TEAM 43

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.

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee.

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

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

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment but denied a motion to dismiss all state claims in consolidated cases No. 17-CV-1234 and No. 21-CV-1776 on June 1, 2022. The order was not final, as the district court did not dispose of the state claims and planned to set a trial date upon completion of discovery. Record at 15; *see Catlin v. United States*, 324 U.S. 229, 233 (1945) (defining "final decision" as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). The district court had subject-matter jurisdiction over the federal claims at issue under 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question), and 42 U.S.C. § 9613(b) (controversies under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")). The district court had supplemental jurisdiction over the state tort law claims under 28 U.S.C. § 1367. Better Living Corporation ("BELCO"), the United States Environmental Protection Agency ("EPA"), and Fartown Association for Water Safety ("FAWS") all filed timely Petitions for Permission to Appeal under Fed. R. App. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 28 U.S.C. § 1292(b), which authorizes a Courts of Appeals, "in its discretion, [to] permit an appeal to be taken from [an interlocutory] order."

STATEMENT OF THE ISSUES

I. Is EPA's determination that the ERA constitutes an ARAR, and therefore a new Regulatory Standard based on which it could reopen the Consent Decree, proper?

II. Is EPA's determination that BELCO is not required to install filtration systems in Fartownian wells under the Consent Decree arbitrary, capricious, or contrary to law?

III. Are the costs incurred by FAWS' independent testing of its members' private drinking water wells reimbursable as response costs under CERCLA?

IV. Has the district court permissibly retained jurisdiction over FAWS' remaining state law tort claims after resolving all federal claims?

STATEMENT OF THE CASE

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

Congress enacted CERCLA in 1980 to address the serious environmental and health hazards posed by industrial pollution. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The Act was designed to promote hazardous waste cleanups and ensure that the parties responsible for the contamination bore the costs of remedial efforts. *Burlington*, 556 U.S. at 602. To implement CERCLA, EPA revised the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), providing guidelines and procedures for removal and remediation actions. 47 Fed. Reg. 31,180, 31,180 (July 16, 1982).

CERCLA requires EPA to create a National Priorities List ("NPL") for cleanup response sites. 42 U.S.C. § 9605(a). Once a site is on the NPL, "a Remedial Investigation and Feasibility Study ('RI/FS') is performed to define the nature and extent of the threat posed by the release and to evaluate proposed remedies." *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1417 (6th Cir. 1991); 40 C.F.R. § 300.430 (2022). If a response action is needed, EPA must publish a proposed remedial action plan ("RAP"). 42 U.S.C. § 9617. After public comment, EPA must issue a Record of Decision ("ROD") that states the selected remedy for the site. *Id.*

After a RAP is issued, EPA may either (1) respond on its own with removal or remedial action, then sue potentially responsible parties ("PRPs"); (2) "issue an administrative order

directing PRPs to implement removal or remedial action;" or (3) create an agreement with PRPs to respond. *Akzo,* 949 F.2d at 1417–18; *see* 42 U.S.C. §§ 9604, 9607, 9606. A PRP is "any person who may be liable . . . for response costs incurred and to be incurred by the United States." 40 C.F.R. § 304.12(m) (2022). But CERCLA goes further, serving as a reimbursement mechanism for any party, whether they are federal, state, or private, that has incurred necessary costs in response to a contamination by a PRP. *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002). The statute assigns liability to PRPs for "any other necessary costs . . . incurred . . . consistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(B).

Notably, in addition to the achievement of the selected remedy, CERCLA requires the remediation of contaminated resources to meet or waive applicable or relevant and appropriate requirements ("ARARs"). 42 U.S.C. 9621(d). An ARAR is a federal or more stringent state "standard, requirement, criteria, or limitation" regarding a "hazardous substance, pollutant, or contaminant that will remain onsite." *Id.* § 9621(d)(2). EPA is responsible for initiating identification of ARARs. 40 C.F.R. § 300.430(b)(9).

II. Statement of Facts

Underlying this action – and the State of New Union – is the Sandstone Aquifer ("Aquifer"), a groundwater source that slowly flows southward from Centerburg to Fartown. *See* Record at 5. Centerburg Water Supply ("CWS") pumps, treats, and distributes Aquifer water to Centerburg residents. *Id.* In Fartown, individuals use private home wells that pump drinking water directly from the Aquifer. *Id.*

From 1973 through 1998, BELCO owned and operated a factory (the "Facility") in Centerburg, above the Aquifer. *Id.* at 5–6. During that period, BELCO manufactured "LockSeal" coating for pipes and machinery. *Id.* at 5. Two chemicals combine to make the solid LockSeal:

liquid nitro-acetate titanium ("NAS-T") and a powdered non-toxic activation agent. *Id.* BELCO manufactured both chemicals at the Facility. *Id* at 6.

In the mid-1980s, medical studies found that NAS-T was a "probable" human carcinogen. *Id.* In 1995, EPA responded by setting a Health Advisory Level ("HAL") for NAS-T in drinking water at 10 parts per billion ("ppb"). *Id.* The HAL accounted for a "significant margin of error to ensure that level of exposure is non-toxic to humans." *Id.* At levels below the HAL but above 5 ppb, humans can smell NAS-T's sour or stale odor. *Id.* No other state or federal laws regulate NAS-T due to its scarce use. *Id.*

In 2013, the Department of Health ("DOH") for Centerburg County began receiving complaints that Centerburgers' tap water smelled sour or off, instigating the following actions:

- In January 2015, DOH tested CWS's public water supply and recorded NAS-T levels of 45 to 60 ppb. *Id.*
- On September 17, 2015, DOH instructed Centerburgers to stop drinking tap water and BELCO began voluntarily supplying all residents with bottled water. *Id.*
- On September 22, 2015, the New Union Department of Natural Resources ("DNR") opened an investigation of NAS-T contamination at the Facility. *Id.*
- On January 30, 2016, DNR referred the investigation and remediation to EPA. *Id.*

In March 2016, EPA and BELCO agreed that BELCO would continue providing bottled drinking water to Centerburgers and develop an RI/FS for the Facility. *Id.* BELCO found that sporadic spills and an unlined wastewater and stormwater lagoon used in the 1980s and early 1990s caused NAS-T to enter the soil and migrate to the Aquifer. *Id.* Over six months, and with EPA oversight, BELCO tested the extent of the NAS-T plume in the Aquifer. *Id.* at 7. BELCO installed three lines of monitoring wells between Centerburg and Fartown. *Id.* The last line of wells was the closest to Fartown at about a half a mile north. *Id.* As each of the five wells in the last line did not detect NAS-T, BELCO concluded that it had reached the end of the NAS-T plume. *Id.* EPA did not order BELCO to install additional wells closer to Fartown. *Id.*

BELCO's RI/FS recommended two remedial measures: (1) excavation of the soils at the Facility and (2) implementation of filtration at CWS. *Id.* The RI/FS did not recommend remediation of the plume due to BELCO's monitoring results and the estimated cost ($45 million) and time (decades) required for pumping and treating the Aquifer water. *Id.* EPA then presented a Proposed Plan to the public based on the RI/FS. *Id.* No citizens objected to the RI/FS or Proposed Plan. *Id.* After receiving public comments, EPA selected a clean-up plan for the Facility in an ROD. *Id.* On June 30, 2017, EPA filed a cost recovery action against BELCO. *Id.*

III. Proceedings Below

The current action is a consolidation of two cases: EPA's cost recovery action against BELCO (No. 17-CV-1234) and FAWS' cost recovery and tort claims against BELCO (No. 21-CV-1776). *Id.* at 3, 10.

A. The BELCO Action

After EPA filed its cost recovery action against BELCO, BELCO and EPA drafted and filed a Consent Decree ("CD") requiring that BELCO implement EPA's selected remedy from the ROD. *Id.* at 7. The district court found the CD to be fair and reasonable. *Id.* After public comment, the district court approved and entered the CD with no citizen objections. *Id.*

The CD required EPA to issue a Certificate of Completion ("COC") to BELCO once BELCO completed the clean-up. *Id.* The COC effectively "closed" the CD. *Id.* EPA could only "reopen" the CD after issuing a COC if: (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." *Id.* The CD defined Regulatory Standards to include "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." *Id.*

From 2017 through September 2018, the CD remained "open," and BELCO engaged in three remedial actions. *Id.* at 7–8. First, BELCO installed a "CleanStripping" water filtration system in CWS' public well. *Id.* The filter remains in operation. *Id.* at 5. Second, BELCO excavated all contaminated soils around the Facility's abandoned lagoon. *Id.* at 4–5. Third, BELCO sampled Aquifer water monthly at each of the monitoring wells installed earlier in the CERCLA process. *Id.* at 7. All samples indicated levels consistent with prior results except two in January 2018. *Id.* That month, monitors at the last line of wells detected NAS-T levels of 5 and 6 ppb, below the HAL of 10 ppb. *See id.* at 6–7.

In September 2018, EPA issued the COC to BELCO due to the multiple non-detects of NAS-T and the low levels in the January 2018 samples. *Id.* at 8.

B. The Middle Years: FAWS Created, ERA Passed, and Consent Decree Reopened

Residents of Fartown requested that DOH sample and test their drinking water for NAS-T after they discovered the investigation and CD. *Id.* Some Fartownians submitted testimony that their private well water had occasionally smelled "off" since 2016, but DOH did not detect NAS-T during a February 2019 sampling of five private wells. *Id.* In May 2019, Fartownians asked EPA to test further. *Id.* EPA declined, citing the non-detects in most wells. *Id.*

In response, Fartownians formed FAWS in December 2019. *Id.* FAWS paid Central Laboratories, Inc. ("Central Labs") $21,500 for testing and analysis of NAS-T in their wells. *Id.* In March 2020, Central Labs reported results from testing 225 samples of 75 private wells. *Id.*

Of the 225 samples taken, 171 detected levels below the smell threshold level of 5 ppb. *Id.* at 6, 8. Fifty-four samples found levels above the smell threshold, but below the HAL. *Id.* Based on this data, FAWS requested EPA reopen the CD. *Id.* at 8. EPA declined, as the low levels of NAS-T did not meet the limited reopening requirements for the CD. *Id.*

On November 3, 2020, New Union passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"), which provided that "[e]ach 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 a caused by humans." *Id.*; N.U. Const. art. 1, § 7. During the ERA's adoption, there was substantial discussion about the meaning of "clean" and the application of the statute. *See generally* Addendum. When EPA asked DNR whether it believed the ERA was an ARAR under CERCLA, DNR responded, "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." Record at 9.

On March 20, 2021, EPA reopened the CD, citing the following supporting information:

- The 2020 Central Labs results;
- The passage of the ERA;
- Fartown's identity as an environmental justice community;
- Possible endangerment, including potential carcinogenic effects; and
- The presence of odors from NAS-T.

Id. EPA initially ordered BELCO to sample 50 Fartownian wells, supply water to any resident with positive NAS-T levels, and continue monitoring the wells. *Id.* BELCO objected to the reopening of the CD, asserting that the ERA did not constitute an ARAR under CERCLA. *Id.* FAWS, however, submitted a request for an additional action: the installation of CleanStripping or any other action to fully remove NAS-T at each private well that tested positive. *Id.*

In response, EPA issued a Unilateral Administrative Order ("UAO") requiring BELCO to conduct the response actions. *Id.* EPA did not include FAWS' requested provision, as no testing results had shown NAS-T levels above the HAL. *Id.* The UAO ordered BELCO to:

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

3. For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install CleanStripping filtration on the well.

Id. When BELCO did not comply with the UAO, EPA carried out sampling. *Id.* at 10. Twenty percent of wells had levels between 5 and 8 ppb, and EPA supplied water to those residents. *Id.* The other 80 percent of samples were below 5 ppb, and 55 percent found no NAS-T. *Id.*

The UAO had two effects on the BELCO action. First, EPA moved to recover its costs for the sampling and water and impose penalties for BELCO's violation of the UAO. *Id.* BELCO answered that EPA had no right to reopen the CD because the ERA was not an ARAR. *Id.* Second, on September 24, 2021, the district court granted FAWS' motion to intervene in the BELCO action. *Id.* FAWS argued that the UAO was arbitrary, capricious, and contrary to law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because EPA did not require CleanStripping on all FAWS' members' private wells with positive NAS-T levels. *Id*.

C. The FAWS Action

FAWS filed a separate action against BELCO on August 30, 2021, for two claims: cost recovery for its testing and compensation for state law negligence and private nuisance. *Id.* FAWS requested the district court order BELCO to: (1) pay its response costs; (2) install CleanStripping on private wells that tested positive for NAS-T; (3) remediate the Aquifer; (4) pay damages for loss of use and enjoyment of FAWS' members' property and diminished property values; and (5) pay punitive damages. *Id.*

The district court consolidated the BELCO and FAWS actions at all parties' request. *Id.* at 8. All parties moved and cross-moved for summary judgment at the end of discovery for the CERCLA claims. *Id.* FAWS additionally moved to dismiss the remaining state law claims without prejudice if the district court resolved the CERCLA claims via motion. *Id.*

Based on the administrative record filed by EPA, the district court granted summary judgment to EPA dismissing BELCO's claim against reopening the CD. *Id.* at 18. Additionally, the court granted summary judgment to FAWS on its claim for filtration systems and vacated the portion of the UAO requiring bottled water instead of filtration or another method that would eliminate NAS-T from FAWS' members' private wells. *Id.* The court granted BELCO summary judgment dismissing FAWS' cost recovery claim and retained jurisdiction over the remaining state law claims, denying FAWS' motion to dismiss. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

EPA impermissibly reopened the Consent Decree based on the erroneous determination that the ERA was an ARAR and therefore a new "Regulatory Standard." A court may only defer to EPA's designation of a state ARAR in proportion to the finding's "power to persuade." *See United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). EPA's determination that ERA is an ARAR lacks the power to persuade because it is not properly promulgated, more stringent than corresponding federal law, or applicable or relevant and appropriate. *See Akzo,* 949 F.2d at 1440. First, proper promulgation requires a law to be legally enforceable. However, the ERA's vagueness renders it legally unenforceable, and EPA does not address the ERA's ambiguities about regulated parties and level of regulation. Second, EPA failed to carry out a thorough, proper comparison of stringency to federal law. Even a cursory analysis demonstrates that federal provisions exist that are likely equivalent to or more stringent than the ERA. Third, while all parties agree that the ERA is not applicable, EPA failed to carry out the NCP's eight factor test to support its determination that the ARAR was relevant and appropriate. Furthermore, it did not address the inconsistency of its

past non-use of state constitutional environmental rights as ARARs. EPA's decision to include the ERA as a state ARAR is unpersuasive and does not deserve deference.

Additionally, the district court erred in deciding that EPA's issuance of the UAO without a filtration requirement in Fartown wells was arbitrary and capricious. Arbitrary and capricious review is narrow and highly deferential to agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 30 (1983). As a threshold matter, the ERA is not an ARAR, so EPA could not rely on it to reopen the CD and require further remedial measures. But even if the Court determines that the ERA is an ARAR, EPA's refusal to require filtration systems is proper, as it is consistent with the intent of the ERA made clear by its legislative history. The ERA was not meant to eradicate all traces of a chemical from water supplies, just protect citizens from harm. *See* Addendum at 4. The testing conducted indicates that the water in Fartown's wells is non-toxic and below the HAL and therefore did not require further filtration. Record at 6, 8. Additionally, CERCLA mandates EPA to evaluate the cost-effectiveness of potential remedial measures. 42 U.S.C. §9621(a). The CleanStripping filtration systems are a substantial expense. Without evidence that Fartown wells need further filtration, EPA's refusal to include filtration systems in the UAO complied with the law and was not arbitrary or capricious.

Next, FAWS' testing costs are not reimbursable under CERCLA. To recover response costs under CERCLA, a non-governmental plaintiff must prove the costs were necessary and consistent with the NCP. 42 U.S.C. § 9607(a)(4)(B). Necessity of response costs must be evaluated at the time the action was taken. *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 704 (6th Cir. 2006). FAWS' tests were not necessary because at the time of its testing, previous samples had shown just two positive detections of NAS-T in the monitoring wells, and both were below the HAL. Record at 6, 8. Additionally, FAWS' tests were inconsistent with the

NCP. In the context of ongoing or completed EPA involvement, remedial actions taken without EPA authorization are inconsistent with the NCP. *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1109 (N.D. Ill. 1988). FAWS' tests were ordered after EPA had concluded remedial measures and had consciously rejected further testing requests. Record at 8. Therefore, the testing is not reimbursable, and the Court should affirm the district court.

Finally, the district court permissibly retained supplemental jurisdiction over the state law tort claims. A district court may choose to decline supplemental jurisdiction in certain situations, including if the claim is a novel or complex state law issue or court has dismissed all federal claims. 28 U.S.C. § 1367(c). While the district court dismissed all federal claims, the factors of judicial economy, convenience, fairness to litigants, and comity favor retaining jurisdiction. *See Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 532 (11th Cir. 2015). The district court is intimately familiar with the facts of this case, and declining supplemental jurisdiction would be a waste of judicial resources. As almost all discovery is complete, forcing the parties to start over in state court would be inconvenient and unfair. Retaining jurisdiction promotes comity because the state claims are closely related to the federal claims and would not be needless decisions of state law. In addition, the state claims here, like other tort claims, are not novel or complex. *See Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743–44 (11th Cir. 2006). The only novel issue here is whether the ERA is an ARAR, and that issue need not be reached to resolve the state law claims. Therefore, the district court's denial of the motion to dismiss should be affirmed.

STANDARD OF REVIEW

The Court of Appeals reviews a district court's grant of summary judgment and interpretation of CERCLA de novo, viewing the evidence in the light most favorable to the non-

moving party. *See United States v. Sterling Centrecorp Inc.*, 977 F.3d 750, 756 (9th Cir. 2020); *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016). The usual summary judgment standard, Fed. R. Civ. P. 56(a), "does not apply when reviewing an agency action under the [Administrative Procedure Act ("APA")]." *McAfee v. FDA*, 541 F. Supp. 3d 21, 26 (D.D.C. 2021). Instead, the district court must "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). "The 'entire case' on review is a question of law." *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

A district court's decision to exercise supplemental jurisdiction is reviewed for abuse of discretion. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 738 (11th Cir. 2006). An abuse of discretion can occur if a district court "applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). However, it is not an abuse of discretion "when [a district court] has a range of choices and the court's choice does not constitute a clear error of judgment." *Estate of Amergi ex. rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1365 (11th Cir. 2010).

ARGUMENT

I. EPA did not have the authority to reopen the Consent Decree, as its interpretation of the ERA as an ARAR and therefore a new Regulatory Standard lacks the power to persuade.

EPA impermissibly reopened the consent decree based on the erroneous determination that the ERA was an ARAR and therefore a new Regulatory Standard. CERCLA requires that remedial actions comply with "applicable or relevant and appropriate" requirements of federal and state environmental law. 42 U.S.C. § 9621(d). State laws constitute ARARs only if they are:

"(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.

Courts only defer to EPA's designation of a state ARAR in proportion to the finding's "power to persuade." Record at 13; *See Mead*, 533 U.S. at 220 (quoting *Skidmore*, 323 U.S. at 140). The weight of EPA's determination, and therefore the court's deference, "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

Here, EPA's determination that the ERA is a state ARAR lacked the power to persuade threefold.[1] First, the ERA was not properly promulgated within the meaning of CERCLA because it is not legally enforceable. EPA fails to address the ERA's vagueness and lack of directive intent, which render it unenforceable. Second, the ERA is not more stringent than federal law, and EPA does not properly compare the ERA to relevant federal law in determining otherwise. Third, EPA fails to address the NCP's eight factor test and its own prior non-designation of similar provisions in deciding that the ERA was relevant and appropriate. Therefore, EPA's designation of the ERA as a state ARAR is unpersuasive and does not deserve deference. The Court should reverse the district court's ruling.

A. <u>EPA's determination that the ERA was "properly promulgated" lacks the power to persuade because the ERA is impermissibly vague, rendering it legally unenforceable for the purpose of ARARs.</u>

EPA's determination that the ERA was "properly promulgated" ignores that the ERA's vagueness renders it legally unenforceable in the context of ARARs. To be an ARAR, a state law must be properly promulgated. 42 U.S.C § 9621(d)(2)(A)(ii). The NCP defines properly

[1] BELCO does not challenge that the ERA was timely identified as an ARAR.

promulgated to mean standards "of general applicability [that] are legally enforceable." 40 C.F.R. § 300.400(g)(4) (2022). Here, BELCO only challenges EPA's determination that the ERA is legally enforceable.[2]

A legally enforceable state ARAR "must be issued in accordance with state procedural laws or standards and contain specific enforcement provisions or be otherwise enforceable under state law." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8746 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.400). "General goals that merely express legislative intent about desired outcomes or conditions but are non-binding are not ARARs." *Id.* ARARs must instead be "directive in intent." *Id.*

Vagueness is a factor in determining legal enforceability. *See Akzo*, 949 F.2d at 1441–42 (discussing at length whether Michigan's antidegradation law was unenforceably vague). In *United States v. Akzo Coatings of America*, the Sixth Circuit held that a state antidegradation law[3] was not vague because it was accompanied by more specific regulations and was "sufficiently specific to provide a fair warning that certain kinds of conduct were prohibited." *Id.* at 1440–41 (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). Additionally, the NCP proposed rule indicates that a law prohibiting discharges of "toxic materials in toxic amounts," could similarly be an ARAR based on context. National Oil and Hazardous Substances Pollution Contingency Plan; Proposed Rule, 53 Fed. Reg. 51,394, 51,438 (Dec. 21, 1988). However, EPA

[2] BELCO does not challenge EPA's determination that the ERA is a law of general applicability.

[3] The text of the law read: "[I]t shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or . . . to domestic, commercial, industrial, agricultural, recreational or other uses . . . ." *Akzo,* 949 F.2d at 1440.

specified that "compliance must be interpreted within the context of implementing regulations, the specific circumstances of the site, and the remedial alternatives being considered." *Id.*

Here, EPA lacked the power to persuade when it determined that the ERA was legally enforceable and therefore properly promulgated because it did not sufficiently support its own decision and failed to address the ERA's vagueness. *Skidmore* deference explicitly relies on "the thoroughness evident in [an agency's] consideration" and "validity of its reasoning." *Skidmore*, 323 U.S. at 140. But EPA has hardly analyzed the ERA's legal enforceability at all. EPA did not provide its reasoning when it designated the ERA an ARAR. Record at 9 ("[C]iting the 2020 Central Labs results and the passage of the ERA, which EPA deemed to be a change in the Regulatory Standards under the Consent Decree, EPA re-opened the Consent Decree . . . ."). Additionally, EPA's only cited reason in the district court was that the ERA was enacted in the procedurally correct manner. Record at 14. While this query is *part* of the enforceability analysis, it is not the entire analysis. EPA therefore lacks the thoroughness *Skidmore* requires to receive deference.

Additionally, EPA failed to address the major point against the ERA's legal enforceability: the standard's generality and vagueness. The ERA's meaning as a potential ARAR is undoubtedly vague. The provision states: "Each and every person of this State has a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. 1, § 7. The ERA is exactly the type of state standard the NCP final rule advises *not* to designate as an ARAR. While a worthy goal, the ERA "merely express[es] legislative intent about desired outcomes or conditions" and is not "directive in intent." *See* National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. at 8746. It fails to specify actions to be taken. It fails to specify technologies

to employ. Critically, it fails to specify the meaning of several words and phrases, including "healthful," "clean," "free from," and "caused by humans."

The ERA is distinguishable in its vagueness from other general provisions that have been found or suggested to be valid state ARARs. The ERA has no implementing regulations. Furthermore, it lacks a directive phrase like "it shall be unlawful for" as in the Michigan antidegradation statute. *See Akzo,* 949 F.2d at 1440. Even the NCP's suggested "toxic pollutants in toxic amounts," is more specific, indicating a level of threshold harm to humans to determine a discharge's illegality.

Neither legislators nor the parties in this case can agree on what the ERA means. The legislative history makes its application to NAS-T unclear. *See, e.g.*, Addendum at 5 (noting Mr. Wright stating that "odors could be an issue if sufficiently offensive" but not explaining what "sufficiently offensive" means). Even EPA and FAWS cannot agree what the ERA requires. EPA believes "clean water" does not actually mean "free from *any* contamination," despite the last line of the ERA. Record at 13. And FAWS relies on an interpretation of the ERA—free from *all* contaminants—that would be nearly, if not totally, impossible to apply generally. *See id.* In the face of this ambiguity, EPA's decision to consider the ERA properly promulgated is unpersuasive and should not be afforded deference. This Court should therefore determine that the ERA was not a state ARAR because it was not properly promulgated.

B. EPA did not properly compare the ERA to relevant federal laws in determining stringency, and the Court should not defer to its unpersuasive finding.

The Court should not defer to EPA's finding of stringency because the EPA did not carry out a proper comparison to federal law. To be an ARAR, a state standard must be "more stringent than any Federal standard, requirement, criteria, or limitation." 42 U.S.C. § 9621(d)(2)(A)(ii). State regulations not under federally authorized programs are more stringent

than a federal standard where either (1) no corresponding federal standard exists or (2) where "a comparison of the requirements . . . assure[s] that [it is] 'more stringent.'" U.S. Env't Prot. Agency, EPA/540/G-89/009, *CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements* 7-7 (1989). This comparison is necessary to a finding of stringency. *Id.* State standards do not satisfy stringency where they are "clearly less restrictive" or are equivalent to the federal requirement. *Id.* at 7-9. Equivalent requirements include "those that are: (1) identical to Federal requirements, i.e., enacted verbatim; or (2) not identical to Federal requirements but are substantively equivalent, i.e., that use the same or a different approach to achieve an identical result." *Id.* Narrative criteria require the state to specify corresponding requirements for ARAR identification. *Id.* at 7-29 to 7-30.

EPA's stringency determination is unpersuasive because it misinterprets the ERA and fails to compare it to similar federal requirements. As mentioned above, the ERA articulates a general goal without specifying standards, chemicals affected, or the definitions of key terms. It therefore has neither quantitative criteria nor narrative criteria to use as a basis of comparison. While the ERA is a self-executing fundamental right, EPA oversimplifies by arguing that the ERA grants a right to clean water "above and beyond" any federal ARARs. *See* Record at 11. Much like the fundamental right to due process, what the ERA requires is case-specific. *See, e.g.*, *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) ("Due process is a flexible concept and a determination of what process is due, or what notice is adequate, depends upon the particular circumstances involved."). The ERA therefore does not function as a clear requirement that can be measured in stringency in the first place.

Furthermore, even if it were comparable, EPA fails to compare the ERA to similar federal provisions. For example, EPA could have compared the ERA to the Clean Water Act's

purpose, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This goal is likely "substantively equivalent" and arguably more stringent than the ERA's objective of achieving "clean water . . . free from contaminants," as it includes physical and biological integrity in addition to chemical. Even the NCP provides a similar goal, considering the "overall protection of human health" when determining an approach for remedial action. 40 C.F.R. § 300.430(e)(9)(iii). But EPA did not address these or *any* similar federal law or regulation, indicating a lack of thoroughness in its finding. The Court should not defer to EPA's decision and instead find that the ERA is not more stringent than federal law.

C. EPA's determination that the ARAR was relevant and appropriate to the remediation is unpersuasive as it did not rely on the NCP's eight factor test and is inconsistent with past non-designation of similar provisions.

The ERA is not relevant or appropriate to the remediation of the Aquifer. EPA's reliance on one factor—that NAS-T is a human-caused chemical—and the ERA's legislative history do not outweigh the NCP's remaining seven factors and EPA's past non-designation of similar provisions. CERCLA requires state ARARs to be either "legally applicable to the hazardous substance" at issue or "relevant and appropriate under the circumstances of the release." 42 U.S.C. § 9621(d)(2)(A). An agency first determines whether a standard is applicable.[4] 40 C.F.R. § 300.400(g)(1). If the requirement "is not applicable to a specific release," the agency determines whether the standard is instead relevant and appropriate. *Id.* § 300.400(g)(2).

Relevant and appropriate requirements are "substantive requirements . . . [that] address problems or situations *sufficiently similar* to those encountered at the CERCLA site that their use

[4] No party contends that the ERA is applicable.

is *well suited* to the particular site." 40 C.F.R. § 300.5 (2022) (emphasis added). The NCP lists eight factors to weigh in determining whether a standard is relevant and appropriate:

(i) The purpose of the requirement and the purpose of the CERCLA action;
(ii) The medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site;
(iii) The substances regulated by the requirement and the substances found at the CERCLA site;
(iv) The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site;
(v) Any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site;
(vi) The type of place regulated and the type of place affected by the release or CERCLA action;
(vii) The type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action;
(viii) Any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site.

40 C.F.R. §§ 300.400(g)(2)(i)–(viii). The NCP helps identify ARARs by categorizing them based on whether they address "a chemical, location, or action." *Id.* § 300.400(g)(2). EPA has determined that "ARARs must be measurable and attainable since their purpose is to set a standard that an actual remedy will attain." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. at 8752. The D.C. Circuit has found that Safe Drinking Water Act ARARs requiring zero-levels of pollutants are not relevant or appropriate, as zero-levels are technologically impossible to prove. *Ohio v. EPA*, 997 F.2d 1520, 1530 (D.C. Cir. 1993).

Here, the Court should not defer to EPA's unpersuasive determination that the ERA was relevant and appropriate. First, if the ERA's purpose is to eradicate all contaminants from water—achieving a zero level—then by EPA's own guidance, the ARAR cannot be achieved and is not appropriate. But even if the ERA's goal is to achieve contaminant levels above zero, the NCP's eight factors demonstrate that the ERA falls short of "sufficiently similar" and "well suited" to the remediation of NAS-T in the Aquifer. Second, EPA's decision is unpersuasive as

does not address EPA's prior non-designation of similar state constitutional provisions as ARARs. The Court should therefore determine that the ERA is neither relevant nor appropriate.

1. EPA did not carry out a thorough analysis of the NCP's eight factors when determining that the ERA was relevant and appropriate to the remediation.

The Court should not defer to EPA's decision that the ERA was relevant and appropriate because EPA did not carry out the NCP's eight-factor test. As a threshold matter, FAWS argues that when the ERA says "free from" contamination, it means a zero level. If so, EPA could not persuasively argue that the ERA is relevant and appropriate, as this would contradict EPA's clear guidance that water pollution goal levels may not be set to zero. As zero is not attainable, a zero level cannot be the goal. *See Ohio*, 997 F.2d at 1530. Arguing otherwise would be inconsistent with EPA's earlier pronouncements, a key *Skidmore* factor. *See Skidmore*, 323 U.S. at 140.

However, if the ERA is interpreted as requiring contaminant levels somewhere above zero, EPA's decision still lacks the power to persuade. EPA provides two reasons that the ERA is both relevant and appropriate: (1) it covers unregulated, human-caused, hazardous materials; and (2) the legislative history supports such an interpretation. Record at 14. The former addresses only one of the NCP's eight factors, and the latter falls outside their scope. Therefore, EPA did not thoroughly address the NCP's eight factors.

The ERA and the remediation action are similar in two ways: (1) they aim to reduce human-caused contamination and (2) the medium of focus is water. But the other six factors outweigh these similarities, for the following reasons:

- The ERA does not specifically regulate any activities, while the remediation contemplates specific remedial action.
- The ERA does not specifically regulate certain types of places, while the remediation specifies certain places affected by the release.
- The ERA does not specifically regulate certain facilities, while the remediation specifies certain facilities affected by the release.

- The ERA does not specifically regulate certain water uses, while the remediation specifies drinking water.
- The ERA's purpose is unclear, as there is no definition for "clean," making it hard impossible to compare to the goals of the remediation.

Additionally, the ERA does not fit into the NCP's three categories for ARAR identification, as it does not address a specific "chemical, location, or action," indicating that it is not relevant and appropriate. *See* 40 C.F.R. § 300.400(g)(2). EPA's failure to carry out thorough analysis and the results of the eight-factor test make EPA's decision that the ERA is relevant and appropriate unpersuasive. The Court should not defer.

2. EPA's decision is inconsistent with earlier practices, as it has never designated a constitutional environmental right provision as a state ARAR.

EPA's determination that the ERA is relevant and appropriate is unpersuasive because EPA has seemingly never designated existing state constitutional environmental right provisions as ARARs. *Skidmore* deference depends on a decision's "consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140. While the ERA is a new law, five states have similar provisions in their state constitutions or bills of rights.[5] BELCO was unable to find even one example of a CERCLA action in these states that designated their environmental right provision as a state ARAR.[6]

For example, Pennsylvania has had a "self-executing" environmental right provision since 1971. *See Moosic v. Pa. Pub. Util. Comm'n*, 429 A.2d 1237, 1239 (Pa. Commw. Ct. 1981); Pa. Const. art. 1, § 27. However, a Pennsylvania Department of Environmental Protection

[5] *See* Pa. Const. art. 1, § 27; Mont. Const. art. IX, § 1; Ill. Const. art. XI, § 2; Mass. Const. art. XCVII; Haw. Const. art. XI, § 9. But note that Hawaii's provision limits the individual right to protections already in other laws. *See* Haw. Const. art. XI, § 9.

[6] BELCO searched case law for any actions in which a state's name, CERCLA, and the key phrase from the relevant provision were mentioned. No relevant cases were found. In addition, BELCO searched each state's website for a list of ARARs used in CERCLA actions. No list included the relevant state's constitutional provision.

guidance document listing state ARARs does not include the constitutional provision on the list. Pa. Dep't of Env't Prot., 262-4500-606, *Applicable or Relevant and Appropriate Requirements (ARARs) for Cleanup Response and Remedial Actions in Pennsylvania* (2013). The provision is even mentioned in the Appendix as part of a "Federal and State Statute/Regulation Guide," indicating that it was not forgotten. *Id.* at 29. EPA must be persuasive for this Court to grant it deference. But EPA's stark change in its use of constitutional amendments as ARARs without explanation is wholly unpersuasive.

II. EPA's determination that BELCO is not required to install CleanStripping filtration systems in Fartown is not arbitrary, capricious, or contrary to law.

EPA's decision to omit CleanStripping filtration requirements for Fartownian wells in the UAO was neither arbitrary, capricious, nor contrary to law because the ERA is not an ARAR. Even if it were, EPA's decision was proper because the legislature did not intend the ERA to require zero-levels of pollutants and the filtration requirement is not cost-effective. Courts review challenges to EPA enforcement orders under the APA's arbitrary and capricious standard. *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 496–97 (2004); *Sackett v. EPA*, 566 U.S. 12, 131 (2012). Under that standard, a reviewing court may only set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard is narrow, and "a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 30.

Here, EPA's issuance of the UAO without a requirement for well filtration systems was not arbitrary, capricious, or contrary to law. First, the ERA is not an ARAR and therefore cannot serve as a basis to reopen the CD and require further remedial measures. Second, even if the ERA were an ARAR, the legislative history of the ERA indicates that legislators designed the amendment to ensure nontoxic water to citizens, and thus the non-harmful levels of NAS-T

present would not validate further filtration. Third, the policy implications of ordering the installation of expensive filtration systems when no evidence of toxicity exists indicate that EPA's decision was not arbitrary or capricious.

A. The ERA is not an ARAR and thus EPA's decision to decline to include further remedial measures in the form of filtration systems was not arbitrary, capricious, or contrary to law.

For the reasons in Part I, the ERA is not an ARAR upon which EPA could rely to reopen the CD. A state must properly adopt and establish a statute as an ARAR before a federal agency may require compliance with the standards set forth. *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001). As EPA is rejecting a remedial action—implementing CleanStripping filtration at FAWS members' wells—instead of *requiring* a remedial action, its decision is neither arbitrary, capricious, nor contrary to law.

B. Even if the ERA were an ARAR, the Court should defer to EPA's interpretation of "clean" in the context of CERCLA, which does not require a zero-level of contaminants in water.

Even if the Court determines that the ERA is an ARAR, it should hold that EPA's omission of filtration systems from the UAO was not arbitrary and capricious because "clean" does not mandate zero-levels of pollutants. When interpreting a statute, courts must look to the intention of the legislature adopting the statute or provision in question. *Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005). If such intent is unclear from the plain language of the statute, courts may instead look to the legislative history surrounding the statute's adoption. *Id.* Additionally, courts should not rely on the literal language of a portion of a statute if it leads to an absurd result or an interpretation inconsistent with the legislative intent. *SEC v. Ambassador Church Fin./Dev. Grp., Inc.*, 679 F.2d 608, 611 (6th Cir. 1982).

Here, the Fartown legislature intended for the ERA to provide citizens with the right to water that is safe to consume, and further filtration is not necessary to achieve that goal. Due to the lack of metrics or context provided in the ERA, the definition of "clean" is vague and difficult to apply to empirical water analyses. Therefore, the Court should look to the ERA's legislative history to derive the legislature's intent. In response to the direct question of what "clean" meant in the context of this bill, the sponsor of the bill, Assemblyman Wright, answered:

> The intent is very clear, that you should be able to consume water through your public water supply without any harm. *That doesn't mean that the water is free o[f] any or all substances besides H2O.* Let's be clear: What is appropriate and desirable for a public water supply involves other chemicals, other substances. But they should not harm you.

Addendum at 4 (emphasis added). Assemblyman Wright is clear that "clean" does not mean water free of all substances, just water that will not harm consumers. And EPA's interpretation of "clean" reflects this sentiment. Furthermore, all testing conducted demonstrates that the NAS-T levels in Fartown wells are not above the indicated threshold of toxicity determined by the EPA. Record at 8, 10. Therefore, the Court should defer to EPA's interpretation of "clean" and determine that the issuance of the UAO was not arbitrary, capricious, or contrary to law.

Additionally, while FAWS may claim that "clean" and "free from contaminants" require zero-levels of NAS-T, such an interpretation is improper because it would produce absurd results. Requiring such an interpretation could invalidate countless permits under the Clean Air Act and Clean Water Act that allow "safe" but non-zero levels of contamination. Additionally, EPA has stated previously that requiring zero contaminants in water is an impractical and unachievable goal. *See Ohio*, 997 F.2d at 1530. EPA's interpretation avoids these absurdities.

Therefore, EPA's interpretation of "clean" is proper, and its issuance of a UAO without a filtration requirement was neither arbitrary nor capricious.

C. The EPA was correct to omit the filtration requirement as its substantial cost and the lack of any evidence of harm indicate that the systems are not cost-effective as required under CERCLA.

CERCLA mandates cost-effective remedial actions. EPA's decision not to require CleanStripping for Fartownian wells in the UAO was therefore in accordance with law and neither arbitrary nor capricious. EPA must evaluate the cost-effectiveness of proposed remedial actions under CERCLA. 42 U.S.C. §9621(a). EPA must conduct this analysis both in the implementation of a remedy and its selection. *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 294 (6th Cir. 1991). The cost-effectiveness analysis has the critical function of "ensur[ing] that the decision-making process produces an effective remedy." *Artesian Water Co. v. New Castle Cnty.*, 605 F. Supp. 1348, 1360 (D. Del. 1985). The EPA should not authorize or require remedial measures that waste resources and do not address any threats to the public. *See In re Bell Petroleum Servs.*, 3 F.3d 889, 906 (5th Cir. 1993) (holding that the EPA's decision to provide an alternate water system was arbitrary and capricious where there was no evidence that anyone was drinking contaminated water and the system was "a waste of money").

Here, the CleanStripping filtration systems are not cost-effective. Each system would be produced at a substantial cost to BELCO—up to $4,500 per household—and FAWS has produced no evidence that the systems would reduce harm to Fartown residents. *See* Record at 16. All testing of Fartownian wells has shown NAS-T levels below the HAL. Record at 8, 10. Therefore, no evidence on the record shows harmful levels of contamination for any use of water. Additionally, the UAO already requires BELCO to provide bottled water to Fartown residents with wells that detect levels of 5 to 8 ppb of NAS-T. Record at 16. Requiring BELCO to supply filtration systems would not address or eliminate any public health threat, as no evidence of a threat exists. EPA's issuance of the UAO without a filtration requirement was

neither arbitrary, capricious, nor contrary to law, and accordingly, this Court should reverse the district court's vacatur of the UAO.

III. CERCLA does not entitle FAWS to recover its testing costs because FAWS failed to show that independent testing was necessary and consistent with the national contingency plan.

CERCLA is not "a general vehicle for toxic tort actions." *Artesian Water Co. v. New Castle Cnty.*, 659 F. Supp. 1269, 1299 (D. Del. 1987). Yet FAWS asks this Court to treat CERCLA as just that by requesting recovery of its testing costs without showing that they were necessary and consistent with the NCP. In addition to the traditional elements for cost recovery,[7] non-governmental plaintiffs bear the burden of showing that their response costs were (1) "necessary" and (2) "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 949 (9th Cir. 2002). This burden honors Congress's intention that CERCLA not allow "recovery of private damages unrelated to the cleanup effort." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535–36 (10th Cir. 1992).

Here, FAWS has failed to affirmatively prove either element. First, FAWS' tests were not necessary; its entire claim rests on the two positive NAS-T samples that existed at the time. Those two data points, weighed against the large number of non-detects, demonstrate there was no evidence indicating a need for further investigatory measures. Second, FAWS' tests were not consistent with the NCP because even if all parties were aware of the NAS-T levels in the Fartown wells prior to FAWS' independent actions, the testing would still not be consistent with

[7] Those elements are: "(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." *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). None of these elements are at issue in the current matter.

EPA authorized measures. Therefore, this Court should affirm the district court's determination that the costs were not reimbursable, as they were neither necessary nor consistent with the NCP.

A. FAWS' testing was not necessary because its tests were duplicative and were not based on an objectively reasonable belief that the NAS-T contamination threatened the Fartown water supply.

FAWS did not have sufficient evidence that independent testing was necessary; therefore, FAWS' testing costs are not recoverable under CERCLA. The requirement that costs incurred be "necessary" is an important statutory limitation to deter ingenuine and superfluous remedial efforts. *G.J. Leasing Co., v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995). The necessity of response costs is evaluated at the time the action was taken. *Reg'l Airport,* 460 F.3d at 704. Any knowledge of an environmental threat must exist prior to said action. *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995); *Reg'l Airport*, 460 F.3d at 704. The plaintiff must provide evidence to demonstrate that the response actions were taken to assist with and help plan the eventual remediation and cleanup efforts. *Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1114–15 (E.D. Mo. 2016). An action is not necessary if it is duplicative of response actions conducted by the EPA. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). A private party's investigatory costs incurred after EPA has already initiated a remedial investigation are duplicative unless they are authorized by EPA. *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993).

Testing and sampling expenses are necessary only if the party seeking reimbursement has an "objectively reasonable belief" that the release of hazardous substances poses a threat to the party's property. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 964 (8th Cir. 2000). Speculation of a threat is not enough. *Krygoski Const. Co. v. City of Menominee*, 431 F. Supp. 2d 755, 766 (W.D. Mich. 2006).

Here, the private testing ordered by FAWS was unnecessary, as it was unauthorized and lacked objective evidence for justification. In response to repeated non-detects and low levels in the monitor well testing, EPA concluded remediation and issued a COC to BELCO in September 2018. Record at 8. Thus, there were no remediation efforts underway when FAWS ordered testing in December 2019, and the tests were unauthorized by the EPA. *Id.* In fact, when FAWS requested EPA for further testing, the agency explicitly denied the request. *Id.* As a result, the testing conducted by FAWS was duplicative and unauthorized, and therefore unnecessary.

Furthermore, when FAWS began testing, no evidence supported an objectively reasonable belief that NAS-T posed a threat. From 2016 to 2018, BELCO recorded just two positive detections of NAS-T; both were well below the HAL. Record at 6, 8. Additionally, DOH's February 2019 tests did not detect NAS-T. *Id.* at 8. FAWS contends that its members had a right to know about exposure levels, making the tests necessary. But "necessary" requires an actual threat to human health or the environment. *See Reg'l Airport*, 460 F.3d at 703. Despite any FAWS members' beliefs, "subjective intent is simply not part of the calculus." *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001). Prior test results showed no threat of toxic contamination in Fartownian wells. Since FAWS did not have an objectively reasonable belief of harm, its testing costs were not necessary and are not reimbursable under CERCLA.

B. FAWS' testing was not consistent with the NCP because it was not authorized by the EPA and the levels of NAS-T found were not sufficiently substantial for the EPA to authorize any remedial efforts.

FAWS contends that because the independently ordered tests revealed some NAS-T in its wells, the testing was consistent with the NCP. However, because the NAS-T levels were within the non-toxic range, even if all parties were aware of its presence, the EPA would not have

conducted further remediation. Thus, FAWS' testing was not consistent with the NCP. Under CERCLA, a private party cannot recover its necessary costs unless they are consistent with the NCP. *Wilson*, 209 F. Supp. 3d at 1116. Actions consistent with the NCP must be compliant with private response requirements and result in a CERCLA-quality cleanup.[8] *Young v. United States*, 394 F.3d 858, 864 (10th Cir. 2005). Merely performing a few investigations of a hazardous site is not compliance with the NCP. *Walnut Creek Manor, LLC v. Mayhew Ctr.*, LLC, 622 F. Supp. 2d 918, 930 (N.D. Cal. 2009). In fact, remedial actions taken without EPA authorization despite EPA's ongoing or completed involvement are automatically deemed inconsistent with the NCP. *Allied Corp.*, 691 F. Supp. at 1109; *see Wilson*, 209 F. Supp. 3d at 1119–20 (holding that private testing was not consistent with the NCP where the party did not receive EPA approval).

Here, FAWS' testing was inconsistent with the NCP, as FAWS acted without the authorization of EPA and did not produce results requiring remediation. EPA explicitly denied FAWS' testing request. Additionally, over half of FAWS' tests did not detect NAS-T. Record at 8. Of the rest, about a quarter showed concentrations below the smell threshold, and none recorded levels above the HAL. Record at 6, 8. Even if this data had been available, EPA would not have recommended any additional remediation measures. FAWS has no evidence showing that the private testing assisted with any remediation efforts or resulted in any actual cleanup. As a matter of policy, FAWS' costs should not be reimbursed. Granting response costs to private parties who acted without authorization encourages more fishing expeditions by others.

Thus, the test results produced by FAWS were unnecessary investigatory measures that simply affirmed the EPA's existing awareness of the NAS-T levels. FAWS' decision to order

[8] The NCP's private party response section outlines requirements for documentation, worker health and safety, permits, ARARs, site investigation, remedy selection, and opportunity for public comment. 40 C.F.R. § 300.700(c)(5)–(6) (2022).

testing contradicted the EPA's explicit rejection of further measures and was not consistent with the NCP. Therefore, FAWS' costs are not reimbursable under CERCLA, and the Court should affirm the district court's grant of summary judgment.

IV. Even though the federal law claims were resolved, the district court permissibly retained supplemental jurisdiction over the remaining state law tort claims because the claims are neither novel nor complex and the *Gibbs* factors support exercising supplemental jurisdiction.

The district court properly retained jurisdiction over the state law claims because they are neither novel nor complex and the *Gibbs* factors support exercising supplemental jurisdiction. A district court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). State law claims are part of the same case or controversy when they "arise out of a common nucleus of operative fact with a substantial federal claim." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006). While exercising supplemental jurisdiction over state claims is discretionary, it "is a favored and normal course of action." *See Promisel v. First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir. 1991); *Parker,* 468 F.3d 733 at 747–47 (noting supplemental jurisdiction is favored with CERCLA claims and state nuisance claims given the similar facts).

Section 1367 of Title 28 codified the Supreme Court decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) and informs the application of supplemental jurisdiction. *See Parker*, 468 F.3d at 742. A district court may decline supplemental jurisdiction if:

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

28 U.S.C. § 1367(c). When a § 1367(c) factor favors declining supplemental jurisdiction, a court must consider four *Gibbs* factors: judicial economy, convenience, fairness to litigants, and comity. *See Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 532 (11th Cir. 2015).

Here, the district court properly retained jurisdiction over FAWS' state law claims. All parties agree the state law tort claims were brought under the same controversy as the CERCLA claims. Therefore, supplemental jurisdiction was proper for two reasons. First, while the district court resolved all federal law claims through summary judgment, the *Gibbs* factors favor retaining supplemental jurisdiction over the remaining state claims. Second, even though the ERA is new legislation, the state law claims do not depend on the ERA's designation as an ARAR and are not otherwise novel or complex. Even if the state law claims were novel or complex, the *Gibbs* factors would favor supplemental jurisdiction. Therefore, the district court did not abuse its discretion in retaining jurisdiction over the state law claims.

A. Even though the district court resolved all federal claims through summary judgment, the *Gibbs* factors favor retaining supplemental jurisdiction.

The *Gibbs* factors favor the district court's exercise of supplemental jurisdiction. A district court *may* decline supplemental jurisdiction if the "district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). However, a district court is *not always required* to do so. *See Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1054 (2d Cir. 1990). When all federal claims are dismissed, a district court must still weigh the *Gibbs* factors of "judicial economy, convenience, fairness, and comity" before declining jurisdiction. *See Raucci,* 902 F.2d at 1055 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

When substantial judicial resources have been dedicated to a case, judicial economy may support supplemental jurisdiction to avoid "a substantial duplication of efforts." *See Parker*, 468 F.3d at 746; *Raucci*, 902 F.2d at 1055 (reasoning that declining supplemental jurisdiction where

discovery was complete and the case was ready for trial would be "a waste of judicial resources, given the extensive proceedings). However, in *Ameritox, Ltd. v. Millennium Laboratories, Inc.*, the court held that pouring resources into a case by itself should not be sufficient to retain jurisdiction. 803 F.3d at 538. The three-year case had 700 entries and a ten-day jury trial, but significant resources had been consumed by nonexistent claims. *See id.* at 537–39. The court reasoned that retaining jurisdiction would incentivize litigants "to sandbag their own cases in the hope that courts spend enough resources" to retain supplemental jurisdiction. *Id.* at 538–39.

Convenience favors supplemental jurisdiction when "it would be most convenient [for the litigants] to try every claim in a single forum." *See Ameritox*, 803 F.3d at 539. Fairness may favor retaining jurisdiction to avoid forcing the parties to start over in state court. *See Parker,* 468 F.3d at 746; s*ee also Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir. 1994) (reasoning that declining supplemental jurisdiction may not be fair if "there has been substantial expenditure in time, effort, and money in preparing the dependent claims"). And comity between the federal and state systems stresses avoiding "needless decisions of state law." *See Gibbs*, 383 U.S. at 726.

Here, the district court did not abuse its discretion when it retained supplemental jurisdiction over the state law tort claims. While the district court resolved all federal law claims, the *Gibbs* factors favor retaining jurisdiction. First, judicial economy and convenience support the district court's decision because declining supplemental jurisdiction would be inefficient and a duplication of the court's and parties' efforts. At this point, the parties have completed discovery of the CERCLA claims. Record at 8. These claims are substantially related to the state law nuisance and negligence claims, as they rely on virtually the same set of facts. FAWS' argument that the case requires further expert discovery for damages does not outweigh the significant factfinding effort in the case thus far. Unlike the needless expenditure of judicial

resources on meritless claims in *Ameritox*, the parties in this action have made good-faith contributions to nonfrivolous claims. *See* 803 F.3d at 537–39. The district court is intimately familiar with this five-year case. It would therefore be easier for the court and parties to resolve the state claims in the same forum. Additionally, the district court's continuing jurisdiction over enforcement of the CD could help avoid conflicts that arise under the state claims.

Fairness and comity also favor supplemental jurisdiction. Two of the three parties—BELCO and EPA—support supplemental jurisdiction. Additionally, FAWS seeks an injunction in state court; if granted, the injunction could conflict with EPA's decision for the proper remedy and EPA's jurisdiction over site remediation. This outcome would be unfair to EPA and BELCO, who will have to spend additional resources to resolve this discrepancy after years of work on this case. Furthermore, supplemental jurisdiction here promotes comity as it is not a needless decision of state law, but a routine set of state tort claims that the district court is equipped to handle. For these reasons, the *Gibbs* factors favor retaining supplemental jurisdiction.

B. The state law tort claims should not be considered novel or complex simply because new state legislation is involved in the broader case.

The state tort law claims are not novel or complex; therefore, the district court did not abuse its discretion in retaining jurisdiction. A court *may* decline supplemental jurisdiction if "the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). In a typical case, state tort claims like "negligence, nuisance, and property damage" are not considered novel or complex. *See Parker*, 468 F.3d at 743–44; *see also Arawana Mills Co. v. United Techs. Corp.,* 795 F. Supp. 1238, 1248 (D. Conn. 1992) (finding state law hazardous waste claims were not novel or complex, despite arising under new legislation). Even if a claim is novel or complex, the *Gibbs* factors must still be considered before declining supplemental jurisdiction. *See Raucci*, 902 F.2d at 105.

A case may be novel or complex if it involves various sources of state case law and brand-new legal theories. In *Ameritox*, the case involved state law claims from nine states and a novel legal theory that several states had incorporated federal law into their own "unfair competition statutes and common-law torts" without any state law precedent. *See* 803 F.3d 518, 520, 533 (11th Cir. 2015). The court held the pendent state claims novel and complex, reasoning that the case was "predicated upon extraordinary legal theories." *See id.* at 533.

Here, FAWS' nuisance and negligence claims are textbook examples of claims that are neither novel nor complex. While the ERA may be new legislation, this fact does not make the accompanying tort claims novel and complex. *See Arawana*, 795 F. Supp. at 1248. The only novel question in this case is federal: whether the ERA is an ARAR. The court need not address this questioned to calculate damages for the state claims. Additionally, this case advances no "extraordinary legal theories," as the state claims in this case involve only the one state and involves the traditional legal theories of negligence and nuisance. *See Ameritox*, 803 F.3d at 520, 533. The district court expressly considered the ERA along with the federal CERCLA claims and determined it was unlikely "that the ERA will substantially alter the tort claims." Record at 18.

Even if the state tort law claims were novel or complex, the *Gibbs* factors still favor retaining supplemental jurisdiction. The district court applied the correct legal standard by analyzing § 1367(c) and weighing the *Gibbs* factors before choosing to retain jurisdiction. Thus, the district court did not abuse its discretion.

* * *

In conclusion, this Court should hold that (1) the ERA does not constitute an ARAR and subsequently that EPA did not have the authority to reopen the CD; (2) EPA's decision not to require CleanStripping technology installation in the UAO was not arbitrary, capricious, or

contrary to law; (3) FAWS may not recover for its independent testing expenses; and (4) the district court permissibly retained supplemental jurisdiction over FAWS' remaining state law tort claims.

CONCLUSION

For the foregoing reasons, BELCO respectfully requests that this Court affirm the district court's partial grant of summary judgment for BELCO, reverse the district court's partial grant of summary judgment for EPA and FAWS, affirm the district court's denial of FAWS' motion to dismiss, and remand for further proceedings consistent with that decision.

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Date: November 22, 2022