NON MEASURING BRIEF
TEAM 13

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Plaintiff-Appellant-Cross Appellee

v.

BETTER LIVING CORPORATION
Defendant-Appellee-Cross Appellant

v.

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

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

Brief of Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated cases 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because of claims arising under federal statutes–the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Administrative Procedure Act ("APA"). 42 U.S.C. § 9613; 5 U.S.C. § 702.

United States Environmental Protection Agency ("EPA"), Better Living Corporation ("BELCO"), and Fartown Association for Water Safety ("FAWS") timely filed Notices of Appeal pursuant to Fed. R. App. P. 4. Summary judgment on the claims in this case were not final judgments, as there remain unresolved claims at the district court level. The United States Court of Appeals for the Twelfth Circuit therefore has jurisdiction over this appeal under 28 U.S.C. § 1292(b), which provides courts of appeals jurisdiction over interlocutory orders of the district courts.

STATEMENT OF ISSUES PRESENTED

I. Are the costs FAWS incurred for testing well-water reimbursable as response costs under CERCLA?

II. Is EPA's determination that the ERA is applicable or relevant and appropriate ("ARAR"), and accordingly its determination to reopen the Consent Decree and order further remediation, correct?

III. Is EPA's determination to not require BELCO to install filtration systems in Fartown arbitrary, capricious, or contrary to law?

IV. Is the District Court's decision to retain jurisdiction over FAWS' remaining state law claims after dismissing the federal claims proper?

STATEMENT OF THE CASE

I. Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA was passed in 1980 in part as a response to the environmental catastrophe at Love Canal. Frank P. Grant, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ('Superfund') Act of 1980*, 8 Columbia Journal of Env't L. 1, 25 (1982). It provides authorization for federal cleanup efforts of hazardous substances and imposes strict liability on potentially responsible parties ("PRPs") from which the government may recoup cleanup costs. 42 U.S.C. § 9604; 42 U.S.C. § 9607. Further, private parties are authorized to recover cleanup costs from PRPs under 42 U.S.C. § 9607. Federal remediation costs can be funded by the Superfund Trust or the government can order PRPs to undertake cleanup under EPA oversight. 42 U.S.C. § 9607.

The CERCLA process begins with a Preliminary Assessment and Site Inspection, submission to the National Priorities List ("NPL"), and Remedial Investigation/Feasibility Study ("RI/FS") before the Records of Decision and Remedial Design/Action stages and ultimately culminates in the Completion stages and deletion from the NPL. During the RI/FS process, EPA will identify and choose to comply with or waive state and federal laws that are legally applicable or relevant and appropriate to the release at issue. 42 U.S.C. § 9621(d)(1).

II. Centerburg, Fartown, and the Sandstone Aquifer

Centerburg and Fartown sit two miles apart in the State of New Union. Fartown is a rural, environmental justice community of about 500 residents just south of Centerburg. Record at 5. Centerburg is a more affluent city of about 4,500 residents. The Sandstone Aquifer ("the Aquifer") lies 300 feet underneath the two cities and provides both with drinking water. *Id.* Water in the Aquifer flows downhill from Centerburg to Fartown. Centerburgers receive their tap

water from the Aquifer after it has been pumped out and treated by the Centerburg Water Supply ("CWS"), while Fartownians use well water pumped directly from the Aquifer. *Id.*

BELCO, a chemical manufacturing company, produced a sealant called "Lock Seal" at a factory ("the Facility") in Centerburg from 1973 through 1998. *Id.* Though the Facility is no longer used to produce Lock Seal, it is still owned and used by BELCO as a storage and training facility. *Id.* at 6. One of the two constituent parts of LockSeal is NAS-T. *Id.* Based on medical studies that found NAS-T to be a probable human carcinogen, EPA drafted a Health Advisory Level ("HAL") that set safe drinking water levels of NAS-T at 10 parts per billion ("ppb"). *Id.* This was a conservative toxicity guideline to ensure exposure levels did not get too high, given the lack of information. Even below the HAL toxicity guideline, NAS-T's smell is detectable by the human nose at 5 ppb. *Id.* Aside from the HAL, there are no other state or federal regulations of NAS-T. *Id.*

In 2013, Centerburgers complained that their drinking water emitted a sour smell. The Centerburg Department of Health ("DOH") tested the Centerburg water supply for NAS-T and found the water had between 45-60 ppb of NAS-T. *Id.* DOH instructed Centerburgers to stop drinking their tap water and BELCO began distributing bottled water throughout the town. State officials turned over the investigation to EPA in 2016. *Id.*

III. Opening and Closure of the Consent Decree

EPA and BELCO agreed in March 2016 that BELCO would continue to supply bottled water to Centerburg while EPA conducted their investigation into the NAS-T contamination. BELCO commenced an RI/FS to assess the sources of the contamination, health and environmental risk, and remediation options. *Id.* In this investigation, BELCO found that NAS-T contaminated the soil around the Facility from spills and an unlined lagoon that stored

wastewater throughout the Facility's operational years. The contaminated water leached through the ground into the Aquifer. *Id.* BELCO installed three lines of monitoring wells radiating out from Centerburg from July 2016 to January 2017 to measure the contamination levels of the Aquifer itself. *Id.* at 7. The five wells closest to Fartown were approximately half a mile away from Fartown and showed no detectable amounts of NAS-T. *Id.* Given this result, EPA determined that additional monitoring well installation was unwarranted. The RI/FS ultimately recommended remediation of the contaminated soil but not the Aquifer plume, due to the extent and cost of remediation. *Id.*

EPA and BELCO entered into a Consent Decree ("CD") in which BELCO agreed to the remediation plan outlined by EPA in the Record of Decision. When BELCO completed remediation efforts, EPA would issue a Certificate of Completion ("COC"), which would prohibit BELCO from further remediation efforts without EPA reopening the CD. *Id.* EPA was only authorized to reopen the CD if: (1) new information is revealed which would render the clean-up plan ineffective or (2) new, stricter regulatory standards are adopted to which the clean-up plan does not conform. These regulatory standards include CERCLA ARARs. *Id.* The District Court found the CD to be fair and reasonable, and no citizens of Fartown nor Centerburg objected. Thus, EPA and BELCO formally entered the CD on August 28, 2017. *Id.*

Pursuant to the CD, BELCO installed filtration systems to remove NAS-T from wells, excavated contaminated soil, and sampled monitoring wells monthly. *Id.* The public well water remediation is ongoing and the soil remediation concluded in December 2017. *Id.* at 8. Save for two detections of NAS-T at low levels (5 ppb and 6 ppb) in the wells closest to Fartown, well testing results consistently demonstrated undetectable levels of NAS-T. Given the consistency of non-detectable or low level results, EPA issued the COC to BELCO in September 2018. *Id.*

However, all was not well in Fartown. Fartownians had reportedly been smelling odors from their private wells since 2016. *Id.* Upon its request, the DOH tested Fartown drinking water for NAS-T in February 2019 and found no detectable levels of NAS-T. When approached by Fartown, EPA declined to perform further testing in Fartown based on the nominal levels and non-detect results available. *Id.* A group of Fartownians then formed FAWS and proceeded to test wells for NAS-T in collaboration with Central Labs. *Id.* FAWS paid $21,500 for the testing and analysis of three samples each of 75 wells in Fartown. *Id.* Fifty-three percent of the samples showed no detectable levels of NAS-T, 22% of the samples showed NAS-T levels between 1 and 4 ppb, and 25% of the samples showed NAS-T levels between 5 and 8 ppb. *Id.* FAWS shared the results with EPA, but EPA declined to extend testing and remediation in Fartown due to the low levels of NAS-T and the provisions of the CD. *Id.*

IV. Reopening of the Consent Decree

In 2020, the citizens, governor, and legislature of New Union enacted an Environmental Rights Amendment ("ERA") into the state constitution. *Id.* The Amendment provided that "[e]ach and every person 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. The New Union Department of Natural Resources ("DNR") informed EPA that the ERA constituted an ARAR for the purposes of CERCLA. Record at 9.

Combined with other factors (Fartown resident complaints, the environmental justice impact on the community, potential health effects of NAS-T, and the test results from Central Labs) the ERA's enactment allowed EPA to reopen the CD in accordance with the reopening provisions and order BELCO to begin sampling water from 50 wells in Fartown. *Id.* Meanwhile,

FAWS submitted a request for remediation actions–including installation of the same filtration systems provided in Centerburg–on any wells that tested positive for NAS-T. *Id.*

BELCO objected to the CD reopening, but EPA issued a Unilateral Administrative Order ("UAO") and ordered BELCO to begin testing. EPA took FAWS' request into consideration but declined to take action because none of the test results reached HAL levels. *Id.* The UAO did require BELCO to sample 50 Fartown wells each month, provide households that rely on wells with levels between 5 ppb and 10 ppb with bottled water until NAS-T levels meet or fall below 4 ppb, and install filtration systems on wells with NAS-T levels above 10 ppb. *Id.* BELCO refused to comply with the UAO and EPA began its own monitoring and water distribution program to wells that demonstrated NAS-T levels above 5 ppb. Record at 10. EPA's sampling was largely consistent with the Central Lab's results. *Id.*

V. Proceedings Below

EPA now seeks to recover penalties and costs incurred during Fartown cleanup and monitoring operations. *Id*. BELCO argues that the ERA does not constitute an ARAR and thus the UAO has no legal foundation. FAWS successfully intervened to argue that EPA decisions under the UAO were arbitrary, capricious, and contrary to law under the APA. *Id*. FAWS separately filed a suit against BELCO seeking CERCLA cost recovery for the Central Labs testing, installation of water filters on their wells that test positive for NAS-T, punitive costs, monetary damage to loss of property, and remediation of the Aquifer. *Id*. The U.S. District Court for the State of New Union exercised original and supplemental jurisdiction over the federal and state law claims and consolidated the BELCO and FAWS actions.

After the completion of discovery, all parties moved for summary judgment. Record at 11. The district court held that: (1) FAWS' Central Lab testing costs were not "necessary" under

CERCLA and thus did not qualify for reimbursement, (2) the ERA constituted an ARAR and thus BELCO's refusal to comply with the UAO was improper and they are now subject to EPA's noncompliance penalties, (3) EPA's decision not to require filtration on wells testing below 10 ppb was arbitrary and capricious, and (4) the court would retain supplemental jurisdiction of state law tort claims after resolving original jurisdiction claims. Record at 18. Summary judgment was granted in favor of BELCO on claim (1), in favor of EPA on claim (2), and in favor of FAWS on claim (3). The Court denied FAWS' motion to dismiss with regard to claim (4). Record at 19.

SUMMARY OF THE ARGUMENT

EPA properly determined that FAWS expenditures were not reimbursable under CERCLA, that the ERA constituted an ARAR for the purposes of reopening BELCO's CD, and that the installation of filtration systems in all Fartown wells was not necessary to attain ARAR standards. The District Court properly retained supplemental jurisdiction over state law tort claims in light of the significant resources and effort invested by the court in becoming acquainted with the factual background of the case.

I. The district court correctly held that the costs FAWS incurred for testing wells in Fartown are not reimbursable under CERCLA. Response costs are reimbursable if "(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, et al. v. Atlantic Richfield Co., et al.*, 427 F. Supp. 3d 1013, 1020 (N.D. Indiana 2019) (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008)). In addition, non-governmental plaintiffs must show that costs incurred under the fourth prong are necessary or consistent with

the National Contingency Plan ("NCP"). Because NAS-T is not a hazardous substance and the costs incurred for testing were not necessary and consistent with the NCP, they are not reimbursable.

II. The ERA constitutes an ARAR because it is properly promulgated, more stringent than federal standards, relevant and appropriate, and timely identified as required by 42 U.S.C. § 9621(d). The ERA is properly promulgated because it is both legally enforceable and of general applicability. U.S. Envt'l Prot. Agency, Publication 9234.2-05/FS, CERCLA Compliance with State Requirements (1989). Further, the ERA is inherently more stringent than federal standards because there are no comparable federal standards that address NAS-T. U.S. Envt'l Prot. Agency, EPZ/540/G-89/009, CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements, 7-8 (1989). Additionally, the ERA is relevant and appropriate because it addresses problems sufficiently similar to those encountered at CERCLA sites and is appropriate to the circumstances of this particular release. Finally, the ERA is timely identified because ultimate authority lies with EPA whether or not to consider identified ARARs.

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 all Fartown wells. EPA was authorized to interpret and apply relevant environmental law to the ARAR because of the absence of quantitative standards in the ERA. The agency relied on its technical expertise to adopt reasonable attainment goals in light of this new legal standard and the facts available to them. In doing so, the agency articulated a "rational connection between the facts found and the[ir] choice" to attain ERA goals through a tiered monitoring and remediation plan.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

IV. The District Court correctly retained jurisdiction over the FAWS state law tort claims after resolving the federal claims. The court exercised supplemental jurisdiction because all state and federal law claims arose under the same "common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see* 28 U.S.C. § 1367(a). Because the district court had expended significant resources becoming acquainted with the complicated and nuanced factual background of this case and the remaining tort claims were not considered novel or complex, the court was well within its discretion to retain supplemental jurisdiction over pending state law claims. *See* 28 U.S.C. § 1367(c)(1); *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191-92 (2d Cir. 1996); *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006).

STANDARD OF REVIEW

The court in this case must review grants of summary judgment concerning CERCLA and APA claims and subject-matter jurisdiction.

Grants of summary judgment on CERCLA claims are reviewed de novo, *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir. 1996), with summary judgment granted only where there remains no issue of material fact, Fed. R. Civ. P. 56(c).

Where summary judgment is granted on APA claims, the reviewing court must determine not "whether a dispute of fact remains" but "whether the agency action was arbitrary and capricious." *Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016); 5 U.S.C. § 706(2)(A). In applying the deferential arbitrary and capricious standard, the court must not substitute its own judgment for the agency's but rather ensure that the agency "examine[d] the relevant data and articulate[d] … a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). As long as the agency has acted lawfully and "within a zone of reasonableness," the court should defer to the agency's expertise and uphold its decision. *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (quoting *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

Subject-matter jurisdiction is also reviewed de novo, as the court is obligated to consider the issue whenever it presents itself. Fed. R. Civ. P. 12(h)(3); *Pillow v. Bechtel Const., Inc.*, 201 F.3d 1348, 1351 (11th Cir. 2000).

ARGUMENT

I. FAWS is not entitled to recover response costs of $21,500 from BELCO because NAS-T is not a hazardous substance, and because FAWS' testing was not "necessary" or consistent with the National Contingency Plan.

The District Court was correct in determining that the costs FAWS incurred are not reimbursable as response costs. CERCLA provides that PRPs may be liable for any "necessary cost of response incurred by any other person consistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(B). A plaintiff can establish a prima facie case for cost recovery by showing: "(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, et al.* 427 F. Supp. 3d at 1020 (citing *Sycamore Indus. Park Assocs.* 546 F.3d at 850).

Furthermore, because FAWS is a non-governmental plaintiff, it must show that the costs incurred were "necessary and consistent with the NCP." *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992) (explaining that 42 U.S.C. § 9607(a)(4)(A) establishes a different standard for "removal or remedial action costs incurred by the United States Government, or a State or Indian Tribe," indicating Congress intended non-governmental parties to "affirmatively prove that their actions are necessary and consistent with the NCP").

Here, there has not been a release of a hazardous substance, and the costs incurred were not necessary or consistent with the NCP. Therefore, the costs FAWS incurred for testing are not reimbursable under CERCLA.

A. The site in question is a facility.

The polluting site must be a facility under CERCLA. *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004). In *Village of Milford*, this prong was met when the Village of Milford incurred costs monitoring its wells due to contamination from a nearby

factory. *Id.* at 930. CERCLA defines a facility as any "building, structure…lagoon…, or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). It is undisputed that NAS-T seeped from an unlined lagoon storing wastewater at the Facility into the Aquifer, which supplies Fartown's wells. Record at 6.

B. BELCO is a responsible party.

An entity is a potentially responsible party if it falls into one of four categories: a current owner or operator of a facility, an owner or operator of a facility at the time a hazardous substance was disposed, one who "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances," or one who transported hazardous substances to disposal or treatment facilities from which there was a release or threatened release. 42 U.S.C. § 9607(a)(1-4). In this case, BELCO (1) is the current owner, (2) owned and operated the Facility while NAS-T was being manufactured from 1973 to 1998, and (3) owned and operated the Facility while wastewater was stored there in the 1980s and 1990s. Record at 6. BELCO is the only possible source of NAS-T, *id.* at 12, and has been found responsible for the contamination. *Id.* at 4.

C. There has been a release of NAS-T, but NAS-T is not a hazardous substance.

Pursuant to 40 CFR § 302.4, CERCLA applies to listed and unlisted hazardous substances. 40 CFR § 302.4 Because NAS-T has not been regulated under any other state or federal regulation, it does not fall under any of the applicable designations or listings, and cannot be a listed hazardous substance. Record at 6. The definition of unlisted hazardous substances relies on characteristics laid out in the Resource Conservation and Recovery Act (RCRA): ignitability, corrosivity, reactivity, and toxicity. 40 CFR § 261.20-24. There is no evidence to

suggest NAS-T is ignitable, corrosive, or reactive. Furthermore, a waste exhibits toxicity if it contains certain levels of listed contaminants, and there is no evidence to suggest NAS-T contains any of these contaminants. 40 CFR § 261.24. Therefore NAS-T is not a listed or unlisted hazardous substance and does not satisfy the criteria for cost recovery under CERCLA.

Nevertheless, there is no question that there has been a release, which is defined as any "spilling, leaking,…escaping, leaching…or disposing into the environment." 42 U.S.C. § 9601(22). The contamination "migrated" from the unlined lagoon to the aquifer. Record at 6.

D. FAWS incurred costs in response to the release, but the costs were not necessary or consistent with the National Contingency Plan.

(1) FAWS has incurred costs in response to the release.

FAWS has incurred costs in response to the release. In *Rolan v. Atlantic Richfield,* the court held the party had not actually incurred costs because the plaintiff's attorney paid to hire an investigator, and whether the plaintiff actually paid that fee depended on the outcome of the case. *Rolan, et al.*, 427 F. Supp. 3d at 1021. Here, FAWS has actually and directly paid for testing due to concern about NAS-T, therefore incurring costs. Record at 8. In addition, the costs were in response to the release. The term "response" encompasses removal and remedial action. 42 U.S.C. § 9601(25). "Removal" includes actions to "monitor, assess, and evaluate the release…of hazardous substances." *Id*. at § 9601(23). FAWS' testing falls within the definition of removal. *Vill. of Milford.,* 390 F.3 at 934.

(2) FAWS' response actions were not necessary and therefore not entitled to cost recovery.

A "necessary" response action cannot be duplicative of EPA's own actions. *United States v. Iron Mt. Mines*, 987 F. Supp. 1263, 1272 (E.D. Ca. 1997). Actions are duplicative if they duplicate work already performed by EPA or a state agency, *Wilson Rd. Dev. Corp. v.*

Fronabarger Concreters, Inc., 209 F. Supp. 3d 1093, 1112 (E.D. Mo. 2016), or they occur after EPA has informed private parties of its own investigation, *Louisiana Pac. Corp. v. Beazer Materials & Servs.*, 811 F. Supp. 1421, 1425 (E.D. Ca. 1993). Furthermore, sampling and testing costs can be recovered if they were reasonable and not scientifically deficient or unduly costly. *Johnson v. James Langley Operating Co*., 226 F.3d 957, 964 (8th Cir., 2000). In addition, the costs incurred must be "closely tied to the *actual cleanup* of hazardous releases." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) (emphasis in original).

Generally, costs incurred by a private party for investigation after EPA has investigated are considered duplicative. *Louisiana Pac. Corp.*, 811 F. Supp. at 1425. EPA has overseen BELCO's monitoring through three lines of wells since July of 2016 and continues to test these wells. Record at 7-8. In February, 2019 the Department of Health (DOH) tested Fartown drinking water wells at FAWS' request and found no NAS-T contamination. *Id.* at 8. Furthermore, FAWS' investigatory actions were not authorized by EPA and in fact had been explicitly denied. *Id*. There is no evidence to suggest that FAWS testing methods were scientifically deficient or unduly costly. However, it was not unreasonable for EPA to decline further testing. Allowing FAWS to recover costs here would be to give them the discretion to incur costs and pass them on to others, *Louisiana Pac. Corp*., 811 F. Supp. at 1425, interfering with EPA's authority to control investigation and cleanups under CERCLA.

Circuits disagree about how to address the reasonableness component of response costs. *Compare Rolan, et al.*, 427 F. Supp. 3d at 1024 (holding that reasonableness of conduct is not relevant) *with Wilson Rd. Dev. Corp.*, 209 F. Supp. 3d at 1112 (holding that monitoring expenses can be reimbursable only if they were incurred in a reasonable manner) *and Vill. of Milford.*, 390 F.3 at 933 (holding that testing of wells known to be contaminated was reasonable). The Court

here should follow the 7th and 9th Circuit in holding that reasonableness is not relevant to the inquiry.

Alternatively, if the Court determines that reasonableness should be considered, FAWS' response actions were not reasonable. In *Village of Milford*, Milford's testing of wells was reasonable because contamination had previously been found and the state Department of Natural Resources had advised continued studies. *Vill. of Milford*, 390 F.3d 926 at 930. Here, however, further testing was not reasonable because previous testing had found only two instances of contamination below the HAL, which did not warrant further testing. Record at 8.

Furthermore, FAWS' testing is not closely tied to actual remediation activities. Investigation and monitoring activities can be recoverable if they are closely tied to actual cleanup, and not if they are only overseeing the liability of another party. *Wilson Rd. Dev. Corp.*, 209 F. Supp. 3d at 1113. FAWS states that they conducted testing because residents had a right to know about any contamination in their water. Record at 12. However, the motive of a party seeking response costs is irrelevant. *Wilson Rd. Dev. Corp.*, 209 F. Supp. 3d at 1111. FAWS did not indicate any intention of initiating cleanup activities. Rather, FAWS sent the results of the tests to EPA to request remediation on the basis of BELCO's liability for the contamination. Record at 8. In June, 2020, EPA declined to take action on the NAS-T detected in the 2019 Central Labs testing because the levels were too low to trigger any cleanup. *Id.* Although EPA later reopened the CD and engaged in further testing and remediation, record at 9, this is not sufficient to establish a nexus between the investigatory response costs and actual cleanup. *Young*, 394 F.3d at 865. Although EPA cited Central Lab's results, the results did not trigger the reopening of the CD. Initiation of further action was due to the changed standards under the

ERA. *See infra* Section III.A. The results did not become relevant to any actual cleanup costs until the standard changed under the ERA.

(3) FAWS' response actions were not consistent with the National Contingency Plan. and therefore not entitled to cost recovery.

An action is consistent with the NCP if it, "when evaluated as a whole, is in substantial compliance with the applicable requirements in [40 C.F.R. § 300.700(c)(5)-(6)] and results in a CERCLA-quality cleanup." *Young,* 394 F.3d at 864. Some Circuit Courts have held that consistency with the NCP is not required to recover costs incurred for monitoring and investigation. *Vill. of Milford,* 390 F.3d 926 at 934. The Court may find that the NCP is not applicable in this case, and therefore that FAWS' response costs are not reimbursable because they were not necessary. If the Court finds the NCP does apply, the result is the same because FAWS' response costs are not necessary or consistent with the NCP.

There is some overlap between "necessary" and "consistent with the NCP." For example, just as FAWS' testing was not closely tied to actual cleanup, it also did not result in any, much less a CERCLA-quality, cleanup. *Young,* 394 F.3d at 864. In addition, there is no evidence to suggest that FAWS' actions were in substantial compliance with 40 C.F.R. § 300.700(c)(5)-(6), but nevertheless the lack of a CERCLA-quality cleanup is sufficient to establish that FAWS' response costs are not consistent with the NCP. *See id.*

The costs FAWS incurred are not reimbursable under CERCLA because NAS-T is not a hazardous substance, and because the costs were not necessary or consistent with the NCP.

II. New Union's Environmental Rights Amendment satisfies the requirements to be properly considered an ARAR.

EPA's proposed remedy must comply with a State's ARAR if the ARAR is (1) promulgated, (2) more stringent than federal standards, (3) applicable or relevant and

appropriate, and (4) timely identified. 42 U.S.C. § 9621(d). The ERA meets all four prongs of the statute, and is thus relevant and appropriate in instant action.

A. The ERA is properly promulgated because it is legally enforceable and of general applicability.

EPA guidance interprets "promulgated" as a law that is "legally enforceable and of general applicability." U.S. Envt'l Prot. Agency, Publication 9234.2-05/FS, CERCLA Compliance with State Requirements (1989). EPA goes on to define "legal enforceability" as regulations that "have their own specific enforcement provisions written into them or can be enforced through the State's general legal authority." *Id.* Further, EPA clarifies that to be generally applicable, the requirement in question "must apply to a broader universe than Superfund sites." *Id.*

To the first requirement, the ERA clearly met this threshold. A constitutional amendment can be enforced through the State's legal authority. Further, the legislative history of the ERA clearly reflects the State legislature's intent that the ERA be self-executing. *Concurrent Resolution of the Senate and Assembly Proposing an Amendment to Article I of the Constitution*, A02137, N.U. Assemb. No. A10377, 3 (2020) (statement of Wright). There is significant jurisprudence that indicates, "where its [constitutional] provisions are negative or prohibitory in character, they execute themselves." *Washingtonian Home of Chicago v. City of Chicago,* 157 Ill. 414, 426 (1895). The New Union legislature's intent with the ERA was to make the right to a clean environment just as legally actionable as other, more commonly enshrined political rights. Wright, *supra*, at 2. One does not question the state's and private citizens' right to enforce political rights, like freedom of speech or the right to bear arms. In adopting the ERA, the New Union legislature attempted to give environmental rights the same enforceability as other constitutionally protected rights.

Additionally, EPA guidance documents clearly state that, "legally enforceable requirements are State regulations or statutes that: (1) contain specific enforcement provisions; or (2) are enforceable by means of the general authority in other laws *or in the State constitution."* (emphasis added) U.S. Envt'l Prot. Agency, EPZ/540/G-89/009, CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements, 7-3 (1989). Clearly, EPA intended State constitutional amendments without an explicit enforcement mechanism to be "properly promulgated."

To the second requirement, the ERA clearly applied to a broader universe than just Superfund sites. There was no indication in the text of the Amendment that the right to a healthful environment applied only to those sites that met CERCLA requirements. N.U. CONST. art. I § 7. Further, the ERA established an affirmative right to clean air and water–something that CERCLA, as a strictly remedial statute, does not. 42 U.S.C. § 9606. CERCLA does not provide for a right to a clean and healthful environment. Rather, its goal is to distribute cleanup costs to responsible parties at hazardous waste sites. See *General Electric Co. v. Litton Indus. Automation Systems,* 920 F.2d 1415 (8th Cir. 1990). Green Rights Amendments like the ERA have been used by other states in a wide array of actions. For example, the Montana Supreme Court has ruled that Montana's ERA provides for the right to equitable relief to prevent environmental harm from occurring in the first place. *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288. As a backward-looking statute, there is no such provision in CERCLA that would allow parties to sue for equitable relief. Therefore, the scope of New Union's ERA included many potential actions for which CERCLA cannot provide relief.

The ERA also satisfied EPA's intended goal of differentiating non-binding policies from those rules that apply to all State citizens. *United States v. Azko,* 949 F.2d 1409, 1440 (6th Cir. 1991). There is no higher legal authority in a given state than the state's constitution. Constitutions, be it state or federal, apply to all citizens within a particular political body. The ERA was passed by the New Union state legislature and was clearly intended to apply equally to all citizens of New Union. Wright, *supra,* at 1. This is in contrast to a nonbinding recommendation that may be promulgated by an administrative organization. BELCO argued that the ERA was not properly promulgated but fails to provide any evidence to reach this conclusion. As evidenced by the record, the ERA was properly promulgated under EPA's guidelines.

In sum, the ERA is properly promulgated because negative state constitutional amendments are self-executing and broadly applies to varied scenarios outside the scope of CERCLA.

B. The ERA is more stringent than federal standards because no equivalent federal standards exist and provides causes of action unavailable under CERCLA.

Absent a comparable federal requirement that addresses NAS-T, State ARARs are considered inherently more stringent than any federal standard that may be applicable. U.S. Envt'l Prot. Agency, EPZ/540/G-89/009, CERCLA Compliance with Other Laws Manual: Part II Clean Air Act and Other Environmental Statutes and State Requirements, 7-8 (1989). NAS-T was not a regulated substance under CERCLA. Record at 6. The only regulation of the chemical is a HAL set by EPA two decades ago. *Id.* HALs are meant to primarily serve as informational tools for regulators to determine if local action is needed to mitigate health risks. 42 U.S.C. § 300g-1(b)(1)(F). EPA specifically stipulates that HALs are not legally enforceable standards and do not constitute regulations. Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances, 87 Fed. Reg. 36,849 (proposed Jun. 21, 2022). Because there are no state or federal

regulations, much less statutes, that regulate NAS-T outside of the (non-legally binding) HAL, the ERA was more stringent than federal standards.

BELCO argued that the ERA was not more stringent than federal environmental standards because it mirrored requirements of a PRP's viable alternative analysis. One of the steps in the remedial investigation process requires the remediating party to consider alternatives while accounting for the alternative's "overall protection of human health and the environment," among other factors. 40 C.F.R. § 300.430(e)(9)(iii). However, one step in a broader process that requires remediating parties to contemplate the effect on human health and the environment is not equivalent to an environmental rights amendment designed to create an actionable right to a healthful environment and fill legislative gaps. *See* Wright, *supra*, at 4. By enshrining a right to a clean and healthy environment into the constitution, the citizens of New Union have made that right inalienable and inherent. The mere consideration of "human health and the environment" as necessitated in the remedial investigation process does not afford a positive right to a clean environment nor does it provide a basis for private citizens to sue entities that endanger the rights enshrined in the ERA.

Presently, three states have implemented environmental rights amendments similar to New Union's ERA: Pennsylvania, Montana, and New York. Other states, like Hawaii and Illinois, have constitutional provisions that afford some protection to natural resources or public health as derived from the environment. National Caucus of Environmental Legislators, *Breaking Down State Green Amendments* (Nov. 6, 2020), https://www.ncelenviro.org/articles/breaking-down-state-green-amendments/ (last visited Nov. 20, 2022). The Pennsylvania amendment, similar to the New Union ERA, explicitly provides the right to clean air and pure water. In *Robinson Tp., Washington Cnty. v. Com.*, the Pennsylvania Supreme Court struck down a law that it found

contradictory to the goals of the Pennsylvania Green Amendment and violated the public trust that Amendment created. 623 Pa. 564, 690 (2013). Due to the New Union and Pennsylvania ERA's similarity, and the legislative history of the New Union ERA, the two ERAs can be interpreted similarly.

Because there are no applicable federal standards, the New Union legislature intended the ERA to have implications outside of CERCLA's remedial causes of action, and other state's ERAs have historically been applied broadly, the ERA is more stringent and broadly applicable than federal standards.

C. The ERA is relevant and appropriate because it addresses problems similar to those present at a CERCLA site and is appropriate to the circumstances of instant Aquifer and soil contamination.

To be considered applicable, a regulation must: (1) directly regulate the pollutant or action being taken at a CERCLA site and (2) be promulgated. U.S. Envt'l Prot. Agency, EPA/540/G-89/006, CERCLA Compliance with Other Laws Manual: Interim Final, 1-60 (1988). As stated above, it is clear that the ERA was properly promulgated. The first prong, however, is not met by the ERA. The New Union legislature intended the ERA to be broadly enforceable and provide sweeping causes of action for private citizens. *Id.* Restricting the ERA to a discrete set of contaminants or types of actions would be contrary to the legislature's intent. Therefore, the ERA is not applicable.

To be considered relevant and appropriate, a requirement must: "(1) regulate or address problems or situations sufficiently similar to those encountered at the CERCLA site, and (2) [be] appropriate to the circumstances of the release or threatened release, such that its use is well suited to the particular site." *Id.* This analysis is site-specific, should be conducted by

professionals, and involves balancing several factors to determine if a regulation is relevant and appropriate. These factors include:

> (1) the purpose of the requirement and the purpose of the CERCLA action; (2) the medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site; (3) the substances regulated by the requirement and the substances found at the CERCLA site; (4) the actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site; (5) any variances, waivers, or exemptions of the requirement and their availability for the circumstances at the CERCLA site; (6) the type of place regulated and the type of place affected by the release or CERCLA action; (7) the type and size of structure or facility regulated and the type and size of structure or facility affected by the release or contemplated by the CERCLA action; and (8) any consideration of use or potential use of affected resources in the requirement and the use or potential use of the affected resource at the CERCLA site. 40 C.F.R. § 300.400(g)(2)(i-viii)

All factors should be construed narrowly.

The ERA was clearly drafted to address issues of water contamination and thus meets the first prong of the relevant and appropriate test. The ERA's focus on "clean water and to a healthful environment free from contaminants and pollutants caused by humans," demonstrates the legislature's intent to generally address the problem of human-caused water pollution. N.U. CONST. art. I § 7. The submitted justification of A02137 to the state assembly explicitly mentions the Amendment's goal of protecting the people and the environment from harms caused by "non-natural, human-caused pollutants and contaminants." S. Rep. No. A10455-A02137, at 1 (2020). There is no dispute from any present party that the contamination of NAS-T into the groundwater and soil is anything other than human-driven. CERCLA contains clear provisions that guide groundwater and contamination remediation. 42 U.S.C. § 9621(d).

The legislative record reflects that the drafters of the ERA considered that sufficiently strong odors may warrant a violation of the ERA's "right to clean air" provision. Wright, *supra*, at 2. Applying the second factor of those listed above, a side-effect of NAS-T is a noticeable smell,

even at low levels. While odor alone may not be regulated under CERCLA, the pollution causing that odor can fall under CERCLA purview. Because groundwater and soil contamination is a common feature of CERCLA sites and the ERA seeks to address groundwater and soil contamination, the first prong is satisfied.

To the second prong of the relevant and appropriate test, the application of the ERA to the facts at hand was appropriate to the circumstances of the release and was suited to the site at hand. In the event that an ARAR arises after a CD has been closed, it is proper for EPA to do further investigation to ensure remediation complies with the ARAR. EPA had issued a HAL to recommend safe levels of NAS-T, though unregulated by any other state or federal standard. This HAL included a "significant margin of error" in calculating appropriate safe exposure levels. Record at 6. EPA recently has sought to afford stronger protections and improved due diligence to environmental justice communities. U.S. Envt'l Prot. Agency, Memorandum: Strengthening Environmental Justice Through Cleanup Enforcement Actions (2021). Specifically, EPA seeks to use UAOs, as it did in this case, to ensure a high level of scrutiny when choosing and implementing remediation measures.

After additional evidence was provided by FAWS after the closure of the initial Consent Decree and the implementation of the ERA, EPA had a stronger justification for reevaluating the remediation measures implemented to ensure the measures were not harming or ignoring environmental justice communities. The ERA is designed to afford protections to New Union citizens from "contaminants and pollutants caused by humans." N.U. CONST. art. I § 7.

In contrast, BELCO argues that the ERA does not meet the legally applicable or relevant and appropriate prong of the ARAR test because it is not specific enough to address the situation at hand. Because the ERA provides no measurable regulations with which to spur action, says

BELCO, it cannot be legally applicable. There are two responses to this argument. First, there is no legal nor administrative precedent requiring that ARARs are specific. EPA's promulgated balancing factors underscore the fact that not every ARAR will directly relate to a site-specific issue. Factor three in particular requires that the ARAR apply to substances regulated at the CERCLA site. It is *because* of the level of generality of the ARAR that it is applicable. To narrowly construe the ERA as only applying to articulated substances (of which there are none) would be to violate the intent of the New Union legislature and will of the New Union citizens. Second, the ERA was designed as a gap-filling, self-executing measure that needs no further clarification to be actionable. The legislative history of the ERA indicates that the drafters of the resolution intended the ERA to protect citizens from harm not otherwise articulated in state or federal statutes. It allows enforcing agencies the latitude to determine whether otherwise unregulated substances threaten a clean and healthful environment.

ERA is relevant and appropriate because it was written to specifically address concerns similar to those at the Sandstone Aquifer and its application to the site was specifically alluded to during New Union state congressional testimony.

D. The ERA was timely identified.

The final criterion in determining whether or not the ERA is an ARAR is whether or not it was timely identified. Absent a State Memorandum of Agreement, EPA is not obligated to consider ARARs identified outside a designated timeframe into their decision framework. CERCLA Compliance with State Requirements (1989). The ERA was adopted by the citizens of New Union on November 3, 2020 with 71% of the vote. Record at 8. Approximately 2 months later, EPA and DNR began discussions concerning the ERA's ARAR status. *Id.* at 9. DNR confirmed to EPA that EPA should consider the ERA an ARAR. *Id*. It is unclear from the record

when precisely in January EPA reached out to DNR. However, BELCO did not contest the timing of the ARAR's identification. Even if DNR did not reply within the appropriate timeframe, decision making ultimately lies with EPA to consider identified ARARs. Therefore, the ERA fulfilled this final requirement as well.

Given BELCO did not raise the issue at the District Court level and discretion of whether to to consider an ARAR ultimately lies with EPA, the ERA was timely identified.

III. The District Court erred in vacating EPA's determination that BELCO was not required to install filtration systems on all wells in Fartown because the decision was not arbitrary or capricious.

EPA acted reasonably and lawfully pursuant to its authority under CERCLA to determine appropriate cleanup action in Fartown. In setting forth the requirements of the UAO, the agency took relevant facts into consideration and used its discretion to apply emerging data and legal standards to the issues before it. *Id.* The agency's reasoning is well documented in the record by its history of regulating NAS-T and its careful consideration of new state guidance and implications of reopening the BELCO consent decree to require supplemental remedial actions. *Id.* at 6, 9-10. Because EPA's determinations and orders involved technical expertise and articulated a rational connection between the facts found and the choice made, they are entitled to heightened deference and should be upheld. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (where analysis requires a high level of technical expertise, courts must defer to the agency's informed discretion); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

A. EPA's decision is rationally connected to the factual findings.

In 1995 EPA adopted, in response to various medical studies, a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). Record at 6. This level

incorporated a "significant margin of error to ensure that level of exposure is nontoxic to humans." *Id.* After complaints of NAS-T in the public water supply were raised by residents of Centerburg in 2013, EPA supervised BELCO's installation of NAS-T monitoring wells–the southernmost five of which were installed approximately half a mile north of Fartown. *Id.* at 7. These five wells showed no detectable amounts of NAS-T during 2016 and 2017, and the agency reasonably concluded that expanding the scope of monitoring toward Fartown was unnecessary. *Id.* Monitoring wells produced consistent non-detect results with only two NAS-T detections near Fartown in early 2018 at 5 and 6 ppb, respectively. *Id.* at 8. These levels being below the HAL for toxicity, EPA considered all test results cumulatively and determined that additional remedial action was not warranted. *Id.*

Despite Fartown residents' testimony that they detected potential contamination in 2016, they did not object to the scope of the Consent Decree until 2019–after remedial actions were completed and EPA issued BELCO's Certificate of Completion. *Id.* at 7-8. In response to the residents' eventual complaints, additional testing of private wells in Fartown was conducted–again returning no presence of NAS-T. *Id.* at 8. The testing data available to EPA at the time therefore justified its rejection of Fartown residents' request to expand testing. *Id.* This decision was based on test results spanning three years, all of which supported the conclusion that NAS-T levels in Fartown were at most nominal. *Id.*

Following this decision, the agency took into consideration additional test results procured by Fartown residents later in 2019. *Id.* Of the test samples, 120 showed no detectable levels, 51 showed concentrations between 1-4 ppb, and 54 detected levels in the 5-8 ppb range. *Id.* While these results provided EPA with information contrary to previous testing, they did not exhibit NAS-T levels at or above the HAL and did not indicate that the cleanup plan in place was

"no longer protective of human health or the environment." *Id.* at 7-8. The results therefore did not constitute the "new information" necessary to trigger reopening of the BELCO Consent Decree. *Id.* at 7. Nor did the existence of conflicting test results undermine EPA decision making. *See Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if … a court might find contrary views more persuasive.")

Only after New Union passed the ERA could EPA reopen the CD. Record at 7. The "new, more stringent" regulatory standard provided EPA with the legal grounds necessary to reopen the CD and reconsider the sufficiency of BELCO's remedial actions. *Id.* After the reopening, EPA took significant steps to assess the adequacy of remedial action in light of the newly promulgated standards, taking into consideration NAS-T's carcinogenic effects, Fartown's status as an environmental justice community, and odors reported by residents. *Id.* at 9. This resulted in the UAO mandating that BELCO sample 50 wells in Fartown each month, supply drinking water for anyone whose well indicates NAS-T levels between 5 and 10 ppb, and supply CleanStripping filtration systems on any well testing above 10 ppb. *Id.*

When BELCO refused to comply, EPA took further action to monitor Fartown wells and supply drinking water. *Id.* at 10. Monitoring produced results consistent with previous FAWS tests, "showing approximately 55% of samples having non-detect levels for NAS-T, 25% in the 1 to 4 ppb range, and 20% in the 5 to 8 ppb range." *Id.* Still, no testing produced results over the HAL of 10 ppb. *Id.* EPA based its tiered testing and filtration requirements in the UAO on the need for consistent data collection and reasonable thresholds for installation of expensive equipment only in cases where NAS-T concentrations rose to harmful levels.

FAWS' challenge to this agency action rests on the group's erroneous conflation of the ERA's status as an ARAR with its capacity when considered within CERCLA's regulatory scheme. *Id.* at 16. It is critical to note that while the ERA provided the procedural mechanism for reopening the CD, quantitatively determining compliance with the new standard was ultimately a matter of EPA interpretation and discretion. EPA's decision to use the HAL threshold for installation of CleanStripping filtration systems as one measure in the overall remediation scheme was therefore a wholly reasonable exercise of agency discretion based on the information and legal standards available.

B. Remedial actions are compliant with ARAR standards and relevant environmental laws.

CERCLA requires that cleanup measures ordered by EPA must attain standards of "any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation." 42 U.S.C. § 9621(d)(2)(A)(ii). Once a standard meets this requirement, it is considered an ARAR. Because the ERA constituted an ARAR, it was EPA's responsibility to ensure that remedial action taken attained the standards therein. *Id.*

Despite the ERA's admirable goals, it provided little in the way of quantitative or substantive requirements for attainment. N.U. CONST. art. I § 7. Not only is the ERA void of articulable numeric standards EPA could apply to remedial action requirements, the amendment's legislative history explicitly acknowledges the text's inherent vagueness. Wright, *supra*, at 2 ("The flip side of language that has no definition… or no detail is that it doesn't have any detail.") The amendment's sponsor urges that the new standard is "simple" and "not complicated," and that "[i]t is what it says." *Id.* at 1. Unfortunately, this simplicity quickly

dissolves into vague, circular definitions when the sponsor is asked, for example, to clarify what "clean" means. *Id.* at 2-3 (clean means "healthful" and "free of contamination or pollution caused by humans that would make that water unhealthful or harmful to consume;" "[h]ealthful" means "do no harm to consume;" smell may be a contaminant if it is "offensive" and "impact[s] what the community would consider 'clean' air").

Beyond general enshrinement of environmental rights, the ERA provides no standards or measures that ensure water and air are "free from contaminants and pollutants," and in the case of NAS-T it is clear that state environmental officials "lack[ed] [the] resources and expertise" to analyze contamination and establish remediation standards. Record at 6 (explaining why New Union DNR officials referred their NAS-T investigation to EPA). Contrary to the district court's reasoning that interpretation of the ERA should not be "left to the … EPA's regulatory framework," Record at 16, this is precisely the context in which the agency must exercise its interpretive authority to determine specific, substantive standards against which to measure cleanup compliance, *see* U.S. Envt'l Prot. Agency, EPZ/540/G-89/009, CERCLA Compliance with Other Laws Manual: Part II at 7-3.

Fortunately, EPA manuals provide guidance for determining attainment with ARAR standards and acknowledge that promulgated state laws may range from specific numeric standards to narrative criteria that "do not contain specific requirements." *Id.* When applying the latter, "[t]he identification of the requirements through which narrative criteria are implemented on a site-specific basis may call for a review of other environmental statutes." *Id.*

Absent any numeric standards in the ERA, EPA guidance required that application of the ERA's "narrative" criteria was based on review and application of other relevant environmental statutes and "interpreted on a site-specific basis." *Id.* The agency therefore resorted to relevant

law to determine (1) what constituted a contaminant and (2) what measures were necessary to attain compliance with the law. N.U. CONST. art. I, § 7 (requiring that "[e]ach and every person of this State shall have a fundamental right to clean air and water and to a healthful environment free from contaminants and pollutants caused by humans").

In this case, the relevant environmental statute was CERCLA, which picks up where the ERA left off in defining "pollutant" or "contaminant" as

> [A]ny element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. 42 U.S.C. § 9601(33).

Though NAS-T was not regulated under CERCLA, *see* Record at 6, considering relevant definitions from CERCLA along with scientific findings regarding NAS-T health impacts to establish attainment standards for a "clean" and "healthful" environment was a reasonable exercise of fact finding, expertise, and discretion expected of EPA pursuant to its statutory authority, *see* 42 U.S.C. § 9621; U.S. Envt'l Prot. Agency, EPZ/540/G-89/009, CERCLA Compliance with Other Laws Manual: Part II at 7-3. It is clear from the ERA's legislative history that clean water doesn't necessarily mean "free of any or all substances besides H2O." Wright, *supra*, at 2. The existence of some NAS-T–below harmful levels–in Fartown wells was therefore permissible under the HAL, ERA, and CERCLA.

Applying the HAL standard to manage filtration installation in Fartown was part of a well-reasoned remediation plan rationally connected to the facts before the agency and calculated to ensure that water in Fartown would be free of harmful contaminants.

IV. The District Court correctly retained jurisdiction over FAWS state law tort claims after resolving the federal claims because all claims formed the same case or controversy.

In any action where federal courts have original federal question jurisdiction, they also have supplemental jurisdiction over all claims so closely related to the claim with the federal claim that they form the same case or controversy. 28 U.S.C. § 1367(a). In this case, the district court had original federal question jurisdiction over claims arising under CERCLA and the APA, *see* 28 U.S.C. § 1331, the state and federal law claims arose from the same operative facts, and the decision to exercise supplemental jurisdiction over the remaining state law claims was a matter of judicial discretion, *Gibbs*, 383 U.S. at 726.

A. The state law claims were so related to the federal law claims that they formed part of the same case or controversy.

The standard for evaluating whether the remaining state law claims were closely related is the "common nucleus" test, which asks whether the claims in question arise from a "common nucleus of operative fact." *Id.* at 725. The tort claims and federal law claims here all rest on a common nucleus of operative fact.

The original jurisdiction claims in this case concerned the parties' actions with regard to cost recovery, response and remediation, and attainment standards under CERCLA. *See* Record at 5. The court's decision on each of these issues involved significant investigation into site specific details, applicable state and federal environmental law, and a fact-intensive timeline of events spanning several years. *See* Record at 18. This expansive and detailed factual background is precisely the same factual background giving rise to the remaining state law claims.

B. No factors weighed in favor of the District Court dismissing the state law claims.

Once it is established that the court may exercise supplemental jurisdiction for claims forming part of the same case or controversy, all grounds for dismissal of state law claims are permissive. *See* 28 U.S.C. § 1367(c). Exercising supplemental jurisdiction becomes a "doctrine of discretion" where courts consider whether (1) state law claims raise a novel or complex issue of state law, (2) state law claims substantially predominate over the federal claims, (3) the court has dismissed all original jurisdiction claims, or (4) there are other compelling reasons for declining jurisdiction. *Id.*; *Gibbs*, 383 U.S. at 726. The court must also consider judicial economy, convenience, and fairness. *Gibbs*, 383 U.S. at 726.

Though it is true in most cases that "the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims," in this case the factors weigh heavily in favor of retaining jurisdiction and the court properly exercised its judicial discretion in doing so. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 364 n.7 (1988).

The remaining state law claims here are general and do not raise any novel issues of law, *see* 28 U.S.C. § 1367(c)(1); *Parker*, 468 F.3d at 743 ("Generally, state tort claims are not considered novel or complex."); Record at 18, nor did they substantially predominate over the federal law claims, *see* Record at 17.

The district court expended significant resources becoming acquainted with the complicated and nuanced factual background of this case, and the factors of judicial economy, convenience, and fairness therefore encouraged the court to apply that familiarity to expeditiously resolve the negligence and nuisance claims. *See Gibbs*, 383 U.S. at 726; *Nowak*, 81 F.3d at 1187 (finding that requiring a state court to duplicate the effort of "acquainting itself with the facts and issues of the case … would not serve the interests … that are central to the exercise of supplemental jurisdiction"); *see also* Record at 18.

Because there were no otherwise compelling reasons to dismiss, the court was well within its discretion to retain supplemental jurisdiction over remaining state law claims. *See* 28 U.S.C. § 1367(c)(4); *see also Gibbs*, 383 U.S. at 726.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's determination that FAWS' purported response costs were not recoverable under CERCLA, the ERA constituted an ARAR and thus BELCO was compelled to comply with the UAO, and supplemental jurisdiction was proper in instant action. This Court should reverse the district court's determination that EPA's standards for well filter installation in Fartown were arbitrary and capricious.