

**THIRTY-FIFTH ANNUAL
JEFFREY G. MILLER
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION**

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

**C.A. No. 22-000677
CONSOLIDATED WITH
No. 17-CV-1234 and 21-CV-1776**

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

and

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

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee.

ON APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief of ENVIRONMENTAL PROTECTION AGENCY, Plaintiff-Appellant-Cross Appellee

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STATEMENT OF JURISDICTION

This case concerns questions of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601, and to what extent those obligations and rights are altered in light of the recently enacted New Union Constitutional Environmental Rights Amendment (“ERA”). N.U. CONST. art. I, § 7. The United States District Court for the District of New Union exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. This Court has proper jurisdiction over this appeal from the district court’s final decision under 28 U.S.C. § 1291, which provides that “the court of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States.”

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the district court correctly determined that costs incurred by FAWS through its Central Labs’ 2020 testing are not reimbursable as response costs under CERCLA.
- II. Whether the district court correctly upheld the EPA’s determination that the ERA is an ARAR under CERCLA and thus, the EPA could reopen the Consent Decree.
- III. Whether the district court erred when it vacated the EPA’s determination that BELCO is not required to install filtration systems in Fartown as arbitrary, capricious, or contrary to law.
- IV. Whether the district court correctly retained supplemental jurisdiction over FAWS’ negligence and private nuisance.

STATEMENT OF THE CASE

The rural city of Fartown in the state of New Union is composed of about 500 residents and qualifies as an “environmental justice community” based on its socio-economic conditions. R. at 5. Centerburg is a larger city located 2 miles north of Fartown, and home to about 4,500 residents. R. at 5. About 300 feet beneath both Centerburg and Fartown lies the Sandstone Aquifer, an underground body of water whereby the underground water flows from Centerburg to Fartown. R. at 5. Centerburg residents receive their tap water from the Centerburg Water Supply (“CWS”), while Fartown uses private drinking water wells. R. at 5.

Beginning in 1973, a company named BELCO manufactured “LockSeal,” a sealant coating used to prevent corrosion, at a factory (“the Site”) in Centerburg. R. at 5. To create LockSeal, BELCO manufactured two chemicals, liquid NAS-T, and its activation agent. R. at 5. BELCO continued to manufacture NAS-T at the Facility until 1998 when it relocated to a new factory in northern New Union, which BELCO continues to own and use for storage and training activities. R. at 6.

By the mid-1980s, medical studies showed that NAS-T was a probable human carcinogen, so in 1995 the EPA adopted a Health Advisory Level I (“HAL”) for NAS-T in drinking water of 10 parts per billion (“ppb”). R. at 6. The EPA determined this HAL by incorporating a significant margin of error that ensures that the level of exposure is non-toxic to humans. R. at 6. While some human noses may be able to detect NAS-T in water as a sour or stale smell at concentrations as low as 5 ppb, NAS-T at those low concentration levels does not pose a health issue to humans. R. at 6. The EPA determined the Safe Drinking Water Act does not apply to NAS-T because it is so scarcely used, and the state of New Union has never regulated NAS-T monitoring. R. at 6.

In 2013, Centerburg citizens began submitting complaints to the Centerburg County Department of Health (“DOH”) stating that their tap water smelled “sour” or “off.” R. at 6. In January 2015, the DOH began testing the CWS for NAS-T and determined that Centerburg’s tap water contained between 45 and 60 ppb NAS-T. R. at 6. Upon this finding, DOH notified the citizens of Centerburg to stop drinking their tap water, and BELCO supplied the citizens with bottled water. R. at 6. On January 30, 2016, after four months of investigation, New Union’s Department of Natural Resources (“DNR”) referred the investigation and remediation to the EPA because of a lack of resources and expertise. R. at 6. In March of 2016, the EPA and BELCO entered into an agreement that required BELCO to continue providing drinking water to the Centerburgians, investigate the cause and extent of the NAS-T contamination, and engage in a remedial investigation and feasibility study (“RI/FS”) under the EPA’s oversight. R. at 6.

During the RI/FS, BELCO discovered the NAS-T contamination was from an unlined lagoon that BELCO used in the 1980s and early 1990s. R. at 6. That contamination migrated from the soil into the underground Sandstone Aquifer. R. at 6. BELCO installed three successive lines of monitoring wells and five final wells about half a mile north of Fartown to study the extent of the contamination. R. at 6. When all five wells showed no detectable amounts of NAS-T, the EPA determined the extent of the NAS-T contamination and did not require BELCO to install any additional wells. R. at 7. Additionally, BELCO’s RI/FS estimated that remediation of the Sandstone Aquifer required pumping and treating the water so the parties agreed that excavating the soil at the Site would be the best remedial action. R. at 7.

In June of 2017, based on BELCO’s RI/FS and public comments the EPA issued a Proposed Plan and selected a clean-up plan for the Site through a Record of Decision (the “ROD”). R. at 7. BELCO and the EPA entered into a Consent Decree (“CD”), in which BELCO

agreed to design and implement the remedy selected in the ROD. R. at 7. Upon completion of the CD, the EPA would be required to issue BELCO a Certificate of Completion (the “COC”). R. at 7. The EPA could reopen the CD upon either of the following two grounds: (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 are established that the clean-up plan does not satisfy.” R. at 7. BELCO then installed and maintained a water filtration system (“CleanStripping”) to remove NAS-T from the CWS, excavated the soils containing NAS-T from around the Site, and conducted monthly sampling of the monitoring wells. R. at 7. Other than an isolated detection of NAS-T at low levels (5-6 ppb) in January 2018, no NAS-T was detected, and the EPA issued the COC to BELCO in September 2018. R. at 8.

In 2016, citizens of Fartown began to complain of the water from their private wells smelling “off.” R. at 8. In February 2019, the DOH took samples from five private drinking wells in Fartown, none of which detected NAS-T. R. at 8. A group of the Fartownians then asked the EPA to order BELCO to conduct further testing but the EPA declined, citing BELCO’s non-detection of NAS-T in the monitoring wells. R. at 8. In December 2019, the Fartownians formed FAWS and retained Central Laboratories, Inc. (“Central Labs”) to test the private wells for a total of \$21,500. R. at 8. After drawing three samples from each of Fartown’s 75 private wells, all 225 samples fell well below the HAL. R. at 4. Not satisfied with these results, the Fartownians again asked the EPA to reopen the CD for additional investigation and the EPA declined, citing the low levels of NAS-T. R. at 8.

On November 3, 2020, the citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution (“ERA”), which read that “each and every

person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans.” N.U. CONST. art. I, § 7. The EPA then wrote to the DNR asking whether the ERA constituted an ARAR for CERCLA purposes. R. at 9. The DNR responded the next month, stating that the EPA should identify the ERA as an ARAR where its guidance was consistent with CERCLA, and where it is not inconsistent with other state or federal regulations. R. at 9.

On March 20, 2021, the EPA reopened its CD and ordered BELCO to collect water samples from 50 private wells in Fartown, citing the 2020 Central Labs results and the passage of the ERA. R. at 9. Additionally, the EPA demanded BELCO supply Fartown households with bottled water if their private well contains NAS-T concentrations between 5-10 ppb, and install CleanStripping filtration for any well where sampling exceeds 1 ppb. R. at 9. Despite challenges from BELCO, the EPA issued an order (the “UAO”), ordering BELCO to conduct these actions. R. at 9. Before the EPA issued its UAO, FAWS submitted a written request to the EPA ordering BELCO to install CleanStripping at each well testing positive for NAS-T. R. at 9. The EPA declined to include this requirement in the UAO, citing both the FAWS’ 2019 results and its own sampling results that had found no Fartown wells containing NAS-T levels above the HAL of 10 ppb. R. at 9.

BELCO refused to comply with the UAO, so the EPA began carrying out BELCO’s duties, including supplying water to Fartownians whose wells tested above 5 ppb for NAS-T. R. at 10. The EPA’s continued monitoring of these wells has revealed no NAS-T level above the HAL R. at 10.

PROCEDURAL HISTORY

Following the order issued by the United States District Court for the District of New Union dated June 1, 2022, in 17-CV-1234 and 21-CV-1776 (consolidated cases), BELCO, the EPA, and FAWS, each sought leave to file an interlocutory appeal to the United States Court of Appeals for the Twelfth Circuit. R. at 1. On June 1, 2022, the Circuit Court entered an order requesting all three parties to brief four issues raised on appeal. R. at 1.

SUMMARY OF THE ARGUMENT

The district court correctly found that the testing costs incurred by FAWS are not reimbursable as response costs under CERCLA because they are not necessary or consistent with the National Contingency Plan (“NCP”). Specifically, FAWS’ response action is not necessary because it was duplicative of the EPA’s actions since Central Lab’s testing was not used to further any existing investigation or remediation. Additionally, FAWS’ remedial action was not cost-effective and therefore violated 42 U.S.C. § 9605(a)(7) by doubling the response costs and passing on those increased costs to BELCO without their consent or notice.

The district court correctly upheld the EPA’s decision that under CERCAL, the ERA is an ARAR. The ERA is an ARAR because the ERA is properly promulgated, more stringent than federal standards, legally applicable or relevant and appropriate, and was timely identified. Accordingly, the EPA properly reopened the CD based on based the ERA being an ARAR.

The district court erred in determining that under the Administrative Procedure Act (“APA”), the EPA’s application of the ERA as an ARAR was arbitrary and capricious where the EPA determined that the ERA did not require BELCO to install filtration systems on Fartown wells. Under the arbitrary and capricious standard, the EPA’s requirement that BELCO provide

bottled water to Fartownians was not an arbitrary and capricious remedy, because the NAS-T levels did not exceed the HAL requirement.

The District Court correctly retained jurisdiction over FAWS' negligence and private nuisance claims. In deciding whether to retain jurisdiction, the district court correctly found that the factors of judicial economy, convenience, fairness, and comity are best served by the district court retaining jurisdiction over FAWS' negligence and private nuisance claims.

ARGUMENT

I. The District Court did not Err When it Determined that Costs Incurred by FAWS in Sampling, Testing, and Analyzing Well Water Samples of its Members' Private Drinking Water Wells are not Reimbursable as Response Costs Under CERCLA.

Under CERCLA, potentially responsible parties (“PRPs”) can be liable to private parties for response costs incurred by those private parties, even if they are not PRPs. 42 U.S.C. § 9607(a)(4)(B). For an action for recovery of response costs to succeed under CERCLA § 107, a plaintiff must prove four elements: (1) the site where the hazardous substances are contained 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. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). In this case, the only contentious element is element four, which requires a non-governmental plaintiff to show that responses were “necessary” and “consistent” with the NCP. 42 U.S.C. § 9607(a)(4)(B); *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992). Accordingly, because FAWS’ response actions were not necessary or consistent with the NCP, FAWS may not recover \$21,500 against BELCO as a response cost.

A. FAWS’ response action is not necessary because it was duplicative of the EPA’s actions.

A response action is “necessary” if it is not duplicative of the EPA or state agency’s actions responding to or remedying the release of a hazardous substance. *Hardage*, 982 F.2d at 1511-17. Additionally, a response action is duplicative if: (1) it occurs at the same time as the EPA’s response action and does not seek to uncover information different than or beyond that of the EPA, or (2) if the action occurs after the EPA has already informed the private party that it will conduct its own investigation. *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.*, 811

F.Supp. 1421, 1425 (E.D. Cal. 1993) (a private party's investigative costs incurred after the EPA has initiated a remedial investigation are duplicative and not recoverable unless authorized by the EPA); *Fallowfield Dev. Corp. v. Strunk*, 1991 WL 17793 at 19 (E.D. Pa. 1991) (investigation that is duplicative and undertaken in anticipation of litigation is not a necessary cost of response).

In *Louisiana*, Louisiana-Pacific brought a suit against Beazer, an operator of a log processing plant, for the recovery of response costs and future costs of response under CERCLA. *Louisiana*, 811 F.Supp. at 1425. Both EPA and Louisiana-Pacific conducted investigations of the site, and after the cleanup, Louisiana-Pacific filed suit for recovery from Beazer for the costs of its investigation. *Id.* The court reasoned that the plaintiff's unauthorized investigation was duplicative and unnecessary because the EPA had notified the plaintiff that it was conducting its own investigation of the site, but Louisiana-Pacific proceeded with its own unauthorized investigation nonetheless. *Id.* at 1431. Accordingly, the court held that Louisiana-Pacific could not recover response costs from Beazer. *Louisiana*, 811 F.Supp.at 1425.

Here, FAWS' unauthorized investigation was duplicative and unnecessary because FAWS' testing was not attempting to further any existing investigation or remediation.¹ Similar to *Louisiana*, FAWS' testing is duplicative because the investigative costs were incurred after the EPA initiated and completed its remedial investigation. R. at 7. FAWS and members of the Fartown community were well-aware of the EPA's remedial investigation, and even had the

¹ Response actions are also necessary if they are "closely tied to the actual cleanup of hazardous releases," and there must be evidence that the response actions were taken "to assist with and help plan the eventual remediation and cleanup efforts." *Young v. U.S.*, 394 F.3d 858, 863 (10th Cir. 2005) ("closely tied" requirement); *Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F.Supp.3d 1093, 1114-15 (E.D. Mos. 2016). The actions cannot be taken to oversee "another private party's legal obligation to [remediate] a property... without direction involvement in the responsible party's remediation and detoxification efforts." *Id.* at 1113.

opportunity to contribute their thoughts in the public comment period, but chose to not do so. R. at 7. Therefore, FAWS' remedial investigation was duplicative of the EPA's response action.

Accordingly, this court should affirm the district court's finding that FAWS' investigation was not necessary.

B. FAWS' response action is inconsistent with the NCP and is therefore not reimbursable.

Under 42 U.S.C. § 9605(a)(7), the NCP shall include “means of assuring that remedial action measures are cost-effective over a period of potential exposure to the hazardous substances or contaminated materials.” In determining whether a remedial action measure is cost-effective, the government—not a private party—must consider all remedial alternatives. 40 C.F.R. § 300.68(g)(1) (1989). Here, FAWS' remedial action was not cost-effective because it was not presented to the EPA for consideration as a remedial alternative. Therefore, FAWS' remedial action violated 42 U.S.C. § 9605(a)(7) by doubling the response costs and passing on those increased costs to BELCO without notifying the EPA.

Additionally, FAWS had the opportunity to submit public comments in response to the RI/FS, Proposed Plan, and entry of the CD. R. at 7. However, no citizen of Fartown nor Centerburg objected to the proposed plans. R. at 7. Rather than expressing their concerns during this period, FAWS undertook its own investigation three years later without notifying the EPA. R. at 8.

When FAWS undertook its own testing, it was doing so at its own expense, for its own purposes, and not as an act of furthering an existing investigation or remediation plan. R. at 10. While the testing may have been carried out in good faith, these sorts of “fishing” expeditions by untrained laypersons hamper the EPA's ability to conduct orderly, cost-effective investigations

and enforcement of CERCLA cleanups. R. at 12; *Louisiana-Pacific*, 811 F.Supp. at 1425.

Simply put, the issue here is similar to that in *Louisiana* in that it is not a question of whether FAWS was carrying out its investigation in good faith, or whether or not its investigation was reasonable. The issue is, instead, who should have to pay for FAWS' exercise of business and litigation judgment, even assuming good faith? *Louisiana*, 811 F.Supp. at 1425.

FAWS chose to be part of the problem and not the solution by initiating its own costly investigation without notifying the EPA. Therefore, FAWS' response action was not necessary and was inconsistent with the NCP, and CERCLA does not entitle FAWS to recover \$21,500 against BELCO as a response cost.

II. The District Court Correctly Upheld the EPA's Determination that the ERA is an ARAR Under CERCLA, and Thus, the EPA Could Reopen the CD.

Under 42 U.S.C. § 9621(d), parties in a CERCLA action must consider applicable or relevant and appropriate standards ("ARARs"), when complying with the agreed-upon remedy. ARARs, are environmental standards of the state in which a site is located. *United States v. Akzo Coating of Am.*, 949 F.2d 1409, 1418 (6th Cir. 1991). A state environmental standard is an ARAR to which a CERCLA remedy must comply if it is: "(1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." *Id.* at 1440 (citing 40 C.F.R. 300.400(g)(4)). Notably, the EPA's interpretation regarding whether a state standard is an ARAR must be given deference based on its persuasiveness. *United States v. Mead Corp.*, 533 U.S. 218, 219-20 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

A. The ERA is an ARAR because it meets the four requirements established under 42 U.S.C. § 9621(d).

The EPA correctly determined that the ERA constitutes an ARAR to which the CERCLA remedy must comply because it is properly promulgated, more stringent than federal standards, relevant and appropriate, and timely identified. Consequently, the EPA could reopen the CD and order further remedial action based on this new, more stringent regulatory standard. Furthermore, in light of the *Mead* standard and ample support from the administrative record, this court must give deference to the EPA's interpretation.

1. The ERA is properly promulgated because it is generally applicable and legally enforceable.

The EPA defined the term "promulgated" within CERCLA as a measure imposed by state legislative bodies that are generally applicable and legally enforceable. C.F.R. § 300.400(g)(4). A law is generally applicable if it applies to the entire state. *See Town of Acton v. W.R. Grace & Co. Conn. Techs., Inc.*, No. 13-12376-DPW, 2014 WL 7721850, at * (D. Mass. Sep. 22, 2014) (finding that the Acton bylaw was not of general applicability where it only applied to the Town of Acton and not the entire state of Massachusetts). A law is legally enforceable if it was issued under state procedural laws or standards, contains specific enforcement provisions, or is otherwise enforceable under state law. *Akzo*, 949 F.2d at 1441 n.31.

Here, the ERA is properly promulgated because it is a constitutional amendment imposed by the New Union legislature that is generally applicable and legally enforceable. First, the ERA was imposed by a state legislative body, as shown by its procedural history. The ERA was first adopted by the legislature and then signed by the Governor of New Union. R. at 11. As the District Court noted, these facts are consistent with those of other statutory enactments that have

been deemed “properly promulgated.” R. at 11; *see Akzo*, 949 F.2d at 1441-42 (finding that EPA intended for properly promulgated laws to be laws or rules promulgated by state legislatures or agencies that are imposed on all citizens of a particular state).

Second, the ERA is generally applicable because it applies to the entire state of New Union. Unlike the bylaw in *Acton*, which only granted environmental protection to citizens in the Town of Acton, the ERA unequivocally grants “[e]ach and every person of this State” a fundamental right to clean air, clean water, and a healthful environment. *Acton*, 2014 WL 7721850, at *14; N.U. Const. art 1, § 7.

Third, the ERA is legally enforceable in light of its legislative history. NU ASSEMBLY Nos. A10377. To determine whether a state standard is a legally enforceable ARAR, a court looks at whether the state standard is “sufficiently specific to provide a fair warning” of prohibited conduct. *See Akzo*, 949 F.2d at 1441 (citing *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). According to the EPA, general requirements containing no specific numerical standards can be enforceable as ARARs. *Id.* at 1442 (finding that, for example, an anti-degradation statute that prohibits degradation of waters below specific levels of quality *or* in ways that preclude certain uses of that water would be a potential ARAR). Even if the ERA does not specifically state a maximum contaminant level, its legislative history gives clear examples of situations in which the Amendment would apply. For example, Senator Wright explained that “if there is any substance or contaminant that is not currently regulated, and it is discovered at some point in the future to cause some type of harm... then this amendment would fill that gap,” until a law is passed to encompass that substance. NU ASSEMBLY Nos. A10377. In effect, the ERA’s legislative intent precludes usage of unregulated contaminants if they will interfere with the New

Union citizens' fundamental right to clean air, clean water, and a healthful environment.

Accordingly, the ERA is legally enforceable.

In summary, since the ERA was imposed by a state legislative body and is generally applicable and legally enforceable, the ERA satisfies the properly promulgated requirement.

2. The ERA is more stringent than federal standards because it grants a fundamental right to clean water and prohibits contaminants.

Under CERCLA, an ARAR is any promulgated state standard that is more stringent than any federal standard. *See* 42 U.S.C. § 9621(d)(2)(A). A state standard is more stringent than a federal standard if the state standard requires a broader prohibition. *Akzo*, 949 F.2d at 1443.

Where no applicable federal standard exists, the state standard is deemed more stringent. *Id.*

In *Akzo*, the court analyzed whether Michigan's groundwater degradation statute constituted a state ARAR. In its analysis, the Sixth Circuit agreed with the district court's finding that no comparable federal statute regulated the discharge of injurious substances into groundwater as broadly as Michigan's standard. *Akzo*, 949 F.2d at 1443. Specifically, the court reasoned that the Michigan standard is not directly comparable to the federal Safe Drinking Water Act ("SDWA") because it is "broader in coverage and, depending on the site, as or more demanding in terms of cleanup requirements," than the SDWA. *Id.* Accordingly, the court held that the Michigan statute was more stringent than the SDWA. *Id.*

Here, there are no comparable federal statutes that guarantee a fundamental right to clean water as broadly as the ERA. Even if this court were to compare the ERA to the NCP, as BELCO suggests, the ERA is more stringent than the NCP. 40 C.F.R. § 300.430(e)(9)(iii) (declaring one goal of the NCP is the "overall protection of human health and the environment"). Like the state standard in *Akzo*, which broadly prohibits the degradation of groundwater by injurious substances, the ERA broadly prohibits contaminants and pollutants, making it more

stringent than the NCP. The NCP merely provides a blueprint for the federal government's responses to hazardous substances under CERCLA. 55 FR 8839 (Mar. 8, 1990).² The ERA goes beyond a mere legislative goal by enshrining in New Union's constitution a fundamental right to clean water and a healthful environment.³ N.U. Const. art 1, § 7. Accordingly, the ERA is more stringent than the NCP, and the third requirement is met.

3. The ERA is relevant and appropriate because it addresses problems sufficiently similar to those encountered at the Site and is well suited to the Site.

For a party to satisfy the “legally applicable or relevant and appropriate” requirement, the ARAR must be either legally applicable or relevant and appropriate. 42 U.S.C. § 9621(d)(2)(A). The ERA is relevant and appropriate, and therefore, it meets this requirement. Under 40 C.F.R. § 300.5, an ARAR is “relevant and appropriate” if the ARAR addresses problems or situations sufficiently similar to those encountered at the CERCLA site, and their use is well suited to the particular site. For example, the court in *Akzo* found that Michigan's groundwater statute was “relevant” when considering the following factors: the environmental media (“groundwater”), the type of substance (“injurious”), and the objective of the potential ARAR (“protecting aquifers from actual or potential degradation”). *Akzo*, 949 F.2d at 1446. Moreover, the court reasoned, Michigan's statute was well suited to the CERCLA site and, therefore, the statute was

² In this Final Rule, EPA explained that the NCP sets forth general guidelines for the federal government to consider when implementing CERCLA.

³ Furthermore, the Supreme Court has held that when a state constitution grants a fundamental right to a clean and healthful environment, the most stringent standard of review, strict scrutiny, is applied to its analysis. *See Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 988 P.2d 1236 (1999). Accordingly, even if the ERA were directly comparable to the NCP, the ERA is more stringent because it grants a fundamental right, requiring a strict scrutiny review in the event of a potential violation, to clean water, and broadly prohibits pollution and contamination caused by humans, whereas the NCP merely describes a general goal for the federal government to consider when instituting cleanup actions.

“appropriate.” *Id.* Accordingly, the court held that the Michigan statute satisfied the “relevant and appropriate” requirement. *Id.*

Here, the ERA addresses problems sufficiently similar to those encountered at the Site. At the Site, there was human-caused chemical contamination of NAS-T, a new, unregulated chemical, which affected the quality of New Union’s drinking water. R. at 16. Applying the factors, the court considered in *Akzo* to the case at hand, the environmental media (“water”), the type of substance (“free from contaminants and pollutants caused by humans”), and the objective of the potential ARAR (guaranteeing every citizen a “fundamental right” to “clean water” and a “healthful environment”) are all “relevant” to the Site. N.U. Const. art 1, § 7. These factors show that the ERA is well suited to the Site and thus “appropriate” as an ARAR. Accordingly, the ERA is relevant and appropriate because it addresses situations sufficiently similar to those encountered at the Site, and its plain language makes it well-suited to the Site.

4. The ERA was timely identified.

A state ARAR must be identified in sufficient time “for the lead agency to consider and incorporate all potential ARARs without inordinate delays and duplication of effort.” 40 C.F.R. § 300.515(d)(1). Here, the EPA wrote to the DNR less than one year after the ERA was passed to ask whether it believed that the ERA constituted an ARAR for CERCLA. R.at 6. About a month later, the DNR confirmed that the EPA should identify the ERA as an ARAR. R.at 6. In this case, the EPA is the lead agency because the RI/FS was completed by BELCO under EPA oversight. R. at 7. Furthermore, BELCO makes no showing that the ERA was not timely identified as an ARAR. Accordingly, the ERA meets the timely identified requirement.

In conclusion, the ERA is a state ARAR to which the remedial clean-up plan must comply because it is properly promulgated, more stringent than federal standards, relevant and appropriate, and timely identified. As a result, the EPA had the authority to reopen the CD.

B. The EPA’s determination that the ERA is an ARAR must be given deference in light of the *Mead* standard.

The EPA’s interpretation regarding ARARs must be given deference based on its persuasiveness. *Mead*, 533 U.S. at 219-20 (2001) (citing *Skidmore*, 323 U.S. at 140). In considering the weight to be given to an administrative determination, courts look to “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 219.

In *United States v. W.R. Grace & Co.*, the court found the EPA’s denomination of a particular removal action under CERCLA to be persuasive in light of the *Mead* standard. 429 F.3d 1224, 1227 (9th Cir. 2005). The EPA’s characterization of the cleanup as a removal action was “amply supported by the administrative record” and easily withstood scrutiny under the modified level of interpretive deference afforded by *Mead*. *Id.* at 1248. As such, the court held that the EPA’s interpretation was persuasive. *Id.*

Here, the EPA’s denomination of the ERA as an ARAR under CERCLA is persuasive in light of the *Mead* standard. Like in *W.R. Grace & Co.*, the EPA’s characterization of the ERA as an ARAR is amply supported by its administrative record, which included the new information relied upon to reopen the CD. R. at 6. Accordingly, this Court should find that the EPA’s interpretation of the ERA as an ARAR is persuasive considering the modified level of interpreted deference afforded by *Mead*.

This court should affirm the district court's holding that the EPA properly identified the ERA as an ARAR under CERCLA because the ERA satisfies the four requirements listed under 42 U.S.C. § 9621(d) and the EPA's interpretation must be given deference under the *Mead* standard.

III. The District Court Erred 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.

Under 5 U.S.C. § 706(2)(A), when an agency action is challenged, courts must determine whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 496-97 (2004) (finding that the EPA orders of compliance fall under the APA). An agency decision is arbitrary and capricious if it does not consider all relevant factors in the administrative record. *See* 42 U.S.C. § 9613 (j)(1); *Akzo*, 949 F.2d at 1426 (the agency must consider all relevant evidence and must act in the public interest).

When applying the arbitrary and capricious standard, a court must consider whether a prior court's decision considered all relevant factors and whether there was a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). When agencies are charged with making technical judgments and considering complex data, there must be deference given to the expertise of the agency. *Akzo*, 949 F.2d at 1426. This is especially true under CERCLA, which empowers the EPA to remedy environmental problems when there is "an imminent and substantial endangerment to the public health" due to an actual or threatened release of hazardous substances from a facility. 42 U.S.C. § 9606(a); *Akzo*, 949 F.2d 1409 at 1423.

In *Akzo*, the CD required the defendants to engage in remedial work to clean up the CERCLA site using “soil flushing;” a method that the state argued would not be effective due to the “variable permeability” of the soils at the site. *Id.* at 1419. The court reasoned that the EPA adequately explained its change of position after publishing its own studies regarding the proven effectiveness of soil flushing, as well as responding sufficiently to public comments about the CD in question. *Id.* The court held that the CD and EPA’s conclusion to carry out soil flushing was a rational agency decision supported by the record and that CERCLA granted deference for scientific decisions regarding toxic substance cleanup to the EPA. *Id.* at 1424.

Here, the EPA is not required to demand BELCO pay for nor install CleanStripping on residential wells in Fartown because the EPA is justified in its scientific determination that the provision of bottled water is sufficient when the presence of NAS-T is below its HAL of 10 ppb. R. at 15-16. This remedy was devised under the HAL standard, which was developed nearly 30 years ago, is based on numerous medical studies, and provides a significant margin of error to ensure the level of NAS-T exposure is non-toxic to humans. R. at 6.

The EPA has diligently acknowledged the complexities and new information surrounding Fartown and the levels of NAS-T in its wells. For example, it carefully considered new information from the 2020 Central Lab results by reopening the CD and ordering BELCO to sample and analyze water from 50 private wells in Fartown. R. at 9. Furthermore, before reopening the CD, the EPA added information to the administrative record that included details about Fartown being an environmental justice community, and its citizens’ concerns regarding NAS-T levels in their wells. R. at 9. Moreover, the EPA demanded the sampling of private wells in Fartown, the supply of bottled water to any Fartownian whose well returned positive results for NAS-T, and the continued monitoring of Fartown wells. R. at 9. EPA even attempted to have

a conference with BELCO, who challenged carrying out these tasks on the basis that the ERA did not constitute an ARAR, as was discussed in Issue 2. R. at 9.

Similar to *Akzo*, FAWS' claim that the EPA is arbitrary and capricious for not requiring filtering of water with NAS-T levels below 10 ppb flies in the face of deference to the expertise of the agency. It is clear through its continued and intended future actions that the EPA has every intention to protect Fartownians by continuing to monitor their wells and by taking necessary action if NAS-T levels are ever to exceed "safe" levels permitted under the Clean Water Act. R. at 16. Just as the EPA in *Akzo* relied on its expertise and knowledge of soil flushing to determine the best remedy, so too does the EPA rely on its expertise of NAS-T to determine the best remedy to ensure the safety of Fartownians. R. at 9. Since the NAS-T levels do not exceed 10 ppb, the water is not unhealthy for humans to drink, and there is no justifiable reason to require BELCO to install CleanStripping to filter and remove all NAS-T from the Fartownian water supply.

Accordingly, the district court erred when it found that the EPA's action was arbitrary and capricious because it did not consider all relevant factors, including the EPA's expertise in handling NAS-T, and its continued efforts to monitor the Fartown wells to ensure they never exceed the 10 ppb HAL limit.

IV. The District Court did not Err When the Court Retained Supplemental Jurisdiction Over FAWS' Negligence and Private Nuisance Claims.

Under 28 U.S.C. § 1367(a), a district court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). After a district court accepts jurisdiction over supplemental claims, 28 U.S.C.

§ 1367(c) delineates four circumstances under which a district court can decide to retain or relinquish jurisdiction over the supplemental claims: “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” If one of these four circumstances exists, the district court must then weigh the values of judicial economy, convenience, fairness, and comity to determine whether the district court should retain or relinquish supplemental jurisdiction over the claims originally brought under 28 U.S.C. § 1367(a). *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 173-74 (1997) (“The statute thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, ‘a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.’” *Id.* (quoting *Carnegie–Mellon University v. Cohill*, 484 U.S. 343, 350 (1988))).

Here, the district court properly exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331 and exercised supplemental jurisdiction over the private nuisance and negligence claims under 28 U.S.C. § 1367(a). R. at 7. The parties do not dispute this. R. at 14-15. In its final order, the district court, correctly realized that in granting summary judgment for the CERCLA claim, the district court had dismissed all claims over which it had original jurisdiction under 28 U.S.C. § 1367(a). R. at 14-15. This order triggered the district court’s discretion under 28 U.S.C. § 1367(c)(3), to decide whether the court wanted to continue retaining supplemental jurisdiction over FAWS’ negligence and private nuisance claims originally brought under 28 U.S.C. § 1367(a). The parties do not dispute this. R. at 14-15. At this point, under 28 U.S.C. § 1367(c), whether the district court retained supplemental jurisdiction over the negligence and

private nuisance claims was completely within the district court's discretion. Accordingly, the only issue before this court is whether the district court abused its discretion under 28 U.S.C. § 1367(c) when it retained supplemental jurisdiction over FAWS' negligence and private nuisance claims.

A. The factors of judicial economy, convenience, fairness, and comity are best served by the district court retaining jurisdiction over FAWS' negligence and private nuisance claims.

In reviewing whether a district court abused its discretion, a circuit court reviews a district court's decision to retain supplemental jurisdiction under an abuse of discretion standard. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009). In determining whether to dismiss or retain supplemental jurisdiction, a district court enjoys "wide latitude" in making this decision. *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). Under this standard, a district court abuses its discretion when it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). However, a district court does not abuse its discretion when it has a range of choices and the district court's decision is not a clear error of judgment. *Estate of Amergi ex. rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1365 (11th Cir. 2010). Accordingly, under the abuse of discretion standard, the district court did not abuse its discretion when it balanced the factors of judicial economy, convenience, fairness, and comity in favor of retaining supplemental jurisdiction over FAWS' negligence and private nuisance claims.

1. Judicial Economy

The district court correctly found that judicial economy weighs in favor of retaining supplemental jurisdiction over the FAWS' negligence and private nuisance claims. Although the general rule is that district courts should relinquish jurisdiction over state law claims after dismissing all federal claims, that presumption is rebutted when a district court has already expensed significant federal judicial resources. *Ritzer v. T.L. James Const., Inc.*, 149 F.3d 1173 (5th Cir. 1998) (finding that the district court abused its discretion in dismissing the state law claims when the CERCLA claim was dismissed at a late stage in the litigation). Additionally, judicial economy weighs in favor of retaining supplemental jurisdiction over the state law claims when a case has spent an extended time at a district court. *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191-93 (2d Cir. 1996) (finding the district court did not abuse its decision to retain supplemental jurisdiction over state law claims because those claims sat in federal court for around a year).

Furthermore, judicial economy weighs in favor of retaining supplemental jurisdiction over state law claims when the parties have completed discovery, the district court has ruled on dispositive motions, and the case is almost ready for trial. *Rauci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990) (find the district court did not abuse its discretion where the district court found that “the completion of discovery, the determination of the third dispositive motion in this case, and the readiness of the case for trial, all favored retaining jurisdiction.”). Finally, judicial economy also weighs in favor of retaining supplemental jurisdiction when retaining the claims is more efficient than dismissing them. *Georgia-Pac. v. OfficeMax Inc.*, No. 12-cv-2797-WHO, 2014 WL 2860267, at *7 (N.D. Cal. June 23, 2014) (“Keeping the state-law claims and the CERCLA claim together, in this case, would promote judicial efficiency.”)

Here, the district court correctly weighed the judicial economy factor in favor of retaining FAWS' negligence and private nuisance claims. R. at 14-15. FAWS filed its initial complaint on August 30, 2021, and summary judgment on the other claims was not granted until June 1, 2022. R. at 7, 15. In other words, FAWS claims have spent around ten months at the district court before the court ruled on the parties' motions, and it has been eight years since the discovery of the NAS-T issue. R. at 3, 7; *Peter Farrell Supercars, Inc. v. Monsen*, 82 F. App'x 293, 297 (4th Cir. 2003) (finding the district court did not abuse its discretion when it retained the state claims after the federal claim was dismissed after spending eight months in court). Additionally, the parties not only completed discovery on the CERCLA claim, but the three parties also spent almost five months on this discovery. R. at 7-8. On top of the five months already spent on discovery, on December 30, 2021, all three parties moved for cross-summary judgment on the CERCLA claims, and FAWS also moved to dismiss any remaining state law claims without prejudice if the CERCLA claim was resolved on summary judgment. R. at 8. Consequently, the district court spent another five months of judicial resources familiarizing itself with the facts before it rendered its decision on June 1, 2022. R. 15. Moreover, a state court would have to familiarize itself with an incredibly complex fact pattern that stretches back over fifty years and involves several parties, and the passing of legislation. R. at 2-9.

As the district court recognized, relinquishing jurisdiction over the state law claims would be inefficient. As the district court pointed out, FAWS and its members have sought several remedies from BELCO, such as the remediation of the aquifer, which presents the possibility that the decision in the tort claims will interfere with the district court's decision in the BELCO Action and the EPA's continued oversight at the Site. R. at 14-15. It would be

judicially inefficient to have a second suit brought by FAWS based on the same underlying facts—the NAS-T leak.

Indeed, from the beginning of this case, FAWS recognized that these claims are almost identical and made a conscious decision to bring them in the same case. R. at 7. FAWS does point out that FAWS still needs to conduct expert discovery on the state law claims regarding damages and the interpretation of the ERA is a novel state issue. R. at 14-15. However, the need for expert discovery regarding damages does not outweigh the enormous amount of judicial resources already spent on this case. *See Peter Farrell*, 82 F. App'x at 297. Accordingly, this court must affirm the district court because judicial economy weighed in favor of retaining supplemental jurisdiction over the FAWS' negligence and private nuisance claims.

2. Convenience

Convenience is best served by the district court retaining supplemental jurisdiction over FAWS' negligence and private nuisance claims. Generally speaking, there is a presumption that parties are inconvenienced when relinquishing supplemental jurisdiction results in the parties having to refile their claims in another court. *See Ameritox, Ltd. v. Millennium Laboratories, Inc.*, 803 F.3d 518, 539 (11th Cir. 2015). Convenience also weighs in favor of retaining supplemental jurisdiction when retention allows a district court to keep all claims in a single forum. *Id.* Finally, convenience weighs in favor of retaining supplemental jurisdiction over state law claims if the state and federal claims rely on the same or similar allegations. *Arkema Inc. v. Anderson Roofing Co., Inc.*, 719 F. Supp. 2d 1318, 1327 (D. Or. 2010).

Here, as a general matter, convenience weighs in favor of retaining jurisdiction because if this court ruled otherwise, it would force the parties to refile their claims in a state court.

Additionally, as the district court recognized, the district court has continuing jurisdiction over the BELCO Action to enforce the CD. R. at 15. Consequently, the district court's decision to retain supplemental jurisdiction over FAWS' negligence and private nuisance claims was convenient to both parties because it kept all the claims and issues in a single forum. *Arkema*, 719 F. Supp. 2d at 1327 (finding that when there are several parties and there are interrelated CERCLA and state law claims, convenience weighs toward retaining supplemental jurisdiction over the state claims). Finally, convenience weighs in favor of retaining supplemental jurisdiction over state law claims because the CERCLA claims, and the claims rely on the same or similar allegations—BELCO's responsibility for realizing NAS-T. *Id.* (holding that when state law claims rely on the same or similar allegations as the CERCLA claim against dismissing the state law claims would waste judicial resources and inconvenience the parties).

It is true that in some cases, federal discovery may be used in a state proceeding, but the state court would still have to familiarize itself with the extremely complex federal issues. However, this fact does not outweigh the fact that a state court would have to familiarize itself with the extremely complex facts of this case. This case spans over fifty years, implicates three different parties, and concerns various scientific matters. Accordingly, this court must affirm the district court order because convenience is best served by the district court retaining supplemental jurisdiction over FAWS' negligence and private nuisance claims.

3. Fairness

Fairness is best served by the district court retaining supplemental jurisdiction over FAWS' negligence and private nuisance claims. Relinquishing supplemental jurisdiction over state law claims is unfair if it requires the litigants to prosecute and defend claims in two

different forums. *See Piccolini v. Simon's Wrecking*, 686 F.Supp. 1063, 1069 (M.D. Pa. 1988) (finding it unfair to require the litigants to prosecute and defend a CERCLA claim and state law claims in federal and state forums). Additionally, when CERCLA claims are interrelated with additional state law claims, it is unfair to relinquish supplemental jurisdiction of state law claims after resolving the CERCLA claims because this will almost certainly lead to confusion. *See Georgia-Pac.*, 2014 WL 2860267, at *6.

Here, it would have been unfair to the litigants if the district court relinquished supplemental jurisdiction over FAWS' negligence and private nuisance claims because it would require the parties to prosecute and defend claims in two different forums. Furthermore, there is a high likelihood of unfairness because a state court order on FAWS' injunction compelling BELCO to remediate the aquifer would be inconsistent with the EPA's prior determinations of the proper remedy. (R. at 15). Finally, because the state law and CERCLA claims are interrelated, there is a high likelihood of confusion. Accordingly, this court must affirm the District Court because the district court correctly found that fairness is best served by retaining supplemental jurisdiction over the FAWS' negligence and private nuisance claims.

4. Comity

The District Court correctly found that comity is best served by retaining supplemental jurisdiction over the FAWS' negligence and private nuisance claims. Comity is the general policy that federal courts should avoid deciding state law decisions. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). However, comity weighs in favor of retaining supplemental over state law claims when the state claims are brought with federal environmental claims—like CERCLA claims. *See, e.g., Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733,

742 (11th Cir. 2006); *Georgia-Pac.*, 2014 WL 2860267, at *6 (“Where the parties, witnesses, experts, and the evidence overlap, keeping state-law claims together with CERCLA claims is preferable.”); *Green Hills (USA), L.L.C. v. Aaron Streit, Inc.*, 361 F.Supp.2d 81, 88 (E.D.N.Y. 2005); *Raytheon Co. v. McGraw–Edison Co., Inc.*, 979 F.Supp. 858, 866 (E.D.Wis. 1997) (citing *INX Intern. Ink Co. v. Delphi Energy & Engine Mgmt. Sys.*, 943 F. Supp. 993 (E.D.Wis. 1996)). More specifically, federal environmental claims and negligence, and nuisance claims are presumed to derive from a common nucleus of operative facts and a plaintiff is expected to try them all in one proceeding. *See State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (citing *Gibbs*, 383 U.S. at 728).

Furthermore, comity weighs in favor of retaining jurisdiction state law claims when the state law claims are not novel or complex questions of law. *Parker*, 468 F.3d at 743-44. Novel or complex issues of state law are not at issue where the only claims are state tort claims and liability has already been determined. *Parker*, 468 F.3d at 743-44 (finding that “a new trial on damages does not raise novel or complex issues of state law.”); *INX Intern. Ink Co.*, 943 F.Supp. at 997 (finding that negligence, nuisance, and property damage do not raise novel or complex issues of state law).

Here, comity weighs in favor of retaining supplemental jurisdiction over the state law claims because the state law claims were originally brought with a CERCLA claim. FAWS’ CERCLA claims and their negligence and private nuisance claims derive from the same nucleus of operative facts, specifically, BELCO’s operation of the factory and their manufacturing of NAS-T. R. at 2-3; *Georgia-Pac.*, 2014 WL 2860267, at *6 (retaining jurisdiction over state law claims where the CERCLA claim remained at the heart of the lawsuit, and the facts supporting the state-law claims related to the CERCLA claim); *Arkema*, 719 F. Supp. 2d at 1327 (“Although

this case remains in the early stages, the number of parties and the interrelated nature of the claims favors keeping it in one piece.”). Further to this point, in their complaint, FAWS expressly conceded that it brought the FAWS action in the district court because the CERCLA claims and tort claims are closely related, and FAWS wanted to avoid any contentions of “claim splitting.” R. at 7.

Additionally, the district court correctly realized that FAWS’ negligence and private claims are not novel or complex state law claims and the determination of damages arising from the negligence and private claims do not involve the question of whether the ERA was properly identified as an ARAR. R. at 15. FAWS’ only attempt to refute these facts is by arguing that the private nuisance and negligence are novel because they involved the interpretation of the ERA in the context of nuisance *per se*. R. at 15. As mentioned above, nuisance and negligence *per se* claims are not considered novel or complex state law. To the contrary, negligence and private nuisance claims are commonly asserted in CERCLA cases. *Ferguson v. Arcata Redwood Co., LLC*, No. 03– 05632 SI, 2004 WL 2600471, at *7 (N.D.Cal. Nov. 12, 2004) (denying defendant’s motion to dismiss plaintiff’s public nuisance, private nuisance, equitable indemnity, and declaratory relief claims in a CERCLA suit); *Wells Fargo Bank, N.A. v. Renz*, No. 08–02561 SBA, 2011 WL 97649, at *9 (N.D.Cal. Jan. 12, 2011) (denying a motion to dismiss plaintiff’s negligence claims in a CERCLA suit).

Furthermore, even if the private nuisance and negligence pose a novel issue of state law, a district court should retain supplemental jurisdiction over state law claims when the values of economy and convenience weigh in favor of retaining jurisdiction over the state law claims. *Arkema*, 719 F.Supp.2d at 1327 (finding that even if the Oregon Superfund Act claims are novel or complex, the number of parties and the interrelated nature of the state law and CERCLA

claims favor retaining supplemental jurisdiction). Accordingly, this court must affirm the district court because the district court correctly found that comity is best served by retaining supplemental jurisdiction over the FAWS' negligence and private nuisance claims.

CONCLUSION

First, this court should affirm the district court's determination that the costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA. Second, this court should affirm the district court's determination that the ERA constitutes an ARAR, and that the EPA could reopen the CD based on the ERA. Third, this court should reverse the district court's determination that the EPA's remedy to provide bottled water to Fartown residents was arbitrary, capricious, or contrary to law. Lastly, this court should affirm the district court decision to retain supplemental jurisdiction over FAWS' remaining state law tort claims.