C.A. No. 22-00067

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

FARTOWN ASSOCIATION FOR WATER SAFETY, ET AL.,
Intervenor Plaintiffs-Appellants-Cross Appellants.

FARTOWN ASSOCIATION FOR WATER SAFETY, ET AL.,
Plaintiffs-Appellants,

v.

BETTER LIVING CORPORATION,
Defendant-Appellee.

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

Non-Measuring Brief of Appellee, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

Better Living Corporation ("BELCO") appeals from an order granting partial summary judgment to plaintiff Environmental Protection Agency ("EPA") and intervenor Fartown Association for Water Safety ("FAWS"), entered June 1, 2022, by the honorable T. Douglas Dolman in the United States District Court for the District of New Union, in consolidated cases Nos. 17-CV-1234 and 21-CV-1776. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question), and 28 U.S.C § 1367 (supplemental jurisdiction). BELCO, EPA, and FAWS 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 that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." An order granting summary judgment is a final decision and subject to appeal. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015).

STATEMENT OF ISSUES PRESENTED

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 New Union's Environmental Rights Amendment ("ERA") constitutes an Applicable or Relevant and Appropriate Requirement ("ARAR"), and, accordingly finding that EPA's reopening the Consent Decree based on that ARAR and ordering further remedial action in EPA's Unilateral Administrative Order ("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. The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") created a comprehensive framework for imposing strict liability on responsible parties that contributed to releases and threatened releases of hazardous substances. *See* 42 U.S.C. § 9607(a)(4); Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 209-11 (2018). CERCLA pursues two primary goals: (1) ensuring the "prompt cleanup of hazardous waste sites;" and (2) shifting cleanup costs to liable parties. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). CERCLA broadly defines liable parties, or "potentially responsible parties" (PRPs) under four categories. 42 U.S.C. § 9607(a)(1)-(4). PRPs are liable for three types of costs related to governments acting in the public interest. 42 U.S.C. § 9607(a)(4)(A), (C)-(D). Relevant here, PRPs are liable for "all costs of removal or remedial actions incurred by" EPA, state agencies, and Indian tribes, who can remediate sites and bring "cost recovery" claims under CERCLA to seek reimbursement. 42 U.S.C. § 9607(a)(4)(A). Congress initially created the "Superfund," a $1.6 billion pool of money that arms EPA with the economic power to conduct and enforce cleanup efforts. *See* Richard J. Lazarus, *The Making of Environmental Law* 110 (2004).

PRPs are also liable to private parties under CERCLA section 107(a)(4)(B). 42 U.S.C. § 9607(a)(4)(B). Congress sought to achieve prompt cleanup by enlisting private *parties* to join in cleanup efforts by allowing them to also "recover expenses associated with cleaning up contaminated sites" from PRPs. *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 131 (2007). By allowing private parties to recover costs that are "necessary and consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B), Congress provided an incentive to "private parties to assume the financial responsibility of cleanup . . . ." *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005).

By virtue of its reliance on congressional funding, EPA's cleanup efforts are limited. Joanna M. Fuller, *The Sanctity of Settlement: Stopping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar*, 34 Colum. J. Env't. L. 219, 224 (2009). Private parties, or volunteer remediators, then, play an important role in cleanup efforts that EPA otherwise does not have the time or resources to address. Brief for Amici Curiae Natural Resources Defense Council et al. at 28, *United States v. Atl. Rsch. Corp.*, 551 U.S. 128 (No. 06-562) (finding that approximately 60% of CERCLA cases litigated between 1995 and 2000 involved voluntary cleanups). Although EPA is limited by funding, time, and administrative capacity, it does not simply offload its cleanup goals to private parties by giving them unlimited license to obtain recovery. Instead, CERCLA expressly limits private parties' ability to recover to those costs that are "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Congress, as courts later affirmed, did not intend CERCLA to be a "general vehicle for toxic tort claims." *Young*, 394 F.3d at 862. If that were the case, it would give private parties "discretion, not merely to double the response costs, but potentially to pass those increased costs on to third

parties without notice or consent." *Louisiana-Pacific Corp. v. Beazer Materials & Servs.*, Inc., 811 F. Supp. 1421, 1425 (E.D. Ca., Jan. 27, 1993).

Regardless of which entities are involved in a cleanup, the selected remedy and response actions are required to take place in accordance with the law. *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991); see 1 Caroline N. Broun & James T. O'Reilly, *RCRA and Superfund: A Practice Guide* § 11:26 (3d ed. 2022). Section 121 of CERCLA mandates that existing standards – within federal and state statutes and regulations – be acknowledged. Broun & O'Reilly, *supra*, § 11:26. Specifically, EPA can select remedial actions that attain or waive ARARs to assure the protection of human health and the environment. 42 U.S.C. § 9621(d). To determine whether a state environmental standard constitutes an ARAR, courts evaluate whether such standard is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. 40 C.F.R. § 300.400(g)(4); *Akzo Coatings of Am.*, 949 F.2d at 1440. And "[t]hese standards are significant [to PRPs] because once determined, they . . . influence or become the cleanup goals." Broun & O'Reilly, *supra*, § 11:26; *see* 42 U.S.C. § 9621(d)(2)(A).

In addition to its cost-recovery provisions, CERCLA also empowers EPA to order PRPs to actually perform cleanup work, through unilateral administrative orders ("UAOs"). 57 Am. Jur. Trials 1 *Private Cost Recovery Actions Under CERCLA* § 12 (2022). UAOs can be issued when PRPs decline to follow consent decrees or do the work that they agreed to perform under a settlement agreement, and "an intermittent and substantial endangerment to the public health or the environment" results. *Superfund Unilateral Orders*, United States Environmental Protection Agency (Sept. 6, 2022), https://www.epa.gov/enforcement/superfund-unilateral-

orders#:~:text=These%20orders%2C%20known%20as%20unilateral,public%20health%20or%20the%20environment.

Generally, EPA orders are assessed under the Administrative Procedure Act's (APA) requirement that agency actions should be set aside by courts when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see *also Sackett v. EPA*, 566 U.S. 120 (2012) (finding challenges to EPA compliance orders fall under the APA's arbitrary and capricious standard). When PRPs or other parties oppose the response actions required by the UAO, CERCLA itself mandates that courts should "uphold EPA's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law." 42 U.S.C. § 9613(j)(2).

B. Contamination of the Sandstone Aquifer

The present action is rooted in the contamination of New Union's Sandstone Aquifer ("Aquifer"). The Aquifer lies approximately 300 feet below Centerburg and Fartown. Record at 5. The Aquifer flows from north to south, so its groundwater travels from Centerburg to Fartown. *Id.* Both towns use the Aquifer as a water source. *Id.* Centerburgers get their water from Centerburg Water Supply ("CWS"), a publicly owned supplier that pumps from the Aquifer, while Fartownians have private wells that pump directly from the Aquifer. *Id.*

BELCO, originally based in Centerburg, developed and manufactured a corrosion-preventing sealant called "LockSeal." *Id.* A key ingredient of LockSeal is a chemical called Nitro-Acetate Titanium ("NAS-T"), which BELCO manufactured at a factory (the "site" or "facility") in Centerburg from 1973 until 1998. *Id.* at 6. In 1995, EPA adopted a Health Advisory Level ("HAL") for NAS-T, based on medical studies that showed that NAS-T was a

probable carcinogen. *Id.* EPA set the HAL at 10 parts per billion ("ppb"), which included a significant margin of error to ensure that exposure to NAS-T levels below that HAL would be non-toxic. *Id.* Aside from the HAL, NAS-T is not subject to other federal or state regulations. *Id.*

In January 2015, after two years of complaints from Centerburgers about the apparent quality of their water, the Centerburg County Department of Health ("DOH") began testing Centerburg's public water supply for contaminants, including NAS-T. *Id.* at 6. After discovering about 45 to 60 ppb of NAS-T in the CWS water supply, DOH directed Centerburgers not to drink the water, and BELCO began to provide bottled water to the town. *Id.* Additionally, the New Union Department of Natural Resources ("DNR") began to investigate BELCO's facility but referred the investigation to EPA on January 30, 2016. *Id.*

In March 2016, BELCO agreed to engage in a remedial investigation and feasibility study ("RI/FS") on the site, which assessed the risk that the site posed to human health and the environment, studied potential remedies for the contamination and required BELCO to continue providing bottled water to Centerburg. The RI/FS showed that the NAS-T contamination resulted from sporadic spills of the chemical at the facility, and the use of an unlined lagoon to store wastewater and stormwater while NAS-T was in use. *Id.* The NAS-T migrated from these sources into the groundwater and into the Sandstone Aquifer, which created a plume. *Id.*

In order to determine how widespread the plume was, BELCO installed three lines of monitoring wells which spanned the distance from Centerburg to Fartown, from north to south, stopping about half a mile north of Fartown. *Id.* at 7. The RI/FS concluded that remediation of the plume was not necessary, but that excavation of the contaminated soil at the facility, filtration of CWS, and monthly sampling of monitoring wells would be sufficient. *Id.* Those actions

made up a remedy called "monitored natural attenuation." *Id.* In the RI/FS, BELCO noted that remediation of the plume would take decades and cost $45 million. *Id.*

In June 2017, EPA selected a remediation plan for the site through a Record of Decision ("ROD"). *Id.* The ROD required that BELCO implement the excavation and remediation measures EPA had recommended and pay EPA what it had spent on any testing or monitoring. *Id.* EPA and BELCO entered into a Consent Decree ("CD") which bound BELCO to these cleanup actions and required EPA to issue BELCO a Certificate of Completion ("COC") upon completion. *Id.* The CD could not be reopened once the COC was issued, unless one of the following was met: (1) newly discovered information showed that the clean-up was no longer sufficient to protect the environment and human health; or (2) newly established Regulatory Standards were not satisfied by the clean-up. *Id.* Regulatory Standards, under the CD, included ARARs. *Id.*

In September 2018, EPA issued the COC to BELCO, once BELCO had completed the required actions under the CD. *Id.* at 7–8. Throughout BELCO's implementation of the CD, it only detected NAS-T in wells closest to Fartown in two samples, in January 2018, at levels of 5 and 6 ppb. *Id.* at 8.

Fartown residents, upon hearing about the CD and BELCO's COC, alerted DOH that their water smelled sour since 2016. *Id.* In February 2019, DOH tested the water from five private Fartown wells and did not detect NAS-T. In May 2019, Fartownians petitioned EPA to get BELCO to do additional testing. *Id.* EPA declined on the grounds that DOH's February 2019 tests had not detected any NAS-T. *Id.* Fartownians then formed FAWS to advocate for further testing and hired Central Laboratories, Inc. ("Central Labs") to test their wells. *Id.*

The FAWS-sponsored Central Labs testing cost $21,500 and was more extensive than that of DOH, taking three samples from each of seventy-five private Fartown wells. *Id.* In March 2020, Central Labs reported its findings – none of the wells contained a level of NAS-T above the HAL. *Id.* Fifty-four samples showed 5–8 ppb of NAS-T, fifty-one samples showed 1–4 ppb of NAS-T, and 120 samples showed no detectable amount of NAS-T. *Id.* Based on these results, FAWS once again requested that EPA reopen the CD in order to force BELCO to take further remedial action in Fartown. *Id.* EPA again denied this request, citing the limited nature of the CD's reopener provisions and the fact that the NAS-T levels found by Central Labs were still lower than the HAL. *Id.*

On November 3, 2020, however, the state of New Union passed the Environmental Rights Amendment ("ERA"), which read: "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." *Id.*; N.U. Const. art. I, § 7. The ERA was passed by the New Union legislature, then signed by the governor, and eventually passed in an election as a ballot measure (with 71% voting in favor of the Amendment). Record at 8. In January 2021, EPA contacted DNR, inquiring whether EPA should consider the ERA an ARAR under CERCLA. In February 2021, DNR advised that EPA assume the ERA as an ARAR so long as it is consistent with CERCLA and where it is not inconsistent with other state and federal regulations. *Id.* at 9. In light of this, on March 20, 2021, EPA agreed to reopen the CD, on the grounds that the ERA constituted a change in the Regulatory Standards under the CD's provisions. *Id.*

In its administrative record, EPA included the reasons it relied upon in its decision to reopen the CD, which included the fact that Fartown is an environmental justice community, the

endangerment that NAS-T might pose to the community (including the potentially carcinogenic effects of NAS-T), and the odors that Fartownians reported in their water supply. *Id.* The CD would require BELCO to sample private Fartown wells, supply bottled water to any household whose well contains NAS-T, and the monitoring of Fartown wells. *Id.* BELCO did not follow the CD, arguing that EPA lacked the authority to reopen it, because the ERA did not constitute an ARAR. *Id.* Meanwhile, FAWS demanded that EPA order BELCO to either install CleanStripping filtration in every Fartown well that had any amount of NAS-T or take further action to remove all NAS-T from the entire water supply. *Id.*

EPA, in response to BELCO's refusal to follow the reopened CD, issued a Unilateral Administrative Order (UAO), requiring that BELCO take these actions. *Id.* But EPA declined to include FAWS' CleanStripping demands in the UAO, citing the fact that multiple tests of Fartown's wells never indicated NAS-T levels above the HAL. *Id.* This request and EPA's response were also included in the administrative record. *Id.* The UAO contained more specific demands. *Id.* BELCO was ordered to: (1) sample 50 Fartown wells per month; (2) supply households with 5–10 ppb of NAS-T with monthly bottled water; and (3) install CleanStripping in wells that exceed 10 ppb. *Id.* When BELCO did not follow the UAO, EPA began to implement these measures itself. *Id.* at 10. Still no detections of NAS-T over 8 ppb were made. *Id.*

C. Proceedings Below

On June 30, 2017, EPA brought an action for cost recovery for costs incurred in Centerburg against BELCO ("the BELCO Action") under 42 U.S.C. § 9607(a)(4)(A). Immediately, the parties entered into a CD which, upon the court's determination that the CD was fair and reasonable, was approved and entered by the district court on August 28, 2017. *Id.*

at 7. EPA gave the COC mandated by the CD to BELCO in September 2018, but later reopened the CD on March 20, 2021. *Id.* at 8–9. After BELCO failed to comply with the reopened CD and EPA's subsequent UAO, EPA made a motion in the BELCO action to recover its costs in Fartown and to penalize BELCO for refusing to comply. *Id.* at 10. BELCO's response stated that the ERA was not an ARAR and thus, EPA could not reopen the CD or promulgate a UAO. *Id.* On September 24, 2021, the district court granted FAWS' motion to intervene in the BELCO action, which also challenged the UAO, on the grounds that EPA's failure to require CleanStripping was arbitrary, capricious, and contrary to law under the APA. 5 U.S.C. § 706(2)(A); *id.*

On August 30, 2021, FAWS and eighty-five individual Fartown plaintiffs filed a complaint against BELCO ("the FAWS action"). *Id.* The action included a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on the Central Labs tests. *Id.* The action also included a negligence and private nuisance claim against BELCO, under New Union state law, which demanded injunctive relief in the form of BELCO's payment of response costs, installment of CleanStripping in Fartown wells, remediation of the Aquifer, payment of damages for loss of use and enjoyment of their property, and payment of punitive damages. *Id.*

Once discovery on the CERCLA claims was complete, all parties moved and cross-moved for summary judgment on those claims. *Id.* at 11. FAWS also moved to dismiss its state law claims without prejudice if the CERCLA claims were resolved on motion for summary judgment. *Id.*

The district court held that FAWS' Central Lab testing expenses were not necessary CERCLA "response costs," and thus granted BELCO's motion for summary judgment and denied FAWS' motion on this front. *Id.* at 13. The district court affirmed the ERA's place as an

ARAR and EPA's use of the ERA to reopen the CD. *Id.* at 15. This meant that the court granted EPA's motion for summary judgment against BELCO and denied BELCO's motion, enjoining BELCO to comply with the UAO and pay EPA its costs and penalties. *Id.* The court also denied EPA's and BELCO's motions for summary judgment against FAWS on the grounds that EPA's decision not to include CleanStripping as a requirement in the UAO was arbitrary, capricious, and contrary to the ERA. *Id.* at 17. Thus, the court granted FAWS' motion to vacate the part of the UAO that requires bottled water, rather than filtration. *Id.* Finally, the court denied FAWS' motion to dismiss the remaining state law claims.

SUMMARY OF THE ARGUMENT

The district court correctly determined that FAWS' sampling, testing, and analysis costs were not reimbursable as response costs under section 9607(a)(4)(B) because they were not necessary. For private parties to recover response costs, they must show that their costs were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Courts have interpreted a showing of necessity to require at least three elements. First, as a threshold matter, that "an actual and real threat to human health or the environment exists before initiating a response action." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001). Second, that response costs are "closely tied to the actual cleanup." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819–20 (1994). And third, that response actions do not duplicate the efforts of EPA, a state agency, or PRPs. *U.S. v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Ca., Oct. 28, 1997); *Marcas, LLC v. Bd. Of Cnty. Comm'rs of St. Mary's Cnty.*, 977 F. Supp. 2d 487, 500–01 (D. Md. 2013).

FAWS failed to show that an actual threat existed prior to its testing because the district court's findings show that no harmful levels of NAS-T had been detected prior to FAWS'

testing. FAWS' testing actions were not tied to the actual cleanup because FAWS only tested, it did not take any subsequent remedial actions. And FAWS' testing duplicated ongoing testing monitored by EPA.

The district court erred when it upheld EPA's determination that the ERA constitutes an ARAR, because the ERA is not properly promulgated nor relevant and appropriate. To determine whether a state environmental standard constitutes an ARAR, courts evaluate whether such standard is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. *U.S. v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991); *see also*, 40 C.F.R. § 300.400(g)(4). Under the first element, a state standard is not "properly promulgated," and therefore not an ARAR, if it is not "legally enforceable." 40 CFR § 300.400(g)(4). With regards to the third element, a state standard is not "relevant and appropriate" for the remedial action selected when the standard lacks a "well-suited use" for the contamination in question.

Here, the ERA is not an ARAR for two primary reasons. The Amendment is not legally enforceable as a result of its vagueness; the standard cannot be understood by ordinary people and encourages arbitrary and discriminatory enforcement. And in failing to propose a remedial action and lacking a measurable standard, the ERA is not well-suited in establishing the proper remedial action needed for Fartown. As the ERA does not constitute an ARAR, the district court in turn erred in holding that EPA's both reopening the CD based on that ARAR and ordering further remedial action in the UAO was proper.

The district court erred when it granted FAWS' motion to vacate EPA's decision not to require filtration in Fartown wells because EPA's decision was not arbitrary, capricious, or contrary to law. Agencies must demonstrate a "rational connection between the facts found and

the choice made" in explanations of decision-making processes. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Furthermore, courts find an agency action arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Here, EPA's UAO was not arbitrary and capricious because the agency relied on the proper factors under CERCLA, EPA drew a rational connection between the evidence collected in Fartown and its decision, and EPA clearly explained its reasoning in the administrative record.

The district court did not err in retaining jurisdiction over FAWS' remaining state law tort claims because the court acted within its congressionally authorized discretion. District courts have power to retain pendent jurisdiction when federal and state claims form the "same case or controversy." 28 U.S.C. § 1367(a); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (holding that claims form the same case or controversy when they "derive from a common nucleus of operative fact."). And when courts have such power, they should weigh the *Gibbs* factors – "judicial economy, convenience, fairness, and equality" – to support their decision to retain jurisdiction. *Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182, 1191 (2d Cir. 1996) (citation omitted); *see also Gibbs*, 383 U.S. at 726. Federal courts of appeal must give "broad discretion" to a district court's decision to retain state law claims. *Moor v. Alameda County*, 411 U.S. 693, 716 (1973).

The district court had power here because FAWS' federal and state law claims shared the same factual background. And while the balance of factors does not strongly weigh in either

direction, they provide support for federal jurisdiction. In light of the *Gibbs* factors, the district court acted well within the broad discretion granted to it by Congress.

STANDARD OF REVIEW

The existence of federal jurisdiction "is a question of law reviewed *de novo*." *Perez-Martin v. Ashcroft*, 394 F.3d 752, 756 (9th Cir. 2005). Federal courts of appeal have a "special obligation" to consider their jurisdiction, and that of lower courts, whether or not parties raise this issue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

A district court's grant or denial of summary judgment is also reviewed *de novo*. *See, e.g.*, *Potvin v. Speedway LLC*, 891 F.3d 410, 414 (1st Cir. 2018); *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016). Summary judgment is appropriate when the materials in the record show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a), (c).

"On appeal from a grant of summary judgment involving a claim brought under the [APA]," federal appellate courts "review the administrative record *de novo* without according deference to the decision of the district court." *Karpova v. Snow*, 497 F.3d 262, 267 (2d Cir. 2007). When an agency action is challenged, "[t]he entire case on review is a question of law." *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). The typical summary judgment standard "does not apply" to review of final agency action decided on summary judgment "because of the limited role federal courts play in reviewing such administrative decisions." *Resolute Forest Prods., Inc. v. USDA*, 130 F. Supp. 3d 81, 89 (D.D.C. 2015). Instead, "summary judgment merely serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise

consistent with the APA standard of review." *Oceana, Inc. v. Locke,* 831 F. Supp. 2d 95, 106 (D.D.C. 2011).

ARGUMENT

I. The district court correctly determined that FAWS' sampling, testing, and analysis costs are not reimbursable as response costs under section 9607(a)(4)(B) because they were not necessary.

With CERCLA, Congress aimed to "promote the timely cleanup of hazardous waste sites." *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. 599, 602 (2008). Congress encouraged private parties to engage in cleanup actions by allowing them to "recover expenses associated with cleaning up contaminated sites" from potentially responsible parties ("PRP's"). *Atl. Rsch. Corp.*, 551 U.S. 128, 131 (2007); 42 U.S.C. § 9607(a). But that encouragement has express limits. Congress only empowered private parties to recover response costs deemed "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). ''CERCLA 'response costs' are defined generally as the costs of investigating *and* remedying the effects of a release or threatened release of a hazardous substance into the environment.'' *Cnty. Line Inv. Co. v. Tinney,* 933 F.2d 1508, 1512 n. 7 (10th Cir. 1991) (emphasis added) (citing 42 U.S.C. § 9601(23), (24), (25)). While Congress did not define "necessary" costs, federal courts have frequently analyzed whether costs are necessary with three lines of inquiry: (a) as a threshold matter, whether a private party's actions respond to an actual threat; (b) whether a close relationship exists between a private party's response costs and the actual cleanup; and (c) whether a private party's response actions duplicated those of federal and state governments or those of a PRP. For any of these reasons, as argued below, FAWS cannot recover costs incurred from its sampling, testing, and analysis ("testing") actions as a matter of law. Therefore, this

Court should affirm the district court's grant of summary judgment and find that FAWS' testing costs were not reimbursable as response costs under section 9607(a)(4)(B).

A. FAWS' testing costs were not necessary because FAWS failed to show that NAS-T levels constitute an actual threat to human health prior to its testing.

As a threshold matter, "[i]t is generally agreed that [section 9607(a)(4)(B)'s necessity] standard requires that an *actual and real threat* to human health or the environment exist before initiating a response action." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (highlighting that whether responses are necessary is an objective inquiry) (emphasis added); *see also City of Colton v. American Promotional Events*, 614 F.3d 998, 1003 (9th Cir. 2010). Where plaintiffs have failed to show that an actual or real threat existed "prior to initiating a response action," courts have denied recovery under CERCLA. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459–60 (1st Cir. 1992); *see also G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995).

Here, FAWS' testing actions were not necessary because FAWS did not show that an actual threat to human health existed prior to its testing. As the district court noted, EPA's HAL for NAS-T included a "*significant margin of error*" to ensure that exposure levels remain non-toxic to humans. Record at 6. And the record shows that NAS-T levels in Fartown's wells remained below the HAL's 10 parts per billion by testing conducted by BELCO and Centerburg County's DOH prior to, and concurrent with, FAWS' testing. *Id.* The highest NAS-T levels detected within a half-mile of Fartown was 5-6 ppb, well below the conservatively drawn HAL. *Id.* at 8. Prior to FAWS testing, then, no previous testing showed that an actual or real threat to human health existed.

It is immaterial that FAWS' testing revealed that NAS-T reached the wells in Fartown, as FAWS argued below. FAWS would need to further show that the arrival of NAS-T created an

actual or real threat to its residents' health. But FAWS' testing only confirmed that NAS-T levels remained below 10 ppb. Therefore, FAWS' testing costs are not reimbursable as a matter of law because it failed to show that any actual or real threat existed prior to its testing.

FAWS is certainly right that Fartown residents had a right to know about exposure levels for their own sake, as they argued below. However, Congress expressly limited recovery costs for private parties under CERCLA to those that are necessary. 42 U.S.C. 9607(a)(4)(B). And whether a response action is necessary requires an objective analysis, regardless of FAWS' subjective intent to test for their own purposes. *See Carson Harbor Vill., Ltd.*, 270 F.3d at 871. Allowing FAWS to recover its testing costs here would violate Congress' express limits by giving private parties "discretion, not merely to double the response costs, but potentially to pass those increased costs on to third parties without notice or consent." *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Ca., Jan. 27, 1993).

B. FAWS' testing costs were not necessary because the testing was not closely tied to the actual cleanup.

A private party's response costs are necessary when they are "closely tied to the actual cleanup." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819–20 (1994). The Supreme Court in *Key Tronic* considered whether different types of attorney's fees were recoverable as a necessary response cost. *Id.* The Court held that those attorney's fees – and any cost incurred – that "significantly benefited the entire cleanup effort" amounted to a "necessary cost," and were therefore recoverable under section 9607(a)(4)(B). *Id.* at 820. Following *Key Tronic*'s analysis, circuit courts of appeal have required that plaintiffs show a close relationship between the actual cleanup and the response costs incurred. *See, e.g.*, *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004) (explaining that necessary response costs are those "closely tied" to actual cleanup); *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) (finding that "costs cannot

be deemed 'necessary' to the containment and cleanup of hazardous release absent some nexus between the alleged cost and an actual effort to respond").

In *Young*, plaintiff homeowners sought to recover response costs under section 9607(a)(4)(B) for site investigation, soil sampling, and risk assessment activities. *Young*, 394 F.3d at 861. The Tenth Circuit affirmed the district court's holding that these costs were not recoverable on the grounds that they "were not tied in any manner to the actual cleanup of hazardous substances." *Id.* at 864. That is, even though plaintiffs' activities were "classic examples of preliminary steps taken in response to the discovery of the release . . . of hazardous substances," plaintiffs did not take any subsequent steps to clean up the contamination. *Id.* Because plaintiffs did not engage in cleanup efforts *at all* – so no close relationship could exist – the court affirmed the district court's grant of summary judgment to defendants. *Id.* at 865.

Here, FAWS' testing costs are not necessary for the simple reason that they were not tied to any actual cleanup. Nothing in the district court's factual findings indicate that FAWS planned to clean up NAS-T in the Sandstone Aquifer. Nor has it taken any steps toward that end. To the contrary, FAWS maintains that Fartown's water remains contaminated. Record at 10. The district court understood FAWS' testing actions as intended to provoke EPA to compel BELCO to take remedial actions beyond those mandated by EPA's 2017 CD. *Id.* at 12. The same deficiency in the plaintiff's argument in *Young* exists here, then: no actual cleanup action has occurred after testing. *Young*, 394 F.3d at 864. Therefore, these costs cannot be "closely tied to the actual cleanup." *Key Tronic*, 511 U.S. at 819–20. And, for this reason, FAWS testing costs are not necessary as a matter of law.

FAWS argued below that its testing was necessary because NAS-T reached Fartown without BELCO's monitoring wells even detecting it. Record at 12. Even if BELCO's testing

missed this, FAWS' cost recovery claim still fails as a matter of law because no actual cleanup has occurred. Absent an actual effort to contain or cleanup NAS-T, FAWS' testing actions fall outside the types of private party cleanup actions that Congress sought to incentivize with CERCLA.

C. FAWS' testing actions were not necessary because they duplicated BELCO's prior EPA supervised cleanup actions and did not reveal new information.

District courts have also held that response costs that duplicate efforts of EPA, a state agency, or PRPs are not necessary response costs. *U.S. v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Ca., Oct. 28, 1997); *Marcas, LLC v. Bd. Of Cnty. Comm'rs of St. Mary's Cnty.*, 977 F. Supp. 2d 487, 500–01 (D. Md. 2013). Costs are "duplicative" when they occur after "EPA has initiated a remedial investigation, unless authorized by the EPA." *Louisiana-Pacific Corp.*, 811 F. Supp. at 1425. Further, response actions are duplicative when they do not reveal information beyond what EPA or a PRP already knew. *Wilson Road Dev. v. Fronabarger Concreters*, 209 F. Supp. 3d 1093, 1111 (E.D. Mo. 2016).

FAWS' testing actions were duplicative because they occurred after EPA mandated BELCO to do similar testing and EPA did not authorize FAWS' testing. In March 2016, EPA and BELCO reached an agreement that required BELCO to conduct an RI/FS. Record at 6. As part of its remedial requirements, BELCO installed monitoring wells beginning in July 2016 to test the Sandstone Aquifer's NAS-T levels each month. *Id.* FAWS' testing occurred nearly four years later in March 2020, far after EPA mandated BELCO's testing under the CD. *Id.* at 8. Further, the district court's factual findings do not show that EPA authorized FAWS to conduct testing after EPA had already initiated its RI/FS.

FAWS' testing was also duplicative because it did not reveal information beyond what EPA already knew about NAS-T levels. BELCO's monthly monitoring – overseen by EPA –

yielded non-detects in its lines closest to Fartown from 2016 through 2017. Record at 8. In January 2018, BELCO's monitoring wells, for the first and only time, detected increased levels of NAS-T (5-6 ppb), still below EPA's HAL (10 ppb). *Id.* And EPA was aware of these two detections of NAS-T prior to issuing a COC to BELCO in September of 2018. But, more importantly, EPA knew that these levels would not likely go much higher because BELCO had already excavated the soil source in December 2017. Therefore, FAWS testing did not provide information beyond what EPA already knew because it only confirmed levels of NAS-T that BELCO's testing had already detected.

FAWS also argues below that its testing was not duplicative because it showed that the NAS-T plume migrated further south into Fartown. However, the information EPA had was sufficient to show that this movement was likely to occur, or that it was already occurring. Previous BELCO testing showed that lines further south from Centerburg detected NAS-T over time, indicating that the plume continued to migrate. FAWS' testing simply confirmed that the plume migrated to Fartown which EPA could have reasonably expected based on BELCO's previous testing. For this reason, FAWS' testing duplicated BELCO's prior testing because it did not reveal information beyond what EPA likely knew.

II. The district court erred when it upheld EPA's determination that the ERA constitutes an ARAR because the ERA is not properly promulgated nor relevant and appropriate.

Section 121 of CERCLA requires that selected remedial actions must attain or waive ARARs to assure the protection of human health and the environment. 42 U.S.C. § 9621(d). To determine whether a state environmental standard constitutes an ARAR, courts evaluate whether such standard 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., 949 F.2d 1409, 1440 (6th Cir. 1991); *see also*, 40 C.F.R. § 300.400(g)(4). For the reasons stated below, the district court erred when it held that New Union's ERA constitutes an ARAR. Therefore, this Court should overturn the district court's grant of summary judgment. Consequently, the district court erred in holding that EPA's reopening the CD based on that ARAR and ordering further remedial action in the UAO was proper.

A. The ERA is not properly promulgated because it is not legally enforceable.

Federal courts only consider state standards ARARs if they are "properly promulgated." *Akzo Coatings of Am.*, 949 F.2d at 1440; 42 U.S.C. § 9621(d)(2)(A)(ii). EPA considers a standard "promulgated" when it is imposed by a state legislative body and is both of "general applicability" and "legally enforceable." 40 C.F.R. § 300.400(g)(4)*; Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements*, 52 Fed. Reg. 32496-01, 32498 (Aug. 27, 1987); *see Ohio v. EPA*, 997 F.2d 1520, 1527 (D.C. Cir. 1993).

For a state standard to be "legally enforceable" as an ARAR it "must be issued in accordance with state procedural laws or standards and contain specific enforcement provisions or be otherwise enforceable under state law." *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666, 8746 (Mar. 8, 1990) (codified at 40 C.F.R. § 300.400(g)(4)) [hereinafter NCP, Final Rule]. So, a regulation is legally unenforceable if it is constitutionally vague or lacks a quantifiable standard. *See Akzo Coatings of Am.*, 949 F.2d at 1441. And a standard is constitutionally vague if it is not drafted "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that [encourages] arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

Here, the ERA is legally unenforceable because the phrase "*free from* contaminants and pollutants caused by humans" renders the amendment vague and allows for arbitrary and discriminatory enforcement. N.U. Const. art 1, § 7. (emphasis added). Because the ERA is unenforceable, FAWS' claim fails as a matter of law. The district court concluded that the ERA was "properly promulgated" because the legislature passed the amendment and New Union's Governor signed it. Record at 14. And the court further found that the amendment was generally applicable because it provides a self-executing right. *Id.* at 14–15.

However, the ERA completely lacks guidance on what the second clause, "free from contaminants and pollutants caused by humans," means. N.U. Const. art 1, § 7. To begin with, the Amendment's legislative history fails to discuss the meaning of "free from." So, looking at the plain meaning of the Amendment, the Merriam Webster dictionary defines "free," in relevant part, as "relieved from or lacking something and especially something unpleasant or burdensome." *Free*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/free (last visited Nov. 17, 2022). And the phrase "free from" is typically understood as an absolute phrase. So, under this plain language definition, water, for example, would be considered "free from" NAS-T when it contains no detectable level. Therefore, the plain meaning of the Amendment's second clause would indicate that the legislature intended to enforce the ERA whenever no amount of contaminant is present.

Furthermore, the legislative history of "clean air and clean water and . . . a healthful environment" indicates otherwise; the first clause of the Amendment exemplifies that the ERA was merely intended to keep New Union residents from being harmed. The legislators' discussion of the ERA suggests that "clean" ultimately means "not harmful." *Environmental Rights Amendment: Assemb. on A02137,* N.U. Assemb. No. A10377 at 4 (2019–2020) ("[T]he

intent is very clear, that you should be able to consume water through your public water supply without any harm . . . What is appropriate and desirable for a public water supply involves other chemicals, other substances. But they should not harm you."). Although the discussion does contain contradictions, such as "odors" being unclean if they are "sufficiently offensive" and impact "what the community would consider 'clean,'" the explanation of "healthful" supports the idea of the first clause ensuring the State's environment is not *harmful*. *Id.* at 6. While the ERA does not define "healthful," the legislative history mentions that "healthful" "means that it will do no harm to consume [for example] that water." *Id.* at 5.

These descriptions of "clean water" and a "healthful environment" are completely incompatible with the ERA's second clause that the environment be "free from contaminants and pollutants caused by humans." N.U. Const. art 1, § 7. To follow the only logical definition of "free from" would mean that, although water containing safe amounts of the contaminant is considered "clean" and "healthful" under the legislative history of the first clause of the ERA, it still violates the Amendment because it is not *entirely* "free from" NAS-T. Thus, there is insufficient definiteness that the ordinary person or business understands what is legitimately prohibited under the ERA. And even if New Union's legislature understood "free from" in its ordinary meaning, then the ERA would allow for arbitrary and discriminatory enforcement. Unless EPA and DNR intend to find *every* business that emits *any* human-created contaminant or pollutant in violation of the ERA – regardless of whether the amount is harmful – then such an interpretation of "free from" would allow EPA and DNR to cherry pick businesses they wish to go after.

B. The ERA is not relevant and appropriate for the remedial action selected at the Fartown site.

Potential state 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." *Akzo Coatings of Am.*, 949 F.2d at 1445 n.38. "Relevant and appropriate requirements" include standards promulgated under state law that address "sufficiently similar" issues and are "well-suited" for use at the site in question. *Id.*; *see* 40 C.F.R. § 300.5; *Superfund Program; Interim Guidance*, 52 Fed. Reg. at 32497; *NCP, Final Rule*, 55 Fed. Reg. at 8742. Courts evaluating the relevance of the state requirement consider the environmental media, the type of substance, and the objective of the potential ARAR, among other factors, on a site-specific basis. *Akzo Coatings of Am.*, 949 F.2d at 1445; *NCP, Final Rule*, 53 Fed. Reg. 51394-01, 51436. When evaluating the appropriateness of the potential state ARAR, courts are generally advised to look at whether the ARAR is well-suited for the particular site based on "the nature of the substances, the characteristics of the site, the circumstances of the release, and the proposed remedial action." *NCP, Final Rule*, 53 Fed. Reg. at 51436. In addition, EPA has even suggested that courts can find that only *part* of a requirement is relevant and appropriate, while dismissing the remainder of that requirement. *Superfund Program; Interim Guidance*, 52 Fed. Reg. at 32497.

Here, although the ERA is "relevant," it is not "appropriate" because the ERA does not have a "well-suited use" for Fartown's situation. The district court recognizes that the ERA is not directly "applicable" but holds that the ERA is "relevant and appropriate." Record at 15. The court is correct that the ERA is "relevant" because the Amendment addresses issues sufficiently similar to that of Fartown – the environmental medium here is groundwater and the type of substance is NAS-T, which are covered by the ERA's guarantee of "clean water free

from contaminants caused by humans." However, the court erred in deciding that the ERA is appropriate. While the Amendment ultimately aims to ensure "clean water" for New Union residents, the ERA provides no guidance on *how* to attain "clean water." Lacking any measurable standard or "proposed remedial action" for situations where there is an unregulated chemical impacting the cleanliness of the State's water, the ERA is not well-suited to establish the remedial action needed at the site.

III. The district court erred when it vacated EPA's decision not to require filtration in Fartown wells because that decision was not arbitrary, capricious or contrary to law.

When an EPA decision is challenged, courts assess the agency's decision under the APA. 5 U.S.C. § 706. Courts will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see *also Sackett v. EPA*, 566 U.S. 120 (2012) (finding challenges to EPA compliance orders fall under the APA's arbitrary and capricious standard); *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461 (2004). The arbitrary and capricious standard is repeated in CERCLA's judicial review provision. 42 U.S.C. § 9613(j)(2) ("[T]he court shall uphold [EPA's] decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law."). Thus, federal courts have consistently used the arbitrary and capricious standard to review EPA orders formed under CERCLA. *See, e.g.*, *Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1425 (6th Cir. 1991) ("A court's review process of a [CERCLA] response action undertaken by EPA is guided by 42 U.S.C. § 9613(j)). The APA's arbitrary and capricious standard is a "narrow" standard under which courts are not meant

to supplant an agency's judgment with their own. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

In its decision-making processes, an agency must examine relevant data and have a "satisfactory explanation for its actions," *State Farm*, 463 U.S. at 43, which should include a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962). Courts find agency actions arbitrary and capricious if the agency, (1) "has relied on factors which Congress has not intended it to consider"; (2) has "entirely failed to consider an important aspect of the problem"; (3) has "offered an explanation for its decision that runs counter to the evidence before the agency, or"; (4) offered an explanation that "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Based on the reasons below, this Court should overrule the district court's grant of summary judgment and find that EPA's decision was not arbitrary and capricious.

A. EPA only relied on factors that Congress intended it to consider, whether or not the ERA is an ARAR.

To avoid the "arbitrary, capricious, or contrary to law" designation, an agency must not rely on "factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. That is, the agency must avoid "conflict with the language of the statute" it "relie[s] upon." *City of Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007); *see also State Farm* 463 U.S. at 48 (relying on "the mandate of the [Act]" to assess the agency's decisions under the arbitrary and capricious standard). In *United States v. Burlington Northern Railroad Company*, the court held that EPA did not act arbitrarily or capriciously in doing a risk assessment of a contaminated site without taking into account potential remedial actions because the purpose of the risk assessment was to gather information about the site as is, not as it might be with remedial measures. 200

F.3d 679, 689–90 (10th Cir. 1999). The court explained that it could "not say that the EPA's Risk Assessment relied on factors which Congress did not intend the EPA to consider," because EPA followed the correct directives by Congress. *Id.*

Because the ERA is not an ARAR, as argued above, the proper question for the court is whether EPA acted arbitrarily and capriciously according to the authority Congress conferred upon it under CERCLA, not the ERA. CERCLA requires parties engaging in response actions to "select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions . . . to the maximum extent practicable." 42 U.S.C. § 9621(b)(1); *see also Ohio v. EPA*, 997 F.2d at 1533 ("CERCLA requires the selection of remedial actions that are 'protective of human health,' not as protective as conceivably possible.").

Here, EPA did not consider any factors outside of those required under CERCLA. First, EPA took into account human health because it based its decision not to include universal CleanStripping in the UAO solely on the fact that the NAS-T levels in Fartown had never been shown to exceed the HAL. Report at 9. The highest detection of NAS-T ever recorded in Fartown was 8 ppb, below EPA's HAL for NAS-T of 10 ppb, which incorporates a significant margin of error. *Id.* at 6, 10. And the UAO required EPA to provide water bottles to Fartown residents with levels of NAS-T in their wells above 5 ppb, even though this amount of NAS-T is non-toxic to humans. *Id.* at 6, 9. The UAO also requires that BELCO continue to monitor Fartown's private wells and install CleanStripping where NAS-T levels in those wells exceed the HAL. *Id.* at 9. These requirements show that EPA took steps to support human health in compliance with CERCLA. The omission of FAWS' requested CleanStripping provision does

not violate EPA's consideration of health, because CERCLA does not force EPA into actions that are "as protective as conceivably possible." *Ohio v. EPA*, 997 F.2d at 1533.

Second, even though the record does not include direct evidence of the cost-effectiveness or permanence of the UAO's provisions, circumstantial evidence shows that the Order ultimately fulfills these two CERCLA mandates. *Id.* at 9. The UAO is cost-effective, because it only requires CleanStripping for wells where NAS-T levels exceed EPA's HAL. *Id.* Given that the installation of CleanStripping would cost as much as $4,500 per Fartown household, and none of the wells tested in Fartown demonstrated levels of NAS-T that exceed the HAL, the UAO avoided unnecessary and costly expenditures. *Id.* at 10, 16. For these reasons, the UAO was cost-effective.

Furthermore, the UAO's and CD's requirements together fulfill CERCLA's requirement that response actions be permanent to a practicable degree. 42 U.S.C. § 9621(b)(1). EPA's initial cleanup plan for the Centerburg Facility was based in part on evidence in the RI/FS that showed that complete remediation of the NAS-T plume would take decades and cost $45 million. Record at 7. Though such remediation would be permanent, it was not practicable due to its cost. Therefore, EPA's decision to pursue a monitored natural attenuation remedy – the excavation of contaminated soil, the continuous monitoring of the Aquifer, and filtration for wells containing NAS-T levels above the HAL – constitutes a "permanent solution" to the extent practicable. *Id.* at 7.

However, even if this Court affirms the district court's holding that the ERA is an ARAR, which would mean that EPA's actions must be assessed under the ERA, the agency still did not go beyond the factors it was intended to consider. A general requirement passed by a state that "contain[s] no specific numerical standards" – like the ERA – can be considered an ARAR, but

"EPA [has] considerable latitude in determining how to comply with the goal in the absence of implementing regulations." *Akzo Coatings of Am.*, 949 F.2d at 1442 (citing *NCP, Final Rule*, 55 Fed. Reg. at 8746).

The ERA states, in relevant part, that New Union residents "have a fundamental right to . . . clean water . . . free from contaminants and pollutants caused by humans." N.U. Const. art. 1, § 7. Because EPA has significant discretion to apply ARARs that are broadly construed, EPA could determine what the ERA means in practice. EPA interpreted the ERA to require that NAS-T levels remain below the HAL. *Id.* at 9. This decision was within EPA's discretion and was not random or arbitrary. Instead, EPA's decision was consistent with other environmental statutes, like the Clean Air Act and the Clean Water Act, which each allow safe levels of contamination in order to facilitate practicability and preserve the agency's rightful discretion. Furthermore, if the ERA is an ARAR, it derives its authority from CERCLA. And, as argued above, the UAO and its definition of "clean water" fulfill the purpose of CERCLA and the factors that Congress intended EPA to consider under CERCLA

B. EPA based its decision on the evidence before it and its expertise as an agency.

To show that a decision is not arbitrary and capricious, an agency must "examine the relevant data and articulate a satisfactory explanation" for its decision that includes a "rational connection" between that data and the choice the agency has made. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. 156, 168 (1962)). When assessing whether an agency action is arbitrary and capricious, courts consider whether that action was based on the "relevant factors and whether there has been a clear error of judgment." *Id.*; *see also In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 905 (5th Cir. 1993) (finding EPA's decision arbitrary and capricious because "not one shred of evidence" existed in the record to support its actions).

In *Akzo*, EPA remediated a contaminated site through a form of soil flushing that it had originally found would not be conducive to the site, due to the nature of the soil and the contamination. *Akzo Coatings of Am.*, 949 F.2d at 1409. The court held that EPA's decision to use soil flushing was not arbitrary and capricious for two reasons. First, EPA included sufficient scientific evidence in the administrative record based on further soil testing and study of the site, which showed that soil flushing actually was a proper remedy. Second, the agency responded to public comments about the consent decree. *Id.* at 1421, 1431–32. For these reasons, the Court decided that EPA's chosen course of action was "rational and supported by the record," and thus, not arbitrary or capricious. *Id.* at 1435.

Similarly, here, EPA was aware of, and used the multiple periods of testing in Fartown in its justifications for its decision and responded to public concerns. Record at 9. EPA was privy to the testing of Fartown wells through DOH in 2019, and through Central Labs in 2020. *Id.* Both tests showed that there were no wells with NAS-T levels above 8 ppb. *Id.* at 8. BELCO's monitoring wells also consistently showed low levels of NAS-T in groundwater headed to Fartown. *Id.* Furthermore, EPA responded to public comment about FAWS' CleanStripping request. *Id.* at 9. FAWS sent a written request to the agency, which it expressly declined, citing (and including in the administrative record) the consistent, below-HAL levels of NAS-T in Fartown. *Id.* For the same reasons given in *Akzo*, EPA has appropriately based its decision on its expertise and the results of its testing. 949 F.2d at 1409.

IV. The district court did not err in retaining jurisdiction over FAWS' remaining state law claims because the court acted within its congressionally authorized discretion.

Federal courts have power to retain pendent jurisdiction over state law claims "that are so related to claims in the action within such original jurisdiction that they form part of the same

case or controversy . . . ." 28 U.S.C. § 1367(a). Federal and state claims form the "same case or controversy" when they "derive from a common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Where such power to exercise pendent jurisdiction exists, "court[s] should consider and weigh in each case" whether the *Gibbs* factors - "judicial economy, convenience, fairness, and comity" - support continued federal jurisdiction. *Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182, 1191 (2d Cir. 1996) (citation omitted); *see also Gibbs*, 383 U.S. at 726. The doctrine of pendent jurisdiction is flexible, "designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1987). Accordingly, the Supreme Court has ordered federal courts of appeal to give "broad discretion" to a district court's decision to retain state law claims. *Moor v. Alameda County*, 411 U.S. 693, 716 (1973).

When the "balance of these factors indicates that a case properly belongs in state court," federal courts "may decline" to exercise jurisdiction. *Carnegie-Mellon Univ.*, 484 U.S. at 350; 28 U.S.C. § 1367(c). The balance often favors dismissal when remaining state law claims present "novel or complex" issues. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999) (finding that dismissal of federal claims before trial "encouraged" dismissal of state claims). Yet when the district court's dismissal of federal claims occurs "after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary." *Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir. 1994) (citation omitted); *see Basista Holdings, LLC v. Ellsworth Twp.*, 710 Fed. Appx. 688, 694–95 (6th Cir. 2017).

Here, the district court had power to retain FAWS' state law claims because its state and federal claims share the same nucleus of common facts. FAWS' federal claims involved facts surrounding BELCO's role in contaminating the Sandstone Aquifer, the March 2016 RI/FS, EPA's August 2017 CD, and the June 2021 UAO. The district court's findings indicate that FAWS had access to multiple reports conducted by BELCO and EPA. Record at 11. These identified BELCO's facility as the source of the NAS-T contamination, detailed how BELCO's storage practices related to the Sandstone Aquifer's contamination, and included public comment surrounding BELCO's role in cleanup based on its actions. *Id.* at 6–9. FAWS' private nuisance and negligence claims rely on the same factual background. Rather than requiring new factual material, these claims would simply foreground a different set of questions regarding causation, the scope of BELCO's liability, and actions BELCO took in storing NAS-T – all of which involve the same common facts as the federal claim. This is a strong example of the kind of claim that a "litigant in a state court would ordinarily expect to try in a single judicial proceeding." *Gibbs,* 383 U.S. at 725. As a result of this shared factual background, the district court had power to exercise pendent jurisdiction.

Having power to retain jurisdiction, the district court acted well within its direction to retain FAWS' state law claims because the *Gibbs* factors favor continued federal jurisdiction. Judicial economy supports retaining jurisdiction. The background facts necessary for FAWS to establish its state tort claims is complex. Dismissal would require a state court to relearn what the district court already familiarized itself with since FAWS filed its action against BELCO on August 30, 2021. And while FAWS claims that they need further discovery regarding its state law claims, especially regarding damages, discovery on FAWS' CERCLA claims already supplied ample findings related to BELCO's role in contaminating the Sandstone Aquifer and

the scope of its liability. *See Berg v. BCS Fin. Corp.*, 372 F. Supp. 2d 1080, 1096 (N.D. Ill. 2005) (declining the court's exercise of supplemental jurisdiction over a state law claim that would "involve considerably more expansive discovery"); Record at 6–9. Because any further discovery would be limited to damages, any remaining discovery would be insubstantial.

For the same reasons, it is more convenient and fairer for the court and all parties to remain in federal court. As is frequently the case, here it is more convenient for all parties to try all claims in the same forum. *See Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518, 539 (11th Cir. 2015). This is true even though FAWS filed its action intending to remove its state claims to state court. Record at 10. FAWS passed on the opportunity to unilaterally dismiss its state claims at a convenient time by failing to dismiss before BELCO answered FAWS' complaint. Fed. R. Civ. P. 41(a)(1). The decision to dismiss state law claims now lies entirely within the district court's discretion. *Id.* However, it would be inconvenient to retread ground in state court and unfair to force BELCO to accumulate unnecessary legal fees and deal with redundant administrative burdens. This would waste the time and effort the district court and parties have already expended.

Comity does not weigh heavily in either direction because concerns could arise no matter what this court decides. FAWS has maintained that its state law claims are novel because state courts have not developed case law regarding whether the ERA triggers nuisance *per se*. Record at 18. The district court was correct to note that FAWS' private nuisance and negligence claims were not novel in any way. *Id.* And even if they were, that is not necessarily dispositive here because dismissal to state court would raise comity concerns too. A state court could grant FAWS injunctive relief that is inconsistent with federal jurisdiction in two ways. First, because FAWS requested injunctive relief, a state court injunction could contradict EPA's prior

determination of the relevant remedy. Second, a state court could make an order inconsistent with the district court's ongoing jurisdiction over the BELCO action to enforce the CD or UAO. Potential comity issues run both directions, suggesting that this factor is not dispositive. And although the balance of factors does not weigh heavily in either direction, they show that the district court had support for its decision.

The dispositive issue here is that Congress vested "broad discretion" to the New Union district court. The overall balance of factors supports federal jurisdiction. And district courts have retained state claims with less support than is present here. *See, e.g., Philan Ins. Ltd. v. Frank B. Hall & Co., Inc.,* 786 F. Supp. 345, 347 (S.D.N.Y. 1992) (supplemental jurisdiction appropriate even when federal claims dismissed before trial). As a result, the district court acted well within its broad discretion.

That substantial proceedings have already taken place further supports the district court's decision. *Basista Holdings*, 710 Fed. Appx. at 694–95. Parties have already conducted substantial discovery related to CERCLA claims that will have some relevance to future discovery on FAWS' state tort claims. The district court decided dispositive motions filed by all parties. Record at 18. The court also expended much time and effort to familiarize itself with the facts of the case. And the court oversaw FAWS' claim since they filed on August 30, 2021. *Id.* at 10. To dismiss FAWS' state claims now would require the state court to retread ground and to throw away its precious time and effort. For these reasons, this Court should affirm the district court's decision to retain jurisdiction over FAWS' remaining state claims.

CONCLUSION

For the reasons stated above, this Court should: (1) affirm the district court's grant of summary judgment for BELCO regarding FAWS' response recovery claim; (2) reverse the district court's grant of summary judgment for EPA regarding its determination to reopen the CD and issue the UAO; (3) reverse the district court's grant of summary judgment for FAWS' regarding its APA claim; and (4) affirm the district court's denial of FAWS' motion to dismiss.