigation is more similar, in some facts, to circumstances in *Walnut Creek Manor*, where the plaintiff desired an eventual remediation and had no intention to abandon its property. *Walnut Creek Manor*, 622 F. Supp. 3d at 929. The court determined such costs to be necessary response costs. *Id.* However, the plaintiff's investigations did not prove to be substantially in compliance with the NCP and had not resulted in a CERCLA-quality cleanup, so the court determined such costs were not consistent with the NCP. *Id.* at 930–31. In FAWS' case,

a CERCLA-quality cleanup has commenced, which is stipulated in the EPA's UAO. Moreover, the EPA would not reopen a CD by relying upon an investigation that was not substantially consistent with the NCP. Because CERCLA desires to encourage necessary cleanups, and the EPA has relied upon FAWS' initial investigations, any minor deviation from the NCP should be considered immaterial or insubstantial.

C. FAWS' costs were necessary because they assisted in the EPA's eventual remediation and cleanup efforts.

The district court erred in holding that FAWS' investigatory response costs were not necessary and incurred at FAWS' own expense because the Central Labs' monitoring resulted in benefitting the overall NAS-T cleanup effort. As previously noted in § III(B), for initial investigation costs to be necessary, they must have resulted in a "CERCLA-quality cleanup," therefore tying them in some manner to the actual containment or clean-up of environmental contamination. 40 C.F.R. § 300.700(c)(3)(i); *see Young*, 394 F.3d at 865. In other words, the costs cannot be "necessary" unless there is a nexus between them and an actual cleanup effort. *Young*, 394 F.3d at 863. The reason necessary monitoring costs are recoverable is to encourage plaintiffs to identify contaminants that otherwise might not have been discovered and remedied. *Wilson Road Dev. Corp.*, 209 F. Supp. 3d at 1112. Allowing the recovery of such costs may significantly benefit the entire remediation effort. *Id.*

In this case, it is undisputed that the EPA began new cleanup efforts in Fartown because of the FAWS' investigations into their wells because EPA cited the Central Labs results when it reopened the CD for further remediation. Order at 6. Rather than draining funds from other necessary cleanup efforts, FAWS assisted the EPA in determining the full extent of the necessary remediation. To not allow recovery for such costs would greatly deter private parties in the future

from taking on costs to assist in CERCLA cleanups, which goes against the intent of encouraging private party assistance in the remediation process.

IV. The District Court Did Not Err When it Vacated as Arbitrary, Capricious, Contrary to Law EPA's Determination that BELCO is Not Required to Install Filtration Systems in Fartown.

A. Arbitrary, capricious, and contrary to law standard scope of review.

The district court did not err in vacating EPA's decision that BELCO is not required to install filtration systems because Fartownians are entitled to clean water under the ERA. The district court granted FAWS a challenge against the EPA's UAO affirming BELCO's noncompliance as arbitrary, capricious, and contrary to law under the Administrative Procedures Act 5 U.S.C. § 706(2)(A). FAWS argues and the district court correctly affirmed that the EPA's UAO failed to compel BELCO to provide CleanStripping filtration systems on FAWS members' private wells, which is an action required under the ERA. Under the APA, 5 U.S.C. § 706(2)(A), the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. This includes holding agency actions that are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). The court will look at the whole record cited by a party when evaluating the standard of review and prejudicial error. 5 U.S.C. § 706. Further, under this standard, a court must find a "rational connection between the facts found and choices made" and determine whether the agency considered the relevant factors and whether there has been a clear error of judgment. *Sierra Pac. Indus. v. Lyng,* 866 F.2d 1099, 1105 (9th Cir. 1989).

In the case, *Natural Resource Defense Council v. Environmental Protection Agency,* Congress prohibited the discharge of any pollutant into the air of the United States unless such a

discharge complied with the Clean Air Act, authorized under the EPA. *Nat'l Res. Def. Council, Inc. v. EPA*, 643 F.3d 311, 324 (D.C. Cir. 2011). The court deferred to the agency's interpretation of its own regulation but reconciled the agency's requirement with the state requirements so long as the statute was "not less stringent" than the guidance in the EPA. *Id.* at 312. The petitioner argued that the EPA's "guidance amounts" to a legislative rule was in violation of the APA's notice and comment requirement and that its substantive content was contrary to law. *Id*. at 399. The court concluded that the EPA's guidance qualifies as a legislative rule that EPA was required to issue through notice and comment rulemaking and that one of its features—the so-called attainment alternative—violates the Clean Air Act's plain language. *Id*. The EPA had an independent statutory obligation to ensure compliance with air quality standards within the state and failed to do so by failing to give notice, and thus the court ruled that the EPA would be held to such statutory requirements. *Id.*

In the present case, FAWS argues, and the district court rightly affirmed, that the UAO enforced by the EPA was not in accordance with the law pursuant to the ERA. Much like in the case of *Nat'l Res. Def. Council, Inc. v. EPA*, the EPA's failure to abide by the statutory deadlines was "unlawful" in that it was noncompliant with the ERA. The EPA had an independent obligation to uphold the statutory provisions recently passed into law under the ERA, that "every person . . . [has the] fundamental right to clean air and clean water . . . free from contaminants." N.U. CONST. art. I, § 7. The district court was correct in ruling that the EPA's failure to implement CleanStripping filtration in individual wells was unlawful and in direct violation to the guideline set forth in the ERA because it violated the right to clean air and water.

B. Actions required under the ERA as a matter of law.

Pursuant to the language set forth in the ERA, FAWS challenges the EPA's decisions to not compel BELCO to pay for or install CleanStripping on residential wells in Fartown testing below 10 ppb. The citizens of New Union passed the ERA that reads "Each and every person of this State shall have a fundamental Right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. The DNR determined the ERA as an ARAR so long as the ERA provides guidance consistent with CERCLA and state and federal regulations. Order at 6.

FAWS argues, and the district court agrees, that "clean water . . . free from contaminants and pollutants caused by humans" cannot reasonably be interpreted to mean "slightly contaminated water impacted by a human-caused chemical that occasionally makes water smell bad." FAWS Mem. of Law at 14. Allowing for polluted water that has been reported contaminated by testing and per observational smell, is arbitrary, capricious, and contrary to law because under the language of the ERA, BELCO and the EPA must insure "clean" water for all Fartownians, for uses that extend beyond drinking.

The court rightly concludes that while the EPA may otherwise adopt interpretations of what constitutes "clean water" and allow for some levels of contamination through their definition, the court cannot agree that this interpretation is reasonable in these circumstances. The court provides that in the present case, the contamination does not result from a well-regulated and permitted discharge, nor does it result from natural sources that do not require a permit. The contamination from the Aquifer is a consequence of human action that resulting from illegal spills and an unlined wastewater pond. This circumstance at hand is what the ERA aims to address. The EPA fails to rightfully address what "clean" water is by failing to remove

illegally discharged chemicals that can be detected by smell. The levels the EPA has in terms of "clean" are arbitrary, capricious, and contrary to the law.

In conclusion, the court is justified in ruling that the EPA's determination that the installation of CleanStripping technology on Fartown's wells are not required because the determination contradicts the ERA and state ARAR. FAWS contends that the UAO requires filtration as a remedy to the contamination, to which the district court agreed.

CONCLUSION

The district court abused its discretion in retaining jurisdiction of the state law claims because § 113(h) bars jurisdiction for it to review the injunctive relief FAWs seeks, the federal claims were resolved, discovery has not begun for the tort claims, and the claims involved novel and complex issues of state law. For these reasons, FAWS requests the tort claims be remanded to New Union State Court.

The district court properly exercised its discretion in determining the ERA as a constitutional amendment establishing a fundamental right to a clean environment. NAS-T is an unregulated, human-created, hazardous material that risks contaminating the cleanliness of the water, air, and environment. It is therefore generally applicable and broader than current federal law, which does not currently regulate NAS-T. The ERA should be considered more stringent because it provides clean water free of all harmful contaminants. These characteristics of the ERA designate it as an ARAR, so the district court's decision should be upheld.

The district court erred in denying reimbursement costs to FAWS for their clean-up efforts assisting the EPA's proposed remediation because they were necessary, non-duplicative, and closely tied to the actual, and eventual, remediation. The threat of NAS-T required

investigative sampling, testing, and analysis to determine the full extent of remediation necessary. To encourage state, federal, and private cooperation regarding contamination remediation, FAWS should recover costs for sampling, testing, and analyzing well water samples in Fartown.

The district court is correct in ruling the EPA's determination that BELCO is not required to install filtration systems in Fartown as arbitrary, capricious, and contrary to the law. Failing to provide CleanStripping filters as remediation for the contamination in Fartown contradicts the ERA as a state ARAR. The district court was justified in its standard of review regarding the EPA's UAO, and properly decided contamination from the Aquifer as contrary to the law set forth in the ERA.