Team No. 6
Non-Measuring Brief

CA. 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 Appellees

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 T. Douglas Dolman.

BRIEF FOR THE PLAINTIFF-APPELLANT,
FARTOWN ASSOCIATION FOR WATER SAFETY

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JURISDICTIONAL STATEMENT

This case is before this Court on appeal from a final order of the United States District Court for the District of New Union. The district court had jurisdiction over (1) FAWS' cost recovery action and (2) FAWS' and BELCO's challenges to EPA's remedy selection under 28 U.S.C. § 1331 (federal question jurisdiction). The district court nominally exercised supplemental jurisdiction over FAWS' state law claims under 28 U.S.C. § 1367; however, CERCLA § 113(h) bars federal courts from asserting jurisdiction over such claims in this way, and these claims should be dismissed without prejudice. *Id*. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, which authorizes the courts of appeals to have "jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE ISSUES

1. The Environmental Rights Amendment (ERA) creates a right to an "environment free from contaminants … caused by humans." Was EPA's determination that the ERA is an applicable or reasonably appropriate requirement (ARAR) for the Site arbitrary and capricious?
2. Was EPA's determination that the ERA does not require BELCO to install filtration devices at Fartown wells with detectable levels of NAS-T below 10 ppb arbitrary and capricious?
3. Did the District Court err in finding that investigative costs incurred by FAWS to uncover undetected NAS-T contamination in members' private drinking water wells after the completion of EPA's investigation are not reimbursable as response costs under CERCLA?
4. Can federal courts exercise supplemental jurisdiction over state law claims that challenge CERCLA response actions given the jurisdictional bar in § 113(h)? If so, did the district court abuse its discretion by exercising jurisdiction under 28 U.S.C. § 1367(c)?

STATEMENT OF THE CASE

Better Living Corporation (BELCO) contaminated the drinking water of approximately 5,000 New Union residents with NAS-T, a probable human carcinogen. R. at 5–6. From 1973 to 1998, BELCO manufactured a sealant called "LockSeal" at its factory in Centerburg by combining a non-toxic "activation agent" with NAS-T. *Id*. EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"), although it has a sour smell in concentrations as low as 5 ppb. *Id*. at 6. NAS-T is not covered by any additional state or federal regulations. *Id*.

In 2013, Centerburg residents complained to the Centerburg County Department of Health ("DOH") that their water smelled. The DOH tested the community water supply in January 2015 and found between 45 and 60 ppb NAS-T. *Id*. By September, DOH directed Centerburgers to cease drinking their tap water, and the New Union Department of Natural Resources ("DNR") began investigating the contamination. *Id*. DNR referred that investigation to EPA on January 30, 2016. *Id*. In March 2016, BELCO agreed to provide bottled drinking water to Centerburgers and investigate the cause of the NAS-T contamination. *Id*. The resulting remedial investigation and feasibility study concluded that NAS-T leached through the soils and into the Sandstone Aquifer because BELCO carelessly spilled NAS-T and stored wastewater and stormwater in an unlined lagoon in the 1980s and early 1990s. *Id.*

Between July of 2016 and January of 2017, BELCO installed monitoring wells to investigate the plume. *Id*. at 7. The monitoring wells farthest from the contamination source are half a mile north of Fartown, a community south of Centerburg. *Id.* No NAS-T was detected in these wells, leading EPA and BELCO to assume they reached the end of the NAS-T plume. *Id*. In June of 2017, EPA brought a cost recovery action against BELCO (the "BELCO Action"). Immediately afterward, the parties entered into a Consent Decree ("CD") in which BELCO

agreed to implement EPA's selected remedy. *Id*. The court approved the CD on August 28, 2017. *Id*. The CD required EPA to issue BELCO a Certificate of Completion ("COC") once the cleanup was complete, which EPA issued in September 2018. *Id*. at 7–8. The CD contains a provision allowing EPA to reopen the CD if either (1) new information reveals that the cleanup is no longer protective of human health or (2) more stringent regulatory standards are established. *Id*. at 7. The term 'regulatory standards' includes ARARs under CERCLA. *Id.*

Fartownians began noticing that the water from their private wells smelled off in 2016. *Id.* at 8. DOH sampled five Fartown wells for NAS-T in February 2019, but none was detected. *Id*. Fartownians then asked EPA to order BELCO to conduct testing in May 2019, but EPA declined. *Id*. In response, Fartownians formed Fartown Association for Water Safety ("FAWS") in December 2019 and paid Central Laboratories, Inc. ("Central Labs") $21,500 to test their wells. *Id*. NAS-T was detected in 105 out of 225 samples. *Id*. In May 2020, FAWS requested that EPA reopen the CD and order an investigation of their wells; however, EPA declined. *Id*.

On November 3, 2020, New Union citizens passed the Environmental Rights Amendment (ERA) to the state constitution. *Id.* at 8. The ERA guarantees each person in the state "a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. In January of 2021, EPA wrote to the DNR, inquiring whether the ERA constituted an ARAR under CERCLA. R. at 9. The DNR replied that "EPA should consider the ERA an ARAR where it provides guidance consistent with CERCLA and it is not inconsistent with other regulations." *Id*.

In March 2021, EPA reopened the CD because the presence of NAS-T in Fartown wells and the passage of the ERA triggered the reopener provision. *Id*. EPA also noted in the administrative record that it reopened the CD because Fartown is an environmental justice ("EJ")

community, odors indicate the presence of NAS-T, and the public could be endangered. *Id*. EPA requested that BELCO sample additional Fartown wells and supply bottled water to Fartownian's whose wells contained 5 or more ppb NAS-T. *Id*. FAWS submitted a written request to EPA that BELCO also be required to install CleanStripping—a water filtration system that removes NAS-T—on *all* Fartown wells with detectable levels of NAS-T. *Id*. EPA refused Fartown's request because no Fartown wells had NAS-T levels above the HAL. *Id*. BELCO refused to comply with EPA's requests, claiming that the ERA could not constitute an ARAR. *Id*. On June 24, 2021, EPA issued BELCO a unilateral administrative order ("UAO") directing the company to take the response actions above and requiring the installation of CleanStripping on any well with *more than 10 ppb* NAS-T. *Id*. When BELCO refused to comply with the order, EPA began monitoring 50 Fartown wells and supplied bottled water to Fartown residents whose wells contained over 5 ppb NAS-T. *Id*. at 10. Of the wells tested, 55% did not contain detectable levels of NAS-T, 25% contained 1 to 4 ppb NAS-T, and 20% contained 5 to 8 ppb NAS-T. *Id*.

On August 2, 2021, EPA filed a motion in the BELCO Action to recover costs and penalties for BELCO's violation of the UAO. *Id*. FAWS filed a motion to intervene in the BELCO action on August 30, 2021, challenging EPA's decision to not require CleanStripping on wells with levels of NAS-T below 10 ppb as arbitrary and capricious under the Administrative Procedure Act ("APA"). *Id*. The court approved the motion on September 24, 2021. *Id*.

On August 30, 2021, FAWS and 85 Fartownians filed a separate suit against BELCO (the "FAWS Action") which includes a CERCLA cost recovery claim to recover $21,500 spent to test Fartown's wells, and separate actions for negligence and nuisance based on BELCO's contamination of the Sandstone Aquifer. *Id*. FAWS complaint and briefings assert that it brought the state law claims in federal court because of the pendency of the BELCO Action, the court's

jurisdiction over related CERCLA claims, and to avoid allegations of "claim splitting." *Id*. FAWS asked the court to compel BELCO to pay its response costs, install CleanStripping on private wells testing positive for NAS-T, remediate the aquifer, and pay compensatory as well as punitive damages. *Id*. While discovery was completed for the CERCLA claims, further discovery is needed for state law claims, as expert discovery on damages has not even begun. *Id.* at 11, 18.

On December 30, 2021, all parties moved and cross-moved for summary judgment on the CERCLA claims. *Id.* at 11. In addition, FAWS moved to dismiss remaining state law claims without prejudice, with BELCO and EPA opposing the motion. *Id*. The district court granted summary judgment with respect to all federal claims, leaving only the state claims unresolved. *Id.* at 18. Specifically, the district court: (1) upheld EPA's UAO directing BELCO to take additional actions because the ERA is an ARAR; (2) vacated EPA's determination that BELCO is not required to install filtration systems on Fartown wells as arbitrary and capricious; (3) determined that the costs FAWS incurred by testing Fartown wells were not reimbursable under CERCLA; (4) denied FAWS' motion to dismiss remaining state law claims. *Id.* at 2.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute of material fact, and judgment can be rendered as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A district court's grant of summary judgment in CERCLA cases is reviewed de novo. *ASARCO, LLC v. Celanese Chem. Co*., 792 F.3d 1203, 1208 (9th Cir. 2015). Courts review challenges to EPA's selection of a CERCLA response action under the arbitrary and capricious standard and limit review to the administrative record. 42 U.S.C. § 9613(j). Reasonable agency interpretations of ambiguities in the statutes they administer are reviewed under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 (1984). However, agency interpretations of state law

are not entitled to the same deference. *Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454, 465 (9th Cir. 2022). District court determinations of subject matter jurisdiction are reviewed de novo. *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002). Where a district court is not precluded from exercising supplemental jurisdiction by statute, its decision to do so is reviewed for abuse of discretion. *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994).

SUMMARY OF THE ARGUMENT

The ERA is an ARAR because it meets all requirements of 40 C.F.R. § 300.400(g)(4). First, the ERA was properly promulgated because it is generally applicable to all sites in the state and is self-executing as indicated by the amendment's legislative history. Second, the amendment is more stringent than federal requirements because it applies to federally unregulated chemicals such as NAS-T. Third, the ERA is relevant and appropriate because its requirements are closely aligned with the issues at the Site.

EPA's determination that BELCO need not install filters on all Fartown wells with detectable levels of NAS-T was arbitrary, capricious, or contrary to law for two reasons. First, this determination is based on an impermissible interpretation of the ERA. EPA's interpretation contravenes the ERA's plain text guarantee of clean water "free from contaminants … caused by humans" and is unreasonable in light of legislative history and the prevailing interpretations of a related statute. Second, EPA failed to properly consider EJ in making this determination because EPA should consider EJ to the fullest extent practicable where it has statutory discretion to do so.

The district court erred in finding that FAWS' incurred investigation costs were not recoverable under CERCLA. The costs were necessary and did not have to comply with the NCP. First, the costs were necessary because they were not duplicative of EPA's investigation and were significantly tied to the cleanup. Second, FAWS' investigation did not need to comply

with the NCP because it was a new investigation. Even if FAWS' investigation did have to comply with the NCP, CERCLA only requires substantial and not strict compliance, which FAWS satisfied.

FAWS' state law claims should be dismissed without prejudice because, pursuant to CERCLA § 113(h), federal courts cannot exercise supplemental jurisdiction over state law claims that challenge response actions. Alternatively, the district court abused its discretion by exercising supplemental jurisdiction over FAWS' state law claims because they pose novel issues of state law and predominate over federal claims. Moreover, exercising supplemental jurisdiction is inconsistent with values of judicial economy, fairness, and comity.

ARGUMENT

I. The ERA is an ARAR because the amendment is legally enforceable, more stringent than the federal standards, and relevant and appropriate for the Site.

ARARs are state or federal environmental requirements that dictate the cleanup levels at a CERCLA site. 42 U.S.C. § 9621(d). For a state requirement to be an ARAR, it must be (1) properly promulgated; (2) more stringent than federal requirements; (3) applicable or relevant and appropriate; and (4) timely identified by the state.[1] 42 U.S.C. § 9621(d)(2)(A); 40 C.F.R. § 300.400(g)(4). The ERA creates "a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7. EPA's determination that the ERA is an ARAR should be reviewed under the arbitrary and capricious standard; however, because the ERA clearly satisfies all four requirements, EPA's decision should also be upheld under a less deferential standard. 42 U.S.C. § 9613(j); *Emhart Indus., Inc. v. New England Container Co., Inc.*, 274 F.Supp.3d 30, 67 (D.R.I. 2017).

[1] Timeliness is not at issue in this litigation. Because New Union does not have a State Memorandum of Agreement regarding ARARs, the procedural requirements for ARAR identification, including timeliness, are given by 40 C.F.R. § 300.515(h)(2). R. at 9.

A. EPA's determination that the ERA is an ARAR should be reviewed under the arbitrary and capricious standard because it is a fundamental aspect of EPA's selection of a response action.

BELCO's challenge to EPA's determination that the ERA constituted an ARAR is fundamentally a challenge to the agency's selection of a response action and should be reviewed under the arbitrary and capricious standard. *Emhart Indus., Inc.*, 274 F.Supp.3d at 67 (reviewing all aspects of defendant's challenge to EPA's selected remedy under the arbitrary and capricious standard). Under CERCLA § 113(j), objections to EPA's response actions are reviewed under the arbitrary and capricious standard. 42 U.S.C. § 9613(j) ("[T]he court shall uphold [EPA's] decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious ….").

Because EPA's selected remedy must comply with all ARARs, a challenge to EPA's determination that a specific state law constitutes an ARAR is indistinguishable from a challenge to EPA's selection of a response action. 42 U.S.C. § 9621(d)(2)(A); 40 C.F.R. § 300.430 (f)(1)(i)(A) ("Overall protection of human health and the environment and compliance with ARARs … are threshold requirements that each alternative must meet ...."). EPA's regulations list the threshold requirement of ARAR compliance under the heading "[s]election of remedy," indicating that EPA's determinations of which laws constitute ARARs and which remedies comply with those ARARs are a part of EPA's selection of a response action. *Id*. Consequently, BELCO's challenge to EPA's determination that the ERA is an ARAR must be reviewed under the arbitrary and capricious standard per § 113(j).

When reviewing agency decisions under the arbitrary and capricious standard, a court evaluates whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions." *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action is arbitrary and capricious if the

agency (1) "relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation … that runs counter to the evidence," or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

B. The ERA is properly promulgated because it applies to all sites throughout the state and is self-executing.

Under EPA's regulations, a state requirement is properly promulgated if it is generally applicable and legally enforceable. 40 C.F.R. § 300.400(g)(4). "Generally applicable" means that the requirement applies to hazardous waste sites throughout the state, not just CERCLA sites, while "legally enforceable" means that the requirement "must be issued in accordance with state procedural requirements and contain specific enforcement provisions or be otherwise enforceable under state law." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8746–47 (Mar. 8, 1990) [hereinafter "NCP Preamble"].

The amendment is generally applicable because it applies across the state of New Union. Unlike *Gloucester Environmental Management Services*, nothing in the amendment limits its application to specific sites. *Cf. N.J. Dep't of Env't Prot. v. Gloucester Env't Mgmt. Servs., Inc*., No. 84–0152, 2005 WL 1129763, at *11–12 (D.N.J. May 11, 2005) (declining to reopen a CERCLA consent decree based on a newly enacted state statute that was limited to, *inter alia*, former landfills that were located on the National Priority List of hazardous discharge sites).

The amendment also meets the requirements for legal enforceability. All state procedural requirements were met because "the ERA was adopted through the legislature originally, and signed by the Governor, as with statutory enactments that are deemed 'properly promulgated.'" R. at 14. The ERA is enforceable under state law because, as explained below, the amendment is self-executing. It does not require further legislative action to take effect.

The ERA should be considered self-executing for two reasons. First, the modern presumption is that state constitutional amendments are self-executing. *E.g.*, 16 Am. Jur. 2d *Constitutional Law* § 103 ("Modern state constitutions have been generally drafted upon the principle that all provisions of a constitution are self-executing."); *People v. Carroll*, 148 N.E.2d 875, 877 (N.Y. 1958). While state constitutions initially served as general outlines of government that required additional legislation to give effect to their provisions, modern state constitutional enactments resemble statutory codes that operate directly on citizens. *Id*.

Second, the legislative history of the ERA indicates that the amendment is self-executing. R. at 14. While the ERA does not explicitly state that it is self-executing, it also does not state that additional legislation is required for enforcement. N.U. CONST. art. I, § 7. Consequently, the amendment is at least ambiguous on the question of self-execution, as it is susceptible to more than one reasonable interpretation. Where a constitutional provision is ambiguous, it should be interpreted in a way that is consistent with the intent of the drafters. *Nat'l Lab. Rels. Bd. v. Noel Canning*, 573 U.S. 513, 534 (2014) (examining the Framer's intent when interpreting an ambiguous constitutional provision). The legislative history of the ERA indicates that the amendment was intended to be self-executing. R. at 14. Congressman Wright stated that the rights enumerated in the ERA "would be self-executing and so would not [] require further definition in regulation or statute." ASSEMBLY NO. A10377, at 6 (2019).

The general nature of the ERA does not render it legally unenforceable. *United States v. Akzo Coatings of America*, 949 F.2d 1409, 1441–42 (6th Cir. 1991). In *Akzo*, the Sixth Circuit examined a Michigan law prohibiting discharges of substances that "may become injurious to the public health … or to … industrial, agricultural, recreational or other uses …" and an accompanying regulation prohibiting degradation of groundwater. *Id*. These were legally

enforceable because they were sufficiently specific to warn dischargers of what conduct was prohibited. *Id*. This general prohibition of discharges that could compromise use or degrade water quality is no more specific than the ERA. If anything, the ERA's general requirement that the environment be "free from" human-caused pollutants provides greater notice of what is prohibited than the ARARs in *Akzo*, which required dischargers to judge whether their discharge would injure specific uses. N.U. CONST. art. I, § 7. No such judgement is required if the environment must be "free from" a certain type of contaminant. Moreover, EPA specifically noted that a general state goal can be an ARAR even when, as here, the state has not promulgated implementing regulations. NCP Preamble at 8746.

C. The ERA is more stringent than the federal standard because it covers chemicals that are otherwise unregulated.

The ERA is more stringent than the "federal standard" because the amendment covers instances where no federal ARAR exists for certain chemicals. A state requirement is more stringent than a federal standard where "no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a State ARAR is broader in scope than the Federal ARAR." Interim National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394, 51435 (Dec. 21, 1988) [hereinafter "Interim NCP Preamble"]. There is no "federal ARAR" for unregulated chemicals, such as NAS-T.[2] In contrast, the ERA applies to all toxic, human-caused chemicals, regulated or not, and states that the environment should be free of such contaminants. N.U. CONST. art. I, § 7. The legislative history of the amendment specifies that the ERA was designed to serve as a backstop to protect citizens from unregulated toxic chemicals. S. REP. NO. A02137, at 9 (2020).

[2] Health Advisory Levels are not regulations. 42 U.S.C. § 300g-1(b)(1)(F).

The NCP's requirement that response actions be "protective of human health" does not change this result. At most, this general constraint suggests that a response action must reduce the concentration of toxic pollutants below a threshold that is known to endanger human health. *See* NCP Preamble at 8709 (noting that when evaluating whether a remedy is protective of human health, "EPA relies heavily on information concerning contaminant toxicity and the potential for human exposure to support its decisions.") As discussed in more detail below, the ERA goes well beyond this, creating a fundamental right to a healthful environment *free from* toxic, human-caused contaminants. N.U. CONST. art. I, § 7. Thus, under the ERA, a CERCLA response action must ensure that the environment does not contain detectable levels of toxic, human-caused pollutants, even if such levels are not known to endanger human health. *See King Pharms., Inc. v. Purdue Pharma, L.P.*, 718 F.Supp.2d 703, 715 (W.D. Va. 2010).

D. The ERA is relevant and appropriate because the amendment was specifically intended to cover otherwise unregulated chemicals like those present at the Site.

State requirements are "relevant and appropriate" if they "address problems or situations sufficiently similar to those encountered at the CERCLA site …" 40 C.F.R. § 300.5. To evaluate whether a requirement is relevant and appropriate, EPA compares the requirement to the CERCLA action at issue, focusing on eight potentially applicable factors. 40 C.F.R. § 300.400(g)(2). Close alignment between the requirement and the issues posed by a site suggests the requirement is "relevant and appropriate." *Id*. Here, all applicable comparisons indicate that the ERA is relevant and appropriate.

First, the purpose of the ERA is closely aligned with the purpose of this CERCLA cleanup. 40 C.F.R. § 300.400(g)(2)(i). The ERA was specifically designed to address toxic contaminants that are not yet regulated and the sole reason for this CERCLA action is the release of NAS-T, a toxic, unregulated chemical. S. REP. NO. A02137, at 9 (2020); R. at 6. Second, the

ERA is specifically designed to regulate the medium contaminated at the Site. 40 C.F.R. § 300.400(g)(2)(ii). The ERA guarantees citizens a right to clean water, and the NAS-T at the Site has contaminated groundwater. N.U. CONST. art. I, § 7; R. at 6. Third, the ERA is designed to regulate the type of substances at the Site. 40 C.F.R. § 300.400(g)(2)(iii). The ERA covers toxic, human-caused pollutants, such as the NAS-T contaminating the Site. N.U. CONST. art. I, § 7; R. at 5–6. Fourth, the actions regulated by the ERA are related to the remediation contemplated at the Site. 40 C.F.R. § 300.400(g)(2)(iv). The ERA creates a right to "clean water" and a healthful environment that is "free from" toxic, human-caused contaminants like NAS-T. N.U. CONST. art. I, § 7. This imposes a specific cleanup level that remedial actions taken at the Site must achieve. Finally, the ERA's consideration of potential uses is closely tied to the use of the affected resource at the Site. 40 C.F.R. § 300.400(g)(2)(viii). A "fundamental right to clean water" implicitly guarantees that citizens can use their tap water for typical, domestic tasks like cooking and cleaning. N.U. CONST. art. I, § 7. Here, 20% of Fartown wells contain NAS-T concentrations that impart a sour smell to their water. R. at 6, 10. Such odors impair typical household uses. In sum, given the close alignment between the ERA and the contamination at the Site, the ERA is "relevant and appropriate." *Akzo*, 949 F.2d at 1446. In *Akzo*, the anti-degradation law at issue was relevant and appropriate where the environmental media (groundwater), type of substance (injurious), and objective of the potential ARAR (protecting aquifers from degradation) all pertained to the site. *Id*.

II. EPA's determination that BELCO need not install filtration systems on Fartown wells was arbitrary and capricious because EPA's interpretation of the ERA contravenes the plain language and legislative history of the amendment, interpretations of a related statute, and EPA's own policies on EJ.

EPA's determination that BELCO is not required to install filtration systems on Fartown wells with detectable levels of NAS-T is reviewed under the arbitrary and capricious standard

described above. *Sackett v. EPA*, 566 U.S. 120, 125 (2012) (challenges to administrative orders are reviewed under the APA); 42 U.S.C. § 9613(j) (challenges to EPA's selection of a CERCLA response action are reviewed under the arbitrary and capricious standard). Here, EPA's decision is arbitrary and capricious because it is based on an impermissible interpretation of the ERA and because EPA failed to consider EJ when determining the appropriate response action.

A. EPA's interpretation of the ERA is contrary to the text and legislative history of the amendment, as well as interpretations of a related statute.

The ERA states that every resident of the 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." N.U. CONST. art. I, § 7. Under EPA's interpretation, this fundamental right is not violated when a citizen's well water is contaminated with detectable levels of NAS-T, so long as the contamination is below EPA's 10 ppb HAL. R. at 9. This interpretation should be reviewed de novo because the ERA is a state constitutional amendment, not a federal law administered by the agency. However, even if EPA's interpretation were entitled to *Chevron* deference, it would still be inappropriate because it contravenes the plain text of the amendment, interpretations of a related statute, and the intent of the New Union legislature.

1. EPA's interpretations of state constitutional amendments are reviewed de novo.

Chevron deference applies when agencies interpret federal laws that they are charged to administer. *Chevron*, 467 U.S. at 842. That same deference should not be afforded to agency interpretations of state laws, or in this case, a state constitutional amendment. *Cal. Pub. Utils. Comm'n*, 29 F.4th at 465 [hereinafter "*CPUC*"]. In *CPUC*, the Ninth Circuit applied de novo review to FERC's determination that a California law allowed electric utilities to voluntarily withdraw from a program because "[w]hile FERC has expertise in electricity regulation, it does not have specific expertise in California public policy or interpreting California law, nor has

Congress assigned it the task of interpreting state statutes." *Id.* Similarly, EPA may have experience with environmental laws generally, but it has no experience with New Union's policies or constitutional interpretation of any kind.

The fact that EPA's remedy selection is reviewed under the arbitrary and capricious standard does not change this result. This standard governs the review of EPA's overall remedy decision, not its interpretation of state law in reaching that decision. *Id*. at 464. In *CPUC*, the Ninth Circuit similarly declined to extend *Chevron* deference to FERC's interpretations of state law that were used to reach a decision that was ultimately reviewed under the arbitrary and capricious standard. *Id*.

While Congress has implicitly given EPA some authority to interpret state laws as ARARs when developing CERCLA remediation plans, giving *Chevron* deference to agency interpretations of state constitutions would violate fundamental principles of federalism and separation of powers. The Supreme Court has declined to defer to agency interpretations that raise such concerns. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) [hereinafter "*SWANCC*"]. In *SWANCC*, the federalism and separation of powers concerns arose from the content of the agency's interpretation; however, the same logic applies to situations where the context of the interpretation raises similar concerns. *Id.* For example, in the context of preemption determinations, where concerns about federalism are paramount, agency interpretations of a state law's effect on the federal scheme are only entitled to *Skidmore* deference. *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). Similarly, here, affording *Chevron* deference in the context of a federal agency's interpretation of state law would raise impermissible federalism concerns.

The court should be even more reluctant to afford *Chevron* deference where, as here, EPA interpreted a state constitution. Constitutional interpretation is typically a role reserved to the judiciary. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). To afford such substantial deference to a federal agency's interpretation of a state constitution would pile separation of powers concerns on top of federalism issues. *See id.*; *West v. Am. Tel. & Tel. Co*., 311 U.S. 223, 237 (1940) ("State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from *all the available data* what the state law is.") (emphasis added).

2. EPA's interpretation of the ERA contravenes the amendment's plain text.

The ERA unambiguously guarantees residents the right to "a healthful environment *free from* contaminants and pollutants caused by humans." N.U. CONST. art. I, § 7 (emphasis added). Because the ERA does not define the terms used in the amendment, they should be construed according to their ordinary meaning. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). "Free from" ordinarily means "does not contain." *King Pharms., Inc.*, 718 F.Supp.2d at 715. Thus, on its face, this language seems to require that residents' water does not contain detectible levels of *any* human-caused pollutant. However, the use of the term "healthful environment" provides an additional limiting principle. This term indicates that New Union's legislature was focused on contaminants that could harm human health or the environment. Given this limitation, the plain text requires that residents' water not contain detectible levels of any toxic, human-caused pollutant.

In contrast, under EPA's interpretation, the ERA's requirements are satisfied when toxic, human-caused contaminants (such as NAS-T) are present in residents' well water, so long as their concentration does not exceed the federal HAL for that contaminant. R. at 9. This is contrary to the ERA's explicit statement that residents have a right to clean water that is "free

from" such contaminants. The plain text is much more consistent with FAWS' request that BELCO install filtration devices on all Fartown wells with detectable levels of NAS-T.

This plain reading of the amendment's text in the CERCLA cleanup context would not require any revision of Clean Air Act ("CAA") and Clean Water Act ("CWA") permits. The NAS-T at issue here was not discharged in compliance with any valid federal permit. In fact, if it had been, the discharger could not be liable under CERCLA, which includes a specific liability exemption for federally permitted releases. 42 U.S.C. § 9607(j) ("Recovery by any person … for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."); *Idaho v. Hanna Mining Co.*, 699 F.Supp. 827, 831 (D. Idaho 1987), aff'd, 882 F.2d 392 (9th Cir. 1989) ("Under § 9607(j), damages caused by a 'federally permitted release' must be recovered under other statutes, not CERCLA.") The term "federally permitted releases" includes, *inter alia*, discharges under CWA and CAA permits. 42 U.S.C. § 9601(10).

Taking the amendment's highly protective language at face value in the CERCLA context would not preclude a different interpretation in another context. Constitutional amendments are not statutes—courts can interpret the level of protection that an amendment provides differently in various contexts where it makes sense to do so. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (distinguishing the levels of First Amendment protection afforded to speech that is of public versus private concern). Moreover, given the amendment's legislative history, the ERA's requirement that air and water be "free from contamination" could be further narrowed to only apply to toxic, human-caused pollutants that are currently unregulated. S. REP. NO. A02137, at 9 (2020). The Senate Report on the ERA notes that it was designed to serve as a "safety net" that protects residents from toxic chemicals that are currently

unregulated, such as NAS-T. *Id*. This additional limitation could further alleviate concerns about the practical implications of a literal interpretation of the amendment's language.

The cost of the filtration devices is irrelevant to the determination of whether such devices are required under the ERA. While EPA includes cost considerations in its selection of a remedy, this factor is only considered when choosing between remedies that satisfy all ARARs. 40 C.F.R. § 300.430(f)(1)(i)(A) ("Overall protection of human health and the environment and compliance with ARARs … are threshold requirements that each alternative must meet in order to be eligible for selection."). The question of cost is simply not relevant to the interpretation of an ARAR. *Ohio v. EPA*, 997 F.2d 1520, 1531 (D.C. Cir. 1993) (noting that the NCP prohibits cost considerations when evaluating whether threshold requirements are met).

3. EPA's interpretation of the ERA is unreasonable because it is inconsistent with interpretations of a related statute and the amendment's legislative history.

Even if the ERA is ambiguous, EPA's interpretation is unreasonable for two reasons. First, EPA's interpretation of "clean water" is contrary to nearly every state's interpretation of the CWA. In interpreting legislative text, courts look at the disputed provision in the context of related statutes. *N.J. Transit Policemen's Benevolent Ass'n v. N.J. Transit Corp.*, 806 F.2d 451, 452–53 (3d Cir. 1986) ("…a court must … read the disputed provision in the context of the entire statute and the provisions of related statutes."). When interpreting the term "clean water," the Clean Water Act seems an obvious choice for a related statute to examine.

Under the CWA, states promulgate water quality standards to "establish the desired condition of a waterway." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Most of these standards are numeric, but some are narrative and proscribe the degradation of aesthetic conditions in surface or groundwater. The record does not include New Union's water quality standards; however, the water quality standards of every other state include a narrative

prohibition of discharges that cause foul odors or tastes that would impair use. *E.g.*, S.D. ADMIN. 74:51:01:08 (2021) ("Materials which will impart undesirable tastes or undesirable odors to the receiving water may not be discharged … in concentrations that impair a beneficial use."); TENN. COMP. R. & REGS. 0400-40-03-.03(4)(g) (2019) ("The waters shall not contain substances that will result in objectionable taste or odor."). This implies that under every other state's interpretation of the CWA, water with a foul taste or odor cannot be considered "clean." Here, EPA determined that any well with less than 10 ppb NAS-T satisfies the ERA's definition of "clean water," even though water with over 5 ppb has a "sour or stale smell." R. at 6. It is unreasonable to conclude that in guaranteeing its citizens a "fundamental right to clean water," the New Union legislature intended the definition of "clean water" to be less protective than every other state's interpretation of the term under the CWA.

Second, EPA's interpretation of the ERA conflicts with the amendment's legislative history. This history bolsters the argument above that "clean" water does not encompass water with a foul odor. ASSEMBLY NO. A10377, at 6 (2019). The question of whether odors could be encompassed in the definition of clean was specifically addressed during the Assembly testimony where Congressman Wright noted that offensive odors bear on the determination of whether air (and presumably also water) can be considered "clean." *Id*. Twenty percent of Fartown residents' wells had between 5 and 8 ppb NAS-T at the time of testing—a concentration that would indisputably produce a sour smell when water is used for cooking, cleaning, or showering. R. at 6, 10. EPA's interpretation that such water satisfies a state's constitutional guarantee of a fundamental right to "clean water" for all citizens is not reasonable.

B. In making its decision, EPA failed to consider EJ issues, contravening two executive orders and EPA's own policies on implementing CERCLA within EJ communities.

To the extent that EPA had discretion in interpreting the ERA, it should have used that discretion to consider EJ issues, and its failure to do so was arbitrary and capricious. Two administrations have issued executive orders instructing agencies to make EJ issues a part of their mission. Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) [hereinafter "EO12898"] ("To the greatest extent practicable … each Federal agency shall make achieving environmental justice part of its mission."); Exec. Order 14,008, 86 Fed. Reg. 7629 (Feb. 1, 2021) [hereinafter "EO14008"] ("Agencies shall make achieving environmental justice part of their missions …"). In considering the impact of EO12898 on environmental statutes, the Environmental Appeals Board ("EAB") concluded that while the order does not change substantive statutory requirements, where a statute leaves EPA discretion, the agency "should exercise that discretion to implement the Executive Order to the greatest extent practicable." *Chemical Waste Management of Indiana, Inc.*, 6 EAD 66 (1995); *Envotech, L.p. Milan, Michigan*, 6 EAD 260 (1996).

While neither executive order creates a private right of action, an agency's failure to properly consider EJ can be challenged as arbitrary and capricious in an APA challenge under an independent statute, such as the National Environmental Policy Act ("NEPA"). *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021). This approach should extend to challenges under CERCLA as well. The two executive orders and EAB decisions demonstrate that EPA is to consider EJ where it has the discretion to do so. EPA itself has acknowledged the specific need to consider EJ in the CERCLA context. U.S. ENV'T. PROT. AGENCY, STRENGTHENING ENVIRONMENTAL JUSTICE THROUGH CLEANUP ENFORCEMENT ACTIONS MEMORANDUM, 1 (2021) [hereinafter "Starfield Memo"]. However, because CERCLA

response actions are not subject to NEPA review, if an agency's EJ analysis could only be reviewed in the NEPA context, failures to consider EJ in CERCLA response actions would essentially be immune to judicial review. Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents, 63 Fed. Reg. 58,045, 58046 (Oct. 29, 1998). If that were the case, in the hazardous waste context, EPA's commitment to EJ would amount to no more than a hollow promise.

Here, EPA failed to properly consider EJ in three ways. First, although the record states that EPA considered EJ when it decided to reopen the CD, there is no indication that the agency considered EJ when interpreting the ERA and determining the appropriate response actions. R. at 9. As noted by the EAB decision, to the extent that EPA had discretion in making its determination, that discretion should have been used to consider EJ concerns. Here it was not.

Second, the Starfield Memo instructs the agency to take early cleanup actions to proactively address potential releases. Starfield Memo at 2. EPA's approach to the contamination in Fartown has been anything but proactive. In addition to refusing to test Fartown residents' wells when they first complained of a sour smell in their water, EPA is now taking a "wait and see" approach to known contamination of these wells. *Id.* at 8. Rather than proactively requiring filtration at all contaminated wells, EPA determined that Fartown residents will have to wait until the contamination in their well reaches EPA's HAL before filtration is required, even though the water has a "stale or sour smell" at half that concentration. *Id*.

Finally, the Starfield Memo instructs the agency to "build trust through community engagement." Starfield Memo at 3–4. As noted above, EPA initially ignored Fartown's requests for well testing. R. at 8. After Fartown's tests revealed contamination in the community's wells and EPA reopened the CD, EPA expressly declined FAWS' request that BELCO be required to

either remove NAS-T from the water supply or provide proper filtration to all Fartown wells with detectable levels of NAS-T. R. at 9. EPA justified its decision by stating that no wells in Fartown have NAS-T concentrations above the HAL. *Id*. This fails to account for the fact that 20% of Fartown residents must now bathe, cook, and clean with water that smells stale and sour. This sort of perfunctory response to community concerns is hardly a way to build trust.

III. BELCO is liable for FAWS' testing costs because the expenses were necessary to uncover unknown contamination in Fartown wells and the costs were a new investigation which was not required to comply with the NCP.

Private parties are authorized by CERCLA to hold potentially responsible parties ("PRPs") liable for the private parties' response costs. 42 U.S.C. § 9607(a)(4)(b). Response costs are those "costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment." *Young v. U.S.*, 394 F.3d 858, 863 (10th Cir. 2005). To recover these costs, plaintiffs much show that: "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release." *Rolan v. Atlantic Richfield Co.*, No. 1:16-CV-357-HAB-SLC, 2019 WL 542905, at *5 (N.D. Ind. Oct. 22, 2019).[3] A non-governmental plaintiff must also show that "any costs incurred in responding to the release were 'necessary' and 'consistent with the [NCP].'" *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012) (citations omitted).

[3] The district court decision does not indicate that this basic four-prong test for cost recovery under CERCLA is at issue. *See* R. at 11–13. However, all four prongs are met. First, BELCO's facility is a facility as defined by CERCLA because it is where the hazardous waste was stored. *See* 42 U.S.C. § 9601(9)(B); R. at 6. Second, BELCO, as the landowner, is a responsible party. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352 (2020). Third, there has been a release of hazardous substances, namely, NAS-T. *See* R. at 6, 8. Fourth, FAWS incurred costs of $21,500 in the form of testing the wells in response to NAS-T. *See id* at 8.

A. FAWS' response costs were necessary because the costs are not duplicative of an EPA action, are directly tied to cleanup actions, and are not merely for litigation.

Response actions are necessary when they are (1) not duplicative of an agency's response to the hazardous waste, and (2) are "closely tied to the *actual cleanup* of hazardous releases" and there is some evidence that the response actions were taken to "assist with and help plan the eventual remediation and cleanup efforts." *U.S. v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1272 (E.D. Cal. 1997); *Young*, 394 F.3d at 863 (emphasis in original). An action is not duplicative when a plaintiff attempts to identify all the contaminants on its property and "[w]ithout that effort, the full extent of the contamination … might not have been discovered and remedied." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937 (8th Cir. 1995) (internal citations omitted). For incurred costs to be closely tied to the cleanup, there must be some nexus between the response cost and an effort to respond to the environmental contamination. *Iron Mountain Mines, Inc.*, 987 F.Supp. at 1272.

1. FAWS' investigation was not duplicative of EPA's because it uncovered unknown contamination in Fartown wells in a separate investigation.

An action may be "duplicative" if it occurs at the same time as EPA's actions, the action does not seek to uncover different information than that of EPA, or the action occurs after EPA has already informed the private parties of its own investigation. *See, e.g.*, *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Cal. 1993). FAWS' investigation falls squarely outside any concerns regarding duplicative actions.

First, FAWS investigation did not occur at the same time as EPA's because EPA issued BELCO's COC in September of 2018, and FAWS' investigation of its private drinking wells did not start until February of 2019. R. at 8. Second, FAWS' investigation uncovered different information because it revealed contamination of Fartown wells that was unknown and undetected in the earlier EPA investigation. *Id.* Third, FAWS did not initiate its investigation

after notification of EPA's investigation because EPA already started and finished their investigation, completed the recommended actions, and issued the COC by the time FAWS started testing its wells. *Id.* Unlike the plaintiffs in *Louisiana-Pacific Corp.*, where EPA notified plaintiffs of its intent to conduct its own investigation and plaintiffs still decided to conduct the same investigation, here EPA refused to investigate the wells when FAWS requested it do so. 811 F.Supp. at 1425; *see* R. at 8.

2. FAWS' actions are directly tied to cleanup because the contamination discovered through the well survey prompted EPA to reopen the CD.

The costs FAWS incurred by testing seventy-five Fartown wells are directly tied to the cleanup of the contamination. For costs to be recoverable, they must be tied to the actual cleanup of hazardous materials. *Young*, 394 F.3d at 864. When plaintiffs have no intention of cleaning up the contamination on their property, the costs are not necessary, because "no nexus exist[s] between the costs [the p]laintiffs expended and an actual effort to clean up the environmental contamination." *Id.* Without the intent to conduct further cleanup, costs incurred during site investigations and risk assessments are not enough. *Id.*

Here, FAWS' investigation detected contamination that EPA was unaware of. This discovered contamination was a factor in EPA's decision to reopen the CD. R. at 9–10. The Supreme Court has found that where a plaintiff's investigation discovers unknown contamination that prompts EPA to take enforcement action, the investigation significantly benefits the entire cleanup. *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994). The connection between FAWS' discovery of the contamination in Fartown and EPA's decision to reopen the CD is the required nexus between the incurred costs from the investigation and the actual cleanup effort. This discovery of contamination, combined with the passage of the ERA and the possible

exposure of Fartown residents to carcinogens,[4] prompted EPA to order BELCO to sample private wells in Fartown and supply bottled water to residents whose wells contain more than 5 ppb NAS-T. R. at 8, 9.

Response costs can only be recovered when the costs "are closely tied to the actual clean up." *Young*, 394 F.3d at 863. CERCLA includes "removal" actions in its definition of "response." 42 U.S.C. § 9601(25). "Removal" includes "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." *Forest Park*, 881 F.Supp. at 977 (internal citations omitted). Therefore, even though EPA declined to require the action FAWS requested, FAWS' investigation still had a significant impact on the response actions that EPA did decide to take. *See* R. at 9; *see also Forest Park*, 881 F.Supp. at 977, *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2009 WL 1605136, *15 (N.D. Ind. June 2, 2009), *Cont'l Title Co. v. Peoples Gas Light & Coke Co.*, No. 96 C 3257, 1999 WL 753933, *3 (N.D. Ill. 1999) (finding reimbursement proper for incurred investigative costs assessing the release of hazardous waste).

Plaintiffs who incur costs solely in preparation for litigation usually cannot establish a significant nexus. *Rolan v. Atlantic Richfield Co.*, 427 F.Supp.3d 1013, 1024 (N.D. Ind. 2019). Costs associated with activities like legal counsel review of historical documents or analysis of contamination data are not recoverable because those activities do not significantly benefit the overall cleanup effort. *Id.*, *see also Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005).

[4] It is disputed by the circuit courts whether there must be "an actual and real threat to human health or the environment" before a plaintiff can incur costs. *Compare Carson Harbor Village, Ltd. v. Unocal Corp.,* 270 F.3d 863, 867 (9th Cir. 2001) *with*, *Forest Park*, 881 F.Supp.2d at 977. If this Court decides that is a requirement, it is satisfied here. NAS-T is a probable human carcinogen which creates an actual and real threat to human health. R. at 6; *see also Forest Park*, 881 F.Supp.2d at 977 (stating that "a migrating plume of perc, … would qualify as just such a threat").

Similarly, advisement on whether to continue residing in a contaminated area or to move is a litigation expense that does not significantly benefit overall cleanup efforts and simply reallocates costs. *See Rolan*, 427 F.Supp.3d at 1024. Here, FAWS' investigation was not in preparation for litigation, but to uncover suspected contamination to encourage EPA to take further response actions. R. at 8.

B. FAWS' investigation did not have to comply with the NCP because it was a separate and new investigation.

The NCP is a set of EPA regulations that "establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants[.]" 42 U.S.C. § 9605(a); *see also* 40 C.F.R. §§ 300.1, 300.3. The NCP provides that "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i). However, initial investigations do not need to comply with the requirements of the NCP. *Cont'l Title Co.*, 1999 WL 753933, at *3; *see also City of New York v. Chemical Waste Disposal Corp.*, 836 F.Supp. 968, 980 (E.D.N.Y.1993) ("The costs of initial investigation and monitoring of a release are recoverable, however, without such a showing [of consistency with the NCP].").

FAWS Central Labs investigation is a separate and new investigation because "a subsequent remediation that seeks to address a different set of problems — *e.g.* problems that were non-existent, unknown, elsewhere, or undisclosed to the regulators and unrevealed in an earlier remediation plan — should not be considered part of the same remediation." *MPM Silicones, LLC v. Union Carbide Corp.*, 966 F.3d 200, 229–30 (2d Cir. 2020), *as amended* (Aug. 13, 2020). Here, the contamination of Fartown wells was unknown to EPA prior to FAWS' testing. Moreover, the ongoing absence of NAS-T in the initial monitoring wells closest to

Fartown indicates that the NAS-T reached Fartown by a path that was not revealed by the monitoring wells. *See* R. at 7–8.

Even if this Court finds that FAWS' investigation is not a new, separate investigation from EPA's, FAWS substantially complied with the NCP. Substantial compliance is different from strict adherence, and substantial compliance is the standard articulated by CERCLA. *Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835 (8th Cir. 2000) (citations omitted). Therefore, applying the substantial compliance standard, "an immaterial or insubstantial deviation from the NCP will no[t] … cause the cleanup to be deemed inconsistent." *Id*. (quotation marks and citations omitted). The only potentially unmet requirement is the absence of public comment on the investigation. *See* 40 C.F.R. § 300.700(c)(6). Although the formal procedure for public comment was not followed, FAWS was formed by Fartownians who were frustrated that governmental agencies were not taking the appropriate actions to investigate contamination in Fartown wells. R. at 8. It was the public who decided to conduct this testing to protect themselves, and the public who incurred the price for the government's failure to act.

IV. CERCLA § 113(h) bars federal courts from exercising supplemental jurisdiction over FAWS' state law claims; alternatively, the district court abused its discretion by exercising supplemental jurisdiction under 28 U.S.C. § 1367(c).

This Court should dismiss FAWS' state law claims without prejudice for two reasons. First, CERCLA § 113(h) bars federal courts from exercising supplemental jurisdiction over state law claims challenging response actions; however, such actions can be brought in state court. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 n.6 (2020) [hereinafter "*Christian*"]. Alternatively, the district court abused its discretion by exercising supplemental jurisdiction over these claims because the factors in 28 U.S.C. § 1367(c) weigh heavily in favor of dismissal. In

either case, New Union state court is the more appropriate forum for adjudication of FAWS' state law claims.

A. The district court cannot exercise supplemental jurisdiction over FAWS' state law claims under CERCLA § 113(h).

CERCLA § 113(h) bars federal courts from exercising supplemental jurisdiction over state law claims that challenge response actions; however, such actions can be brought in state court. *Id*. Pursuant to § 113(h), unless one of five enumerated exceptions applies, "[n]o Federal court shall have jurisdiction … other than under … diversity of citizenship jurisdiction or under State law which is applicable or relevant and appropriate … to review any challenges to … removal or remedial action." 42 U.S.C. § 9613(h).[5] Under the Supreme Court's interpretation, the jurisdictional bar of § 113(h) applies to both federal and state law claims that challenge remedial or removal actions, unless: (a) the federal court is sitting in diversity; (b) the action invokes an ARAR; or (c) one of the five enumerated exceptions applies. *Christian*, 140 S. Ct. at 1351 n.6. The Court stated that the general jurisdictional bar of § 113(h) "applies to all 'challenges to removal or remedial action' that make their way into '[f]ederal court' … includ[ing] state law challenges arising by way of diversity jurisdiction or supplemental jurisdiction[.]" *Id.* The Court clarified that the exceptions for diversity jurisdiction and state actions brought under ARARs are "necessary to delineate which of these challenges may proceed in federal court and which may not." *Id*.

[5] FAWS' cost recovery claim against BELCO is allowed under the 113(h)(1) exception ("[a]n action under section 9607 of this title to recover response costs or damages or for contribution"). The challenges that BELCO and FAWS make to EPA's remedy selection under the reopened CD are allowed under the § 113(h)(2) exception ("[a]n action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order"), as both challenges are brought within EPA's action to seek a penalty under the UAO issued to BELCO.

As a threshold matter, the general bar of § 113(h) applies because FAWS' state law claims "pose a challenge to a removal or remedial action." Actions seeking relief that would increase the level of cleanup required at a site constitute a "challenge" to removal or remedial actions because the relief sought is "directly related to the goals of the cleanup." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995). Here, in connection with its tort claims, FAWS is seeking an injunction compelling BELCO to remediate the aquifer—a remedy that exceeds the level of cleanup that EPA determined is required. R. at 18.

Further, none of the exceptions within § 113(h) apply. First, the enumerated exceptions only encompass actions brought under CERCLA, not state law claims. *See* 42 U.S.C. § 9613(h)(1)–(5). Second, FAWS' state law claims for private nuisance and negligence are not brought under an ARAR, they are brought under New Union common law. R. at 10. While the ERA is an ARAR, and it will likely bear on New Union state courts' application of common law doctrines in this case, the claims themselves are not brought under the amendment. Third, the federal court cannot exercise diversity jurisdiction over FAWS' state law claims under 28 U.S.C. § 1332 because both FAWS and BELCO are domiciled in New Union. *Id*.[6]

The court should not imply an additional exception to § 113(h) for supplemental jurisdiction exercised under 28 U.S.C. § 1367. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980). While § 1367 was enacted several years after § 113(h), this does not change the result

[6] A corporation is a citizen of any state where it is incorporated and where it has its principal place of business. 28 U.S.C. § 1332(c)(1). BELCO is a Delaware corporation with its principal place of business in Centerburg, New Union. R. at 10. For diversity jurisdiction purposes, a suit by an unincorporated organization is treated as a suit by all its members. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 195-96 (1990). All FAWS members are citizens of New Union. R. at 10.

because courts exercised supplemental jurisdiction for decades before the practice was codified by statute. Courts assume that "Congress is aware of existing law when it passes legislation." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

B. Alternatively, the district court abused its discretion by exercising supplemental jurisdiction over FAWS' state law claims because these claims raise novel issues of state law and all federal questions have been resolved.

Given the factors in 28 U.S.C. § 1367(c), the district court abused its discretion by exercising supplemental jurisdiction over FAWS' state law claims. Under 28 U.S.C. § 1367(a), where a federal court has original jurisdiction over a civil action, it can exercise supplemental jurisdiction over purely state law claims that arise from the same nucleus of operative facts unless Congress has expressly provided otherwise.[7] A district court can decline to exercise supplemental jurisdiction if: (1) the state law claim presents a novel or complex issue of state law; (2) the state law claim substantially predominates over the original jurisdiction claim(s); (3) the district court dismissed all claims over which it has original jurisdiction; or (4) there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c). A district court abuses its discretion where, as here, it retains jurisdiction when all four factors weigh in favor of dismissal. *Kolari v. New York-Presbyterian Hosp*., 455 F.3d 118, 124 (2d Cir. 2006).

1. FAWS' claims raise novel and complex issue of state law because the claims implicate a new state constitutional amendment.

This case poses the novel and complex issue of how the ERA applies to negligence and nuisance actions. In states with environmental rights amendments resembling the ERA, such amendments can be implicated in the analyses of state law tort claims involving environmental

[7] FAWS does not contest that its state law claims arise out of the same nucleus of operative facts as the CERCLA claims.

issues. *See City of Elgin v. Cnty. of Cook*, 660 N.E.2d 875, 891 (Ill. 1995); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 165 P.3d 1079, 1094 (Mont. 2007); *Shammel v. Canyon Res. Corp.*, 167 P.3d 886, 888 (Mont. 2007). Here, the ERA is relevant to BELCO's liability for both of FAWS' tort claims. First, the ERA bears on whether BELCO's contamination of the aquifer constitutes a nuisance per se. R. at 18. An action constitutes a nuisance per se if it "is a nuisance at all times and under any circumstances, regardless of location or surroundings, and regardless of the care with which it is conducted, and hence is not permissible or excusable under any circumstance." 58 Am. Jur. 2d Nuisances § 12. Whether the ERA's guarantee of a "healthful environment free from contaminants caused by humans" implicitly designates BELCO's contamination of Fartown's groundwater as a nuisance per se is a question of New Union state law. *See Phillips Petroleum Co. v. Vandergriff*, 122 P.2d 1020, 1021–22 (Okla. 1942) (discussing the application of nuisance doctrines to violations of the state constitution).

Second, the ERA is relevant to negligence liability because the amendment could be used to establish breach of duty. Under the negligence per se doctrine, a person is negligent if "the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." Restatement 3d of Torts §14. Whether this doctrine is applicable to state constitutional amendments as well as statutes, and whether BELCO's actions constituted a violation of the ERA are questions of New Union state law. *See Mathews v. Dow Chem. Co*., 947 F.Supp. 1517, 1521–22 (D. Colo. 1996) (declining to exercise supplemental jurisdiction because plaintiff's negligence per se claim would raise complicated issues of state statutory law).

The record does not indicate that any New Union court has yet addressed these state law questions. Given that ERA was passed in November 2020, it is highly unlikely that such

questions could be considered a settled issue of state law only two years later. R. at 5. Because "[s]tate courts, not federal courts, should be the final arbiters of state law," the district court should dismiss FAWS' claims and allow these novel state law issues to be addressed by New Union courts. *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997).

2. State law claims substantially predominate over federal claims in terms of proof and comprehensiveness of the remedy sought.

A court can decline supplemental jurisdiction where the state law claims substantially predominate over federal claims. 28 U.S.C. § 1367(c)(2). State claims can predominate over federal claims "in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought[.]" *United Mine Workers of Am.*, 383 U.S. at 726–27. Here, FAWS' state law claims predominate for three reasons.

First, FAWS' claims for nuisance and negligence predominate in terms of proof because these claims require additional evidence. Because CERCLA imposes a strict liability standard, state claims require more extensive discovery on issues like causation. *Mathews*, 947 F.Supp. at 1522 (D. Colo. 1996) (state law claims predominated over CERCLA claims because "[t]he elements of proof regarding the state tort claims are … substantially different from the strict liability standard of CERCLA"); *Polger v. Republic Nat. Bank*, 709 F.Supp. 204, 210 (D. Colo. 1989) (noting that state law claims predominated over CERCLA claims because "state law claims would require much more extensive evidence at trial than the CERCLA claim"). While the parties engaged in discovery on the CERCLA claims, this discovery would have been significantly limited as (1) CERCLA does not require proof of causation and (2) the challenges that BELCO and FAWS pose to EPA's remedy selection are both limited to the administrative record. R. at 11; 42 U.S.C. § 9613(j). Moreover, expert discovery regarding damages for FAWS' state law claims has not even begun. R. at 18.

Second, FAWS' state law claims predominate in terms of comprehensiveness of the remedy because CERCLA does not allow for recovery of punitive damages. *Polger*, 709 F.Supp. at 210 (D. Colo. 1989) ("While CERCLA provides for strict liability, it does not authorize … punitive damages."); *Mathews*, 947 F.Supp. at 1522. Here, FAWS has sought punitive damages in conjunction with its tort claims. Such damages typically require an additional showing of recklessness or intentional action that would exceed the scope of any CERCLA claims. Restatement 2d of Torts § 908(2).

3. All federal claims over which the federal courts have original jurisdiction have been resolved.

When all federal claims are dismissed prior to trial, "Supreme Court case law strongly encourages or even requires dismissal of the state claims." *Est. of Owens v. GEO Grp., Inc.*, 660 F.App'x 763, 775 (11th Cir. 2016) (internal quotations omitted); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 35 (1988) (where "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."). The same principle applies when all federal claims are resolved at summary judgment. *Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152 (M.D. Fla. 2020). Here, all federal claims have been resolved, and only FAWS' state law claims remain. R. at 18.

The district court's continuing jurisdiction over the BELCO Action to enforce the CD does not justify the exercise of supplemental jurisdiction. Congress believed that state courts are capable of adjudicating tort claims that challenge EPA response actions. CERCLA includes a specific savings clause to preserve state law remedies. 42 U.S.C. § 9614 ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."). The Supreme Court has also noted that state courts are authorized to hear state law claims that

pose a challenge to EPA cleanups. *Christian*, 140 S. Ct. at 1351. Additionally, federal judges are no more qualified to address conflicts between a federal CD and a state court remedy than state judges. *Burrell v. Bayer Corp*., 918 F.3d 372, 386 (4th Cir. 2019) ("State courts are fully capable of resolving federal issues that arise in connection with the state claims before them.").

CERCLA § 122(e)(6) does not lend any support to the argument that FAWS' state claims should be heard in federal court. While § 122(e)(6) requires parties to seek permission from EPA before pursuing remedial actions at a facility, that provision is not applicable here because "§ 122(e)(6) applies only to sites on the Superfund list." 42 U.S.C. § 9622(e)(6); *Christian*, 140 S. Ct. at 1354. The record contains no indication that the Site is on the Superfund list.

4. The exercise of supplemental jurisdiction does not comport with the values of judicial economy, fairness, and comity.

Supplemental jurisdiction may be declined for "other compelling reasons," including the values of judicial economy, convenience, fairness, and comity articulated in *United Mine Workers of Am. v. Gibbs*. 28 U.S.C. § 1367(c)(4); *Parker v. Scrap Metal Processors*, Inc., 468 F.3d 733, 745 (11th Cir. 2006). Here, judicial economy, fairness, and comity all favor dismissal.

First, judicial economy favors dismissal because this value is served "when issues of state law are resolved by state courts." *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1288 (11th Cir. 2002). State courts can resolve state claims more efficiently because of their experience and expertise with applicable law. The time spent litigating the federal issues in this case does not change this result because FAWS' tort claims raise multiple issues that were not addressed by the adjudication of the CERCLA claims. The state and federal claims have different standards of liability and available remedies. Discovery for FAWS' state law claims has not begun. R. at 15. Moreover, evidence obtained in discovery on the CERCLA claims can be used in a later state proceeding. *Ameritox, Ltd. v. Millennium Laboratories*, Inc., 803 F.3d 518, 540 (11th Cir. 2015).

Second, fairness favors dismissal because of the lack of "time, effort, and money" expended on the state law claims thus far. *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994). Finally, comity favors dismissal because in the absence of diversity or unresolved federal questions, state law claims should be heard by state courts.[8] The federal district court performed its function by resolving the parties' CERCLA claims. The state courts of New Union should be allowed to perform their own functions by addressing FAWS' state law claims.

While it is typically most convenient to try every claim in a single forum, convenience is not a dispositive factor in the supplemental jurisdiction analysis. *Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152 (M.D. Fla. 2020) (declining to exercise supplemental jurisdiction over state claims even though convenience weighed in favor of retaining jurisdiction). Consequently, on balance, the *Gibbs* factors weigh in favor of dismissal.

CONCLUSION

For the foregoing reasons, FAWS respectfully requests that this Court affirm the district court's orders upholding EPA's determination that the ERA is an ARAR, and vacating EPA's determination that BELCO is not required to install filtration systems in Fartown wells. FAWS also requests that this Court reverse the district court's order that costs incurred in sampling residents' private drinking wells were not reimbursable as a response cost and the court's decision to exercise supplemental jurisdiction over FAWS' state law claims.

[8] Comity is a general principle of federalism founded on respect for state functions and the acknowledgement that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).