Brief 5 Non-Measuring

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

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee.

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

Brief of Defendant, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union issued an Order in consolidated cases 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction over the action pursuant to 42 U.S.C. § 9613(b) (claims arising under CERCLA), 5 U.S.C. § 702 (agency decisions), and 28 U.S.C. § 1331 (federal question). Better Living Corporation ("BELCO"), the United States Environmental Protection Agency ("EPA") and Fartown Association for Water Safety ("FAWS") all properly sought leave to file an interlocutory appeal pursuant to Fed. R. App. P. 5. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1292, which permits "appeals as of right from interlocutory orders of the district courts granting or refusing requested injunctions."

STATEMENT OF ISSUES PRESENTED

I. Whether the district court correctly determined that FAWS was not entitled to recover third party investigative costs given that NAS-T is neither a "hazardous substance," nor a "pollutant or contaminant" posing an imminent and substantial danger, and when the investigative costs were duplicative of the investigation already conducted by EPA?

II. Whether the district court erred in upholding EPA's determination that the ERA constitutes an ARAR and accordingly finding EPA's reopening of the Consent Decree and ordering further remedial action through the UAO on that basis to be proper, given that the ERA was promulgated after remediation efforts concluded and is a broad policy-based prohibition that is silent regarding prohibited acts and does not give direction regarding remedial procedures?

III. Whether the district court erred when it vacated EPA's decision that BELCO need not install filtration systems in Fartown as arbitrary, capricious, and contrary to law based on FAWS's incorrect determination that the ERA requires removal of all human-caused chemicals from the water supply?

IV. Whether the district court correctly exercised its statutorily granted discretion to retain supplemental jurisdiction over FAWS'S state law tort claims when doing so most sensibly accommodates the factors of judicial economy, convenience, fairness, and comity?

STATEMENT OF THE CASE

A. The Source and Discovery of the Contamination

Centerburg and Fartown both receive tap water from the Sandstone Aquifer; Centerburg receives treated water from the Centerburg Water Supply ("CWS") and Fartown receives water from private drinking water wells. Record at 5. In 1972, BELCO patented a sealant called "Lockseal" to prevent corrosion. *Id*. Lockseal is made by combining the chemical NAS-T (Nitro-Acetate Titanium) with a non-toxic activation agent to create a solid coating for metal pipes and machinery exposed to corrosive liquids. *Id.* BELCO manufactured NAS-T and the activation agent at a factory (the "Site") in Centerburg from 1973 through 1998. Record at 6.

In the mid-1980s, a series of medical studies showed NAS-T to be a probable human carcinogen. *Id*. In response, EPA adopted a Health Advisory Level ("HAL") for NAS-T of 10 parts per billion ("ppb"), incorporating a significant margin of error to protect the community from toxins. *Id*. Humans can detect the smell of NAS-T in water at concentrations of 5 ppb, but no further state or federal regulations apply to NAS-T, and it is not regulated under the Safe Drinking Water Act ("SDWA"). *Id*.

When Centerburgers began complaining about the smell of their water in 2013, the Centerburg County department of Health ("DOH") tested the water supply and determined that the water in the CWS contained between 45 and 60 ppb NAS-T. *Id*. After DOH recommended Centerburgers cease drinking their tap water in September 2015, BELCO provided all Centerburgers with bottled water. *Id.* The New Union Department of Natural Resources ("DNR") then referred the investigation to EPA citing a lack of resources and expertise. *Id.*

B. The Investigation and Consent Decree

BELCO's remedial investigation and feasibility study ("RI/FS") revealed that NAS-T had entered the soil from sporadic spills in the 1980s and 1990s and from an unlined lagoon used to store wastewater and stormwater. *Id*. The contamination leaked into the groundwater creating a plume of NAS-T in the Sandstone Aquifer. *Id*.

BELCO installed monitoring wells from Centerburg to Fartown to maintain low levels of NAS-T, with five wells positioned approximately half a mile north of Fartown showing no detectable amounts of NAS-T. Record at 7. Thus, EPA did not require BELCO to install additional wells. *Id.* EPA and BELCO agreed that remediating the plume by pumping and treating the water was not feasible as it would take several decades and cost more than $45 million. *Id*. In June 2017 BELCO issued a Proposed Plan to the public and a remedial plan was chosen through the Record of Decision ("ROD"). *Id.* Following the ROD, EPA brought a cost recovery action against BELCO ("the BELCO Action") and both parties entered into and filed a Consent Decree ("CD") on June 30, 2017. *Id.* Pursuant to the CD, BELCO agreed to implement EPA's proposed remedy. The public could comment, but no Fartown or Centerburg citizens objected to the RI/FS, the Proposed Plan, or the CD. *Id.*

After completing the cleanup, EPA issued BELCO a Certificate of Completion ("COC") meaning that EPA could not order BELCO to further remediate the Site unless they "reopened" the CD under two conditions, one of which being "where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." *Id*. The CD defines regulatory standards to include applicable or relevant and appropriate requirements ("ARARs") under CERCLA. *Id*.

C. The Remediation

Pursuant to the CD, BELCO installed "CleanStripping", a water filtration system that removes NAS-T, on Centerburg's public well. Record at 7-8. Over the years, BELCO continued to monitor the wells and, except for two detections at 5 ppb and 6ppb in 2018, recorded consistent results with previous tests showing no detections of NAS-T. Record at 8. As a result, EPA granted BELCO the COC in September 2018. *Id.*

D. Testing Fartown's Private Water Wells

A group of Fartownians submitted testimony that they noticed the water from their private wells smelled "off" as early as 2016 and asked DOH to test their drinking water for NAS-T. *Id*. In response, DOH tested five Fartownian wells but detected no NAS-T. *Id*. However, some Fartownians were still not happy and asked EPA to demand further testing from BELCO. *Id*. EPA declined this request, citing the non-detects in the wells just north of Fartown. *Id.* In response, some Fartownians formed FAWS and retained Central Laboratories, Inc. ("Central Labs") to test their private wells. *Id*. Central Labs took three samples each from 75 private wells in Fartown with most wells not detecting NAS-T. *Id.* Of the wells that had detectable NAS-T, 51 showed concentrations between 1 to 4 ppb and 54 showed concentrations between 5 to 8 ppb. *Id.* All the wells tested below the HAL with none of the samples detecting more than 8 ppb of NAS-

T,. *Id.* Regardless, FAWS asked EPA to reopen the CD and order further investigation and remediation. *Id.* EPA declined, citing the low levels of NAS-T and the requirements to reopen the CD. *Id.*

E. The Environmental Rights Amendment

On November 3, 2020, the citizens of New Union passed the Environmental Rights Amendment ("ERA") which reads: "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." *Id*. In January 2021, EPA wrote to DNR asking whether the ERA constituted an ARAR for CERCLA purposes. Record at 9. DNR stated that "EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations." *Id*.

F. Reopening the Consent Decree

On March 20, 2021, citing the 2020 Central Labs results and the passage of the ERA, EPA reopened the CD. *Id*. Prior to reopening, EPA included in its administrative record the new information relied upon – including the fact that Fartown is an environmental justice community, the possible endangerment including potential carcinogenic effects, and the presence of odors from NAS-T. *Id*. EPA ordered BELCO to sample and analyze water from 50 private Fartownian wells and provide bottled water to any Fartownian whose well tested positive for NAS-T. *Id*. FAWS also submitted a request for EPA to order BELCO to install CleanStripping at each well that tested positive NAS-T or take other remedial actions to completely remove NAS-T from their water. *Id*. EPA declined because the levels of NAS-T in Fartownian wells were below the HAL. *Id.* BELCO argued EPA did not have the right to reopen the CD because the ERA cannot legally be considered an ARAR, and the response action ordered was inconsistent with

CERCLA. *Id*. EPA then issued a Unilateral Administrative Order ("UAO") directing BELCO to conduct the response actions FAWS requested. *Id.* BELCO did not comply with the UAO, so EPA supplied water to the Fartownians whose wells contained more than 5 ppb of NAS-T and monitored those wells. *Id*. The test results were consistent with previous results, and still no wells tested above 8 ppb for NAS-T. *Id*.

G. Procedural History

On August 2, 2021, EPA filed a motion seeking to recover its costs incurred in Fartown and for penalties for BELCO's alleged violation of the UAO. Record at 10. BELCO argued that the UAO had no legal foundation, and that EPA had no right to reopen the consent decree because the ERA is not an ARAR. *Id.* Then, on August 30, 2021, FAWS filed a motion challenging the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedure Act ("APA"). *Id*. FAWS argued that, under the ERA, BELCO should be required to provide CleanStripping filtration systems on private wells throughout Fartown. *Id.* FAWS also filed an action against BELCO seeking recovery of the $21,500 spent on own testing their wells. *Id.* FAWS contended that BELCO was negligent in its contamination of the Sandstone Aquifer and that the contamination constituted a private nuisance. *Id.* FAWS asked the Court to order BELCO to: (1) pay its response costs; (2) install CleanStripping on their private wells that tested positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay them damages for the loss of use and enjoyment of their property and diminished property values, and (5) pay punitive damages. *Id*.

On December 30, 2021, all parties moved and cross-moved for summary judgment on the CERCLA claims. Record at 11. FAWS moved to dismiss any remaining state law claims without prejudice to litigate them in state court if the CERCLA claims can be resolved via the motion. *Id.*

BELCO and EPA opposed FAWS's motion to dismiss. *Id.* The district court denied Fartown's motion to dismiss. *Id.*

SUMMARY OF THE ARGUMENT

The district court's decision to grant summary judgment in favor of BELCO with respect to the recovery of FAWS's testing costs should be upheld because NAS-T is not a "hazardous substance," and the testing costs were duplicative and thus not necessary. Because NAS-T is not a hazardous substance as defined in CERCLA § 9601(14), regulation is contingent upon there being imminent and substantial danger to the public health or welfare. 42 U.S.C § 9601(14). Here, NAS-T was only present in the Sandstone Aquifer at non-hazardous levels that don't justify FAWS's response costs. Furthermore, even if NAS-T was a "hazardous substance", EPA and BELCO's consent decree included constant testing of the Sandstone Aquifer making FAWS costs "duplicative" and not recoverable.

Next, BELCO challenges the district court's decision to uphold EPA's determination that the ERA constitutes an ARAR, and, accordingly finding the reopening of the Consent Decree and ordering further remedial action in the UAO to be proper. Under *Chevron* and in light of the arbitrary and capricious standard of review, the record reflects that the EPA failed to exercise independent decision making and the final judgement was inconsistent with the statutory mandate. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Sec. Indus. Ass'n v. Bd. Of. Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984). EPA's decision deeming the ERA an ARAR was inconsistent with the directives under CERCLA.

An ARAR must be (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified. First, the ERA lacks the specificity necessary to provide fair warning of the certain kinds of conduct that is prohibited,

and its vagueness invites arbitrary and discriminatory enforcement. *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Second, the ERA is a powerless policy objective that seeks to accomplish goals achieved solely through the federal guidelines in CERCLA's RI/FS requirement and the federal HAL for NAS-T. Third, the ERA is a broadly written statute lacking substantiveness and definition to qualify it as "relevant and appropriate." *Ohio v. United States EPA*, 997 F.2d 1520, 1526 (D.C. 1993). Finally, the citizens of Fartown and Centerburg have resisted good faith collaboration with EPA and BELCO in remediation efforts, and EPA should have taken an expanded reading of the timeliness requirement and found the ERA untimely to uphold the spirit and purpose of CERCLA. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1346 (2020).

BELCO also challenges the district court's decision to vacate EPA's determination that BELCO is not required to install additional filtration systems in Fartown as arbitrary, capricious, or contrary to law. Challenges to EPA decisions fall under the Administrative Procedures Act ("APA"). *Sackett v. EPA*, 566 U.S. 120, 131 (2012). According to APA, a court may set aside an Agency's actions only if it finds the actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard is narrow and highly deferential. If the Court finds any rational basis for EPA's decision it may not substitute its own judgment for that of EPA. *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. 1981).

This Court should reverse the district court's decision for the following reasons: (1) EPA based its assessment on scientific evidence that Fartownian wells contained non-toxic levels of NAS-T, so their decision was not arbitrary, capricious, or contrary to the ERA; (2) EPA based their decision on a permissible construction of the ERA so this Court must defer to that decision; and finally, (3) Adopting FAWS's would be too costly and take decades to implement.

Finally, the district court's decision to retain supplemental jurisdiction over FAWS's state law claims should be upheld because there was no clear error of judgement that justifying reversal. Supplemental jurisdiction is a doctrine of discretion, and the court is not automatically divested of jurisdiction just because the federal claims are dismissed. Here, FAWS's state law claims do not involve novel or complex issues of state law, and retaining supplemental jurisdiction accommodates the values of judicial economy, convenience, fairness, and comity. Therefore, the district did not abuse its discretion.

ARGUMENT

I. FAWS is Not Entitled to Recover its Testing Costs Because the Concentrations of NAS-T Did not Justify the Response Actions Taken and Even if There was a Hazard the Costs were Duplicative and thus Not Necessary

Congress enacted CERCLA to "establish a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive waste disposal sites." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989), as clarified on denial of reh'g (Jan. 23, 1990). CERCLA section 9607 permits "government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances at those sites." *Id*.; 42 U.S.C § 9607. Whether CERCLA permits FAWS to recover its testing costs in this case is a mixed question of law and fact, and the granting of BELCO's summary judgment is reviewed de novo. *See G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir.1995); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001).

A. Polluters May Not Be Liable for the Costs Incurred to Clean up "Pollutants or Contaminants"

Establishing a prima facie case of liability in a CERCLA cost recovery action, requires a plaintiff to prove: (1) that the site in question is a "facility" as defined in section 9601(9); (2) that

the defendant is a responsible person under section 9607(a); (3) that a release or a threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs. 42 U.S.C. §§ 9601(9), 9607(a); *Amoco*, 889 F.2d at 668. A plaintiff may then recover the costs, from responding to those hazardous substances, that are both necessary and consistent with the National Contingency Plan ("NCP"). 42 U.S.C § 9607(a)(4)(B). In addition to "hazardous substances," CERCLA also authorizes the EPA to respond to releases of and "pollutants or contaminants" that may present "an imminent and substantial danger to the public health or welfare." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985). "Different consequences flow if a substance constitutes a 'hazardous substance', as opposed to a 'pollutant or contaminant'" and the distinction is critical for purposes of a cost recovery action. *Id*. at 932; *United States v. United Nuclear Corp.*, 814 F. Supp. 1552, 1557 (D.N.M. 1992). Specifically, a landowner "may not be liable for the clean-up costs of pollutants or contaminants but is liable for the costs incurred to clean up hazardous substances." *United Nuclear Corp.*, 814 F. Supp. at 1557.

B. FAWS Cannot Recover its Testing Costs Because NAS-T is not a "Hazardous Substance," and it Does not Pose an Imminent and Substantial Danger to the Public Health or Welfare

As previously stated, CERCLA allows private parties to recover the costs from cleaning up hazardous substances. 42 U.S.C § 9607 (a)(4)(B). Here, NAS-T does not fall under the definition of "hazardous substance" as defined in 42 U.S.C § 9601. Furthermore, NAS-T is not a type of mixture that was discussed in *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1201 (2d Cir. 1992). There the court held that "[w]hen a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability." *Id*.

Here, NAS-T, is a distinct chemical compound, not listed in the applicable environmental statutes and nitro-acetate nor titanium are "hazardous substances."

1. Concentrations of NAS-T Stayed Below 10 ppb in the Sandstone Aquifer After EPA Issued the COC

FAWS may correctly point out that "[r]esponse costs are generally and specifically defined to include a variety of actions designed to protect the public health or the environment. *Amoco*, 889 F.2d at 669. However, to justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment." *Id.* Admittedly, CERCLA gives the President authority to respond to "pollutants and contaminants" which pose "an imminent and substantial danger to the public health or welfare." 42 U.S.C § 9604(a)(1). Furthermore, it is not disputed that NAS-T likely satisfies the definition of "pollutant or contaminant." 42 U.S.C § 9601(33). However, here there is no threat to the public health that justified the incurrence of response costs, because the level of NAS-T is below the 10ppb threshold that was found to be harmful to human health. To be clear, BELCO is not arguing that NAS-T can do no harm. It is well established by the Health Advisory Level (HAL) that NAS-T is a possible carcinogen. Record at 6. However, the NAS-T HAL of 10 ppb in drinking water "incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans." Record at 6. Because NAS-T is not present in the Sandstone Aquifer at harmful levels greater than 10 ppb, it cannot be said that NAS-T poses "an imminent and substantial danger to the public health or welfare."

2. This Court Should Adopt the Fifth Circuit's Approach for Determining Whether Response Costs are Recoverable and Find that FAWS's Testing Costs are Not Recoverable

The Fifth Circuit has found that determining whether response costs are recoverable requires a factual inquiry focusing on "whether the particular hazard justified any response

actions." *Amoco*, 889 F.2d at 670; *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396, 399 (5th Cir. 1997). The court in *Amoco* states that response costs can be justified when a "plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that *any* release violates, or any threatened release is likely to violate, *any* applicable state or federal standard, including the most stringent." 889 F.2d at 671. Here the HAL is the only federal standard and was certainly not violated because the only positive NAS-T detections after issuing the COC were below 10 ppb. Record at 8. FAWS may argue there was a violation under the ERA that justified the testing costs. However, this is a flawed argument because the ERA does not create potential liability for "any" release but rather releases that cause harm, which seems to provide more support for using the Fifth Circuit's "Particular Hazard" approach. Record at 4-5.

This case is distinguishable from the kind of minimum threshold requirements that other circuits have denounced, because here BELCO is the only polluter and NAS-T is not a "hazardous substance." *See A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260-61 (3d Cir. 1992) [hereinafter "*Alcan I*"]; *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720-21 (2d Cir. 1993) [hereinafter "*Alcan II*"]. First, in *Alcan I*, the court denounced the minimum threshold because "[i]t is difficult to imagine that Congress intended to impose a quantitative requirement on the definition of hazardous substances and thereby permit a polluter to add to the total pollution but avoid liability because the amount of its own pollution was minimal." 964 F.2d at 260. The court based its reasoning in part on the fact that a polluter was trying to evade liability for only small contributions to pollution caused by multiple other polluters despite CERCLA imposing joint and several liability. Second, cases from other circuits denouncing a minimum threshold all involve "hazardous substances" as defined in 42 U.S.C section 9601(14). *See A & W Smelter & Refiners, Inc*., 146 F.3d 1107 (concerning small amount of lead); Alcan I, 964 F.2d 252 (concerning elements of oil emulsion); *Alcan II*, 990 F.2d 711(concerning elements of oil

emulsion). Thus, while the statute does not on its face "impose any quantitative requirement or concentration level on the definition of hazardous substances," it does require the presence of a "hazardous substance," or that the release constitute an "imminent and substantial danger." *Alcan I*, 964 F.2d at 260; *Dickerson v. Adm'r, E.P.A.*, 834 F.2d 974 (11th Cir. 1987).

This Court should adopt the Fifth Circuit approach because it considers the requirement for imminent and substantial danger where a "hazardous substance" is not present. Since the concentrations of NAS-T did not create any imminent and substantial danger as defined in the HAL, FAWS was not justified in incurring testing costs and is not entitled to recover those costs.

C. Even if NAS-T was a "Hazardous Substance" FAWS Conducted Testing Concurrent with EPA's Investigation Such that the Costs Are Duplicative Legislative Expenses and are Not Recoverable

Under CERCLA, a plaintiff may recover response costs that are both necessary and consistent with the NCP. 42 U.S.C § 9607(a)(4)(B). The party seeking cost recovery bears the burden of proving necessity. *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir.1992). Investigative costs are generally recoverable. *Id*. at 1498. However, some courts have found that when a private party incurs unauthorized investigative costs after EPA has initiated a remedial investigation, those costs are considered "duplicative" and are not recoverable. *Louisiana-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1424-1425 (E.D. Cal. 1993); *U.S. v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). The defendant, Beazer, in *Louisiana-Pacific* dumped pentachlorophenol into the water that flowed between Beazer's and Louisiana-Pacific's properties. *Id.* at 1423. After EPA and Beazer failed to reach an agreement, EPA indicated it would investigate the Louisiana-Pacific sites. *Id.* Before EPA began that investigation, Louisiana-Pacific conducted its own, unauthorized investigation. *Id.* Louisiana-Pacific then sought recovery from Beazer of its costs of investigation under CERCLA section

107. *Id.* The court found the costs associated with Louisiana–Pacific's site investigation were not "necessary" because they were duplicative of EPA's investigation. *Id*. At 1424. The court agreed with Beazer that the purpose of Louisiana–Pacific's investigation was to demonstrate Beazer was the source of contamination and thus the cost of investigation should be characterized as "litigation expenses" not recoverable under CERCLA. *Id*.

BELCO began regular testing throughout the Sandstone Aquifer up to a half-mile from Fartown in 2017 and continued tests throughout the aquifer after EPA issued the COC in 2018. Record at 7-8. After the initial remediation and while testing continued in the wells closest to Fartown, some Fartownians requested that DOH test their drinking water for NAS-T. Record at 8. DOH subsequently tested five private drinking water wells in Fartown and found no NAS-T. *Id*. However, a group of Fartownians were not satisfied and asked EPA to order BELCO to conduct further testing in Fartown. *Id*. After EPA declined, citing all the prior non-detects, FAWS retained Central Labs to test their private wells and subsequently filed the "FAWS Action" seeking recovery of the costs from Central Labs' analysis and testing. *Id.*

While EPA did explicitly inform Louisiana–Pacific of its intent to begin an investigation, here FAWS knew that EPA was conducting tests and carrying out remediation activities as part of the consent decree. *Louisiana-Pac. Corp.*, 811 F. Supp. at 1425. In fact, it was not until they knew of the testing that EPA was doing that they reached out to DOH, EPA, and finally Central Labs to conduct tests of Sandstone Aquifer through some of the private well. Record at 8. Moreover, in *Louisiana-Pacific*, the court found the costs duplicative even though Louisiana–Pacific proceeded with its unauthorized investigation before EPA's investigation. *Louisiana-Pac. Corp.*, 811 F. Supp. at 1425. Here, FAWS's unauthorized investigation occurred after EPA's initial investigation in 2016, and even after the remediation of the wastewater lagoon. Record at

6. These are exactly the kind of duplicative costs that the *Louisiana-Pacific* court was concerned about. Here, it appears that FAWS was merely trying to demonstrate that BELCO caused the smell in their water. Thus, the costs FAWS incurred are duplicative litigation expenses that are not recoverable.

FAWS may adopt Louisiana–Pacific's argument that their investigation was not designed solely to develop evidence against BELCO, but rather, it was designed to determine the extent and source of contamination on its sites and is therefore a recoverable response cost. However, as the *Louisiana-Pacific* court points out, allowing a plaintiff like FAWS to recover its investigation costs in a case like this "is to give it discretion, not merely to double the response costs, but potentially to pass those increased costs on to third parties without notice or consent… [n]othing in the statute suggests such a result, and arguably, such a result violates the statutory requirement that remedial actions be cost-effective." *Louisiana-Pac. Corp.*, 811 F. Supp. at 1425 (citing 42 U.S.C. § 9605(a)(7); *Cnty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1514 (10th Cir. 1991)). Once FAWS knew EPA had commenced investigations, subsequent unapproved testing of the Sandstone Aquifer was duplicative, unnecessary, and not recoverable under CERCLA.

II. The ERA Does Not Constitute an ARAR, Therefore It Was an Improper Basis to Reopen the Consent Decree and Order Further Remedial Action

Though a federal scheme, CERCLA leaves a meaningful role for individual states in the execution of remedial actions. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1418 (6th Cir. 1991). CERCLA must make way for more stringent ARARs found in the state in which the site is located. *Id.* A state environmental standard 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." *Id.* at 1440. The New Union Constitutional ERA does not constitute an ARAR, because it (1) is constitutionally vague and therefore legally unenforceable,

(2) fails to do more than set policy objectives which are accomplished through stringent federal standards, (3) is not a substantive requirement and has not been tailored to be relevant and appropriate, and (4) propels interests that were untimely brought after remediation efforts concluded. The district court erred in upholding EPA's determination that the ERA constituted an ARAR, and accordingly, finding EPA's reopening of the Consent Decree and ordering further remedial action in the UAO to be proper.

A. The Arbitrary and Capricious Standard of Review Should Guide the Court in Reviewing EPA's Decision and the Court Should Withhold Deference to EPA for EPA's Failure to Take a Permissible Construction of CERCLA

EPA's decision can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard demands an evaluation of "whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement." *Sierra Club v. Johnson*, 541 F.3d 1257, 1264 (11th Cir. 2008). Deference should be given to EPA according to a two-step analysis.[1] *Chevron,* 467 U.S. at 842. The Court must determine (1) whether Congress has directly spoken to the precise question at issue and (2) if Congress has not spoken, and the statute is silent or ambiguous with respect to the specific issue, whether the agency based its interpretation on a permissible construction of the statute. *Sierra Club*, 541 F.3d at 1264. The latter is at issue here. Unexplained inconsistencies in EPA's interpretation of CERCLA can be potential reasons for finding that the actions are arbitrary and capricious. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 115 (1st Cir. 2009). Thus, this Court should reject EPA's construction of CERCLA in finding the ERA to be an ARAR, because it frustrates the policy Congress sought to implement.

[1] A two-step analysis governs the review of agency interpretations of a statute which it administers. *Chevron*, 467 U.S. at 842.

The administrative record will support BELCO's contention that EPA's decision was not based on a consideration of the relevant factors necessary to deem this state standard to be an ARAR.

Further, administrative agencies receive deference from the court on account of their specialized knowledge and specifically tailored functions, and the *Chevron* court acknowledged this. However, EPA did not exercise the independent judgement *Chevron* sought to protect. EPA exceedingly based its decision on DNR's opinion that the ERA should be identified as an ARAR. If this Court upholds EPA's determination that the ERA constitutes an ARAR, it will be applying *Chevron* in part to the DNR – an entity beyond the reach of *Chevron* deference. Additionally, it was arbitrary and capricious for EPA to base its decision on the opinion of an entity that has noted its lack of resources and expertise. Record at 6.

B. The ERA was Not Properly Promulgated Under CERCLA Because the Vagueness of the Statute Renders it Legally Unenforceable

Both the NCP and EPA have accepted the term "promulgated" to refer to "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Akzo,* 949 F.2d at 1440; *See Ohio*, 997 F.2d at 1527. Legal enforceability requires the standard to be drafted with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). It must warn of "certain kinds of conduct" that are prohibited and is otherwise void due to vagueness. *Id.*; *Colten*, 407 U.S. at 110.

For instance, in *Akzo* the Sixth Circuit considered whether the Michigan Water Resources Commission Act[2] ("WRCA") escaped being constitutionally vague where the language did not

[2] The WRCA was a potential ARAR. *Akzo*, 949 F.2d at 1441.

permit anyone "directly or indirectly to discharge into the waters of any substance which is or may become injurious to the public health, safety, or welfare." 949 F.2d at 1441. The court answered in the affirmative, reasoning that those "who desire to obey the statute will have no difficulty in understanding it." *Id.* (citing *Colten*, 407 U.S. at 110). The WRCA did not enumerate every kind of conduct that would violate the act, but the court nonetheless found that providing a general type of prohibited conduct[3] was sufficient to render it enforceable. *Id.*

BELCO agrees with EPA and FAWS that the ERA is of general applicability. However, the latter parties are mistaken in their belief that the ERA is legally enforceable. The ERA lacks the specificity necessary to provide fair warning of the certain kinds of conduct that are prohibited, as demanded by *Colten.* 407 U.S. at 110. During NU Assembly No. A10455, Mr. Maloney presented Mr. Wright with a question regarding what a "healthful environment" meant, particularly regarding food safety. Addendum at 5. Mr. Wright answered vaguely[4] that food "without contamination in the way that nature intended it to be consumed" is healthful, and something "that poisons you, that causes disease or convulsion" is the opposite. *Id.* Further, when Mr. Harrison complained of "trash trains" coming through the district and causing an unpleasant smell, Mr. Wright proffered that the ERA would cause municipalities to "be more conscious and self-conscious… to make sure that the landfill is not intruding upon the… new expectation." *Id*. Again, no explanation was offered as to the certain kinds of conduct would intrude upon that expectation. *Colten,* 407 U.S. at 110.

Vagueness plagues the ERA. What prohibited conduct exists is left for the imagination. It leaves those growing produce to wonder whether use of pesticides and GMOs goes against a

[3] Discharging into waters substances that may become injurious to public health.
[4] Much in the spirit of the ERA.

"healthful environment" or promotes one. It places those collecting trash to ponder whether they further the New Union's goal of a "healthful environment" or if exacerbating the smell in any way, even if in transporting it to be removed, violates the "clean air" provision of the ERA. The ERA lacks such definition that even those who desire to obey the standard, whether in their horticultural practices or in waste removal, *would* have difficulty understanding it. *Colten,* 407 U.S. at 110. The ERA is silent regarding prohibited acts, and it invites arbitrary and discriminatory enforcement because "it is simple, it is too simple… it [is] unhelpful, unclear, unpredictable." Addendum at 7. Ordinary people will be left unable to understand what denoted prohibited conduct because of the "wide interpretation of how [the ERA] could be applied." *Id.*

It does not save the opposing parties to argue that CERCLA does not demand objective standards to be implemented into the statute. BELCO recognizes that indeed, a general goal lacking objective standards, with only broad requirements and no specific numerical standards, can nonetheless be an enforceable ARAR. *Akzo,* 949 F.2d at 1442. However, specific requirements for implementation must nonetheless exist, if not in the statute itself, in other promulgated regulations. *Id.* The ERA fails to survive as an ARAR, not because the statute itself has no objective standards, but because it is deficient of *any* objective standards.

C. The ERA Has Failed to Achieve Standards More Stringent Than Those Federally Proscribed, Because the ERA is a Mere Policy Goal Lacking any Teeth, and those Policy Objectives are Achieved by Federal Standards in CERCLA and EPA's Health Advisory Level for NAS-T

A remedial action plan is subject to state standards only if that standard is "more stringent than any Federal standard, requirement, criteria or limitation…" *Id.* at 1443. EPA has stated that "[w]here no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." *Id.* In *Akzo*, the WRCA was deemed more stringent than the federal

SDWA. *Id*. The court reasoned that the WRCA was (1) broader in coverage than the SDWA and (2) more demanding in terms of cleanup requirements, depending on the site. *Id.* The WRCA covered "any substance which is or may become injurious to public health" while the federal SDWA applies only to a limited number of substances. *Id.* Additionally, the WRCA's cleanup requirements were equally or in some cases more demanding the federal maximum contaminant levels under the SDWA. *Id.* at 1443-44.

The ERA does not parallel the WRCA because (1) an inquiry into broadness of coverage regarding substances is irrelevant where only one contaminant is involved, and (2) the ERA has *no* cleanup requirements. Unlike in *Akzo*, the ERA is not an ARAR.

1. The ERA is a "Gap-Filler" and Cannot be Stringent Where it is a Mere Policy Objective Without Bite

The ERA alone has no power. It does not alter current rights – proactively or in a regressive way. Addendum at 5. It does nothing more than urge municipalities to be "more conscious and self-conscious." Addendum at 5-6. The amendment was passed with the idea that it would fill a regulatory "gap" regarding the regulation of toxic chemicals. Addendum at 6, 9. This is a familiar scheme.

CERCLA was enacted in 1980 and was a "hastily-assembled bill which contained a number of technical flaws due to Congress' limited understanding of the hazardous waste problem and its effects on the environment." *Akzo*, 949 F.2d at 1416-17. CERCLA's goal was effectuated through EPA – which in turn would develop a National Priorities List, conduct an RI/FS, and propose remedies. *Id*. CERCLA alone was a general goal that required additional legislation and enforcement by EPA to take force. The ERA is no different. It is a noble plan that plants seeds for a greater goal, relying on further expertise and outside legislation to give it the force and effect of law. The Constitutional amendment was a "historic moment" for New Union,

but so was CERCLA. Addendum at 7. Yet, CERCLA required decades of revision to have the effect it was intended to.

2. The Cleanup Procedures Developed Using the RI/FS Process Under CERCLA and the Federal HAL for NAS-T Conjunctively Accomplish the Same Goals Behind the ERA

The target of the ERA is not to be *totally* rid of contaminants and pollutants. "Free from contaminants and pollutants caused by humans" means to be free from the level of pollution or contamination that would make consumption *harmful.*[5] Addendum at 5. It has the simple goal of ridding harm.

Prior to the implementation of a proposed plan, an RI/FS must be performed to evaluate the nature and extent of the contamination as well as provide an evaluation for proposed remedies. *Akzo*, 949 F.2d at 1417. Proposed remedial alternatives are subject to a "detailed analysis" stage pursuant to the NCP. *Sealy Connecticut, Inc. v. Litton Indus.*, 93 F. Supp. 2d 177, 183-84 (D. Conn. 2000). The factor of greatest importance in this "detailed analysis" is the ability of the remediation plan to achieve "overall protection of human health and the environment." *Id.* at 184. Here, in addition to that inquisition is an incorporation of the federal HAL for NAS-T. The HAL is set at 10 ppb, a numerical standard with a significant margin of error built to ensure a non-toxic level of exposure to humans. Record at 6. These federal standards give assurance that citizens are rid of harm caused by NAS-T. It is no matter that the human nose can detect NAS-T in water concentrations as low as 5 ppb. *Id*. If the people of New Union wish to be rid of discomfort, that is a request to be taken to the legislature.

[5] Levels of contaminants in air or water that do no harm are sufficient to denote the air or water "clean" or "healthful" under the meaning of the ERA. Addendum at 4-5.

The Court should not be swayed by the opposing parties' contentions that the ERA grants a "fundamental right" to clean water or that it has a wider breadth of coverage regarding types of substances, as in *Akzo.* Record at 11. The ERA's grant of a "fundamental right" is meaningless in this inquiry of stringency where that right is only protected and accomplished through remediation standards located solely in federal requirements. In *Akzo*, the WRCA had accompanying regulations that prescribed cleanup requirements. 949 F.2d at 1441. The ERA has no such accompanying legislation. The fundamentality of the right indicates nothing regarding the level of scrutiny required to achieve that right.

D. The ERA Has Not Met the Baseline test of Being "Substantive" to be "Relevant and Appropriate" Nor Has it Been Tailored to be "Relevant and Appropriate"

An ARAR 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*, 949 F.2d at 1445. "Relevant and appropriate requirements" are *substantive* requirements that "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." *Ohio*, 997 F.2d at 1526. The statutory language specifically narrows the language to be limited to "substantive" requirements, for that is CERCLA's only concern. *Id.* at 1526-27. The parties appear to agree that the ERA is not directly "applicable." Record at 15. It is neither "relevant and appropriate" for failure to include substantive requirements in the statute or in accompanying legislation. *Id*.

Additionally, the ERA was not tailored in any way such that it could be "well suited" to any "particular" site. It is a broadly written statute without substantive requirements or any implementing direction that seemingly applies to endless environmental circumstances with no input or direction on how to approach those issues. FAWS and EPA contend that it is "relevant

or [sic] appropriate" because the ERA covers an unregulated hazardous material "caused by humans." Record at 14. FAWS and EPA have taken it into their own hands to tailor the ERA in a way that legislators failed to. Nowhere in the statute are "unregulated hazardous material[s]" mentioned.

E. Citizens of New Union Stayed Silent Throughout Remediation Efforts and Made an Untimely Display of Their Interests through the ERA After Remediation Efforts Concluded, Going Against CERCLA's Intent

An ARAR must be timely identified such that there is "sufficient time to avoid inordinate delay or duplication of effort in the remedial process." *United States v. Akzo Coatings of Am.*, 719 F. Supp. 571, 584 (E.D. Mich. 1989) [hereinafter *Akzo II*]. CERCLA is fundamentally collaborative and therefore wanting of a certain degree of trust between parties. EPA recognizes this and has stated that a strong partnership and open communication between EPA and the states is key to the timely identification of ARARs.[6] Collaboration and negotiation are paramount in the identification of ARARs and the development of remedies. *Atl. Richfield Co*, 140 S. Ct. at 1346. Once a plan is selected, the time for debate ends and the time for action begins. *Id.*

EPA should have taken a broader reading of the "timely identified" requirement. When a state standard has been promulgated after the remediation efforts have ended, the question should be whether the interests and objectives within the newly promulgated rule were or could have been raised earlier during the public comment period, such that the remediation efforts could have been modified accordingly to avoid inordinate delay or duplication of effort. *Akzo II,* 719 F. Supp. at 584. Pursuant to *Chevron*, an agency's change in precedent is permitted if accompanying by some reasoning indicating the shift is rational. *Napolitano*, 558 F.3d at 115.

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[6] *EPA Memorandum*, *Office of Land and Emergency Management Directive 9200.2-187* (Oct. 20, 2017), https://semspub.epa.gov/work/HQ/197017.pdf.

"This is not a difficult standard to meet." *Id.* EPA could have and should have taken this broadened interpretation to further the interests of CERCLA and failing to do so was arbitrary and capricious.

Centerburgers began complaining of the smell of their water in 2013 -- long before the commencement of the RI/FS, the Proposed Plan, or the entry of the Consent Decree. Record at 6, 7. Some Fartownians also noted a smell in the water since at least 2016. Record at 8. However, no citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan nor the entry of the Consent Decree. Record at 7. Additionally, the ERA was passed with an overwhelming 71% majority in favor of the act, and the sour smell in the water was present long before EPA's presence in New Union was a whisper. Many citizens felt the need to redress the issue, yet all failed to comment and aid in developing a remediation effort.

FAWS may posit the Court should overlook the lack of involvement and give weight to Fartown's status as an environmental justice community. They may argue that they deserve a higher level of protection from EPA. However, in considering timeliness, the fact that Fartownians are subject to socio-economic conditions that qualify the region as an environmental justice community should be given little weight in comparison to other circumstantial factors. *United States v. Atl. Richfield Co.*, 324 F.R.D. 187, 194 (N.D. Ind. 2018) [hereinafter *Richfield II*]. This expanded reading of timeliness is in line with the cooperativeness and collaboration Congress intended between parties.

III. The District Court Incorrectly Vacated EPA's Determination That BELCO is Not Required to Install Filtration Systems in Fartown as Arbitrary, Capricious, or Contrary to Law Because the Decision is Supported by Ample Evidence, is Rational, and Deference Requires the Court to Uphold EPA's Decision.

This Court should hold in favor of BELCO and EPA on this issue for three main reasons: (1) EPA correctly determined that BELCO is not required to install filtration systems in Fartown

because none of the wells contained toxic levels of NAS-T; (2) EPA's decision was rational and therefore the Court may not substitute its own judgment for that of EPA; and (3) adopting FAWS's interpretation of the ERA would affect a multitude of other regulations, cost an unreasonable amount of money, and take decades to implement.

A court should determine whether there is a rational basis for an agency's decision by considering relevant factors—such as scientific data and/or expert opinion—and whether the agency in question has made a clear error of judgment. *Northern Ohio Lung Association v. EPA*, 572 F.2d 1143, 1148 (6th Cir. 1978). In the absence of such an error, a court does not have the authority to overrule an agency's decision. *Id*.

A. EPA's Determination that BELCO is Not Required to Install Filtration Systems in Fartown was Not Arbitrary, Capricious, or Contrary to Law Because it is Supported by Ample Evidence that Levels of NAS-T in Fartownian Wells Were Too Low to Cause Harm.

An agency's action is considered arbitrary and capricious if the agency failed to meet statutory, procedural, or constitutional requirements. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). Additionally, an action may be deemed arbitrary and capricious if it is not supported by substantial evidence. *Id*. While acts considered arbitrary and capricious are not specifically listed, a court can turn to a discussion of the relevant issues and consistency with past practices to determine whether an agency's decision is rational. *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993).

1. EPA's Decision Was Not Arbitrary or Capricious

Courts rarely, if ever, hold an agency's decision to be arbitrary or capricious. For instance, in *Costle*, the appellant alleged EPA's approval of water quality standards concerning salinity in the Colorado River was arbitrary and capricious. 657 F.2d at 283. Appellant argued EPA arbitrarily discarded its previous position that required numeric standards in the upper basin

of the river to minimize salinity levels in lower basins. *Id*. at 288. After carefully studying the problem, EPA determined numeric criteria were only necessary for "appropriate points" along the river, and the circuit court agreed that EPA's solution sufficiently complied with the Clean Water Act. *Id*. Appellant failed to show EPA's decision was arbitrary, capricious, or contrary to law, and the court ruled in EPA's favor. *Id*.

FAWS's argument that EPA's decision against installing additional filtration systems is arbitrary, capricious, and contrary to law is without merit. They claim, "clean water… free from contaminants and pollutants caused by humans" cannot possibly mean "slightly contaminated water impacted by a human-caused chemical…" Record at 16. Through vigorous testing EPA determined, with a significant margin of error, that levels of NAS-T under 10 ppb are not harmful to humans. Record at 6. FAWS did not meet their burden of proving EPA's decision was arbitrary and capricious because the water was already safe to drink; requiring BELCO to install CleanStripping on every well would be costly, time consuming, and completely unnecessary.

2. EPA's Decision Was Not Contrary to Law and it Fulfils the Legislative Purpose of the ERA

FAWS contends that EPA's decision violated the ERA based on an incorrect interpretation of the statute. The sponsor of the ERA himself, Mr. Wright, confirmed the intent of the ERA is to ensure residents of New Union can drink water from the public water supply without harm. Addendum at 4. Mr. Wright also admitted that "clean water" does not mean water free from other substances and stated sometimes chemicals are necessary to produce the best tasting water. *Id*. EPA's solution achieves that purpose as the water in Fartownian wells contains low levels of NAS-T, if any at all, and the water is perfectly safe for human consumption. FAWS

has clearly misunderstood the meaning of "clean water", as the ERA was not in fact intended to remove all chemicals from the water supply.

B. Deference Requires Upholding EPA's Decision Because it is Rational and the Court Does Not Have Authority to Substitute its Judgment for EPA's

EPA properly exercised its authority in determining additional filtration is unnecessary, because the decision was logical and consistent with test results. No Fartownian wells have tested above 8 ppb for NAS-T and the UAO directed BELCO to install CleanStripping only where sampling showed NAS-T concentrations above 10 ppb. Record at 8-9.

1. The Arbitrary and Capricious Standard is Highly Deferential

Agencies are entitled to substantial deference so long as their decisions are rational. *Puerto Rico Sun Oil Co.*, 8 F.3d at 77. The question for the Court here is whether EPA's decision was based on *any* permissible construction of the statute. *Chevron*, 467 U.S. at 843. EPA's interpretation of the ERA was based on scientific data and expert opinions; thus, it is clearly a permissible construction of the ERA.

One major purpose of the *Chevron* decision was to respect the decisions of administrative agencies that have specialized knowledge beyond the courts. 467 U.S. at 844. This Court consistently holds when parties cannot agree on the meaning of a policy, agencies are entitled to deference because they have "more than ordinary knowledge" of the interest the statute is designed to protect. *Id*. at 844. Therefore, if an agency presents a rational basis for its decision, the decision must be affirmed regardless of whether the court agrees with the decision or there may be a better solution. *Costle*, 657 F.2d at 283 (*citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974); *United States v. Allegheny-Ludlam Steel Corp.*, 406 U.S. 742, 749 (1972)).

2. EPA Correctly Rejected FAWS's Unrealistic Interpretation of the ERA

Remedial decisions are left to agencies because they are the most qualified and educated on the subject. For example, in *Akzo*, the Sixth Circuit held EPA's decision to remediate soil borings using a method called "soil flushing" was appropriate based on test results which disproved a previous belief that soil flushing would be ineffective. 949 F.2d at 1431. The court held that appellant's argument was not "substantial enough to overcome the deference accorded to EPA's decision." *Id*. at 1431. The court also relied on the Supreme Court's decision in *Marsh v. Oregon Nat. Res. Council*, quoting: "When specialists express conflicting views, an agency *must* have discretion to rely on the reasonable opinions of its own qualified experts, even if… a court might find contrary views more persuasive. (emphasis added)." 490 U.S. at 378.

Here, EPA rejected FAWS's request for additional filtration based on extensive medical studies. Record at 6. Those studies led EPA to set the HAL at 10 ppb, incorporating a large margin of error to ensure the water would not cause anyone harm. *Id*. FAWS's claim against EPA's decision is even less persuasive than the appellant's claim in Akzo because FAWS's opinion is not based on any scientific data; it is merely based on the opinions of non-experts. So, even if this Court finds FAWS's argument to be more persuasive, the Court must afford discretion to EPA, who relied on qualified experts and scientific data to formulate the remediation plan.

C. <u>FAWS's Proposed Solution is Not the Most Efficient or Effective Way to Satisfy the ERA.</u>

As a matter of policy, this Court should not accept FAWS's interpretation of the ERA because it is unreasonably strict. If the ERA required the removal of all human-caused chemicals in the air and water, it would nullify an immeasurable number of permits under the Clean Water Act and the Clean Air Act. It would also invalidate any federal regulation that allows "safe"

amounts of chemicals and other substances, and thereby cause a rippling affect far beyond the impact on FAWS. For instance, farmers would have to cease their use of GMOs and pesticides, and water treatment facilities would not be permitted to use chlorine to disinfect and purify water. In cases such as these, FAWS's interpretation of the ERA would contradict the purpose of the act by allowing untreated water to enter the pipes from which we receive drinking water.

Additionally, adopting FAWS's interpretation of the ERA would be unreasonably expensive; it would cost BELCO as much as $4,500 per household to install CleanStripping on every well that tested positive for NAS-T. Record at 16. Other industries would have to change their practices to ensure no contamination reached the air or water, requiring changes in infrastructure. Farmers would have to develop all new systems for growing crops that contained no GMOs or pesticides.[7] This would mean many fruits and vegetables would no longer be available. This Court should adopt the EPA's interpretation of the ERA because removing all human-caused substances from the air and water would be costly and is unrealistic.

IV. The District Court did Not Abuse its Discretion in Retaining Supplemental Jurisdiction Because Supplemental Jurisdiction is a Doctrine of Discretion and Dismissal of Federal Claims Does Not Automatically Divest the Court of Power Over the Remaining State Law claims

This Court reviews the district court's decision to retain supplemental jurisdiction for abuse of discretion. *Campanella v. Com. Exch. Bank*, 137 F.3d 885, 892 (6th Cir. 1998). This Court should affirm the district court's decision "unless [it is] left with a definite and firm conviction that the trial court committed a clear error of judgment," *Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 849 (6th Cir. 2012). Here, the district court properly exercised its

[7] Currently 92-94% of staple crops in the United States are genetically modified. *About Genetically Engineered Food,* Center for Food Safety, https://www.centerforfoodsafety.org/issues/311/ge-foods/about-ge-foods (last visited Nov. 20 2022).

discretion in deciding to retain supplemental jurisdiction, and there was no clear error of judgement justifying reversal.

Federal courts have supplemental jurisdiction over state law claims "whenever a federal law claim confers subject matter jurisdiction on the court and both claims derive from a common nucleus of operative fact." *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1054 (2d Cir. 1990) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). "[D]istrict courts are given broad discretion in evaluating whether [supplemental] jurisdiction is appropriate." *O'Connor v. State of Nev.*, 27 F.3d 357, 362 (9th Cir. 1994), as amended (July 1, 1994), as amended (July 12, 1994). Moreover, supplemental jurisdiction, is a "doctrine of flexibility, designed to allow courts to deal with cases involving [supplemental] claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Accordingly, a court may decline to retain supplemental jurisdiction over a claim or claims if any of the following occurs:

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C § 1367.

Despite the dismissal of the federal claims, the district court correctly exercised its discretion to retain supplemental jurisdiction over FAWS's state law claims.

A. Dismissal of Federal Claims Before Trial Does Not Automatically Divest the Court of Jurisdiction

It is well established that generally "the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) (citing *Gibbs*, 383 U.S. at 726). However, the

termination of the foundational federal claims does not automatically divest the district court of power to exercise supplemental jurisdiction. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996) (citing 28 U.S.C. § 1367(c)(3)). Rather, it sets the stage for the court to exercise its informed discretion. *Id*.; *See also Raucci*, 902 F.2d at 1054-55 (citing *Cohill*, 484 U.S. at 350 n. 7). While dismissal may sometimes be appropriate if the federal-question claim is eliminated early in the proceedings, each case must be gauged on its own facts. *Roche*, 81 F.3d at 257. The preferred approach is pragmatic and case-specific. *Id.* Thus, in "an appropriate situation, a federal court may retain jurisdiction over state-law claims notwithstanding the early demise of all foundational federal claims." *Id.* (citing *Rodriguez*, 57 F.3d at 1177).

B. The Remaining State Law Claims Do Not Involve Novel or Complex Issues of State Law

Failure to dismiss a supplemental claim after dismissing a federal claim "may be an abuse of the district court's discretion" especially when the state claim involves novel questions of state law. *Robison v. Via*, 821 F.2d 913, 925 (2d Cir.1987). For example, in *O'Connor v. State of Nev*. the Ninth Circuit found that the district court properly declined to retain supplemental jurisdiction over state law claims that remained after dismissing the federal claims providing original jurisdiction. 27 F.3d at 363. There, the remaining state law claim was a challenge to the constitutionality of a Nevada statute requiring candidates for the Nevada Supreme Court to be attorneys. *Id*. at 362. The Ninth Circuit found that the difficult question of whether the statute violated Nevada constitutional law presented "the very sort of 'novel' issue that usually will justify declining jurisdiction over the claim." *Id.* at 363.

Conversely, the state tort laws in this case are not of the sort that would justify declining supplemental jurisdiction, because "generally, state tort claims are not considered novel or complex." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). The

Parker court cites cases from other circuits that each found no novel or complex issues of state law for common state law tort claims. *See Myers v. Richland County*, 288 F. Supp. 2d 1013, 1018 (D.N.D. 2003) (holding that breach of contract, defamation, and intentional infliction of emotional distress claims did not raise novel or complex issues of state law); *Holland v. O'Bryant*, 964 F. Supp. 4, 7 (D.D.C.1997) (holding that false imprisonment, false arrest, intentional infliction of emotional distress, assault and battery, and invasion of privacy do not raise novel or complex issues of state law); *Yeager v. Norwest Multifamily, Inc.*, 865 F. Supp. 768, 771 (M.D.Ala.1994) (holding that assault and battery claims do not raise novel or complex issues of state law). More specifically and relevant to this case, state law tort claims of negligence and nuisance have been held as not raising novel or complex issues of state law. *Parker*, 468 F.3d at 744. Here FAWS's complaint contends that BELCO's contamination of the Sandstone Aquifer constituted negligence and a private nuisance. Record at 10. These state-law claims do not raise novel or complex issues but rather involve mere tort claims and the district court need not automatically divest supplemental jurisdiction.

C. Retaining Jurisdiction Accommodates Considerations of Judicial Economy, Convenience, Comity, and Fairness

Section 1367(c) also provides that district courts may decline to exercise supplemental jurisdiction over a claim if "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4). Clarifying section 1367(c), the Ninth Circuit has held that once a circumstance like those identified in section 1367(1)-(4) is identified, "the exercise of discretion ... is informed by whether [declining jurisdiction] comports with the underlying objective of 'most sensibly accomodat[ing] [sic]' the values of 'economy, convenience, fairness, and comity." *O'Connor*, 27 F.3d at 363. Therefore, if the Court identifies one of the circumstances in 28 U.S.C section 1367(c)(1)-(4), the Court "consider[s] and weigh[s]

in each case, and at every stage of the litigation the factors of economy, convenience, fairness, and comity to decide whether to decline supplemental jurisdiction." *Raucci*, 902 F.2d at 1054-55; *See also O'Connor*, 27 F.3d at 363. It is generally understood that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." *Raucci*, 902 F.2d at 1055. However, like in *Raucci*, this is not the usual case. Instead, because there are countervailing circumstances that require the conclusion that retaining jurisdiction will most sensibly accommodate the factors of judicial economy, convenience, fairness, and comity, the court did not abuse its discretion in declining to consider the state law tort claims. *See O'Connor*, 27 F.3d at 363. This case is especially unique because EPA arguably has jurisdiction over the response to the BELCO Site. Under CERCLA, the EPA has authority, delegated from the President, to "respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner." 42 U.S.C § 9604(a)(4); *United States v. United Nuclear Corp.*, 814 F. Supp. 1552, 1554–55 (D.N.M. 1992). Moreover, "once a consent decree containing a specific remedy is entered by the federal court, neither the parties themselves, the non-parties, nor the Court can alter that remedy, absent a modification of the Consent Decree itself." *State of Mo. v. Indep. Petro Chem. Corp*., 104 F.3d 159, 161 (8th Cir. 1997). Here, EPA already entered the CD and explicitly decided not to include further remediation of the plume in the Sandstone Aquifer. Record at 7. However, part of FAWS's state law claims seek damages that include an injunction compelling BELCO to remediate the aquifer. Record at 18. This would clearly require the altering of the CD and may also invoke a separate federal question of whether FAWS is able to seek injunctive relief. *United States v. Princeton*

Gamma-Tech, Inc., 31 F.3d 138, 148 (3d Cir. 1994) (stating that injunctions are not per se barred in a suit for response provisions costs) (overruled on other grounds by *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018, 1025 (3d Cir. 1997)); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 697 (9th Cir. 1988) (agreeing with the district courts determination that "Congress did not intend to create a private cause of action for injunctive relief under CERCLA"). Also, like in *Raucci,* the district court here has decided multiple dispositive motions, including the summary judgment on the CERCLA claims and summary judgement against BELCO on enforcing the UAO and for FAWS on installing clean stripping. Record at 18; *Raucci*, 902 F.2d at 1054-55. Furthermore, discovery on all the CERCLA issues is complete, and, pending discovery on the state-law tort issues, this case is otherwise ready for trial.

Finally, while FAWS did indicate interest in litigating the state law claims in state court, it is expected that the claims in this case would all be tried together. Record at 10. Generally, the exercise of supplemental jurisdiction in federal environmental claims, like CERCLA claims, is favored because "federal environmental and state nuisance claims derive from a common nucleus of operative facts and the plaintiff would ordinarily be expected to try them all in one proceeding." *Parker*, 468 F.3d at 746–47. Here, since the federal claims are based in CERCLA, supplemental jurisdiction over the negligence and nuisance claims is favored. Moreover, the claims in this case clearly derive from the same nucleus of operative facts. Specifically, the federal and state claims derive from the discharge of NAS-T from the unlined lagoon at the Centerburg Site into Sandstone Aquifer. Furthermore, FAWS expressly stated that it initially brought the FAWS Action in this Court, not only because of the pendency of the BELCO Action and to avoid contentions of claim splitting, but because of "this Court's jurisdiction over the closely related CERCLA claims." Record at 10.

Given the aforementioned considerations, retaining supplemental jurisdiction adequately accommodates the factors of economy, convenience, fairness, and comity. Accordingly, the district court did not make a clear error of judgment and did not abuse its discretion in retaining supplemental jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decisions (1) that FAWS's response costs are not reimbursable under CERCLA and (2) to retain jurisdiction over FAWS's remaining state law tort claims. This Court should reverse the district court's decisions (1) upholding EPA's determination that the ERA constitutes and ARAR and accordingly that ordering further remedial action in the UAO was proper and (2) vacating 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.