Non Measuring Brief
Team 46

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, FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgement in consolidated cases No. 17-CV-1234 and No. 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because the parties' claims arise under Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. § 9601 *et seq*. The United States Environmental Protection Agency, Better Living Corporation, and the Fartown Association for Water Safety 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 pursuant to 28 U.S.C. § 1291 because this is an appeal of a final judgement in a civil case.

STATEMENT OF ISSUES PRESENTED

I. Whether the costs incurred by FAWS in sampling, testing, and analyzing well water samples for NAS-T after residents noticed their water smelled off are reimbursable as response costs under CERCLA.

II. Whether EPA correctly determined that the Environmental Rights Amendment constitutes an Applicable or Relevant and Appropriate Regulation under CERCLA.

III. Whether EPA acted arbitrarily, capriciously, or otherwise contrary to law in not requiring BELCO to install CleanStripping filtration on NAS-T contaminated wells in Fartown, contrary to the text and purpose of the Environmental Rights Amendment.

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

STATEMENT OF THE CASE

A. Comprehensive Environmental Response, Compensation, and Liability Act

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*., to address the serious environmental and health risks posed by industrial pollution." *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). At heart, CERCLA is "a remedial statute designed by Congress to protect and preserve public health and the environment" by promoting timely cleanup of hazardous waste sites. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). As part of ensuring prompt cleanup, one of CERCLA's most essential purposes is "making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir. 2003) (internal quotations omitted). To achieve these goals, CERCLA grants the President "broad powers to command government agencies and private parties to clean up hazardous waste sites." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)).

A CERCLA action begins whenever there is a release or threatened release of a hazardous substance from a facility into the environment that may present "an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604(a). Once the site of the release has been located, the EPA may commence a response action to clean up the site either through remediation efforts which minimize or prevent releases, or through removal efforts, which attempt to eliminate the substance entirely. *Id.*

Before the EPA selects a cleanup action, it conducts, or orders a potentially responsible party (PRP) to conduct, a remedial investigation and feasibility study (RI/FS) to determine the extent of the contamination and evaluate cleanup options. 40 C.F.R. § 300.430. Under CERCLA,

the EPA is required to provide States with the opportunity for substantial and meaningful involvement in the initiation, development, and selection of cleanup actions within their borders. 42 U.S.C. § 9621(f). Additionally, any remedial action the EPA selects must comply with federal law and "legally applicable or relevant and appropriate requirements" (ARAR) of state law. 42 U.S.C. § 9621(d).

After a cleanup plan has been selected, the EPA can either remediate the site itself or enter into an agreement with the PRP to have them cleanup the site under EPA supervision. 42 U.S.C. § 9604. In certain circumstances, the EPA can also issue a Unilateral Administrative Order (UAO) and file suit in federal court to compel the PRP to abate the threat to human health posed by the site. 42 U.S.C. § 9606. When the EPA remediates a hazardous waste site itself, it can seek reimbursement of the response costs from the PRPs. 42 U.S.C. § 9607. Additionally, a PRPs can be liable to private parties for response costs incurred. 42 U.S.C. § 9613.

As a remedial statute, Congress intended CERCLA to provide the greatest protection for human health and the environment, which is reflected in its strict liability standard, broad design and substantial requirements for cleanup actions. *Dedham*, 805 F.2d at 1081. The RI/FS and state input requirements ensure that careful consideration and planning goes into each cleanup action and that each action is done as thoroughly as possible. By allowing for cost recovery and reimbursement, Congress encourages the EPA and private parties to identify hazardous waste sites, thus ensuring prompt and timely cleanup to minimize the danger to the public.

B. BELCO's NAS-T Contamination of the Sandstone Aquifer

Fartown is a rural, environmental justice community of approximately 500 residents located in the State of New Union. R. at 5. Fartown is located about two miles south of Centerburg. *Id.* Both Fartown and Centerburg draw their drinking water from the Sandstone Aquifer (Aquifer), which flows south beneath both towns. R. at 5. While Centerburg supplies its residents with

treated water through a public municipal water system, Fartownians rely on private drinking water wells that pump water directly from the Aquifer. *Id.*

Better Living Company (BELCO) is an industrial manufacturer with a factory located in Centerburg. R. at 5. BELCO is the sole manufacturer of NAS-T, a toxic chemical compound that forms part of a sealant. *Id.* Medical studies from the mid-1980s revealed that NAS-T is a probable human carcinogen. R. at 6. In 1995, EPA adopted a Health Advisory Level (HAL) for NAS-T in drinking water at 10 parts per billion (ppb). No other state or federal laws or regulations exist regarding NAS-T. *Id.* In water, NAS-T produces a sour or stale smell which is detectable by the human nose at 5 ppb. *Id.*

From 1973 to 1998, BELCO produced NAS-T at its Centerburg factory. R. at 6. Throughout its operation, BELCO used an unlined lagoon to store wastewater and would sporadically spill NAS-T into the soil. *Id.* The contamination leached into the groundwater and created a NAS-T plume in the Aquifer. *Id.*

In 2013, Centerburgers began complaining to the New Union Department of Health (DOH) that their water smelled sour. R. at 6. In January 2015, DOH tested Centerburg's water supply, revealing NAS-T concentrations between 45 and 60 ppb. *Id.* Centerburgers were immediately advised to stop drinking their tap water and the New Union Department of Natural Resources (DNR) began an investigation into the contamination. In January 2016, DNR referred the matter to EPA. *Id.* Around this time, residents in Fartown began to notice that their water also smelled off and reported their concerns to DOH. R. at 8.

In March 2016, EPA directed BELCO to conduct an RI/FS to determine the source of the contamination, the risk to human health and the environment, the extent of the plume, and the possible remedial actions. R. at 6. As part of the study, BELCO installed three lines of

monitoring wells between Centerburg and Fartown, the final five of which are located a half mile north of Fartown. R. at 7. Initially, the wells showed no detectable amounts of NAS-T. *Id.* After completing the RI/FS, EPA and BELCO elected to leave the NAS-T plume in the Aquifer citing to the cost and time it would take to remediate the plume. *Id.* In June 2017, EPA issued a Record of Decision (ROD) directing BELCO to excavate the contaminated soils and install CleanStripping filtration in Centerburg's water supply. *Id.*

EPA brought a cost recovery action against BELCO. R. at 7. Immediately after they entered into a Consent Decree (CD) which required BELCO to implement the remedial actions selected in the ROD. *Id.* A condition of the CD was that once EPA certified BELCO's completion of the cleanup, it could not reopen the CD or order BELCO to undertake any new remedial actions unless either: (1) new information previously unknown or unavailable is revealed, showing that the cleanup plan no longer protected human health or the environment; or (2) new, more stringent Regulatory Standards are established that the plan does not satisfy. *Id.* Such standards include ARARs. *Id.*

Pursuant to the CD, BELCO excavated the contaminated soil, installed CleanStripping filtration in Centerburg, and conducted monthly sampling of the monitoring wells. R. at 7. In January 2018, the two monitoring wells closest to Fartown detected NAS-T at 5 and 6 ppb. R. at 8. EPA certified BELCO's completion of the cleanup in September 2018. *Id.*

Fartownians repeatedly asked EPA to order BELCO to test the wells in Fartown that they relied upon for all of their household water, but EPA refused. R. at 8. Frustrated, in December 2019, approximately 100 Fartownians formed the Fartown Association for Water Safety (FAWS). *Id.* FAWS paid Central Laboratories, Inc. (Central Labs) to sample and test 75 of their private wells. *Id.* Of the 225 samples taken, 46% showed NAS-T contamination. *Id.* Fifty-one

samples showed concentrations between 1 and 4 ppb, and 54 showed between 5 and 8 ppb. *Id.* Based on these results, FAWS again asked EPA to order testing, but EPA refused. *Id.*

On November 3, 2020, the State of New Union passed the Environmental Rights Amendment (ERA) to the New Union Constitution. R. at 8. The ERA provides a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans. N.U. Const. art. I, § 7. The ERA was passed by the legislature, signed by the governor, and voted on as a ballot measure. R. at 8.

EPA determined that the ERA constituted an ARAR, and in March 2021, EPA reopened the CD, citing to the Central Labs test results and the ERA as a new Regulatory Standard. R. at 9. EPA amended the administrative record to reflect the possible danger to human health that NAS-T posed and the NAS-T odors in the water that Fartownians drew from their wells. *Id.*

EPA determined that further sampling and monitoring of the Fartown wells was required and began supplying Fartownians with bottled water. R. at 9. After BELCO refused to sign a new CD with these new remedial actions, EPA issued a UOA, ordering BELCO to take 50 monthly samples from Fartown wells chosen by EPA, to supply bottled water to residents whose wells showed NAS-T concentrations between 5 and 10 ppb, and to install CleanStripping filtration on any well showing NAS-T concentrations greater than 10 ppb. *Id.* Prior to the issuance of the UAO, FAWS asked EPA to require BELCO to install CleanStripping filtration on every well testing positive for NAS-T at any concentration, but EPA refused. *Id.*

BELCO refused to comply with the UAO, so EPA continued to monitor and sample Fartown's wells and supply its residents with bottled water. R. at 10.

C. Proceedings Below

Plaintiffs FAWS and EPA both filed actions in the District Court for the District of New Union, which were consolidated by the court. R. at 10. FAWS challenged EPA's determination

that it could not recover the $21,500 expended on testing Fartown's NAS-T contaminated wells, as well as EPA's decision not to require BELCO to install CleanStripping filtration on wells that tested positive for NAS-T. *Id.* EPA and BELCO argued that FAWS could not recover its response costs because the testing was (1) unnecessary, (2) inconsistent with the NCP, and (3) contrary to public policy. *Id.* at 11. EPA and BELCO additionally argued that EPA's decision to only require BELCO to install CleanStripping filtration on wells that were contaminated with more than 10 ppb of NAS-T was lawful because the scientific data did not support findings that NAS-T was carcinogenic below that threshold. *Id.*

EPA sought to recover response costs from and enforce civil penalties against BELCO. R. at 10. BELCO argued that EPA acted unlawfully when it reopened the CD. *Id.* BELCO contends that the ERA cannot be an ARAR under CERCLA because it is not stricter than federal standards, and therefore it could not be held liable for EPA's response costs or be liable for civil penalties. *Id.* at 13.

Finally, FAWS sought to dismiss its state law tort claims against BELCO so that they could be refiled in state court. R. at 17. FAWS argued that the interaction between its state tort claims and the ERA raised novel issues of state law that were better left to state courts as a matter of comity. *Id.*

All three parties filed timely motions for summary judgement. R. at 11. The district court granted summary judgement to EPA and refused to allow FAWS to recover its response costs. *Id.* at 13. The district court granted summary judgement to EPA, affirming its decision to reopen the consent decree based on its determination that the ERA was an ARAR. *Id.* at 14. The district court granted summary judgement to FAWS and vacated the portions of the UAO that did were inconsistent with the ERA. *Id.* at 17. Finally, the district court retained supplemental jurisdiction

of the state law claims. *Id.* at 18.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in determining the testing costs incurred by FAWS were not recoverable under CERCLA. EPA correctly determined that the ERA constitutes an ARAR, and as such, reopening the CD was lawful and proper. EPA's determination that BELCO is not required to install CleanStripping filtration in Fartown's NAS-T contaminated wells was arbitrary, capricious, or otherwise contrary to law. The district court abused its discretion in retaining supplemental jurisdiction over FAWS' state law claims.

The district court erred in determining CERCLA does not provide for reimbursement of FAWS' costs incurred testing Fartown's water supply for NAS-T contamination. Costs incurred by a private party in response to a hazardous release by a PRP are reimbursable under CERCLA when they are "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). While courts vary widely as to the meaning of "necessary," the most important factors are the presence of an "actual threat to human health or the environment" and "some nexus between the alleged response cost and an actual effort to respond to" a hazardous release. *Carson Harbor Village, LTD. v. Unocal Corp.,* 270 F.3d 863, 867 (9th Cir. 2001); *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005). Further, costs incurred by a private party in response to a hazardous release are consistent with the national contingency plan (NCP) when "as a whole, [the costs are] in substantial compliance with the [NCP]… and result in a CERCLA-quality cleanup." 40 C.F.R § 300.700(c)(3)(i). The NCP permits private parties to make site evaluations when more information is needed. *Id.* at § 300.410(d). FAWS' testing was necessary because it was in response to a threat to human health posed by the NAS-T contamination of the

Aquifer and their private wells. The testing was consistent with the NCP because it substantially complied with the procedural requirements and, additionally, because it provided new information which lead to EPA reopening the CD and resulted in a CERCLA-quality cleanup.

Next, EPA correctly determined that the ERA constitutes an ARAR. A state environmental law constitutes an ARAR if it is "(1) properly promulgated, (2) more stringent than federal standards, [and] (3) legally applicable or relevant and appropriate." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991). The ERA was properly promulgated because it is both legally enforceable and generally applicable. *Id.* The ERA passes the stringency test because it creates a fundamental right to a healthful environment free from human-caused contamination and because "no federal applicable ARAR exists" for NAS-T. *Id.* at 1443; N.U. Const. art. 1, § 7. The ERA is relevant and appropriate because "it addresses problems or situations sufficiently similar to the circumstances of the release [and the] remedial action contemplated, and [it] is well-suited to the site." 40 C.F.R. § 300.400(g). EPA's determination as to what constitutes an ARAR is entitled to *Skidmore* deference and thus depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). EPA, in its expert opinion, determined the ERA was an ARAR because it met each of the requirements prescribed by the NCP.

Having established the ERA constitutes an ARAR, EPA acted arbitrarily, capriciously, or otherwise contrary to law by not requiring BELCO to install CleanStripping filtration on NAS-T contaminated wells in Fartown in the UAO. In selecting which remedial action to implement at a hazardous waste site, EPA must comply with identified ARARs and the NCP. 40 C.F.R. § 300.430(d)(2)(a)(ii). Here, EPA failed to comply with the ERA because it cannot be reasonably

read to allow for NAS-T contamination between 1-10 ppb in drinking water. In addition, EPA's selected remedy does not comply with the NCP because it does not adequately protect human health and the environment. 40 C.F.R. § 300.430(f)(1)(i). EPA based its decision not to install CleanStripping filtration on NAS-T contaminated wells in Fartown on an arbitrary threshold of NAS-T exposure based on medical studies from the 1980s, which cannot have considered the health data necessary to make a proper determination of likelihood of carcinogenic risk.

Finally, the District Court abused its discretion in retaining supplemental jurisdiction over FAWS' state law claims. A federal court must justify the exercise of supplemental jurisdiction by considering the common law factors outlined in *United Mine Workers of Am. v. Gibbs*, and statutory factors established in 28 U.S.C. § 1367(c). 383 U.S. 715, 722 (1966). Here, FAWS' state law claims present novel and complex issues of state law of the sort identified in §1367(c)(1) and therefore should be decided in state court. In considering the *Gibbs* factors, the district court placed too much weight on judicial economy and convenience, and only superficially considered comity and fairness. The district court's decision to retain supplemental jurisdiction therefore demonstrates an erroneous interpretation of the statutory and common law factors governing supplemental jurisdiction and constitutes an abuse of discretion.

Accordingly, this Court should reverse the district court's decision on reimbursement of FAWS' testing costs, affirm EPA's determination that the ERA constitutes an ARAR and subsequently vacate EPA's decision not to require BELCO to install CleanStripping filtration on NAS-T contaminated wells because it was arbitrary, capricious, or otherwise contrary to law. Finally, this Court should find the district court abused its discretion in retaining supplemental jurisdiction over FAWS' state law claims.

STANDARD OF REVIEW

A grant or denial of summary judgment is reviewed de novo, applying the same legal standards used by the district court. *Yarbrough v. Decatur Hous. Auth.*, 941 F.3d 1022, 1026 (11th Cir. 2019). When summary judgment is granted on a claim brought under the Administrative Procedure Act, the appellate court reviews the administrative action directly to determine if it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Roberts v. United States*, 741 F.3d 152, 157 (D.C. Cir. 2014).

A district court's exercise of supplemental jurisdiction is reviewed for abuse of discretion. *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 243 (2d Cir. 2011). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021) (quotation marks omitted). Additionally, a district court exceeds its discretion if it fails to consider a relevant factor that should have been given significant weight, considers an improper factor, or commits a clear error in judgment weighing the proper factors. *Qwest Commc'ns Corp. v. Free Conferencing Corp.*, 837 F.3d 889, 899 (8th Cir. 2016).

ARGUMENT

I. The District Court Erred in Determining Costs Incurred by FAWS In Sampling, Testing, and Analyzing Water from Its Members' Private Drinking Water Wells Are Not Recoverable as Response Costs Under CERCLA.

Private parties can recover response costs incurred in the cleanup of a release or threatened release of a hazardous substance from PRPs. 42 U.S.C. § 9607(a)(4)(B). Private parties, such as FAWS, seeking to recover response costs must show that: (1) the site in question is a "facility" as defined by CERCLA; (2) the defendant is a PRP; (3) there has been a release or threatened release of a hazardous substance; and (4) the party incurred the costs in response to

the release or threatened release. 42 U.S.C. § 9604. A private party must also demonstrate their costs incurred were "necessary" and "consistent with the national contingency plan (NCP)." 42 U.S.C. § 9607(a)(4)(B).

According to CERCLA, "response costs" include the costs associated with "removal, remedy, and remedial actions." 42 U.S.C. § 9601(25). A "removal" action are those actions "taken in the event of the threat of release of hazardous substances into the environment [including] such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." *Id.* at § 9601(23). Finally, a "release" is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing [of a hazardous substance] into the environment." *Id.* at § 9601(22).

All parties agree that BELCO is a PRP and that the introduction of NAS-T into the Aquifer from BELCO's factory is the release of a hazardous substance from a facility. Additionally, all parties agree that FAWS' sampling costs were incurred in response to that release. However, BELCO and EPA argue that FAWS' sampling costs were both not "necessary" and not "consistent with the national contingency plan" and therefore are not recoverable as response costs under CERCLA.

A. FAWS' Testing Costs were Necessary.

Courts vary widely on which factors determine whether a response cost is necessary to allow a private party to recover response costs from a PRP. *Compare G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995) (looking at the private party's primary motive in engaging in the response action), *with Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533-34 (10th Cir. 1992) (looking only at whether the response action fell within the definition of removal or remedial action). However, it is clear that "costs cannot be deemed necessary to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an

actual effort to respond to environmental contamination." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005); *see also Key Tronic Corp.*, 511 U.S. 820 (1994) (holding that attorney's fees, in general, are not recoverable because attorneys' "services do not constitute 'necessary costs of response'").

"The touchstone for determining the necessity of response costs is determining whether there is an actual threat to human health or the environment." *Carson Harbor Village, LTD. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001) (holding that the EPA's decision to provide an alternate water source was unnecessary because the record did not show anyone was actually drinking contaminated water). Multiple circuits have held that monitoring and evaluation costs fit squarely within the definition of necessary response costs. *See Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 935 (6th Cir. 2004) (holding "where a release has occurred and there may be potential for further contamination, some response costs will almost always be reasonable, to ensure that the water remains safe"); *Cadillac Fairview, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 693-94 (9th Cir. 1988) (holding that plaintiff's monitoring, testing, and security costs were necessary); *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 651 (3d Cir. 1988) (holding that monitoring and evaluation costs were recoverable even if the plaintiff had not incurred any other response costs).

There can be no doubt that there was an actual threat to human health posed by the NAS-T contamination and that FAWS' testing was taken in response to that threat. In 2015, after people in Centerburg, which is two miles north of Fartown and also draws its water from the Aquifer, began to notice that their tap smelled off, DOH ordered them to cease drinking there tap water. R. at 6. Soon after, Fartownians began to notice that their water smelled off as well. R. at 8. As the Sixth Circuit said in *Village of Milford*, "CERCLA plaintiffs cannot be expected to wait

until their water is unsafe to take response actions." 390 F.3d at 935.

BELCO argues that FAWS' testing of the NAS-T contaminated private wells in Fartown was not necessary because the testing was duplicative of its own testing as part of its CD with EPA. R. at 12. To support this argument, BELCO asserts (1) "at the time of the [] testing, there was no need because there was no scientific evidence supporting the further testing" and (2) even if there were "trace" amounts of NAS-T in the wells, "that would not have justified further response actions." *Id.* Both BELCO's initial argument and assertions in support of that argument must fail because they are unsupported by both law and fact.

First none of the sampling and testing undertaken by FAWS was actually duplicative of BELCO's own testing. R. at 7-8. FAWS sampled and tested the water from the private drinking wells of 75 residences within Fartown's limits, while BELCO's testing was limited to the monitoring wells installed between Centerburg and Fartown, the closest of which was a half mile north of Fartown. *Id.* Additionally, the fact that FAWS' testing revealed NAS-T contamination not detected by BELCO's monitoring wells further underscores the fact that the testing conducted by FAWS was not duplicative. R. at 8.

However, even assuming BELCO is correct in classifying FAWS' testing as duplicative of its own, CERCLA only bars cost recovery for duplicative response actions when they are duplicative of the EPA' actions. *See Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Ca. 1993) (holding that actions which occur at the same time as the EPA's own actions and which do not seek to uncover new information are duplicative); *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992) (holding that when a private party engaged in testing after the EPA expressly stated its intent to engage in such testing that the actions were duplicative and the costs were unrecoverable). In *Village of Milford*, the Sixth

Circuit explicitly stated the fact that the village's studies were duplicated of those of the PRP did not make the testing unnecessary and bar recovery under CERCLA. 390 F.3d at 935. *See also Artesian Water Co.,* 851 F.3d at 651 (holding that response costs that were duplicative of the state's efforts were recoverable).

Second, BELCO's contention that there was no scientific evidence supporting further testing blatantly ignores the facts. In January 2018, the final line of BELCO's monitoring wells, those closest to Fartown, showed two detections of NAS-T. R. at 8. As mentioned above, at the time FAWS began testing, residents of Fartown had complained their water smelled "off" for nearly three years. *Id.* Scientific studies show, and BELCO agrees, the human nose can detect NAS-T in water because it produces a sour or stale smell. *Id.* By BELCO's own admission, there was enough scientific evidence to support further inquiry into NAS-T levels in Fartown wells. *Id.*

Finally, in claiming that the "trace amounts" of NAS-T in the monitoring wells did not justify further response costs, BELCO attempts to impose a threshold for CERCLA liability that courts have expressly rejected. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000). *See also United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993) (holding that quantity or concentration is not a factor, and that if Congress wished to impose such a distinction it would have done so). As the Eighth Circuit said in *Johnson*, "To fashion a quantitative minimum threshold for CERCLA liability under the guise of a non-statutory 'justification' theory is to undo the policy decision Congress has already made: that the threat posed by hazardous substances does not depend on a minimum concentration or quantity." 226 F.3d at 962. It is enough that FAWS knew of an actual release of a hazardous substance and that their sense of smell told them it was in Fartown. R. at 8. To require a showing of NAS-T levels in excess of some arbitrary threshold would fly in the face of CERCLA's purpose as a broad

remedial statute aimed at cleaning up *any* hazardous substance.

EPA argues that allowing FAWS to recover testing costs from BELCO would "frustrate CERCLA and EPA's authority under the statute" because it is contrary to EPA's preferred policy that affected private parties will blindly trust its assertions in direct contradiction of their own knowledge and experience R. at 12. EPA's argument too must fail as a matter of law.

First, as a matter of law, EPA is not authorized to supplant the will of Congress. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). The plain language of CERCLA explicitly allows private parties to recover response costs from PRPs for "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). EPA cannot, therefore, preclude private parties from conducting monitoring, testing, and other assessment response actions and then recovering those costs from PRPs simply because it has a different policy preference.

Second, the Eighth Circuit has held that "the results of site assessments obtained by the plaintiffs are not determinative of the plaintiffs' ability to recover the cost of such assessments." *Johnson* 226 F.3d at 964. So even if Fartown's testing revealed no additional contamination of NAS-T in the private wells, the costs would have still been recoverable under 42 U.S.C. § 9607. However, here, FAWS' discovery of increased NAS-T contamination in Fartown's wells lead EPA to reopen the CD, further bolstering the nexus between the response costs and the cleanup of hazardous waste. *Young*, 384 F.3d at 863.

B. FAWS' Testing was Consistent with the National Contingency Plan.

"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 [Sections 5 and 6] and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i). Additionally, actions by private parties "will not be considered 'inconsistent with the

NCP'…based on immaterial or insubstantial deviations[1] from the provisions of [the NCP]." *Id.* at § 300.700(c)(4). Furthermore, some courts have held that private parties are not required to act consistently with the NCP when their only costs are associated with monitoring and investigations. See *Village of Milford*, 390 F.3d 926, at 934; *Artesian Water*; 851 F.2d at 651; *Carlyle Piermont Corp. v. Federal Paper Board Co.*, 742 F. Supp. 814, 819 (S.D.N.Y. 1990). Section 5 provides for sections of the NCP that are "potentially applicable to private party response actions." 40 C.F.R. § 300.700(c)(5). The majority of the sections listed related to actions taken by the lead agency or PRPs and these do not apply to FAWS. *Id.* The only section that might be relevant is § 300.410, which concerns removal site evaluations. *Id.* the removal site evaluation section allows for a removal site inspection to be performed "if more information is needed." *Id.* at § 300.410(d). As discussed above, FAWS' testing of NAS-T contaminated Fartown wells was necessary under CERCLA.

Section 6 provides that "private parties undertaking response actions should provide an opportunity to public comment concerning the selection of the response action." 40 C.F.R. § 300.700(c)(6). Many of the provisions detailing the requirements for providing meaningful opportunity for public participation again concern actions taken by the lead agency or PRPs, and thus are not binding on FAWS. *Id.* Even so, FAWS is a community lead organization comprised of Fartown's residents and therefore substantially complies with the purpose of the requirements listed in § 300.700(c)(6). R. at 5, 8.

[1] Until the 1990 NCP, private parties had to be in strict compliance with the NCP in order to recover. However, EPA made the standard more lenient "to encourage private parties to perform voluntary cleanup of sites, and to remove unnecessary obstacles to their ability to recover their costs." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8,666, 8,792 (March 8, 1990) (codified as 40 C.F.R. § 300 *et seq.*).

"A 'CERCLA-quality cleanup' results if the response action protects human health and the environment through the utilization of permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible." *Young*, 394 F.3d at 864. EPA relied on the testing done by FAWS to reopen the consent decree which led to the issuance of the UAO, ordering BELCO to take removal actions in Fartown in compliance with CERCLA. R. at 9. As such, it can hardly be denied that FAWS' testing resulted in a CERCLA-quality cleanup.

FAWS' testing of private drinking wells in Fartown was both necessary and consistent with the national contingency plan. Denied a CERCLA-quality clean up, FAWS' testing constituted Fartown's residents only option to ensure the safety of their water. BELCO must compensate FAWS for performing the testing necessary to prevent BELCO's hazardous release from threatening the health and wellbeing of Fartownians and their environment.

II. The District Court Correctly Affirmed EPA's Determination that the Environmental Rights Amendment Constitutes an Applicable or Relevant and Appropriate Requirement Because it was Properly Promulgated, is Stricter Than Federal Standards, and is Relevant and Appropriate to BELCO's NAS-T Contamination of the Aquifer.

ARARs are "any promulgated standard, requirements, criteria, or limitation under a State environmental or facility siting law that [are] more stringent than any Federal Standard, requirements, criteria, or limitation." 42 U.S.C. § 9621(d). Courts have interpreted this to mean that a state environmental law constitutes 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." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

BELCO argues that EPA cannot consider the ERA an ARAR because (1) it was not properly promulgated, (2) it is not more stringent than federal standards because it "essentially mirrors the first criteria to be analyzed pursuant to the NCP…when determining alternatives,"

and (3) it is not applicable, or in the alternative, not relevant and appropriate. R. at 13-14.

However, EPA's determination that the ERA constitutes an ARAR is entitled to deference. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *see also United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1235 (9th Cir. 2005) (finding that the EPA was entitled to *Skidmore* deference in its determination of whether an action constituted a "removal" under CERCLA). The weight of that deference "depends 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." *Id.* (citing *Skidmore v. Swift*, 232 U.S. 134, 140 (1944)). The district court's opinion shows that EPA properly and thoroughly considered whether the ERA satisfies the four criteria for what constitutes an ARAR, and as such, this court should defer to EPA's decision.

A. The ERA was Properly Promulgated.

EPA was correct in determining that the ERA was properly promulgated. An ARAR is properly promulgated if it is legally enforceable and of general applicability. *Akzo Coatings*, 949 F.2d at 1440; R. at 5. The properly promulgated rule was instituted to "differentiate 'advisories, guidance, or other non-binding policies, as well as standards that are not of general application,' from laws or rules promulgated by state legislatures or agencies that are imposed on all citizens of a particular state." *Id.* (quoting Superfund Program; Interim Guidance on Compliance with Other Applicable or Relevant and Appropriate Requirements, 52 Fed. Reg. 32,496, 32,498 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.400 *et seq.*) (internal citations omitted) (hereinafter Interim Guidance).

First, according to the Interim Guidance, a state regulation or statute is "legally enforceable" if it contains specific enforcement provisions or is otherwise enforceable under state law. Interim Guidance, 52 Fed. Reg. at 51,438. BELCO argues that the ERA is not

enforceable because further legislation or regulation would be necessary to give it any meaning. R. at 13-14. However, as EPA noted, the text and legislative history of the ERA show BELCO's argument cannot be supported. *Id.* The ERA was adopted by the state legislature, signed by the governor, and passed a state-wide referendum. R. at 8. It provides every person in New Union with a fundamental right. N.U. Const. art. 1, § 7. The legislative history of the ERA is clear that "as with all fundamental rights, [the ERA will] be self-executing and so would not require further definition in regulation or statute." Addendum, at 6.

Second, a state requirement is "generally applicable" as long as it is not promulgated specifically for one or more CERCLA sites as potential ARARs. Interim Guidance, 52 Fed. Reg. at 51,438. Since the ERA does not specify any specific CERCLA sites or classes of CERCLA sites, it is generally applicable on its face. R. at 14.

B. The ERA is More Stringent than Federal Standards.

EPA properly determined that the ERA is more stringent than federal standards because it creates a fundamental right to a "healthful environment free from contaminants and pollutants caused by humans," which is not matched or surpassed, in terms of stringency, by any federal law. N.U. Const. art 1, § 7; R. at 9.

A state ARAR passes the stringency test when "no federal applicable ARAR exists for a chemical, location, or action," or "where a state ARAR is broader in scope than the federal ARAR." *Akzo Coatings*, 949 F.2d at 1443. The only federal regulation that speaks to NAS-T is the EPA's 1995 HAL, which does not qualify as an ARAR because it is not legally enforceable. R. at 6. The ERA, on the other hand, provides a fundamental right to clean water and a healthful environment free from all contaminants and pollutants caused by humans, which unquestionably includes NAS-T. N.U. Const. art 1. § 7. Therefore, the ERA is significantly broader in scope than any nonexistent federal ARAR.

BELCO argues that the ERA cannot be more stringent than federal standards because "it essentially mirrors the first criteria to be analyzed pursuant to the NCP by a remediating party when determining viable alternatives." R. at 14. However, BELCO's invocation of the NCP's guidance on conducting feasibility studies, bears no weight on the stringency of the ERA relative to federal law.

The first criteria, "Overall protection of human health and the environment," requires the party conducting an RI/FS to consider whether alternatives "can adequately protect human health and the environment." 40 C.F.R. § 300.430(e)(9)(iii)(A). This is just a restatement of CERCLA's purpose as a broad remedial statute. *See Dedham* 805 F.2d at 1081. If, as BELCO contends, this were considered an applicable federal standard, then no federal or state regulations without explicit numerical standards could qualify as an ARAR. However, according to the Interim Guidance, "general State goals that are duly promulgated have the same weight as explicit numerical standards." 52 Fed. Reg. at 32,498.

C. The ERA is Relevant and Appropriate to BELCO's NAS-T Contamination of the Aquifer.

EPA correctly determined that even if the ERA is not legally applicable, it is still relevant and appropriate. A state law or regulation is relevant and appropriate if it "it addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and [if] the requirement is well-suited to the site." 40 C.F.R. § 300.400(g).

The NCP provides eight comparisons to be made to determine whether a law is relevant and appropriate: (1) the purpose of the statute and the purpose of the CERCLA action; (2) the medium regulated and the medium affected by the contamination; (3) the substances regulated and the substances found at the site; (4) the actions or activities regulated and the contemplated remedial action; (5) any variances, waivers, or exemptions of the statute and their applicability to

the site; (6) the type of place regulated and the type of place affected by the contamination; (7) the nature of the facility regulated and the nature of the facility affected by the contamination; and (8) the resources contemplated in the statute and the resources affected by the contamination. 40 C.F.R. § 300.400(g)(2).

The fourth, fifth, and seventh comparisons are not relevant here because the ERA does not speak directly to any specific actions nor to the nature of any structures, and it does not provide any variances, waivers, or exemptions. However, the first, second, third, sixth, and eighth comparisons all weigh in favor of the ERA being relevant and appropriate to the NAS-T contamination.

The first comparison requires EPA to look at "the purpose of the requirement and the purpose of the CERCLA action." 40 C.F.R. § 300.400(g)(2)(i). As EPA notes, the ERA's stated purpose is to provide a fundamental right to clean air, clean water, and a healthful environment free from human-caused pollutants. Additionally, the legislative history reveals that the ERA was passed as a regulatory gap-filling measure to ensure that when an unregulated, hazardous, human-caused pollutant is discovered in the environment, the residents of New Union do not suffer until a law can be passed that address it specifically. Addendum, at 6. Since the purpose of the current action is to clean up a hazardous site to protect human health, the first comparison weighs in favor of the ERA being relevant and appropriate. R. at 9.

The second comparison requires EPA to look at "the medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site." 40 C.F.R. § 300.400(g)(2)(ii). Since the ERA specifically creates a fundamental right to clean water, which is the medium at issue here, the second comparison also weighs in favor of the ERA being relevant and appropriate. N.U. Const. art 1. § 7.

The third comparison requires EPA to look at "the substances regulated by the requirement and the substances found at the CERCLA site." 40 C.F.R. § 300.400(g)(2)(iii). As mentioned above, the ERA specifically creates a fundamental right to an environment free from unregulated, human-caused hazardous contaminants. Addendum, at 6. Since NAS-T is a toxic, human-made contaminant that is not regulated by any other legally enforceable federal or state standard, the third comparison also weighs in favor of the ERA being relevant and appropriate to the NAS-T contamination. R. at 5-6.

The sixth comparison requires EPA to look at "the type of place regulated and the type of place affected by the release or CERCLA action." 40 C.F.R. § 300.400(g)(2)(vi). Since the ERA applies to the entirety of the State of New Union and the current action takes place in New Union, the sixth comparison also weighs in favor of the ERA being an ARAR.

Finally, the eighth comparison requires EPA to look at "any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resources at the CERCLA site." 40 C.F.R § 300.400(g)(2)(viii). Here, the affected resource is the Aquifer, which is the sole source of drinking water for the residents of Fartown. R. at 5. Since the ERA explicitly creates a fundamental right to clean water, free from contamination from human-caused pollutants, and the legislative history specifically discusses the ERA's protections of drinking water, the eighth comparison also weighs in favor of the ERA being a relevant and appropriate. Addendum, at 4.

Because all of the relevant comparisons weigh in favor of the ERA being relevant and appropriate, and EPA properly considered the statutory and regulatory requirements, this Court should defer to EPA's determination that the ERA constitutes an ARAR and affirm EPA's authority to issue reopen the CD.

III. The District Court Was Correct in Determining that EPA's Decision Not to Require BELCO to Install CleanStripping Filtration on NAS-T Contaminated Fartown Wells was Arbitrary, Capricious, or Otherwise Contrary to Law Because the UAO Did Not Comply with the ERA, CERCLA, or the NCP.

EPA's decision not to require BELCO to install CleanStripping filtration on all NAS-T contaminated wells was arbitrary, capricious, or otherwise contrary to law because it fails to comply with the ERA, CERCLA and the NCP.

A. The UAO Does Not Comply with the ERA.

EPA argues that despite the express language of the ERA, it cannot be interpreted to mean that there may not be "*any* contamination" of the water in New Union lest it "invalidate…federal regulatory schemes that allow for some 'safe' levels of contamination." R. at 16. However, even though EPA's interpretation of "clean water" is entitled to some deference, it misstates the purpose and meaning of the ERA. It is clear from the ERA's legislative history that "clean water" is meant to be read in conjunction with "healthful environment" and that rather than requiring water free from *any* contamination, it requires water to be free from any harmful or poisonous contamination that would render it unhealthful. Addendum, at 5.

CERCLA requires that when EPA selects a remedial action that allows a hazardous substance to remain onsite, that the action must attain a degree of cleanup that complies with state ARARs. 42 U.S.C. § 9621(d)(2)(a)(ii)[2]. The ERA, which by EPA's own admission is an ARAR under CERCLA, creates "a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." R. at 9; N.U. Const. art 1, § 7. The UAO only requires BELCO to install CleanStripping filtration on NAS-T contaminated Fartown wells showing concentrations greater than 10 ppb. R. at 9. By allowing

[2] The directives to BELCO in the UAO are remedial actions under CERCLA. 42 U.S.C. § 9606(a); *see General Electric Co. v. Johnson*, 610 F.3d 110 (D.C. Cir. 2010).

NAS-T, a probable human carcinogen, to remain in the wells with concentrations between 1-10 ppb, EPA blatantly violates the standard set forth in the ERA requiring clean water free from harmful and unhealthful human-caused contaminants.

Additionally, there is no risk of the ERA upending federal regulatory schemes because the Supremacy Clause of the United States Constitution would not permit such an outcome. U.S. Const. art. VI, cl. 2. Quixotically, the two statutes that EPA points to in order to support its contention, the Clean Air Act and the Clean Water Act, are both premised on principles of cooperative federalism, and each of which gives New Union the authority to regulate discharges (or emissions) within its borders more strictly than federal law demands. *See* 33 U.S.C. § 1342(b) and 42 U.S.C. § 7410.

B. The ERA Does Not Comply With the NCP.

BELCO argues that it cannot be required to install CleanStripping filtration on all NAS-T contaminated wells in Fartown because it is too costly. R. at 16. However, CERCLA is not concerned with overall cost, but rather cost-effectiveness. 40 C.F.R. § 300.430(f)(1)(ii)(D).

Installing CleanStripping filtration is a cost-effective remedy. "Cost-effectiveness is determined by comparing overall effectiveness to cost. Overall effectiveness is determined by evaluating three criteria: (1) long-term effectiveness and permanence; (2) reduction of toxicity, mobility, or volume through treatment; and (3) short-term effectiveness. A remedy is cost-effective if its costs are proportional to its overall effectiveness." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 546 (6th Cir. 2001) (citing 40 C.F.R. § 300.430(f)(1)(ii)(D)) (internal citations omitted). The remedy in the UAO, indefinitely providing bottled water and conducting monthly testing, continues to accrue cost without achieving a permanent or effective solution. Alternatively, installing CleanStripping filtration on all contaminated wells would permanently solve the issue of Fartownians being subjected to

undrinkable and unusable NAS-T contaminated water, making it proportional to the cost.

Additionally, relying on cost alone ignores the other factors that must be considered when selecting a remedial action. The NCP provides that when selecting a remedy, EPA must consider, as a threshold matter, the "overall protection of human health and the environment." 40 C.F.R. § 300.430(f)(1)(i). The UAO fails to adequately protect human health by only requiring BELCO to supply bottled water to households with a well showing NAS-T concentrations between 5 and 10 ppb. R. at 9. Fartownians whose wells show concentrations of 4 ppb and below are forced to continue drinking water containing a probable human carcinogen. *Id.* EPA relies on the HAL threshold of 10 ppb to make its determination, but the HAL was based on a few medical studies conducted in the 10-15 years following the first use of NAS-T, which cannot have considered vital aspects of carcinogenic risk, such as toxicokinetics, bioaccumulation over decades, the effects of pre-natal and peri-natal exposure on development, long-term carcinogenicity, and other carcinogenic phenomena that cannot be ascertained without decades worth of epidemiological studies. *See* U.S. Envt'l Prot. Agency, Guidelines for Carcinogen Risk Assessment (2005).

This Court should find that EPA's decision not to require BELCO to install CleanStripping filtration on all NAS-T contaminated wells in Fartown is arbitrary, capricious, or otherwise contrary to law because EPA failed both to comply with the ERA and to properly consider the factors contained in the NCP when selecting a remedy.

IV. The District Court Abused its Discretion in Retaining Supplemental Jurisdiction Over FAWS' State Law Claims by Failing to Properly Consider and Apply the Relevant Statutory and Common Law Factors.

Under certain circumstances, supplemental jurisdiction permits federal courts to exercise jurisdiction over state law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 722 (1966). Pursuant to the supplemental jurisdiction provision of the Judicial Improvements Act of

1990, whenever a district court has original jurisdiction over a claim, that court "shall have supplemental jurisdiction over all other claims [so related to the federal claim] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The statute further provides that a district court may decline to exercise supplemental jurisdiction if: (1) the claims raise a novel or complex issue of State law, (2) the state law claims substantially predominate over the federal claims, (3) the court has dismissed all federal claims, or (4) there are other compelling reasons to decline exercising jurisdiction. *Id.* at § 1367(c).

While the decision to exercise supplemental jurisdiction lies soundly within the discretion of the district court, that discretion is not unbounded. *Doe v. Bd. on Pro. Resp. of D.C. Ct. of Appeals*, 717 F.2d 1424, 1428 (D.C. Cir. 1983). The exercise of supplemental jurisdiction must be justified by considerations of judicial economy, convenience, fairness, and comity. *Gibbs*, 383 U.S. at 726. In *Gibbs*, the Supreme Court admonished federal courts that "needless decisions of state law should be avoided" and that as a general rule, when "federal claims are dismissed before trial, the state claims should be dismissed as well." *Id.* In determining whether a district court abused its discretion in retaining jurisdiction, an appellate court must determine whether the district court properly considered and balanced the statutory factors set forth in 28 U.S.C. § 1367(c) and the common law factors articulated in *Gibbs*. *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 159 (5th Cir. 2011).

The District Court for the District of New Union denied FAWS' motion to dismiss the state law claims because of the "tremendous amount of work" that had gone into the cases, the efficiencies of trying the case in the same court, its belief that the ERA will not substantially alter the state law tort claims, and because it believed some of the relief sought by FAWS could

potentially interfere with decisions made in the BELCO Action. R. at 18. But this misapplies the statutory factors and fails to properly consider the common law factors. Therefore, this Court should find the district court abused its discretion and dismiss FAWS' state law claims without prejudice so they may be filed in state court.

A. The District Court Misapplied the Statutory Factors and Erred in Finding That FAWS' Claims Do Not Present Novel or Complex Issues of State Law.

While the district court was correct in finding that it had dismissed all federal claims under 28 U.S.C. § 1367(c)(3)[3], in finding that FAWS' state law claims did not involve novel or complex issues of state law, the district court erroneously disregarded the effect of the ERA on tort law and misconstrued the scope of 28 U.S.C. § 1367(c)(1).

The district court relied on *Parker v. Scrap Metal Processors, Inc.* to say that FAWS' tort claims are not novel or complex issues of state law. R. at 17-18 (citing *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). However, in *Parker*, the state law claims concerned trial damages alone after liability had already been determined. 468 F.3d at 744. In holding that there were no novel issues of state law, the Eleventh Circuit pointed to the fact that the claims relied solely upon state tort law and that the defendant offered no authority to support that trial damages alone raised novel issues. *Id.* Conversely in the FAWS Action, FAWS' negligence and nuisance claims rely not only upon New Union's tort law, but upon the interaction between tort law and the newly passed ERA. R. at 18.

Based on questions it had already answered relating to the effect of the ERA under CERCLA, the district court found that the ERA would not substantially alter FAWS' tort claims. R. at 18. But these questions only concerned whether the ERA was properly promulgated, more

[3] Every circuit court has held that for the purposes of 28 U.S.C. § 1367(c)(3), a grant of summary judgement for the federal claims constitutes a dismissal. *See* Bradley Scott Shannon, *A Summary Judgement Is Not A Dismissal!*, 56 Drake L. Rev. 1, 12-13, n. 49 (2007).

stringent than federal standards, and legally applicable or relevant and appropriate to CERCLA hazardous waste sites. R. at 13. As FAWS points out, none of these questions address the effect of the ERA on state tort claims like nuisance per se or negligence. R. at 18. Nor do they fully define the terms of the ERA like "clean" or "healthful environmental" under state law. Addendum, at 6. The legislative history explicitly recognizes the uncertainty these undefined terms create with regard to the duty and legal liability they impose on businesses operating in New Union. *Id.* In *Grano v. Barry*, the D.C. Circuit found the district court erred in retaining jurisdiction when a new state law contained ambiguous terms with disputed meanings because it posed a novel issue of state law. 733 F.2d 164, 169 (D.C. Cir. 1984).

The district court also misconstrued the scope of 28 U.S.C. § 1367(c)(1). The caution against exercising supplement jurisdiction when there may exist novel issues of state law is not based upon a federal court's capability to competently try matters of state law. *Women Prisoners of D.C. Dep't of Corr. v. D.C.*, 93 F.3d 910, 922 (D.C. Cir. 1996). Instead, it is a recognition that "the proper function of a federal court is to ascertain what the state law is, not what it ought to be." *Id.* (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497 (1941) (internal quotations omitted). In *Women Prisoners*, the D.C. Circuit found that the lack of state jurisprudence on whether injunctive relief may be granted under a specific section of the D.C. Code meant the claim raised a novel issue of state law, even though injunctive relief under tort law is not normally a novel issue. *Id.* at 921-23. *See also Independent Bankers Ass'n of N.Y. State, Inc. v. Marine Midland Bank, N.A.*, 757 F.2d 453 (2d Cir. 1985) (questioning the wisdom of the district court in adjudicating a question of state law not yet considered by a state court).

The state courts of New Union have not yet addressed the above-mentioned questions of how the ERA affects duty and liability under New Union's tort law. Addendum, at 4, 6. Even if

the district court believed it could adequately address these questions, the lack of state jurisprudence makes the interaction between the ERA and tort law a novel issue of state law that would be better left for state courts to unravel.

B. The District Court Also Failed to Properly Consider the Common Law Factors by Improperly Weighting Judicial Economy and Convenience and Inadequately Considering Comity and Fairness.

Though not expressly identified as such, district court found the common law factors articulated in *Gibbs* supported its decision. R. at 18. However, the district court's analysis improperly weighs and balances the factors.

1. Judicial Economy and Convenience

The district court chose to continue to exercise supplemental jurisdiction over FAWS' state law claims because of the "tremendous amount of work [that] has gone into these cases" and the efficiencies of trying the case in the same court. R. at 18. This overestimates the importance of judicial economy and convenience.

The district court relies on *Nowak v. Ironworkers Loc. 6 Pension Fund* to support its claim that when a significant amount of resources has been committed to a case, the federal court should retain jurisdiction. R. at 17 (citing *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182 (2d Cir. 1996). However, in *Nowak*, the federal claims were dismissed nine days before trial and after discovery had been completed. 81 F.3d at 1192. Additionally, the Second Circuit found that requiring a state court judge to learn the facts would be a duplicative effort because the factual inquiries relevant to the dismissal of the federal claims were also relevant to the state law claims. *Id.* The district court also cites to *Raucci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990). However, similar to *Nowak*, in *Raucci* the Second Circuit upheld the exercise of supplemental jurisdiction because discovery had been completed, the case was ready for trial, and the district court had decided three dispositive motions in the case. 902 F.2d at 1055.

Unlike both of these cases, discovery in the FAWS action has not yet been completed. R. at 17. In fact, FAWS has yet to even begin expert discovery for its state law claims. R. at 18. As the district court itself points out, a trial date has not yet been set for the case. *Id.* In *Parker & Parsley Petroleum Co. v. Dresser Indus.*, the Fifth Circuit found the district court should not have retained supplemental jurisdiction, even after a trial date had been set. 972 F.2d 580, 589 (5th Cir. 1992). In *Parker*, the Fifth Circuit held that the district court abused its discretion in retaining supplemental jurisdiction over the state law claims despite the case being heard by a judge with a reputation for resolving cases quickly and the district court's notes of "rigorous deposition schedules, ungodly amounts of discovery documents, and a hearing on discovery disputes," because discovery had not yet been completed and the parties were not ready for trial, so the conservation of judicial economy to be had by retaining jurisdiction was diminished. *Id.* at 584, 587. The district court failed to articulate how the further expenditure of federal judicial resources in completing discovery and preparing for trial on the FAWS state law claims would conserve judicial economy. R. at 18.

Besides failing to account for the additional resources that would be expended, the district court also misjudged the gains to judicial economy and convenience. In *Financial General Bankshares, Inc. v Metzger*, the D.C. Circuit held that because the material obtained through discovery in the district court could be used in state court, the effort expended would not need to be duplicated, and therefore the district court should have afforded both judicial economy and convenience less weight. 680 F.2d 768, 774 (D.C. Cir. 1982). To address Financial General's concern that some of the deposition evidence would not be admissible in state court, the D.C. Circuit conditioned dismissal on Metzger's waiver of evidentiary objections. *Id.* at 774-775. The District Court of New Union failed to consider the fact that discovery from the BELCO

Action could be used in the FAWS Action in state court, and in doing so, overestimated the amount of judicial economy gained by retaining jurisdiction. Furthermore, if the district court was concerned about any procedural or substantive issues arising in state court, it could have followed the D.C. Circuit's example and conditioned the dismissal on a waiver.

Finally, the district court failed to acknowledge that judicial economy and convenience carry significantly less weight once the federal claims in a case are dismissed. *Independent Bankers*, 757 F.2d at 465 (holding that in cases "decided without trial and on motions for summary judgment, we have even less concern about judicial economy").

2. Comity and Fairness

The district court's entire consideration of the final two common law factors is contained in the brief phrase, "FAWS and its members seek several remedies from BELCO – such as remediation of the aquifer – that have the potential to interfere with decisions made in the BELCO Action and the EPA's continued oversight at the Site." R. at 18. Not only is this insufficient to support the district court's decision, but it is an improper interpretation of comity and completely ignores fairness.

Concerns about balancing EPA's authority and the remedies sought by FAWS were not unfounded but alone did not warrant retaining supplemental jurisdiction. In *Gibbs*, the Supreme Court held that concerns about the scope of state remedies being too broad is not enough to tilt the common law factors in favor of exercising supplemental jurisdiction. 383 U.S. at 729-31. In response to such concerns, the Supreme Court provided several examples where federal courts have narrowed or restricted the relief granted by a state court to ensure that the relief complied with federal law. *Id.*

Additionally, in only considering possible interference with the EPA's authority, the

district court misunderstands the principles underlying comity. Comity is based in concerns of federalism and respect for state interests and authority. *Parker & Parsley*, 972 F.2d at 588-589. "It is a bedrock principle that needless decisions of state law should be avoided as a matter of comity and to promote justice…by procuring…a surer-footed reading of applicable law. State courts, not federal courts, should be the final arbiters of state law in our federalist system." *Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 540 (11th Cir. 2015) (internal quotations omitted).

This deference to state courts is particularly important where claims, such as those raised by FAWS, involve novel issues of state law. A federal court's holding "may unduly limit later state consideration of the problem" because there is no mechanism by which state courts can appeal a federal court's errors in the application of state law. *Financial General*, 680 F.2d at 776. In *Jones v. Fitch*, the Fifth Circuit upheld a court's refusal to assert supplemental jurisdiction because of concerns of comity and federalism in the face of an issue of state constitutional law that had not yet been addressed by the state supreme court. 665 F.2d 586, 592 (5th Cir. 1982).

The district court's opinion is utterly devoid of any discussion of these principles. R. at 18. The ERA is a *constitutional amendment* that created a new fundamental right for every person in New Union. R. at 8. The courts of New Union have a clear and significant interest in the ERA's implementation and interpretation. Addendum, at 3-4. However, the district court makes no recognition of this interest and instead seeks to determine both the meaning and the scope of New Union's highest law, in complete disregard of the ideas of comity and federalism.

Finally, the district court did not consider fairness to the parties. Neither BELCO or EPA claims that it would be unfair for the FAWS Action to be tried in state court nor that they would be unduly prejudiced. R. at 18. On the other hand, FAWS has repeatedly asserted that it intended

to try its state law claims in state court, and that it only filed its claims in the district court to avoid contentions of claim-splitting. R. at 10. It would hardly be fair to force FAWS to try its claims in federal court when from the outset it has expressed a reluctance to do so. *Id.*

The district court's opinion demonstrates an erroneous and inadequate interpretation and application of both the statutory and common law factors and, therefore, abused its discretion in retaining supplemental jurisdiction over FAWS' state law claims.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's determination that FAWS' testing costs are not recoverable under CERCLA, affirm the district court's determination that the ERA is an ARAR, affirm the district court's determination that the UAO is arbitrary, capricious, and otherwise contrary to law with respect to its failure to require BELCO to install CleanStripping filtration on all NAS-T contaminated wells, and finally, find that the district court abused its discretion when it decided to retain supplemental jurisdiction over the state law claims after all the federal claims had been dismissed.