NON-MEASURING BRIEF
TEAM 45

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant

-and-

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

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

Brief of Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered summary judgment in consolidated cases C.A. No. 22-000677 on June 1st, 2022. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). Environmental Protection Agency (EPA), Fartown Association for Water Safety, and BELCO all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. This is an interlocutory appeal from all parties.

STATEMENT OF THE ISSUES

I. Did the District Court err 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 CERCLA?

II. Did the District Court err when it upheld EPA's determination that the ERA constitutes an ARAR, and, accordingly finding that EPA's reopening the Consent Decree based on that ARAR and ordering further remedial action in the UAO was proper?

III. Did the District Court err when it vacated as arbitrary, capricious or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA?

IV. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

A. Statement of Facts

Fartown and Centerburg are two towns entirely in the State of New Union. Fartown is approximately two miles south of Centerburg. R. at 1. A body of water known as "the Sandstone Aquifer" lies underground underneath both towns, and the water in this aquifer moves from north to south. R. at 2. Both towns rely on this aquifer for their public water supply, though Centerburg treats the water at a public facility before distributing it to its residents whereas Fartown residents pump water directly from the aquifer through private wells. R. at 1.

Better Living Corporation ("BELCO") is an industrial chemical company that operated a factory in Centerburg through 1998. From 1973 through 1998, BELCO manufactured a chemical product named "LockSeal" in its Centerburg factory, which was produced using the liquid chemical NAS-T. *Id.* NAS-T is a probable human carcinogen, and in 1995 the Environmental Protection Agency (EPA) adopted a Health Advisory Level ("HAL") of 10 parts per billion (ppb) for NAS-T in drinking water. R. at 2.

In 2015, the Centerburg County Department of Health (DOH) detected NAS-T in the Centerburg public water supply in a concentration of between 45 and 60 ppb. *Id.* The New Union Department of Natural Resources (DNR) began investigating a possible NAS-T contamination, but referred the matter to EPA in early 2016. *Id.* Soon thereafter, EPA and BELCO entered into an agreement wherein BELCO agreed to investigate the cause and extent of NAS-T contamination, and evaluate proposed cleanup remedies. *Id*. BELCO determined that the NAS-T contamination came from a lagoon used to store wastewater, and that a NAS-T plume existed in the Sandstone Aquifer. As of 2017, BELCO believed that this plume did not reach Fartown. R. at 3.

In June 2017, BELCO and EPA entered into a Consent Decree (CD) wherein BELCO agreed to remediate the lagoon source area, and EPA agreed to issue BELCO a Certificate of Completion (COC) once this was done. *Id.* The CD specified that, after issuance of the COC, EPA could not order BELCO to further remediate the site unless new information or standards were established. *Id.* BELCO remediated the source area as agreed, and EPA issued BELCO a COC in September 2018. R. at 4.

In December 2019, approximately one-hundred Fartown residents formed the Fartown Association for Water Safety (FAWS) and retained a private laboratory to test 75 private wells in Fartown at a cost of $21,500. These tests revealed variable concentrations of NAS-T from 0-8 ppb. *Id.* Based on these results, FAWS asked EPA in May 2020 to reopen the CD and investigate Fartown wells for NAS-T contamination. EPA declined this request. *Id.*

In November 2020, the State of New Union Constitution was amended to include an Environmental Rights Amendment (ERA), which declared that each citizen of New Union has a right to clean air, clean water, and an environment free from human-caused pollution. *Id.* Following this amendment, EPA determined that, under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.,* the ERA could be considered an Applicable or Relevant and Appropriate Requirement (ARAR). R. at 5.

Citing this determination and other considerations (including possible community endangerment, a change in regulatory standards, and the fact that Fartown is an environmental justice community), EPA re-opened its CD with BELCO in March 2021 and demanded that BELCO investigate Fartown wells for NAS-T contamination. *Id.* BELCO challenged this action and argued that EPA could not legally re-open the CD because the ERA could not be considered an ARAR. In response, EPA issued a Unilateral Administrative Order (UAO) in June 2021

ordering BELCO to sample Fartown water, provide bottled waters to households with well-water NAS-T concentrations between 5 and 10 ppb, and install filtration systems in wells with NAS-T concentrations above 10 ppb. *Id.* FAWS asked EPA to include more comprehensive remediation requirements in this UAO, but EPA declined to do so. *Id.* BELCO did not comply with the UAO, again arguing that there was no legal basis for the UAO because the ERA was not an ARAR. R. at 6.

B. Procedural History

Plaintiff EPA, in response to BELCO's noncompliance with the UAO, filed a motion in the United States District Court for the District of New Union in August 2021 (the "BELCO action") seeking recovery of costs and penalties for BELCO's violation of the UAO. FAWS filed a motion to intervene in this action, asserting that EPA's UAO is arbitrary, capricious, and failed to compel BELCO to provide filtration to all FAWS' members' wells, which FAWS argues violates the ERA. *Id.*

FAWS also filed a separate action against BELCO in the District Court (the "FAWS action"), asserting a federal CERCLA cost recovery claim against BELCO for the private laboratory testing, and New Union state tort claims for negligence and private nuisance against BELCO for contamination of the Sandstone Aquifer. The United States District Court for the District of New Union exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. At the parties' joint request, the Court subsequently consolidated the BELCO Action and FAWS Action. *Id.*

In December 2021, all three parties (EPA, FAWS, and BELCO) moved for summary judgment on the CERCLA claims. FAWS also moved to dismiss all state law claims without

prejudice if all the CERCLA claims were resolved by summary judgment. The District Court granted summary judgment for BELCO on FAWS' cost recovery claim; for EPA on its motion for costs and penalties against BELCO; and for FAWS on its claim that EPA's UAO failed to compel filtration. R. at 9, 11, 13. The District Court also declined to dismiss FAWS' remaining state law claims, exercising supplemental jurisdiction. R. at 14.

STANDARD OF REVIEW

The standard for reviewing grants of summary judgment under the Administrative Procedure Act is de novo; the court "review[s] the administrative record directly, according no particular deference to the judgment of the [d]istrict [c]ourt." *Roberts v. United States*, 741 F.3d 152, 157-58 (D.C. Cir. 2014) (quotations omitted). When an agency action is under review, the entire case…is a question of law," *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993), and the usual summary judgment standard, Fed. R. Civ. P. 56(a), "does not apply." *Resolute Forest Prods., Inc. v. USDA*, 130 F. Supp. 3d 81, 89 (D.D.C. 2015). A court must grant summary judgment to the agency when its "action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id*.

SUMMARY OF THE ARGUMENT

First, the cost of the tests for NAS-T in March of 2020, conducted by Central Labs at the behest of FAWS, should not be collected from BELCO. CERCLA provides for potentially responsible parties to be liable for "necessary costs of response incurred by any other person consistent with the national contingency plan", and these tests do not fall under this description. 42 U.S.C. § 9607. To be necessary, the costs must be undertaken in response to a threat to human health or the environment. *Reg'l Airport Auth. v. LFG, LLC,* 460 F.3d 697 (6th Cir. 2006)

(quoting *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562, *aff'd*, 54 F.3d 379 (7th Cir. 1995)). Previous testing done by both BELCO and the DOH had separately shown little to no traces of NAS-T near Fartown, and the testing that was actually done showed only levels of NAS-T that would have had no statutory basis to act upon, as they were under the prescribed limit set by the EPA, and the New Union Environmental Rights Amendment had not yet been passed. Further, the National Contingency Plan states the cost must actually result in a CERCLA-quality cleanup. 40 C.F.R. 300.700(c)(3)(i). Here, there is a tenuous connection at best between the testing and later cleanup efforts, for it was the passing of the Environmental Rights Amendment that changed the EPA's mind on whether to reopen the consent decree, and the remedial action thus far has consisted of supplying water bottles. Finally, there is indication that testing was done for the purposes of litigation, which would disqualify it from being a reimbursable cost. *Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.*, 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. Sept. 16, 2016). FAWS knew that the EPA had already declined to look into the matter, and once they received their results, elected to sue for BELCO to pay for filtration systems in their homes, rather than installing it themselves and suing for the costs in this action.

Second, the EPA was correct in interpreting New Union's Environmental Rights Amendment (ERA) as an applicable rule and regulation (ARAR) and justified in reopening the consent decree and implementing the UAO against BELCO. To qualify as an ARAR, a state law must be properly promulgated, more stringent than federal standards, legally applicable or relevant and appropriate, and timely identified. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991). The ERA was indeed properly promulgated as it had passed the New Union Legislature by normal procedure and was signed off by the Governor. It is legally

enforceable and generally applicable, for it has been held that broad goals can meet the definition of an ARAR, and such statutes don't necessarily need numeric standards. *Akzo*, 949 F.2d at 1441 (quoting *Interim Guidance*, 52 Fed.Reg. at 32,498). It is more stringent than federal standards due to its broad scope- it was passed for the purposes of filling in gaps in the existing law, and was read by the EPA to do exactly that. EPA guidance states that where a state law fills in gaps in federal law, the state law is considered more stringent. Proposed Rule, 53 Fed.Reg. at 51435. Further, the ARAR is legally applicable to the prevention of NAS-T in Fartown. For a state law to be legally applicable, the analysis depends on consideration of factors such as environmental media, the type of substance, and goal of potential ARAR. *Akzo*, 949 F.2d at 1446. The environmental media here is any environment, such as the water of Fartown, and the type of substances regulated are any pollutants, such as NAS-T. The goal of the ERA is to maintain a clean and healthy environment, which its application here would do. As timely identification is not at issue, this along with the deference afforded to EPA interpretations all points to the EPA's usage of the ERA as an ARAR as correct.

Thirdly, the EPA did not act capriciously, arbitrarily, or contrary to the law when it determined that BELCO was not required to install filtration systems in Fartown. When determining if the EPA acted arbitrarily or capriciously, the court is to look at "the administrative record, searching for errors of procedure and for glaring omissions or mistakes which indicate that EPA has acted arbitrarily and capriciously." *Akzo*, 949 F.2d at 1424. In this case, the administrative record favors the EPA's actions. The results from the BELCO monitoring of Fartown wells from 2017-2018, and the DOH's results in 2019, all showed trace amounts of NAS-T at best, and the 2020 results were again not past the level of toxicity. Still, the EPA ordered BELCO to provide water bottles to Fartown residents, and install filtration systems if

NAS-T moves past 10 ppb. FAWS argues for unreasonable actions of ordering the installment of filtration systems and decontamination of the Sandstone Aquifer based on this data alone. The EPA was also not acting against the ERA or CERCLA with this decision. The ERA affords a right to healthy water to all, but does not mandate a filtration system for water if it is not necessary for that right. The district court relies on a literal translation of the right to be "free from human-made contaminants", but such an unrealistic idea was not the intent of the legislature. The record shows that the proponents of the ERA did not believe it to quite literally mean that water must have no contaminants at all, but rather that all have the right to water that does not harm them. The EPA's decision to supply water bottles to Fartown residents fulfills this. CERCLA is also not meant to guarantee a right to zero contaminants in water and air. Hazardous waste has to go somewhere, and the trace, non-toxic amounts that we may end up consuming are not a legal issue under either of these laws. The National Contingency Plan requires the EPA to examine the cost-effectiveness of a remedy, which is what the EPA did in this case. 40 C.F.R. § 300.43(f)(1)(ii)(D). They determined that the cost of installing filtration systems for every resident was not proportional to the low risk of harm that the test results indicated, and that the supply of water bottles was a much more economical and proportional issue to the matter.

Lastly, the District Court acted correctly in retaining supplemental jurisdiction over FAWS' remaining state law claims of nuisance and negligence in tort after the federal claims had been resolved. Although it is generally judicial practice to remand cases to state courts once federal questions have been resolved, courts can consider efficiency and whether any novel state law questions remain in the case. *See Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182 (2d Cir. 1996) (discussing efficiency) and *Ameritox, Ltd. v. Millennium Labs., Inc.,* 803 F.3d 518, 539 (2015) (discussing novel state law questions). With regards to efficiency, courts look at the

procedural history and knowledge of the court of the matter at hand. *See Nowak*. This case has had a long history dating back to 2017, and as such it would require a state court to spend an inordinate amount of time orienting itself to its technical features, whereas the District Court was already up to speed with the issues in question. It is also convenient to all parties to try a matter in one court and avoid the confusion of multiple venues. In regards to whether there are any novel state questions left, the District Court of New Union was correct in saying that there are no substantial state legal questions here. The interpretation of the ERA is not what is at issue here, it is simply cases in tort law which are not seen as novel questions of state law.

ARGUMENT

I. The additional testing expenses incurred by FAWS were not "necessary" response costs and instead were done for the purposes of litigation, and thus cannot be collected from BELCO.

FAWS contends that the Central Labs testing done in March of 2020 qualifies as a "necessary" response cost of $21,500 and entitles them to recovery from BELCO. The EPA agrees with BELCO that this testing cannot be interpreted to be "necessary", and such a motion should be denied. 42 U.S.C. § 9607 states that:

> Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for…any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607. Implicit in this is that private parties may recover for costs associated with the investigation and cleanup of hazardous substances from parties potentially responsible for the pollution. However, such costs must actually be necessary, and here, the testing done by

FAWS was not. Although it did yield results of some trace contamination, at the time it 1) was not closely tied to the actual cleanup of hazardous releases and 2) was done for the purpose of preparation for future litigation.

A. FAWS' additional testing was not necessary because it was not closely tied to the actual cleanup of hazardous releases.

When determining whether a private party's response costs were "necessary", the National Contingency Plan (NCP) states in 40 C.F.R. 300.400(i) that "[300.400] may be used as guidance concerning methods and criteria for response actions by other parties under other funding mechanisms". Specifically in regard to the criteria to use to determine necessity, the regulation states:

> 3) In addition to applicable or relevant and appropriate requirements, the lead and support agencies may, as appropriate, identify other advisories, criteria, or guidance to be considered for a particular release. The "to be considered" (TBC) category consists of advisories, criteria, or guidance that were developed by EPA, other federal agencies, or states that may be useful in developing CERCLA remedies.

40 C.F.R. 300.400. Although the text here makes reference to "lead and support agencies", as stated above, subsection i makes it clear that this can apply to private actions. Here, it is of relevance to note that in 1995, the EPA adopted a Health Advisory Level ("HAL") of 10 ppb for NAS-T, meaning that the presence of NAS-T below 10 ppb is not toxic to humans. No other guidance that falls under the statutory definition of "to be considered" has been identified. The 1995 guidance was based on a series of medical studies and takes into account statistical margin of error, and is thus the standard we believe prudent to use in this analysis.

A private party's investigation or cleanup effort must be closely related to the actual cleanup of hazardous releases. *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) To show this, "a theoretical threat is not enough. For response costs to be "necessary", [sic] plaintiffs must establish that an actual and real public health threat exists prior to initiating a response action.". *Reg'l Airport Auth. v. LFG, LLC,* 460 F.3d 697 (6th Cir. 2006) (quoting *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562, *aff'd*, 54 F.3d 379 (7th Cir. 1995)).

In January of 2017, Belco had completed construction of monitoring wells in compliance with their agreement with the EPA. They had five wells 1.5 miles north of Fartown that were active until September of 2018. Apart from January of 2018, these wells did not record any amounts of NAS-T near Fartown. Only in January 2018 did two wells test at 5 ppb and 6 ppb (which does not meet the threshold for the HAL of NAS-T) respectively. There were no positive results after this. In response to some Fartownians contending that their water smelled "off", in February of 2019 the Centerburg County Department of Health tested five private drinking wells in Fartown. and again, found no NAS-T.

The above record shows that there was no evidence of active threat to human health and neither was there any need for the containment or cleanup of hazardous waste when, in May of 2019, FAWS enlisted Central Labs to conduct their testing in Fartown drinking wells. Here, a third-party group has ordered testing done when there was very little indication, if any, that NAS-T would be identified. Their results notwithstanding, which only show again that NAS-T was found in amounts consumable as per EPA standards, the testing cannot be said to have been done in response to an active threat of human health under any standard of reasonableness. In *Reg'l Airport Auth. v. LFG, LLC* an airport authority was ruled to have not had enough information for decontaminating a landing strip during construction to be a "response cost". This

was because they had only done an Environmental Impact Statement prior to the "response action" which showed that the site of decontamination was not a public health risk. They decontaminated *for* the environment and public health, but the court ruled that the lack of evidence of an *actual* threat "demonstrates that the cleanup costs could not have been incurred in response to a threat to human health or the environment, because the Authority did not have the relevant information at the time the costs were incurred". *Id.* That is precisely what is occurring in this case. FAWS ordered the test be done *for* the health of Fartown residents, but there was no evidence that there was an *actual* threat.

What's more is that in order to qualify as a response cost that is "consistent with the National Contingency Plan", the NCP itself specifies in 40 C.F.R. 300.700(c)(3)(i) that:

> "A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup."

40 C.F.R. 300.700(c)(3)(i). What is not at issue here is whether the tests performed by Central Labs complied with paragraphs 5 and 6 of the above statute, which are largely procedural to ensure the action is of quality and taking into account the public opinion. Rather, what is at issue is whether these tests specifically resulted in a CERCLA-quality cleanup, in fact whether it resulted in a cleanup at all. *Young v. United States* noted that "several circuit courts of appeal have concluded a response cost is only "necessary" if the cost is closely tied to the actual cleanup of hazardous releases". *Young*, F.3d 858 at 863. We contend that the same is true for this case. The tests did yield some trace amounts of NAS-T, but it was at levels the EPA has determined to be non-toxic, just as previous tests. It did not on its own lead to a cleanup, as the EPA initially

denied taking further action upon FAWS' request. The passing of the Environmental Rights Amendment and the complaints of their water's odor by Fartownian (events that were independent of the FAWS testing) were also relied upon by the EPA when reopening the consent decree. Previous tests had also shown traces of NAS-T, and could have been relied upon to make such a decision.

Further, it should be noted that to the extent that cleanup can be said to have actually been done: very little has yet taken place in Fartown. The updated UAO states that clean water is to be supplied to residents with 5-10 ppb of NAS-T in their wells, and filtration systems are to be installed for those over that figure. No household's water has risen above 10 ppb, and as a result, there have been no filtration systems installed, simply water bottles provided. It may speak to the "threat to human health" that residents have not bought filtration systems themselves and included the costs in the suit at hand.

B. <u>FAWS testing was done with the intent to pursue future litigation and thus cannot qualify as necessary.</u>

Reimbursement for expenses "incurred solely in preparation for litigation" cannot be granted "unless they significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.*, 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. Sept. 16, 2016). FAWS knew about the BELCO investigation. They also knew that the BELCO wells near Fartown had been silent with one exception from 2017-2018 and that the DOH's test had returned negative results of NAS-T in 2019. As a result, it would appear that Fartown was conducting such results simply in the interest of exploring potential litigation against BELCO.

The results did not "significantly" benefit the entire cleanup effort. Trace results of NAS-T were found, whose magnitude and cost to cleanup is dwarfed by the original cleanup site.

It also cannot be said that the testing "served a statutory purpose", since at the time, the Equal Rights Amendment had not yet passed, and so there was no statutory basis for citizen-led testing efforts. As stated above regarding the necessity of the tests, FAWS very well could have installed the filtration systems themselves and then sued for the costs in the case at hand. They chose not to, electing instead to use the tests to petition the EPA to update the UAO to make BELCO pay for filtration systems. As the situation stands, reimbursement should not be granted. Doing so would set a precedent that would interfere with EPA's ability to serve our nation's citizens, for many such groups may begin to go on fishing expeditions and charge Defendants for the costs of such endeavors- even if nothing is found.

One may understandably view these two points as relying on each other- that is because they are indeed heavily related. The lack of any real threat to human health, demonstrated by the totality of the previous data as well as the FAWS test itself, and the lack of action on the part of FAWS to urgently rectify a problem to which they knew the solution, point instead to litigation as the actual motive behind this test. But even if the court does not find that to be true, the lack of necessity of the FAWS test itself is sufficient to rule against holding BELCO liable for its costs.

II. The EPA was correct in interpreting the ERA as an ARAR, justifying the reopening of the Consent Decree and ordering further remedial action in the UAO.

The EPA correctly interpreted the ERA as an ARAR for the purposes of reopening BELCO's Consent Decree ("CD") and ordering further remedial action in the UAO. Per the CD, EPA has the discretion to reopen the CD and order BELCO to further remediate the site if:

> (1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or

(2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

CD, § 13.3. The Consent Decree defines Regulatory Standards to include "applicable or relevant and regulatory requirements under CERCLA ('ARARs')." CD, § 1.12. Remedial actions under CERCLA must attain or waive "any promulgated standard, requirement, criteria, or limitation under a State environmental ... law that is more stringent than any Federal standard." 42 U.S.C. § 9621(d)(2)(A). A state environmental standard or law constitutes an ARAR that a remedy must comply with if it is: (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

The EPA was justified in interpreting the ERA as an ARAR because the ERA meets the requirements set by precedent and 42 U.S.C. § 9621(d). First, the ERA was properly promulgated because it was enacted through the state legislature, is generally applicable and is enforceable as it is self-executing. Second, the ERA is more stringent than federal standards because it is broader in scope than federal equivalents and applies to unregulated contaminants. Third, the ERA is legally applicable to the NAS-T release because NAS-T is otherwise unregulated and has potentially harmful effects on human health and the environment. Finally, timely identification is not challenged in this case, so this analysis assumes the fourth element is satisfied.

Finally, the EPA is entitled to deference for its interpretations of state laws as ARARs according to the persuasiveness of its interpretation. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The level of deference accorded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

and all those factors which give it power to persuade, if lacking power to control." *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

A. The ERA was properly promulgated because it was enacted through the state legislature, is generally applicable to all citizens, and is enforceable in its current form.

First, the ERA satisfies the element of proper promulgation. "Properly promulgated" has been defined by the EPA as "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." EPA, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance,* 52 Fed.Reg. 32495, 32498 (Aug. 27, 1987). Laws or rules promulgated by state legislatures are generally applicable when they apply to all citizens of that state. *Akzo*, 949 F.2d at 1441. A state law may be a legally enforceable ARAR without including numerical standards. ("General State goals that are duly promulgated (such as a non-degradation law) have the same weight as explicit numerical standards, although the former have to be interpreted in terms of a site and therefore may allow more flexibility in approach." *Akzo*, 949 F.2d at 1441 (quoting *Interim Guidance*, 52 Fed.Reg. at 32,498). Objective standards are not required under CERCLA for a requirement to qualify as an ARAR. *See* 42 U.S.C. § 9621(d); *Akzo*, 949 F.2d at 1442; *see also* EPA, *National Oil and Hazardous Substances Pollution Contingency Plan*; Proposed Rule, 53 Fed.Reg. 51394, 51,438 (Dec. 21, 1988). Even if a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria for state ARARs. *Id*. Self-executing rights and statutes do not require regulations for enforceability. The EPA has considerable latitude in determining how to comply with a state statute in the absence of implementing regulations. *Akzo*, 949 F.2d at 1442.

There are few cases that address CERCLA ARAR validity. In *United States v. Akzo Coatings*, the most substantive example, the State of Michigan passed an anti-degradation law that read in relevant part: "It 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…" M.C.L.A. § 323.6(a). In a CERCLA remedial action suit, the validity of this anti-degradation law as an ARAR was challenged on the grounds of improper promulgation, specifically on its enforceability. *Akzo*, 949 F.2d at 1441. As the law was promulgated by the state legislature, it was not challenged on general applicability. *Id*. The court found that statutes stating general state goals with broadly applicable language, such as the anti-degradation law, were not rendered invalid and unenforceable because they lacked quantitative standards.[1] *Id*.

The ERA is generally applicable and is legally enforceable and therefore is properly promulgated. The ERA was adopted through the state legislature originally, and signed by the Governor; statutes enacted under these same steps are deemed "properly promulgated." Record at 4-5. In *Akzo*, enactment through the state legislature was sufficient for general applicability. *Akzo*, 949 F.2d at 1441. Additionally, the ERA is generally applicable as it applies to all citizens of the state. N.U. CONST. art. I, § 7. Further, the ERA is legally enforceable as an ARAR in its current form because CERCLA does not require ARARs to have quantifiable standards. The ERA's lack of numerical standards allows for flexibility in EPA's interpretation but does not render the amendment unenforceable. Finally, in evaluating the legislative record for the ERA, it is clear the ERA is meant to be a self-executing statute and does not require promulgated regulations for enforceability. Senate Report, p. 6.

[1] The *Akzo* anti-degradation statute had requirements for the state agency to enact accompanying regulations, but the ERA is specifically self-executing. *See* M.C.L.A. § 323.6(a).

B. The ERA is more stringent than federal standards because it has a broader scope than federal standards and applies to unregulated substances.

Second, the ERA meets the element of increased stringency because it is broader in scope than federal equivalents and applies to gaps in federal law. For state standards to qualify as an ARAR, they must be "more stringent than any Federal standard, requirement, criteria or limitation. *Akzo*, 949 F.2d at 1443. EPA guidance states that: "where no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." Proposed Rule, 53 Fed.Reg. at 51435. Federal laws are considered less stringent and more narrowly scoped if the federal law applies to certain substances while the state equivalent does not. *See Akzo*, 949 F.2d. Broad state laws that have the potential to be "more demanding in terms of cleanup requirements" are considered more stringent than federal laws. *Id*. at 1443.

The ERA is more stringent than relevant federal requirements and therefore meets the stringency requirement to qualify as an ARAR. The language of the ERA is broadly applicable and broader in scope than the language of any comparable federal statute. *See generally* 33 U.S.C. § 1251 *et. seq.*; 42 U.S.C. § 7401 *et. seq*. Major environmental statutes, such as the Safe Drinking Water Act and Clean Water Act, are applicable to specific actions and substances; the ERA is not specified to specific substances and is broader in scope than any federal equivalents. Per the legislative documents, the ERA was promulgated in order to address chemicals and locations otherwise unregulated by federal or other state laws: "...if there is any substance or contaminant that is not currently regulated, and it is discovered… to cause some type of harm…then this amendment would fill that gap and help to ensure that no one suffers until such a time as a law is passed to encompass that scenario or substance." S.R., at 6. The broad scope of

ERA has the potential to require more cleanup than other rules. As there is no federal or state regulation of NAS-T, the ERA is the most stringent requirement for the NAS-T release.

C. The ERA is legally applicable to, relevant and appropriate for the NAS-T release because it addresses unregulated substance releases sufficiently similar to the Fartown NAS-T contamination.

Finally, the ERA is legally applicable and the relevant and appropriate requirement to apply to the NAS-T release. Under section 9621(d) the potential ARARs must be "legally applicable to the hazardous substance or pollutant or contaminant concerned or relevant and appropriate *under the circumstances of the release* or remedial action selected" (emphasis added). *Akzo*, 949 F.2d at 1445. "Relevant and appropriate requirements" are standards promulgated under federal or state law that address problems sufficiently similar to those encountered at a site so that their use is applicable to that site. 40 C.F.R. § 300.6; *Interim Guidance*, 52 Fed.Reg. at 32497; *NCP Final Rule*, 55 Fed.Reg. at 8742. Applicability of a potential ARAR depends on its scope. *Akzo*, 949 F.2d at 1445. Whether a potential ARAR is relevant and appropriate to the site or scenario in question depends on consideration of factors such as environmental media, the type of substance, and goal of potential ARAR. *Id*. at 1446.

In *Akzo*, the applicability of the anti-degradation statute, which prohibited direct and indirect discharges of injurious substances into groundwater, was challenged for a site where soil contaminants had leached into groundwater indirectly through natural infiltration. *Id*. at 1445. Evidence in the record demonstrated continued, indirect discharges into soil and that the contaminant discharged into the soil would continue to leak into the groundwater; the statute scope including *indirect* discharges into groundwater made the anti-degradation applicable. *Id*. For the relevance and appropriateness of the anti-degradation statute the court held: "...the environmental media ("groundwater"), the type of substance ("injurious") and the objective of

the potential ARAR ("protecting aquifers from actual or potential degradation)," aligned with the site at issue. *Id*.

The ERA is applicable, relevant and appropriate to the NAS-T contamination. The scope of the ERA is broad and includes any release threatening "a clean and healthful environment". N.U. CONST. art. I, § 7. Prior remedial action and Consent Decree demonstrates that NAS-T may contaminate the environment and cause harm to human health. R. at 2. The ERA is also relevant and appropriate to the BELCO release of NAS-T based on the factors of environmental media, type of substance, and objective of the potential ARAR. As mentioned above, the ERA applies to the environment generally, so any environmental media. The ERA is meant to apply to human-made substances otherwise unregulated; NAS-T is man-made and not currently regulated by any state or federal rules. S.R. at 6; R. at 3.The goal of the ERA is to maintain a clean and healthful environment free from human-made contaminants and NAS-T is a human-made contaminant, with potential harm to health, found in the environment.

In conclusion, the EPA is correct in interpreting the ERA as an ARAR based on precedent and was therefore justified in reopening the Consent Decree and ordering further remedial action. *Akzo* established that a state statute may be interpreted as an ARAR if it is: (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. 949 F.2d at 1440. The ERA was enacted through the state legislature and is generally applicable and legally enforceable. It applies to all citizens of the state and potential contaminations and is self-executing. The ERA is broader in scope than any comparable federal requirements and is therefore more stringent. The ERA is legally applicable to the NAS-T release because it was promulgated for this scenario; the ERA applies to

any environmental medium contaminated by a human-made chemical with potential harm. Timely identification is not challenged in this case.

III. The EPA did not act capriciously, arbitrarily or contrary to law in determining BELCO was not required to install filtration systems in Fartown.

In determining that filtration systems were not required in the remedial action plan, the EPA did not act capriciously, arbitrarily or contrary to applicable law. Where a challenge is made to an EPA enforcement order under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004). The EPA decided to not require filtration systems based on the administrative record and their interpretation of the ERA; the remedial plan addressed the potential health risks from the NAS-T contamination. The EPA also did not act contrary to the ERA or CERCLA. The purpose and intent of the ERA is to maintain human health and is focused on keeping water clean for consumption; this did not require filtration systems. The EPA's plan is not contrary to CERCLA requirements as CERCLA does not require complete elimination of contaminants.

A. <u>The EPA's remedial action is not arbitrary and capricious based on the administrative record.</u>

The administrative record factually supports EPA's decision to not require filtration systems on every Fartown well showing some level of NAS-T. The Court's role in reviewing agency decisions under CERCLA is to review "the administrative record, searching for errors of procedure and for glaring omissions or mistakes which indicate that EPA has acted arbitrarily and capriciously." *Akzo*, 949 F.2d at 1424. The arbitrary and capricious standard of review is used "because determining the appropriate removal and remedial action involves specialized

knowledge and expertise, [and therefore] the choice of a particular cleanup method is a matter within the discretion of the [government].” *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992). The arbitrary and capricious standard is deferential to the agency: “court will not vacate agency's decision unless it has relied on factors which Congress did not intend it to consider, entirely failed to consider [an] important aspect of problem, or offered an explanation for its decision that runs counter to evidence”. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007). The administrative record indicates that the EPA did not act capriciously or arbitrarily or demonstrate a clear error in judgment in not requiring filtration systems; acceptable limits of NAS-T and well testing data show that the systems were not necessary.

The administrative record shows that the NAS-T detected in Fartown’s private wells was not significant enough to require filtration systems on every well. Additionally, the EPA considered relevant factors in its decision including: level of drinking water contamination, possible endangerment from potential carcinogenic effects, presence of odors, and Fartown’s status as an environmental justice community. R. at 5. The EPA developed the acceptable Health Advisory Level (“HAL”) based on external studies establishing NAS-T as a human carcinogen. R. at 2. The HAL for drinking water is set at 10 ppb; this level contains a significant margin of error to ensure the acceptable amount will not be toxic to humans. *Id*. The EPA is aware that NAS-T can be detectable by odors under 10 ppb, but below the HAL it is not toxic. *Id*. In the original Consent Decree with BELCO, there are only two instances where NAS-T was detected in wells, both under 10 ppb. R. at 4. The New Union Department of Health (“DOH”) did not detect any NAS-T in Fartown wells before FAWS engaged in private testing. *Id*. The private well testing by Central Labs produced varied results, showing that all sampled wells were below the

HAL of 10 ppb.[2] *Id*. Over half the samples did not have *any* detectable NAS-T. *Id*. Remediation of the entire Sandstone Aquifer was not required in the original CD or UAO due to prohibitive costs. *Id*.

The EPA's Unilateral Administrative Order addresses the relevant human health concerns at differing levels of NAS-T contamination. It is clear from the lack of contamination in *every* Fartown well that the total decontamination of the Sandstone Aquifer is not reasonable or necessary. Both the original CD and the UAO require continued monitoring of drinking water sources to ensure accurate remedies; Centerburg and Fartown are not treated differently in this regard. For Fartown wells that test above 10 ppb, the HAL signifying likelihood of toxicity, the UAO does require filtration systems to eliminate NAS-T entirely. EPA designated filtration systems for wells with the risk of health impacts; no Fartown wells are exhibiting a level of NAS-T that is toxic. Additionally, the EPA did consider odor in its UAO and requires BELCO to provide clean, bottled drinking water for Fartown wells testing above 5 ppb, the level where NAS-T may be detectable by smell. The EPA's remedial action plan addresses both odor and potential exposure to carcinogens in Fartown's drinking water. The EPA considered Fartown's status as an environmental justice community in reopening the CD and requiring remedial action from BELCO, even when the NAS-T contamination is below toxic levels.

B. <u>The EPA's decision to not require filtration systems is also not contrary to either the ERA or CERCLA.</u>

In addition to the EPA's remedial action plan being supported by the administrative record, the plan was not contrary to law. First, the UAO was not contrary to the ERA as the ERA is focused on clean drinking water and potentially mitigating sufficiently offensive odors. The

[2] The District Court summarized the results as follows: "Central Labs took three samples each from 75 private wells in Fartown. Results from Central Labs' 225 samples, reported in March of 2020, were varied: 120 showed no detectable levels of NAS-T; 51 showed concentrations of 1 to 4 ppb; and 54 had detections of NAS-T in the 5 to 8 ppb range." R. at 4-5.

UAO addresses both of these issues in the Fartown water wells. Second, the UAO is not contrary to CERCLA requirements as CERCLA does not require complete elimination of potential exposure to carcinogens and does require the EPA to consider cost-effectiveness in its solutions.

1. *The plain language of the ERA is contrary to clear legislative intent and would produce an absurd result.*

The literal interpretation of the ERA preferred by FAWS and the District Court is contrary to the legislative intent of the ERA and would produce absurd results. Courts must apply the plain language of a statute "except in the rare circumstance when there is a clearly expressed legislative intent to the contrary or when a literal application would frustrate the statute's purpose or lead to an absurd result." *Nat'l Coalition for Students With Disabilities v. Allen*, 152 F.3d 283, 288 (4th Cir.1998).

Interpreting the language "free from" human-made contaminants literally would frustrate not only regulatory programs like permitting under the Clean Water Act, but would also result in requiring expensive, unnecessary remedial actions all over the state. Requiring a complete lack of contaminants with no consideration for actual environmental and health impacts is unreasonable. This interpretation is also contrary to legislative purpose, which is analyzed in the next section.

2. *Legislative history contradicts the District Court's literal interpretation of the ERA's language.*

The legislative history of the ERA supports the EPA's interpretation and chosen remedial action. Regardless of the ambiguity of a statute's plain language, the Court may look to legislative history "where the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001). The ERA's legislative history clearly does not require zero or near zero levels of

contamination; the purpose of the ERA is to ensure citizens have access to air and water that is not toxic.

The legislative history of the ERA demonstrates that the broadly applicable language like "clean", "healthful" and "free from contaminants" is meant to focus on human health impacts and safe drinking water. S.R. at 4. Upon being questioned on the intended meaning of "clean", a sponsor of the amendment, Mr. Wright, stated: "I believe that 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."[3] S.R. at 4. Mr. Wright further explained that "clean" water means it will not harm one to drink it. Id. For "healthful" Mr. Wright explained that: "Healthful" means that it will do no harm *to consume that water*. And if you look at the latter part of this amendment, clean would mean, for example, water that is free of contamination or pollution caused by humans *that would make that water unhealthful or harmful to consume*." (emphasis added) S.R. at 5. It is clear that the broad language of the ERA, in the context of water, was intended to apply to the consumption and potability of water. There is no evidence in the legislation history to support FAWS' argument that the ERA clean water requirement was meant to apply to all potential uses of water beyond potability.

The legislative history also discusses the issue of odor and whether it can constitute uncleanliness for the purposes of the ERA. Mr. Wright stated: "...odors could be an issue if sufficiently offensive and if they impact what the community would consider "clean" air." S.R. at 6. The issue of odor was only discussed in the context of air. Id. It is unclear if the legislature thought that odor which is "sufficiently offensive" would constitute unclean water. However, if

[3] Note the specification of public water supply; it is arguable that the "clean" water requirement could only apply to public water supplies, which would make Fartown's private wells outside of the ERA's clean water requirement.

one does interpret that odor could constitute unclean water, the administrative record shows that the EPA addressed this concern in their remedial action plan.

3. The District Court's interpretation of the ERA and decision regarding the UAO would operate contrary to CERCLA.

CERCLA does not require the complete elimination of risk or of all known or anticipated effects; remedies under CERCLA are not required to entirely eliminate potential exposure to carcinogens. *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 FR 8666-01. A State standard, requirement, criteria, or limitation may not "effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants." 42 U.S.C. § 9621.

The District Court's and FAWS' interpretation of the ERA's "free from…contaminants", which implies zero or near-zero levels of contaminants, would operate contrary to CERCLA. While any proposed remedies must also meet ARARs, the cleanup is ultimately governed by CERCLA; ARARs may not be interpreted to run inconsistently with CERCLA or other federal requirements. R. at 5. The EPA's remedial action plan addresses NAS-T contamination in Fartown wells well below the level believed to be harmful. The UAO does not completely eliminate *potential* exposure to NAS-T related carcinogens, but it is not required to. Furthermore, the more extreme interpretation of the ERA would effectively prohibit the disposal of hazardous substances. This is evident in FAWS' argument that there can be no contamination or even occasional odor under the ERA. FAWS Mem. of Law at 14. This is also evident in the Senate's discussion of odor; Mr. Wright theorized that sufficiently odorous, but legal, activities like landfill disposal could be challenged under the ERA. S.R. at 5-6. This would be an unacceptable interpretation and application of the ERA as it would potentially prohibit disposal of hazardous substances within the state.

4. The EPA did not act contrary to the CERCLA regulatory scheme in not requiring filtration systems on all Fartown wells.

The EPA also did not act contrary to CERCLA in choosing the Fartown remedial action plan. Under CERCLA, the EPA has considerable latitude in determining how to comply with a state statute in the absence of implementing regulations. *Akzo*, 949 F.2d at 1442. The President or the EPA must "select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." 42 U.S.C. § 9621(b). National Contingency Plan (NCP) is EPA's regulatory template for a CERCLA quality cleanup; NCP sets performance standards, identifies methods for investigating the environmental impact of a release or threatened release of hazardous substances, and establishes criteria for determining the appropriate extent of response activities. 42 U.S.C. § 9601 *et seq.*; 40 C.F.R. § 300.1 *et seq*. The EPA is authorized to take necessary actions consistent with the National Contingency Plan. 42 U.S.C. § 9604(a)(1). In addition to overall cost, the NCP requires that the EPA analyze the cost-effectiveness of each remedial alternative. 40 C.F.R. § 300.43(f)(1)(ii)(D). A remedy is deemed cost-effective only if "its costs are proportional to its overall effectiveness." *Id*. Cost cannot be used to justify selection of remedy that is not protective of human health and environment, but it can be considered in selecting from options that are adequately protective. *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1533 (D.C. Cir. 1993). A remedy is adequately protective if its solutions align with regulatory requirements for reducing carcinogenic exposures. *Id*. Additionally, CERCLA prioritizes ensuring a safe drinking water supply in its remedies. 42 U.S.C. § 9618.

The EPA's chosen remedial plan and its choice not to require filtration systems in Fartown is not contrary to CERCLA requirements. As the ERA does not have, or require, implementing regulations and the EPA has discretion in determining how to comply with the ERA. The EPA, in accordance with CERCLA and the NCP, considered cost and cost-effectiveness in its determination to not require filtration systems for Fartown private wells. The EPA reasonably determined that expensive filtration systems were not necessary for wells that tested below the acceptable level of NAS-T; especially as this acceptable level is determined by potential health impacts and both the ERA and CERCLA focus on remedies protective of human health. The cost of installing filtration on all private wells is grossly disproportionate to the benefit. The EPA's current remedial plan is adequately protective because it addresses human health risk within applicable regulations. "For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10 [ppb] and 10 [parts per million]...." 40 C.F.R. § 300.430(e)(2)(i)(A)(2). The EPA's UAO addresses NAS-T exposures within and beyond this limit, ensuring that those outside the acceptable level of exposure have filtration systems available to them so there are no health risks associated with their drinking water.[4]

IV. The District Court acted correctly in retaining supplemental jurisdiction over FAWS' remaining state law claims after the federal claims had been resolved.

The District Court was correct in its judgment to continue exercising supplemental jurisdiction over this case after all the federal CERCLA issues were resolved. Federal courts are entitled to supplemental jurisdiction under 28 U.S.C. § 1367(a), but federal courts generally dismiss state claims for state courts to resolve once all federal matters in the case have been

[4] Note that per 42 U.S.C. § 9621(d)(4), there are exceptions to when the EPA is required to achieve a State ARAR; one of these exceptions is when it is unclear whether the State has or will apply the ARAR consistently. 42 U.S.C. § 9621(d)(4). EPA may determine that the ERA is not a consistently applicable ARAR and default to CERCLA cleanup requirements.

resolved. Indeed, failing to do so can be, and has been, considered an abuse of discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

However, as the District Court discussed in its opinion, there are circumstances in which federal courts may rightly choose to retain jurisdiction over lingering matters of state law even after all federal questions have been answered. In deciding whether to retain jurisdiction, courts consider several factors. The first is efficiency–which includes asking whether the case has significant procedural history at that court and whether the court is sufficiently well-versed in the remaining legal issues. *Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182 (2d Cir. 1996). In *Nowak*, the court aptly stated that

> to now require much of this court's efforts in acquainting itself with the facts and issues of the case to be substantially replicated in state court would not serve the interests of judicial economy, convenience, and fairness that are central to the exercise of supplemental jurisdiction.

Id. at 1187. In addition to considering spent effort, courts have maintained supplemental jurisdiction over cases in which they are "conversant with the facts" of or "intimately familiar" with. *Kelly v. Mercoid Corp.*, 776 F. Supp. 1246; *Smith v. Amedisys Inc*., 298 F.3d 434.

The District Court correctly interpreted that the efficiency factor weighs in favor of the court retaining supplemental jurisdiction in this case for several reasons. First, the time that this case has spent in this court is significant. The District Court entered the initial consent decree for this case on August 28, 2017, and issued its most recent order on this case on June 1, 2022–nearly five years later. The court is obviously fluent with the facts and issues of this case, and the substantial amount of time and expense that it would take to replicate this fluency in state court. There is also the simple matter of convenience. The Eleventh Circuit noted that it is most

convenient for the parties to try every claim in a single forum, and thus convenience always weighs in favor of retaining supplemental jurisdiction. *Ameritox, Ltd. v. Millennium Labs., Inc.,* 803 F.3d 518, 539 (2015).

The second factor federal courts consider when determining whether to retain supplemental jurisdiction is whether the remaining state law claims are "novel or complex". Federal courts are highly encouraged to defer substantial matters of state law to state courts in the interest of judicial comity and to ensure that state courts are the final arbiters of state law. *Ameritox* at 540, citing *Baggett v. First Nat'l Bank*, 117 F.3d 1342 (1997). However, where no novel state legal questions are presented, federal courts can properly retain supplemental jurisdiction. 81 F.3d at 1182. By the District Court of New Union's own admission, the nuisance and negligence claims that have arisen in this case are not novel or complex.

CONCLUSION

For the foregoing reasons, this Court should affirm in part the District Court's summary judgment in favor of BELCO with respect for reimbursement of FAWS' testing expenses and in favor of EPA with respect to its determination to reopen the Consent Decree and issue the UAO. This court should reverse in part summary judgment against EPA as to EPA's decision not to require installation of CleanStripping technology on Fartown's wells. This Court should affirm the denial of FAWS' motion to dismiss the remaining state law claims.