NON-MEASURING
BRIEF
TEAM 53

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.
FARTWOWN 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,
Douglas Bowman, United States District Judge

Brief for Appellant, FARTOWN ASSOCIATION FOR WATER SAFETY

TEAM 53

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated case nos. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had original jurisdiction over the CERCLA claim under 28 U.S.C. section 1331 and supplemental jurisdiction over the associated state law claims under 28 U.S.C. section 1367. This Court has jurisdiction over this appeal under 28 U.S.C. section 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Because grants of summary judgment are final, *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015), this is a proper appeal from the final judgment disposing of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED

I. Did the district court err when it determined costs incurred by FAWS in sampling, testing, and analyzing water from Fartown wells are not reimbursable under CERCLA?

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

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

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

STATEMENT OF THE CASE

A. The Initial Discovery and Investigation of NAS-T

Centerburg and Fartown are located two miles apart from one another in the State of New

Union. Record at 5. Both communities sit above the Sandstone Aquifer, a large underground waterbody which flows in a southerly direction from Centerburg to Fartown. *Id.* While Fartownians pump their water directly from the aquifer through private drinking wells, Centerburgers get their water from the Centerburg Water Supply ("CWS"), a publicly owned source. *Id.* The CWS pumps water from the Sandstone Aquifer, treats it, and then distributes clean water back to Centerburgers. *Id.*

In 2013, Centerburgers began to alert the County Department of Health (DOH) that their water smelled "sour" or "off." *Id.* at 6. As a result, DOH began testing the CWS in January 2015 for chemical contamination. *Id.* at 6. This testing revealed the presence of NAS-T—a chemical that had been produced by the Better Living Corporation (BELCO) at a factory (the "Facility" or "Site") in Centerburg from 1973 through 1998—at levels between forty-five and sixty parts per billion ("ppb"). *Id.* at 5-6. Although humans can detect the sour smell of NAS-T in water concentrations as low as five ppb, the EPA has adopted a Health Advisory Level (HAL) for NAS-T double this amount: ten ppb. *Id.* at 6. As a safety precaution, the EPA incorporated a significant margin of error in the HAL to ensure the exposure levels are non-toxic to humans. *Id.*

The DOH directed Centerburg residents to cease drinking their NAS-T contaminated tap water while EPA investigated the contamination further. *Id.* In the following months, EPA and BELCO entered into an agreement, whereby BELCO was to conduct a remedial investigation and feasibility study ("RI/FS") regarding the source of the contamination, the risk to human health and the environment, and evaluate alternative remedies for the Site. *Id.* Through soil testing and review of operation records at the Facility, BELCO concluded that NAS-T had entered the soil from sporadic spills and an unlined lagoon, eventually migrating into the groundwater and creating a plume of NAS-T withing the Sandstone Aquifer. *Id.*

From July 2016 to January 2017, BELCO installed three successive lines of monitoring wells to investigate the extent of the plume. *Id.* at 7. The final line of wells sat 1.5 miles South of Centerburg (half a mile from Fartown), and when tested these specific wells showed no detectable amounts of NAS-T. *Id.* Satisfied with this result, the EPA did not find it necessary for BELCO to install additional wells. *Id*. Rather than spend decades and $45 million on remediating the plume itself, BELCO's RI/FS suggested excavation of soil at the Site and implementation of filtration at Centerburg's CWS. *Id.* Based on this suggestion and the comments from the public, the EPA selected a clean-up plan for the site through a Record of Decision (the "ROD"). *Id.* BELCO and the EPA then entered into and filed a Consent Decree ("CD") on August 28, 2017, in which BELCO agreed to design and implement the remedy in the ROD. *Id.* Specifically, the CD stipulated that the EPA would issue BELCO a Certification of Completion (the "COC") once the clean-up was completed, and at that point no further remediation would be required from BELCO unless the EPA "reopened" the CD. *Id.*

B. The Evolution of the Consent Decree

BELCO undertook all actions laid out in the CD: installation of "CleanStripping" water filtration system to remove NAS-T from CWS; excavation of NAS-T contaminated soils at the Site; and monthly sampling of the monitoring wells. Record at 7. The results from the monitoring wells were largely consistent with the prior results, with the only change coming in January 2018, where just two of the five wells in the final line 1.5 miles from Centerburg showed NAS-T at 5 ppb and 6 ppb. *Id.* This amount is large enough for the average person to smell, but far enough from the HAL of 10 ppb to not cause concern. *Id.* at 6. In fact, satisfied with these results, EPA issued the COC to BELCO in September. *Id.* at 8.

Despite no citizens from Fartown or Centerburg objecting to the RI/FS, the Proposed

Plan, or the entry of the CD in 2017, some Fartowntians (now members of the Fartown Association for Water Safety or "FAWS") subsequently submitted sworn testimony that they noticed the water in their wells occasionally smelled "off" since about 2016. *Id.* at 7-8. After requesting that their water be tested, the DOH tested five private drinking water wells in Fartown, none of which showed the existence of NAS-T. *Id.* at 8. Due to the non-detects in sampling, the EPA declined to conduct further testing in Fartown. *Id.*

In December of 2019, about 20% of Fartownians formed FAWS and paid Central Laboratories, Inc. ("Central Labs"), $21,500 to conduct the testing that EPA did not find necessary. *Id.* After taking three samples from seventy-five wells in Fartown, results varied: over half of the samples detected no NAS-T; fifty-one detected one to four ppb; and fifty-four detected five to eight ppb. *Id.* The EPA once again declined FAWS requests that the EPA take further action, pointing to the low levels of NAS-T and the limited reopener provisions of the CD. *Id.* Specifically, the CD noted only two grounds for when reopening is allowed:

1. Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or
2. Where new, more stringent Regulatory Standards, or "applicable or relevant appropriate requirements" ('ARARs') are established that the clean-up plan does not satisfy.

Id. In November 2020, citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"), specifying that "[e]ach and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollution caused by humans." N.U. Const. Art. 1, § 7. This Amendment was passed by the New Union legislature after a hearing about the amendment and potential issues regarding its language. The ERA was signed by the governor and officially passed in the November election as a ballot measure. Record at 8. In February 2021, the DNR

instructed EPA to "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.* at 9.

In light of the ERA, Central Labs results, and smell of odors in Fartown wells, EPA reopened the CD in March 2021, ordering BELCO to analyze water from fifty wells in Fartown. *Id.* Noting that EPA did not have the legal right to reopen the CD because the ERA did not constitute an ARA, BELCO rejected EPA's demands as inconsistent with CERCLA. *Id.* EPA disregarded BELCOs objection, issuing a Unilateral Administrative Order ("UAO") directing BELCO to conduct the following response actions: sample fifty private wells in Fartown monthly, supply bottled water to families with NAS-T between five to ten ppb until it is four ppb or lower, and install CleanStripping filtration on wells above ten ppb. *Id.* This UAO did not include FAWS' requests that BELCO install CleanStripping in every well or take actions to fully remove NAS-T from their water supply, since no wells in Fartown tested above the HAL for NAS-T. *Id.* EPA began carrying out the UAO in July 2021 because BELCO refused to comply, contending it was made illegally. *Id.* at 10. Their sampling was consistent with Certified Labs' results from March 2020, with no well testing above eight ppb. *Id* at 8, 10.

C. Procedural History

In the BELCO action, EPA moved to recover the costs it incurred in Fartown, as well as penalties for BELCO's violation of the UAO. Record at 10. BELCO alleges that because the ERA is not an ARAR, EPA did not have the right to reopen the CD and the UOA did not have a legal foundation. *Id.* On September 24, 2021, FAWS intervened in the BELCO Action, bringing forth a claim against EPA. *Id.* FAWS challenged the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedures Act ("APA") to the extent that it failed to compel BELCO to install CleanStripping filtration systems on FAWS' private wells, an act

FAWS argues is required under the ERA. *Id.* Separately on August 30, 2021, FAWS and eighty-five individual plaintiffs from Fartown filed an action against BELCO. *Id.* The complaint's first cause of action is a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on testing. *Id.* FAWS further contends that BELCO's contamination of the Sandstone Aquifer constituted negligence and a private nuisance under New Union state law. *Id.* FAWS expressly stated in its complaint that it initially brought the FAWS Action in federal court due to the Court's jurisdiction over the closely related CERCLA claims and to avoid "claim splitting." *Id.*

On December 30, 2021, after completing discovery on the CERCLA claims, all three parties moved and cross-moved for summary judgment on the CERCLA claims. *Id.* at 11. FAWS additionally moved to dismiss any remaining state law claims without prejudice should the CERCLA claims be resolved by motion. *Id*. On June 1, 2022, the district court granted summary judgment in favor of BELCO with respect to reimbursement of FAWS's expenses in testing; in favor of EPA with respect to its determination to reopen the CD and issue the UOA; and in favor of FAWS as to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells. *Id.* at 18. Finally, the court denied FAWS' motion to dismiss the remaining state law claims. *Id.* This appeal is now before the Court.

SUMMARY OF THE ARGUMENT

The district court correctly upheld BELCO's motion for summary judgment regarding reimbursement costs, as FAWS merely undertook unnecessary, duplicative testing not consistent with the NCP in light of no actual threat to the citizens of Fartown. FAWS needed to have been faced with an actual threat before initiating a response to a release of NAS-T. After BELCO investigations unveiled no amounts of NAS-T in the Fartown wells, a group of Fartown citizens hired Central Labs to undertake further testing. Since EPA had already directed FAWS that no

threat to their private water wells existed, this subsequent testing undertaken by FAWS was duplicative. Unsurprisingly, the testing revealed no NAS-T meet the HAL of ten ppb.

Even if the court were to find that this testing was in some way necessary, it was not consistent with the NCP and CERCLA-quality cleanup was never initiated, therefore making any money FAWS spent non-reimbursable. A public plaintiff's response actions are typically considered to be in substantial compliance with the NCP when the public participated in the response and the proposed remedial action was cost effective. Since FAWS failed to include the public in the decision to undergo further testing and sought a remedial action that would cost nearly $45 million in light of a non-threat, FAWS failed to meet either of these NCP requirements. Furthermore, even if the public participated and the response was cost-effective, since FAWS never actually began to engage in CERCLA-quality cleanup, the district court was correct to find in favor of BELCO.

Next, the district court erred when it upheld EPA's determination that the ERA constitutes an ARAR, and as a result, EPA's reopening of the CD was improper and further remedial action should not have been ordered. In order for EPA to reopen the CD, new information must be revealed to EPA that shows the prior clean-up plan is no longer effective, and new, more-stringent regulatory standards must show the clean-up plan is no longer sufficient. CD, § 13.3. BELCO argues that the ERA is not a proper ARAR under CERCLA and thus should not be considered a new Regulatory Standard.

To establish a state environmental standard as a state ARAR to which a remedy must comply, it first must be properly promulgated. To be properly promulgated, a law must be definite and measurable so that an ordinary person can understand the conduct prohibited. The ERA is too vague and there is not a quantifiable standard to render it legally enforceable. Next,

the state law must be more stringent than any federal standards set in place so that it can be easily distinguishable. Because the ERA essentially mirrors the first criteria to be analyzed pursuant to the NCP, it cannot be deemed more stringent than any federal standard. Third, the state law must be legally applicable or relevant and appropriate, directly related to the problem, or its use well-suited to the site. While it is undisputed that the ERA is not directly applicable, it does not address problems or situations sufficiently similar to those encountered at the Site, thus making irrelevant and unapplicable. Finally, the state law must be timely identified, which is not at issue in our case. Therefore, New Union's ERA is not an ARAR to which a proposed remedy must comply. Accordingly, EPA was wrong to reopen the CD and order further remedial action.

Furthermore, the district court was incorrect in finding that EPA's determination to not require BELCO to install CleanStripping filters to Fartown wells was arbitrary, capricious, and contrary to law. While courts give deference to agencies interpreting federal laws, very few courts have confronted the issue of a federal agency interpreting state law. A recent district court opinion consolidated two appellate decisions on the issue, finding courts should "defer to a federal agency's reasonable interpretation of a state regulation" but not permit it to "effectively amend the regulation to give it a meaning that the text of the regulation does not fairly support." *Ohio Valley Env't Coal. v. Horinko*, 279 F. Supp. 2d 732, 754–57 (S.D.W. Va. 2003).

Under *Robinson v. Shell Oil Company*, the first step in statutory interpretation is to "determine whether the language at issue has a plain and unambiguous meaning." 519 U.S. 337, 340 (1997). In applying the literal meaning of "clean" and "free," it becomes clear that the ERA does not have a plain and unambiguous definition. The ERA does not define these words nor does the dictionary provide clear guidance. Further, the statute could have included specific terms to denote what level of contamination is allowed, but the drafters chose not to include such

language. This Court should not add words that are not there already.

Therefore, the court must next look to the surrounding context in which the language is used, the statutory context as a whole, and the legislative history of the statute. *See Robinson*, 519 U.S. at 341. Here, there is no surrounding language or statutory scheme with which to analyze the ERA, so legislative history is the final method to employ. In the New Union Assembly and Senate hearing on the ERA, Mr. Maloney pointedly asked what clean meant. In response, Mr. Wright, the drafter of the ERA, admitted that to require absolute adherence and no contamination whatsoever would be impractical. Instead, he explained that protecting health is the primary goal of the ERA and "clean" means water that won't harm humans. Here, every well tests at a level below what has been determined safe and thus, the water is by extension clean.

Finally, the district court appropriately retained jurisdiction over the remaining state law tort claims. So long as any state law claims are so related to the federal claims to form the same case or controversy, the federal court may properly weigh the four goals of judicial economy, convenience, fairness, and comity in deciding whether to retain jurisdiction. Since both the federal and state claims at issue below stemmed from facts surrounding the BELCO spill, the next step in deciding whether jurisdiction is proper is weighing the factors.

Judicial economy and convenience both weigh in favor of retaining jurisdiction. Since the litigation has been pending for over two years and various dispositive motions have been heard, this court has expanded substantial judicial resources that should not be wasted by remanding the case to state court. The parties would be inconvenienced by having to undertake this process again. Furthermore, since the state law tort claims of negligence and nuisance provide no complex issue of state law, considerations of comity also weigh in favor of retaining jurisdiction.

Finally, it would be unfair for BELCO for the case to be sent back to state court, as it would likely result in inconsistent judgments.

STANDARD OF REVIEW

Summary judgment is properly granted when no genuine issue of material fact remains, and when, viewing the evidence most favorably to the nonmoving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56. Further, summary judgment in CERCLA cases is reviewed de novo. *Carson v. Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001). When an EPA enforcement order is challenged under the Administrative Procedure Act ("APA"), 5 U.S.C. section 706(2)(A), courts must determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004); *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012) (holding that challenges to EPA orders of compliance are reviewed under the APA). Appellate review of a district court's exercise of supplemental jurisdiction "is limited to whether the district court abused its discretion." *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994).

ARGUMENT

I. THE COSTS FAWS INCURRED BY CONDUCTING DUPLICATIVE TESTING WERE NOT PROMPTED BY AN ACTUAL AND REAL THREAT, NOR CONSISTENT WITH THE NCP, THEREFORE MAKING THEM NON-RECOVERABLE.

CERCLA was enacted in part to promote the timely cleanup of hazardous waste sites and shift the costs associated with clean-up efforts to those parties responsible for contamination. *Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc*, 209 F. Supp. 3d 1093 (E.D. Mo. 2016). Under CERCLA's statutory scheme, the former must precede the latter. *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000). One aspect of CERCLA's overarching purpose is to

promote the timely cleanup of hazardous waste sites and shift the corresponding costs to parties responsible for contamination. EPA, *Superfund*, https://www.epa.gov/superfund/superfund-cercla-overview (last updated Feb. 14, 2022). Accordingly, to recover response costs under CERCLA, a non-governmental plaintiff must establish that (1) the site is a facility; (2) the defendant is a responsible party; and (3) there has been a release or threatened release of a hazardous substance; which (4) caused plaintiff to incur response costs "necessary" and "consistent with the national contingency plan" ("NCP"). *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012); 42 U.S.C. § 9607(a)(4)(B). Here, it is undisputed that the Site is a facility within the meaning of CERCLA, BELCO was a responsible party, and that there was a release of NAS-T at the Site. Thus, the only remaining issue before the district court was whether FAWS costs were necessary and consistent with the NCP.

A. FAWS' Duplicative Testing Was Undertaken To Further Understand Exposure Levels, Not Assist In Further Investigation Or Remediation Of An Actual And Real Threat

1. Duplicative testing was undertaken when no real threat existed.

The statutory limitation allowing reimbursement only for "necessary" cleanup costs is important—without it there would be no check on the temptation to improve one's own property despite very low levels of contamination that do not necessarily require extensive remediation measures. *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995). Accordingly, before a party can initiate a response to a release of hazardous waste, there must exist "an actual and real threat to human health or the environment." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001). Whether a release caused the incurrence of necessary response costs under CERCLA focuses on if the particular hazard justified the response action because "[b]are proof that there was a release [of a hazardous substance] is not enough. . . ."

Licciardi v. Murphy Oil USA, 111 F.3d 396, 399 (5th Cir. 1997).

For example, in *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F. Supp. 2d 1369, 1378–79 (11th Cir. 1999), the court found that costs Southfund undertook to remediate contaminated groundwater were unrecoverable because Southfund produced no evidence that the water posed any threat to public health. Alternatively, in *Carson Harbor Village*, the court found that deposition testimony about contamination levels measuring above a broadly accepted level and the withholding of a "no-further-action letter" served as dipositive evidence that a public threat potentially existed. 270 F.3d at 872–73.

Furthermore, while various circuits have allowed reimbursement for investigative costs undertaken to reveal the magnitude of a potential threat, courts only allow this when those investigative actions are not duplicative of already-taken measures. *See Louisiana-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993). For example, investigative costs incurred by a private party after the EPA has already initiated a remedial investigation are not necessary because they are considered duplicative of the EPA's prior work. *Id.* Moreover, even if the EPA expressed interest in a plaintiff's subsequently collected data, this alone is not enough to establish that plaintiff's efforts were necessary or distinct from the EPA's. *United States v. Iron Mt. Mines*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997); *see also Marcas LLC. v. Bd. of Cnty. Comm'rs*, 977 F. Supp. 2d 487, 500–01 (D. Md. 2013) (finding monitoring and assessment costs to be non-recoverable where such efforts were "duplicative of work already performed" by the EPA).

In the present action, no test revealed that NAS-T's presence was at a level sufficient to pose an actual and real threat to Fartownians. While the DOH readily responded to testing requests after FAWS members testified that their water smelled "off," these tests detected no

NAS-T, and as such the EPA declined to permit further testing in light of these results. Absent a lack of an actual threat to the public at this point, any testing FAWS undertook became unnecessary, and therefore its costs became unrecoverable. Even if the court found that the smell alone was sufficient to conduct further testing, this malady presented no actual threat to Fartownians, especially because over half of the Central Labs testing results found no NAS-T in the wells, and what amounts it did detect were still well below the HAL of ten ppb.

Moreover, testing became duplicative once FAWS chose to retain Central Labs. Unlike in *Forest Park National Bank & Trust*, where "initial investigations" of a migrating plume was deemed a viable "response cost" undertaken to evaluate a possible threat to human health, EPA had already conducted extensive testing to uncover any threats to Fartown, which revealed no level of NAS-T in resident wells. 881 F. Supp. 2d at 977–78. Instead, this issue is comparable to *Marcas L.L.C.*, in which the record clearly established that the plaintiff undertook inspection after the County had already directed and completed testing of the same area. 977 F. Supp. 2d at 500. While FAWS may argue that the testing was necessary and not duplicative because EPA relied on its results to re-opening the CD and results were different than the EPA's prior findings, under *Iron Mountain Mines*, the EPA's interest alone is not sufficient to demonstrate the costs' necessity. Accordingly, FAWS' testing was not necessary, rather it was merely duplicative of the EPA's prior work and no real threat existed at the time it hired Central Labs.

2. FAWS' investigative measures were not tied to actual cleanup.

Several circuits have acknowledged that response costs are only "necessary" if they are closely tied to the actual cleanup of hazardous releases. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004) (holding that work must be "closely tied" to actual cleanup); *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 297 (3d Cir. 2000) (finding

response costs unnecessary absent direct involvement in remediation efforts); *Gussack Realty*, 224 F.3d at 92 (requiring cost be incurred in the process of *remedying* a site) (emphasis added); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669–70 (5th Cir. 1989) (finding a party must have had to act to contain a release); *United States v. Hardage*, 982 F.2d 1436, 1148 (10th Cir. 1992) (requiring a nexus between response cost and cleanup effort). Notably, the court in *Key Tronic v. United States*, 511 U.S. 809, 820–21 (1994), reasoned that studies undertaken merely to advance a party's interests but not "closely tied to the actual cleanup" are not recoverable, even where such costs may have "aided the EPA" or "affected the ultimate scope and form of the cleanup."

Yet, investigatory costs incurred "in order to assist and help plan the eventual remediation and cleanup efforts" are necessary under CERCLA and may be "recoverable even absent any subsequent recoverable response costs." *Orange Cnty. Water Dist. v. Alcoa Glob. Fasteners, Inc.*, 12 Cal. App. 5th 252, 327–28 (2017). There is a stark difference between an intent to plan or assist eventual site remediation and a desire to identify a potential threat. This is illustrated in *Wilson Road Development Corporation*, whereby the court did not reimburse plaintiffs where they failed to present evidence of "even vague" remediation plans, but instead merely undertook testing to identify whether hazardous substances had been released on their property. 209 F. Supp. 3d at 1114–15. Similarly, in *Young v. United States,* the plaintiffs' cost-recovery action failed because the costs were not tied in any manner to the actual cleanup of the environmental contamination and plaintiffs emphatically rejected aiding in the cleanup. 394 F.3d 858, 863 (10th Cir. 2005). Alternatively, the court found that the plaintiffs in *Walnut Creek Manor, LLC v. Mayhew Center.*, 622 F. Supp. 2d 918, 929 (N.D. Cal. 2009), incurred necessary costs where plaintiff undertook studies to affirmatively help plan cleanup efforts.

Here, like in *Wilson Road* and *Young*, FAWS' testing was not tied to any actual cleanup efforts. Rather, FAWS argued that it believed hiring Central Labs was necessary and reasonable simply because FAWS members had a right to know about exposure levels. After the EPA declined to take action, FAWS paid Central Labs, took no action to remediate Fartown wells, and expressed no desire to be reimbursed for these costs until over a year later. At this point, EPA had already re-opened the originally unopposed CD and litigation had commenced between BELCO and EPA. Accordingly, FAWS has not adduced any evidence of a nexus between the testing and "actual cleanup." While FAWS may attempt to show that EPA's decision to reopen the CD and have BELCO monitor Fartown wells is proof that their investigation led to pertinent clean-up measures, the decision to remediate occurred more than a year after FAWS' testing took place and was not the only factor that led to the decision. Rather, it was the implementation of the ERA that led to this decision, and without it Fartown wells would likely not have been tested again. Here, unlike in *Walnut Creek Manor*, the original investigative costs were not taken with the intent of assisting cleanup efforts, they merely became one of many factors that later led the EPA to reopen testing on their own accord. Accordingly, FAWS' costs were not necessary.

B. Any Evidence Of Necessary Costs Would Still Be Insufficient, Since Efforts Were Not Consistent With The National Contingency Plan

Private plaintiffs bear the affirmative burden of proving that any necessary response actions are also consistent with the NCP. *See United States v. Ne. Pharm. & Chem. Co.*, 579 F. Supp. 823, 850–51 (W.D. Mo. 1984). It is well-established that costs of investigation, assessment, or monitoring of potential harm qualify as "costs of response" under CERCLA and must also adhere to the NCP. *See Orange Cnty. Water Dist.*, 12 Cal. App 5th at 330–3 (noting that it would "contravene the plain language of the statute to hold that investigatory costs are exempt from NPC compliance"). Assuming *arguendo* that plaintiffs can prove their costs were

necessary, such evidence is still insufficient to show that plaintiffs' response, when "evaluated as a whole," was in "substantial compliance" with the NCP as required under 40 C.F.R. section 300.700(c)(3)(i). Accordingly, BELCO is not required to reimburse FAWS.

To substantially comply with the NCP, FAWS' response action must satisfy various provisions detailed in 40 C.F.R. section 300.700(c)(5)-(6) and result in CERCLA-quality cleanup. *Marcas L.L.C.*, 977 F. Supp. 2d at 500. Importantly, the level of compliance is "substantial" rather than strict. *Wilson Rd. Dev. Corp*, 209 F. Supp. 3d at 1116. Accordingly, the two main provisions of the NCP applicable here include the requirements that: (1) public participation occur throughout the investigation, study, and remedial phases of the response action and (2) the proposed remedial action must be cost-effective. *See Waste Mgmt. of Almeda Cnty., Inc. v. E. Bay Reg'l Park Dist.* 135 F. Supp. 2d 1071, 1100 (N.D. Cal. 2001).

Courts have consistently held that a party's failure to provide for public comment "renders a remedial action inconsistent with the NCP and bars recovery." *See Orange Cnty. Water*, 12 Cal. App. 5th at 335. For example, *Marcas L.L.C*, 977 F. Supp. 2d at 500, and *Orange County Water District*, 12 Cal. App. 5th at 334–35, both held that the plaintiffs' failure to engage with the community regarding the proposed action was alone strong enough to block recovery under the statute. Furthermore, to determine if a remedy is cost-effective, courts will balance long-term effectiveness, reduction of toxicity or volume through treatment, and short-term effectiveness against the cost undertaken to implement the remedy. *Orange Cnty. Water Dist.*, 12 Cal. App. 5th at 335–36. Ultimately, a court will disregard both these consistency requirements if no CERCLA-quality cleanup occurred. *Young*, 394 F.3d at 865.

FAWS meets neither of the two requirements set forth above, effectively failing to maintain substantial compliance with the NCP. First, no community engagement occurred before

FAWS hired Central Labs. While the record reflects that various Fartown members joined together to create the FAWS group and sought to remedy the NAS-T issue, there is no evidence they agreed on a method to complete the remediation. Further, no evidence exists that the desired remedy is cost-effective. FAWS requested that BELCO and the EPA remediate the plume of the contamination, an undertaking that would require decades of work and cost around $45 million dollars. This potential remediation strategy was rightfully rejected even in Centerburg, where the NAS-T contamination level was over four times the HAL. Even if the court found that community participation was occurred and the remediation strategy was cost effective, FAWS still does not substantially comply with the NCP because it never actually began to engage in CERCLA-quality cleanup. Accordingly, FAWS fails to show that its response costs were consistent with the NCP because it did not engage the community, its chosen remedial method was not cost-effective, and it never began cleanup efforts.

II. THE ERA DOES NOT CONSTITUTE AN ARAR, MAKING IT IMPROPER TO REOPEN THE CD BECAUSE THE ERA WAS NOT PROPERLY PROMULGATED, MORE STRINGENT THAN THE NCP, OR DIRECTLY APPLICABLE

BELCO argues that EPA's determination that the ERA constitutes an ARAR is improperly interpreted and thus the consent decree should not be reopened. In order for EPA to reopen the CD, (1) new information must be revealed to the EPA that shows the prior clean-up plan is no longer effective and (2) new, more stringent Regulatory Standards have been created that show the clean-up plan is no longer sufficient. CD § 13.3. Regulatory Standards are defined in the CD as "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." CD § 1.12. To establish a state environmental standard as a state ARAR to which a remedy must comply, it must be (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) [hereinafter *Akzo*]. Once a state environmental standard is determined to be an ARAR, remedial actions can be implemented in order to protect human health and the environment. 42 U.S.C. § 9621(d). The EPA's interpretation of what constitutes an ARAR under CERCLA is entitled to deference "according to its persuasiveness" *See United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (holding that the United States Customs Service Agency deserved judicial deference in its tariff classification). It is undisputed that the ERA was timely identified; however, looking at the first three requirements, the ERA does not represent an ARAR under CERCLA because the act itself contains terms that are ambiguous and fail to provide a measurable standard for a specific problem.

A. The ERA is Not Properly Promulgated Because its Vagueness and Lack of a Quantifiable Standard Render it Legally Unenforceable

To be properly promulgated, a state law has to be generally applicable and legally enforceable, requiring it to apply to all remedial situations and be drafted with adequate definiteness that a lay person can understand what conduct is prohibited. *Akzo*, 949 F.2d at 1440. As seen in the Sixth Circuit, Michigan's anti-degradation law made it unlawful for anyone "directly or indirectly to discharge into the waters of the state any *substance which is or may become injurious* to the public health, safety, or welfare . . . ." *Id.* The court found this standard was specific enough to prohibit a particular conduct and sufficiently provided a fair warning as to what behavior is unpermitted. *Id.* at 1441. A law is considered to be constitutionally vague if it is not considered to be sufficiently specific and it is unclear in its application and goals, resulting in inconsistency when it's applied. *See Colten v. Kentucky,* 407 U.S. 104, 110 (1972).

The EPA's failure to adequately define certain terms in the ERA creates uncertainty and fails to provide a quantifiable standard, thus making it not properly promulgated. The EPA fails

to define terms such as "clean" and "healthful," consequently leaving open the possibility for conflicting interpretations about what is actually being restricted. Those terms can have several applications as to their meaning. In the present case, the discrepancy regarding the meaning of these words creates confusion as to how the amendment should be carried out. Unlike the anti-degradation law that was created in *Akzo,* here, the EPA fails to lay out penalties for violating the amendment or how the amendment will be executed, resulting in much uncertainty. Since the law is too broad, a regular person reading it cannot readily decipher what conduct is restricted.

Accordingly, because the word choice is very general, a floodgate of litigation is likely to ensue, with many frivolous claims brought forth. The ERA's purpose is to protect the public from harmful contaminants. *See* Environmental Rights Amendment: Hearing on A02137 Before the New Union Senate and Assembly, NU Assembly No. A10377 1–7 (N.U. 2020) (statements of Mr. Wright and Mr. Maloney, Members). If we interpret these terms to mean absolutely free from all contaminants, then everyone can bring forth claims. This is too extreme of a standard. Unlike in *Colten v. Kentucky*, here, the ERA gives no indication as to who can bring a suit. The flood of lawsuits would put New Union Courts in a position to interpret what these terms mean and make environmental decisions rather than leaving this to the agencies themselves. It is difficult to pinpoint how and when the rights of individuals have been violated and the extent to which those rights are protected in the ERA, leaving courts to implement certain interpretations on a case by case basis. This would lead to a disparity as to how the ERA should apply terms such as "clean air," "clean water," "healthful environment," and "free from contaminants and pollutants." The legislative history shows that the new right was supposed to be self-executing, requiring no further legislation or regulation to take effect, implicitly directing courts to stay out of this interpretive role. However, since there is little to no direction on how to enforce the ERA,

this regulation must be looked at in conjunction with other federal environmental laws and requires the courts to take on a more interpretive role when giving meaning to the law.

B. The ERA and the National Contingency Plan are Equally Broad, and Thus Can Not Be Considered More Stringent

To distinguish a state ARAR from any federal environmental standard, the ARAR must be stricter in scope so that the primary enforcer of the law is that state. *Akzo,* 949 F.2d at 1443–44. In order for a party to recover remediating costs under CERCLA, the remedy has to comply with the criteria set forth in the NCP. *Id*. at 183. A cleanup will be consistent with the NCP if it is in "substantial compliance" with 40 C.F.R. § 300.700(c)(5)-(6), and result in "CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001). Courts have reasoned that "it was Congress' intent that CERCLA be construed liberally in order to accomplish the statute's goals." *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir.1999) (internal alterations omitted); *see Sealy Conn., Inc. v. Litton Indus., Inc.*, 93 F. Supp. 2d 177, 183–84 (D. Conn. 2000) (concluding the plaintiff substantially complied with the NCP when they conducted a detailed investigation of feasible alternatives, in which they looked at several factors, the most important being the overall protection of human health and the environment). *But see Akzo*, 949 F.2d at 1443 (citing National Oil and Hazardous Substances Pollution Contingency Plan, *Proposed Rule,* 53 Fed. Reg. 51394-01, 51435 (Dec. 1988)) ("Where no federal applicable 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.").

The ERA essentially mirrors the first criteria to be analyzed pursuant to the NCP, therefore it is not deemed to be more stringent than any federal environmental standard. The ERA states, "[e]ach and every person of this State shall have a fundamental right to clean air and

clean water and to a healthful environment free from contaminants and pollutants caused by humans." Similarly, the first criteria set forth by the NCP—and the one courts consider most important— is the overall protection of health and the environment. Both these standards are broad and not easily distinguished from another. Similar to *Sealy Connecticut,* here, we have a law that can be looked at in conjunction to the NCP when looking at remedies under CERCLA. The ERA would not benefit anyone any more than the criteria set forth in the NCP, therefore it would not be rendered any more applicable than the standard already set in place.

C. The ERA is Not Directly Applicable Nor Is It Relevant and Appropriate

A state law must specifically address the hazardous substance or address situations sufficiently similar to those present at the CERCLA site such that their use is well-suited to the particular site. 40 C.F.R. § 300.5. Both parties agree that the ERA does not directly address the hazardous substance, NAS-T. In *Akzo*, the court analyzed several factors when considering if Michigan's anti-degradation law was relevant and appropriate. 949 F.2d at 1446 (6th Cir. 1991). The court identified important factors were the environmental media, the type of substance, and the objective of the potential ARAR, which are all relevant because they are referencing the conditions of the affected site. Using those same factors, the court found the use of Michigan's anti-degradation law was well suited to the site and therefore considered "appropriate." *Id*.

In the present matter, EPA does not directly address NAS-T, nor does it address similar situations to those at the Site. Unlike the Michigan anti-degradation law examined in *Akzo,* here, there is no specificity as to what the environmental medium is or what type of substance officials seek to prevent from harming the environment. Although we know the objective of the potential ARAR are hazardous materials caused by humans, even then, the detail is speculative and vague. Under *Akzo*'s reasoning, the ERA would not be relevant or appropriate to the CERCLA site. It

does not address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site. There is no indication that the ERA is referring to NAS-T or similar hazardous substances and thus it cannot be relevant given its large scope of possible deference. Reading the amendment alone, there are no cues that this relates to the conditions at the Site and therefore it cannot be deemed as a suitable remedy for that location.

Accordingly, with respect to 42 U.S.C. section 9621(d), the New ERA is not an ARAR to which the proposed remedy must comply. Although it was timely identified, it is not properly promulgated, not more stringent than the federal standard, and not legally applicable. Because the ERA does not constitute as an ARAR, the EPA's reopening of the consent decree and subsequent order for further remedial action is incorrect. Therefore, the Court should reverse and remand the district court's judgment in favor of BELCO.

III. BELCO'S INTERPRETATION OF THE ERA WAS NOT CONTRARY TO LAW BECAUSE ITS TERMS ARE AMBIGUOUS, ITS LEGISLATIVE HISTORY INDICATES AN INTENT TO ALLOW SOME LEVEL OF CONTAMINATION, AND FAWS INTERPRETATION OF THE ERA AS REQUIRING EXACTLY ZERO CONTAMINATION HAS FAR-REACHING ABUSRD CONSEQUENCES

Courts review challenges to EPA final orders under the APA. *Sackett v. EPA*, 566 U.S. 120, 131 (2012). This standard of review is used to determine "whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 496–97 (2004) (quoting 5 U.S.C. § 706(2)(A)). The APA "requires the EPA to articulate[] a rational connection between the facts found and the choice made." *Sierra Club v. EPA.*, 671 F.3d 955, 961 (9th Cir. 2012) (internal quotations omitted). Specifically, the EPA "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The issue presented here has not been extensively discussed in the federal case law. While it is clear that Chevron deference, the process of giving judicial deference to administrative actions, applies when an agency, such as the EPA, interprets a federal statute, it is relatively unclear whether that same deference, or any at all, applies to a federal agency interpreting a state statute. The district court for the Southern District of West Virginia recently examined this type of situation, explaining that it found only two prior cases discussing a federal agency interpreting state statutes. *See Ohio Valley Env't Coal. v. Horinko*, 279 F. Supp. 2d 732, 754–57 (S.D.W. Va. 2003). Furthermore, in *Montgomery National Bank v. Clarke*, the Third Circuit addressed this issue when the Office of the Comptroller of the Currency was tasked under federal law with interpreting and applying state law in the context of its own decisions to expand the national bank. 882 F.2d 87, 87–89 (3d Cir. 1989). There, the Third Circuit found that courts shall defer to a federal agency's reasonable interpretation of a state statute if the "unsettled question of state law falls squarely within the federal agency's field of expertise and the state courts or state agency charged with administering the state statute have not ruled out the interpretation of the statue proffered by the federal agency." *Id.* at 92.

While the *Ohio Valley Environmental Coalition* Court found that the Third Circuit's holding didn't directly apply because the EPA was not tasked with administering the state statute in its case, it did still find the rationale of *Montgomery National Bank* applicable. *Ohio Valley Env't Coal.*, 279 F. Supp. 2d at 755. Specifically, it held that in the present case, as in *Montgomery National Bank*, the state law fell "squarely within the federal agency's field of expertise and the state courts . . . have not ruled out the interpretation" of the state law by the EPA. *Id.* (citing *Montgomery Nat'l Bank*, 882 F.2d at 92). The only other published case dealing with this issue held that the EPA amended a portion of California's proposed interpretation.

Riverside Cement Co. v. Thomas, 843 F.2d 1246, 1247–48 (9th Cir. 1988). The Ninth Circuit did not explicitly discuss the deference owed to the EPA's interpretation of the California statute, however, it did find that the EPA's interpretation was unreasonable. *Id*. at 1248. In fact, in the dissent, Judge David Thompson noted that because "EPA's interpretation is reasonable," it is "entitled to deference." *Id*. at 1250. The *Ohio Valley Environmental Coalition* Court determined that it was clear both cases were "consistent with the rule that the court should defer to a federal agency's reasonable interpretation of a state regulation, but that the agency is not permitted to effectively amend the regulation to give it a meaning that the text of the regulation does not fairly support." *Ohio Valley Env't Coal.*, 279 F. Supp. 2d at 755. Ultimately, that court held it would "defer to the EPA's reasonable interpretations of West Virginia's regulations in light of the EPA's particular knowledge and expertise in the area." *Id*.

FAWS contends that the EPA's interpretation of the ERA and subsequent decision to not require CleanStripping filtration systems on wells testing below ten ppb was arbitrary, capricious, and contrary to law. However, the EPA argues that "clean water" cannot be reasonably interpreted to mean free from *all* contaminants, and as such, requiring filtration on wells testing at or below the HAL level for NAS-T is unnecessary. Thus, this Court should reverse the district court's determination that EPA's interpretation of the ERA and resulting decision not to require BELCO to install CleanStripping filtration systems on wells testing below ten ppb of NAS-T was contrary to the language, intent, and purpose of the ERA, and thus, contrary to law.

A. Clean And Free Are Ambiguous Terms As Used In The ERA Because Their Literal Meaning Does Not Definitively Explain How The Court Should Read Them

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Further, the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id*. at 341 (internal citations omitted). The EPA's interpretation of "clean water" and "free from contaminants and pollutants" is the central focus of this issue. Thus, we must first ask whether the terms "clean*"* and "free*"* speak in relative or absolute terms regarding the level of contamination in Fartown water supplies. "Clean" is defined as "free from dirt or pollution" and "free from contamination or disease." *Clean*, Merriam-Webster, https://www.merriam-webster.com/dictionary/clean (last visited Nov. 14, 2022). The definition of "clean" then rests on the separate meaning of "free." The dictionary defines "free" as "relieved from or lacking something and especially something unpleasant or burdensome." *Free*, Merriam-Webster, https://www.merriam-webster.com/dictionary/free (last visited Nov. 14, 2022). The two controlling verbs in this definition, "relieved" and "lacking," do not speak to the degree to which something must be relieved from or lacking "something unpleasant or burdensome" in order to be "free." *Id*. Thus, the true issue the Court needs to determine is if something must be *entirely* relieved or lacking unpleasant substances in order to be "free" and by extension, "clean."

Dictionary definitions do not completely explicate to what degree these terms refer. While it could be entirely reasonable to interpret these definitions as requiring *absolute* relief from unpleasantness in order to be free and thus clean, it is also reasonable to interpret the exact opposite. Thus, when the Court is faced with two equally reasonable interpretations of the term at issue, that provision can be labeled ambiguous which then requires further, external inquiry. *See Robinson*, 519 U.S. at 342 (examining ambiguous word in context to find their meaning).

B. Clean And Free Can Be Interpreted By The ERA'S Legislative History And Comments Made By The Amendment's Drafters And Other Politicians Specifically Regarding The Meaning Of These Terms

When the Court finds a term to be ambiguous on its face, it must look to the surrounding context in which the language is used, the statutory context as a whole, and finally the legislative history of the statute. *See Robinson*, 519 U.S. at 341. Here, the statute itself is merely one sentence, and is without a surrounding statutory or regulatory framework within which it can be interpreted. This Court cannot find the meaning of "clean" or "free" from their use in nearby sections or find their intended purpose from a larger body of text that applies these terms elsewhere. Thus, the only other place in which this Court can look to find meaning is in the legislative history. Specifically, this Court can determine the ERA's intended purpose and what the individual words mean from the drafters' answers in the legislative history. S*ee U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) (finding Committee Reports and legislative notes clarified ambiguous statutory language such that the court could interpret the statute's meaning).

Here the ERA's legislative history is illuminating in determining what the statute intends to accomplish. First, in the 2019-2020 Environmental Rights Amendment Assembly, the ERA's drafters explain that its purpose is to protect public health and "ensur[e] clean air and water, including and not limited to, harms from contaminants and pollutants." Within this provision, the three operative words in the sentence are "protect," "ensuring," and "harms." Specifically, the purpose of the ERA is to protect the public's health from the harms that come with contamination and pollution. What this purpose provision does not say however, is that the ERA's intent is to maintain the state's water supplies at zero-concentration levels of all contaminants. Had the drafters intended this outcome, they could have written exactly that in the ERA itself. This Court should not write words into the statute that are not there and were not

intended to be there. Reading this statute then with its listed purpose in mind, and omissions excluded, it is clear that the drafters of the ERA intended to use the amendment as a mechanism to protect individuals from physical harm as a result of contamination and pollutants. This interpretation would naturally lead to health-based limits on the concentration of individual types of particulates in drinking water supplies, not the complete absence of those substances.

If this Court interprets the statute through this lens, then the most likely intended outcome of the ERA is to create restrictions against any contaminant building up to a concentration level above its HAL. This would protect individuals from being harmed by their water supply, which is the stated goal of the ERA, and allow reasonable cleanup standards in the event any contaminant does exceed its HAL concentration level. Applied here, the NAS-T HAL is ten ppb which would allow BELCO to avoid installing CleanStripping technology on wells testing below that number because those water sources will not "harm" the public. In fact, in setting the level at ten ppb, a significant margin of error was incorporated to ensure the level of exposure is non-toxic to humans. Thus, the numbers produced are far from harmful.

Second, the sponsors of the ERA specifically addressed how to interpret these ambiguous words in the testimony provided during the NU Assembly Nos. A10377 and A10455. *See generally Environmental Rights Amendment: Hearing on A02137 Before the New Union Senate and Assembly*, NU Assembly No. A10377, 1–4 (N.U. 2020) (statements of Mr. Wright and Mr. Maloney, Members). Mr. Maloney, a member of the New Union Senate and Assembly, directly asked Mr. Wright, a sponsor of the ERA, if *clean* "mean[s] that the water that's supplied under the public water system doesn't have any additives – any chemicals added to it?" *Environmental Rights Amendment: Hearing on A02137 Before the New Union Senate and Assembly*, NU Assembly No. A10377, 2 (N.U. 2020) (statements of Mr. Wright and Mr. Maloney, Members).

In fact, Mr. Maloney even asked Mr. Wright "[w]hat is 'clean'?" *Id.* Mr. Wright responded and explained that individuals "should be able to consume water through [their] public water supply without any harm." *Id.* He then stated "[t]hat doesn't mean that the water is free of any or all substances besides H20." *Id.* (cleaned up). Mr. Wright clarified this by explaining that, while a public water supply will contain other chemicals and substances, it "should not harm you." *Id.* Mr. Maloney then asked a follow-up question in which he wished to confirm that Mr. Wright's definition of "clean" was "not harmful." *Id.* In response, Mr. Wright explained that what clean means in this context is "water that is free of contamination or pollution caused by humans *that would make that water unhealthful or harmful to consume*." *Id.* at 3 (emphasis added).

The ERA does not provide a definition for its terms or a true explanation of what the individual words mean. However, once those terms are shown to be ambiguous, this Court must then look at context, of which there is none here, and importantly, the legislative history and comments made by the amendment's drafters. *See Vogel Fertilizer Co.*, 455 U.S. at 26; *see also Robinson*, 519 U.S. at 341. Here, there are clear, unmistakable comments made by the writers of the ERA that specifically address the present issue. Mr. Wright's primary meaning behind what *clean* means is that the water does not need to be entirely free of substances as long as it is not harmful to humans. *See Environmental Rights Amendment: Hearing on A02137 Before the New Union Senate and Assembly*, NU Assembly No. A10377 1–4 (N.U. 2020) (statements of Mr. Wright and Mr. Maloney, Members). This is precisely how the EPA interprets the ERA. Given that the HAL for NAS-T is ten ppb, any concentrations below this level are scientifically shown to be not harmful to humans. Furthermore, as Mr. Wright concedes, the water is not, and should not, be absolutely free of all contaminants and substances. This would be unnecessary and

unpractical to achieve, especially when the technology to filter the water carries a substantial cost like in this case with CleanStripping.

Ultimately, the EPA must only prove that its interpretation of the ERA was reasonable and not contrary to the law under the APA. *See Ohio Valley Env't Coal.*, 279 F. Supp. 2d at 755 (finding that courts should defer to an agency's reasonable interpretation of state regulations). Here, the legislative history clearly points towards *clean* and *free* taking on relative meanings, and as such, this Court should find that the EPA's interpretation of the state regulation was reasonable— not arbitrary, capricious, or otherwise not in accordance with the law.

C. Even If The ERA Creates An Absolute Requirement Of Zero Contamination, The Court Should Decline To Interpret It In This Way Because Of The Practical Consequences Of Such A Reading

Ultimately, even if this Court does accept FAWS's interpretation of the ERA that "clean" and "free" should be absolutely construed such that water must be filtered to undetectable levels of contaminants, it still should avoid ruling in this way under the Absurd Results Doctrine. The Supreme Court has consistently held that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Here, FAWS asks the Court to interpret the ERA such that all water supplies must be treated to the point of no detectable levels of NAS-T. While BELCO sympathizes with the idealistic wishes of FAWS, this reading of the statute would produce absurd results as applied here and elsewhere.

Reading the ERA as guaranteeing *absolutely* clean water would force numerous businesses, individuals, and government entities to treat water supplies to a level that is entirely impracticable. In fact, other cities around the country have nowhere near this level of purity in their water supplies, and if this interpretation is selected, then New Union will face countless

problems cleaning its water to such untenable levels. For example, the Los Angeles, Austin, and Manhattan water supplies contain thirty, twenty-four, and eighteen contaminants, respectively, which are linked to disease and cancer. Environmental Working Group, *EWG's Tap Water Database*, https://www.ewg.org/tapwater (last visited November 14, 2022). Assuming New Union is home to water with similar, or even lower, levels of contamination, affirming the district court's ruling would open the floodgates to challenges to the cleanliness of every water supply in the state. Allowing such a cascade of legal proceedings would be immensely costly and unrealistic. The Absurdity Doctrine was created for exactly this type of case.

All told, the EPA is only required to produce a reasonable interpretation of the ERA in order to pass scrutiny under the APA's standard of review. Here, the EPA clearly put forward a reasonable interpretation given the ERA's ambiguity. It would be unreasonable to assume the terms "clean" and "free from contaminants" mean exactly zero. While the clarifying legislative history materials show that the drafters intended to protect society, it would be unnecessary and unpractical to assume that water should be free from *all* contaminants. Nonetheless, even if EPA's interpretation was unreasonable, this Court should still avoid reaching FAWS's interpretation as it would lead to far-reaching unintended consequences.

IV. IN THE INTEREST OF JUDICIAL ECONOMY, CONVENIENCE, COMITY, AND FAIRNESS, THIS COURT SHOULD HEAR THE REMAINING, STRAIGHTFORWARD STATE LAW CLAIMS

Under 42 U.S.C. section 9613(b), federal district courts have exclusive original jurisdiction over all controversies "arising under" CERCLA. If other state law claims are so related to these claims already within the court's original jurisdiction so as to form part of "the same case or controversy," then the court can exercise supplemental jurisdiction over those associated claims. 28 U.S.C. § 1367(a). A state law claim is part of the same case or controversy

where it shares a "common nucleus of operative facts" with the federal claims, whereby they would normally be tried together. *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004). Once all claims arising under the court's original jurisdiction are resolved, any supplemental state law claims may still be heard so long as the goals of judicial economy, convenience, fairness, and comity can still be accomplished. *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996). Accordingly, courts weigh these four goals when determining whether to exercise supplemental jurisdiction. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) (internal citations omitted).

The state and federal law claims at issue arise from a common nucleus of operative fact as required under *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1996). FAWS' state law negligence and nuisance claims both stem from the BELCO spill. In fact, the district court noted that FAWS' complaint explicitly states that it brought the action in federal court due to its "jurisdiction over the closely related CERCLA claims." Accordingly, the main issue is to determine whether federal adjudication of the state law claims would meet the four goals above.

A. Judicial Economy And Convenience Favor Retaining Jurisdiction Over The State Law Claims Because Dismissal At This Stage Would Delay Trial, And Increase Legal Expenses

In general, the purpose of exercising supplemental jurisdiction is to conserve judicial energy and, importantly, avoid multiplicity in litigation. *Rosado v. Wyman*, 397 U.S. 397, 405 (1970). Additionally, courts should "retain jurisdiction over state law claims where substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort." *Id.* (internal quotations omitted). Courts have found that exercising supplemental jurisdiction "furthered judicial economy" when "all claims arose from the same core of facts." *Tomaiolo v. Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002). Furthermore,

appellate courts have also determined it is not an abuse of discretion to exercise supplemental jurisdiction over a case where judicial economy is promoted because the "litigation had matured well beyond its nascent stages, discovery had closed, the summary judgment record was complete, [and] the federal and state claims were interconnected." *Roche v. John Hancock Mutual Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996).

Here the litigation has been pending before this court for two years, including now three dispositive motions for summary judgment being heard and decided by this court. Accordingly, this court has gained a vast amount of knowledge regarding these cases through these hearings and motions. In order to gain this level of knowledge, the court has expended significant judicial resources throughout this proceeding. To send the case to state court would create the need for a separate court to perform work that has already been accomplished here. *See Rosado*, 397 U.S. at 405 (holding that courts should retain jurisdiction when to do so would avoid duplicative litigation). In fact, courts have upheld the exercise of supplemental jurisdiction in situations where far fewer resources were expended before the dismissal of federal claims. *See Ametex Fabrics, Inc. v. Just In Materials, Inc.,* 140 F.3d 101, 105–06 (2d Cir.1998) (finding the district court did not abuse its discretion in maintaining jurisdiction after discovery and a settlement conference took place). These facts favor the district court retaining jurisdiction to avoid judicial waste and the potential consequences of altering the case's setting this late in the proceeding. *See Roche*, 81 F.3d at 257 (finding judicial economy favored retaining jurisdiction when the summary judgment motions had been resolved, and the case had proceeded past initial stages). Finally, the state and federal claims are significantly related due to the fact that nuisance and negligence will be resolved through federal findings of fact related to BELCO's liability, and it is

simply damages left to determine. Thus, judicial economy here favors the district court retaining jurisdiction over the state law claims.

Courts also analyze whether retaining jurisdiction will affect the convenience of litigation to each party. *Nowak*, 81 F.3d at 1191. Specifically, courts have found that it "would be most convenient to try every claim in a single forum." *Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518, 539 (11th Cir. 2015). Finally, courts will focus on the potential delay of trial or additional expenses parties might incur if the case is remanded. *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984).

Here, retaining jurisdiction would provide more convenience to the parties than remanding because of the litigation's history, proximity, and to do so would avoid potential delays and costs associated with transferring the case to state court. First, here as in all cases that could be remanded, it is far more convenient for the parties to finish the litigation in the court where it began. To remand the case to state court would require the parties encounter a new venue with different rules and regulations. Second, convenience favors retaining jurisdiction when to remand the case would create delays and additional costs. *See Huene*, 743 F.2d at 704. Here, as is typically true, to remand the proceeding to New Union state court would likely create delays to its resolution and force the parties to expend additional resources. Since it would be more convenient for parties to remain in federal court, this factor favors retaining jurisdiction.

B. The Common Tort Claims Of Negligence And Nuisance Do Not Pose Complex Issues, Allowing The Federal Court To Fairly Hear The Remaining State Law Claims

In evaluating comity, courts will generally decline to exercise supplemental jurisdiction over remaining state law claims when the claims present novel or complex issues of state law. *See MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n*, 487 F. Supp. 3d 364, 376 (D. Md. 2020) (noting states should deal with claims involving the intricacies of a new state

regulatory scheme, rather than allow federal courts to "wade into [] murky" state law territory). This is because the federal courts do not want to unduly intrude upon complex state processes, or reach conflicting decisions of state law. *Burford v. Sun Oil*, 319 U.S. 315, 333-34 (1943). Generally, state law tort claims are not considered novel or complex. *Parker v. Scrap*, 468 F.3d 733, 743 (11th Cir. 2006); *see also Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 56–57 (2d Cir. 2004) (holding the district court did not abuse its discretion in exercising jurisdiction over the remaining state law claims when it would favor judicial efficiency and fairness while ruling on statutes that were not novel or complex issues of state law). Furthermore, courts determine whether a specific fora satisfies the fairness requirement by evaluating both the convenience and the fairness of the outcome in either jurisdiction. For example, in *E.R. v. Sutter Davis Hosp.*, 2017 U.S.Dist. LEXIS 5587, at *4 (E.D. Cal. 2017), the court found that, given the equally convenient forums and the lack of reason to doubt either court would fairly adjudicate the issues, the court found fairness would be satisfied in either forum.

At this point in the litigation, all that remains are state law tort claims sounding in negligence and nuisance. Unlike the intricate issues that the court in *MediGrow* deferred to the state court on, these straightforward tort claims are neither novel, nor complex. FAWS will likely be able to prove that BELCO had a duty of due care to the citizens of New Union, which they breached by failing to exercise proper protective measures when manufacturing NAS-T at the Site, and but for this breach the aquifer would not have been contaminated. Accordingly, the bulk of the issue left to be resolved is the extent of damages FAWS may be entitled to. In recognizing this, the court ruled that it will allow FAWS to conduct any further expert discovery necessary to fully evaluate the relevant damages. By doing so, the court has provided a fair forum for FAWS to seek relief in. Alternatively, if the case is moved to state court, there is a

chance that the court would grant an injunction seeking to compel BELCO to remediate the aquifer—a task estimated to cost nearly $45 million—unfairly prejudicing BELCO, as this would be inconsistent with the EPA's prior determinations of the proper remedy of the site.

Accordingly, the goals of comity and fairness both weigh in favor of keeping the case in federal court. Since all that is left to be adjudicated are straightforward tort claims, there is no concern that the federal court will be wading into murky state law territory to decide an important issue of state law. Furthermore, since FAWS will have the opportunity to conduct necessary discovery and BELCO will not be subject to inconsistent judgments, the federal courts present the fairest forum to conclude this ongoing litigation.

Even if this court finds that these four factors are of equal weight, this is not enough to reverse the finding that the court has jurisdiction over the remaining state law claims, as the standard of review on appeal is for an abuse of discretion. *See Rowe v. Fort Lauderdale*, 279 F.3d 1271, 1288 (11th Cir. 2002) (finding no abuse of discretion by the district court, despite judicial economy and comity usually being served where issues of state law are solved by state courts). Since the court noted compelling reasons for why jurisdiction should be retained—namely that a tremendous amount of work has gone into these cases and there are efficiencies to be had in trying the case—this court should it was not an abuse of discretion to retain the case.

CONCLUSION

BELCO requests this court uphold the district court's grant of summary judgment in favor of BELCO with respect to reimbursement of FAW's expenses in testing, reverse the district court's grant of summary judgment in favor of the EPA's use of the ERA as an ARAR, and reverse the district court's grant of summary judgment in favor of FAWS. Finally, BELCO requests this court uphold its denial of FAWS' motion to dismiss the remaining state law claims.