NON-MEASURING BRIEF
TEAM 14

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

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

On Appeal from the United States District Court for the District of New Union in consolidated cases 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 nos. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The District Court had subject-matter jurisdiction of the federal claims pursuant to 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). The District Court has supplemental jurisdiction of the state law claims pursuant to 28 U.S.C. § 1367. The Environmental Protection Agency ("EPA"), Better Living Corporation ("BELCO"), and Fartown Association for Water Safety ("FAWS") all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. All parties cross-motioned for summary judgement, and the court granted at least one party's motion for each issue. A denial of a motion for summary judgement is a final order and thus appealable if the court grants a cross-motion summary judgement. *Abend v. MCA, Inc.,* 863 F.2d 1465, 1482 (9th Cir. 1988), *aff'd sub nom. Stewart v. Abend*, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990).

STATEMENT OF ISSUES PRESENTED

I. Did the District Court properly determine that costs incurred by FAWS for sampling, testing and analyzing private water wells are not reimbursable as response costs under CERCLA?

II. Did the District Court properly uphold the EPA's determination that the Environmental Rights Act constitutes an Applicable or Relevant and Appropriate Requirement, and the EPA's decision to reopen the Consent Decree and order further testing?

III. Did the District Court improperly determine that EPA's decision not to require BELCO to install filtration systems in Fartown was arbitrary, capricious, or contrary to law?

IV. Did the District Court properly retain jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

A. CERCLA, Parties, and Relevant Geography

The Comprehensive Environmental Response, Compensation, and Liability Act, coined CERCLA, is a federal environmental remediation program that was enacted to "to address the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). It was designed "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Id.*

The EPA is a federal agency that protects people and the environment from significant health risks; sponsors and conducts research; and develops and enforces environmental regulations. *See Our Mission and What We Do*, U.S. E.P.A. https://www.epa.gov/aboutepa/our-mission-and-what-we-do. As part of these duties, the EPA administers CERCLA. *See United States v. Azko Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) (CERCLA left "decisions regarding toxic substance cleanup to the President's delegate, the EPA administrator and his staff"). BELCO is an industrial manufacturer that created NAS-T, the pollutant at issue in this case. R. at 5. FAWS is an organized group of 100 Fartown residents and the third party to this case.

New Union has two towns relevant to the issues in this case: Centerburg and Fartown. Centerburg is home to 4,500 residents and is located 2 miles north of Fartown, which is a rural

town with approximately 500 residents. R. at 5. About 300 feet below both towns lies the Sandstone Aquifer. The Centerburg Water Supply ("CWS") pumps and treats water from the aquifer and distributes it to Centerburg residents. R. at 5. Fartown residents, however, receive their water directly from the Aquifer, which pumps water into their homes' private wells. R. at 5.

B. NAS-T Investigation and Cleanup

From 1973 to 1998, BELCO manufactured NAS-T and an activation agent at a factory in Centerburg to create their product "LockSeal" for industrial usages. R. at 5. In the mid-1980s, medical studies revealed that NAS-T was a probable human carcinogen. Consistent with these studies, the EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"), which incorporates a significant margin of error to ensure that the level of exposure at or below 10 ppb is non-toxic and safe for humans. R. at 6. Though the safe limit of NAS-T is 10 ppb, it can be detected by a sour or stale smell at concentrations as low as 5 ppb. R. at 6.

In 2013, Centerburg residents began noticing their water was smelling sour and complained to the Centerburg County Department of Health ("DOH"). R. at 6. The DOH tested the public water supply for contamination and determined that NAS-T levels were at 45 to 60 ppb in the CWS. R. at 6. Given NAS-T was at unsafe levels, the DOH notified Centerburg residents to stop drinking their tap water, and BELCO began voluntarily supplying residents with bottled water. R. at 6. On September 22, 2015, the New Union Department of Resources ("DNR") began officially investigating BELCO's facility in Centerburg, but several months later referred the investigation and remediation process to the EPA because of its greater resources and expertise. R. at 6.

That following year, the EPA and BELCO entered into an agreement under CERCLA's remedial investigation and feasibility study ("RI/FS") process. R. at 6. Under this process, BELCO agreed to continue to supply Centerburg residents with water and to investigate the cause and extent of the NAS-T contamination, and to evaluate proposed remedies for the contamination. R. at 6. The investigation revealed that the NAS-T entered the soil around BELCO's facility through sporadic spills and an unlined lagoon used for waste storage. R. at 6. The contamination eventually made its way into the groundwater in Centerburg, creating a plume of NAS-T in the Sandstone Aquifer. R. at 7.

To investigate the extent of the plume, BELCO installed monitoring wells progressively from Centerburg to a half-mile north of Fartown. R. at 7. When sampled, the final wells showed no detectable levels of NAS-T; the EPA, reasonably believing this was the end of the contamination, did not require BELCO to install any additional wells closer to Fartown. R. at 7.

Based on the investigation, the EPA's RI/FS recommended excavating the soil near the contaminated site and filtering the CWS water as a feasible remediation effort under CERCLA. R. at 7. The EPA issued a Proposed Plan encompassing these recommendations to the public, and after receiving comments, selected a plan through a Record of Decision ("ROD"). R. at 7. The EPA then brought a cost recovery action against BELCO, which resulted in a Consent Decree ("CD"). R. at 7. Pursuant to the CD, BELCO agreed to implement the remedy the EPA selected in its ROD. R. at 7. The district court approved and entered the CD in August 2017, after receiving no objections from Fartown or Centerburg residents to either the RI/FS, the Proposed Plan, or to the CD. R. at 7.

The CD limited the EPA's ability to order further clean-up of the site once the EPA issued to BELCO the Certificate of Completion. R. at 7. The CD set forth two circumstances under which the EPA could reopen it and order BELCO to conduct further clean-up:

> 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. CD, § 13.3

Under the second circumstance, allowing reopening for new regulatory standards, the CD defined Regulatory Standards to include "applicable and appropriate requirements under CERCLA ("ARA")." CD, § 1.12.

Beginning in September of 2017, BELCO adhered to the CD by (1) installing a water filtration system known as "Clean Stripping" to remove NAS-T at the CWS well; (2) excavating the soils contaminated with NAS-T near the site; and (3) conducting monthly sampling of the wells installed during the initial investigation. R. at 7. Over the next year, BELCO's monitoring results of the wells consistently revealed no NAS-T, with two exceptions in January 2018 with levels at 5ppb and 6ppb in the wells located a half-mile from Fartown, which is well below the safe limit set by the EPA. R. at 8. Pursuant to the CD's requirements, and with multiple tests revealing no NAS-T or NAS-T at safe levels, the EPA issued the certificate of completion to BELCO in September 2018. R. at 8.

Around this time, Fartown residents learned of the CD and investigation, and wanted the DOH to sample and test their drinking water for NAS-T. R. at 8. DOH complied with their requests and tested five private drinking wells in Fartown, but none of the tests revealed any NAS-T. R. at 8. Unsatisfied with the test results, Fartown citizens went to the EPA and asked it

to conduct more testing. R. at 8. The EPA refused, citing BELCO's extensive monitoring of the wells north of Fartown which revealed either no NAS-T or low and safe levels. R. at 8.

At that point, Fartown residents took matters into their own hands, and a group of 100 residents formed FAWS. R. at 8. The group retained and paid $21,500 for a private lab company, Central Laboratories, Inc., ("Central Labs") to test their private wells. R. at 8. Once again, those tests revealed either no NAS-T, or levels that were low and safe. R. at 8 (Out of 225 samples taken, 120 revealed no detections of NAS-T; 51 revealed levels of 1-4 ppb; and 54 revealed levels in the 5-8 range). FAWS then asked the EPA to re-open the CD for further remediation. R. at 8. The EPA declined, citing the low levels of NAS-T and the provisions in the CD setting forth the circumstances in which the CD could be reopened. R. at 8.

C. ERA and Reopening of Consent Decree

On November 3, 2020, New Union citizens passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"), which provides:

> 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 Amendment was passed through typical state procedural measures, with enactment by the New Union legislature; signature by the governor; and a majority vote on a ballot measure with 71% of New Union citizens voting in its favor. R. at 8. The EPA noted the ERA's passage and asked the DNR to advise on whether the ERA constitutes an ARAR under CERCLA. R. at 9. The DNR responded rather cryptically, advising that the EPA should recognize the ERA as an ARAR where its guidance is consistent with CERCLA and not inconsistent with state or federal regulations. R. at 9.

The EPA re-opened the CD and ordered BELCO to sample and analyze 50 Fartown wells. R. at 9. The agency, anticipating backlash from BELCO for reopening the decree, explained its decision in detail in the administrative record. R. at 9. It cited the passage of the ERA; the fact that Fartown is an environmental justice community and thus is more vulnerable to environmental hazards like NAS-T; the possible carcinogenic effects if further testing exceeded NAS-T's HAL; and the odors present from NAS-T in Fartown. R. at 9. Despite the EPA's good faith attempts to secure BELCO's cooperation, the company refused, however, citing its view that the ERA did not constitute an ARAR and was not grounds to reopen the CD. R. at 9. Even with the EPA's proactive steps, FAWS demanded that the EPA order BELCO to install CleanStripping in every single well that tested positive for NAS-T, or to take other actions to remove NAS-T entirely from the water. R. at 9. The EPA declined and explained that FAWS' own lab had not revealed levels of NAS-T exceeding its safe limit. R. at 9.

On June 24, 2021, the EPA, in light of its failed attempt to BELCO's cooperation, the EPA issued a Unilateral Administrative Order ("UAO"), instructing BELCO to: (1) sample 50 private Fartown wells each month; (2) supply households with NAS-T concentrations between 5 ppb and 10 ppb with monthly bottled waters until levels reach 4 ppb or lower; and (3) install CleanStripping filters on wells exceeding 10 ppb. UAO, § 3.2.

When BELCO refused to comply with the UAO, the EPA stepped in and supplied Fartown residents whose wells tested within the "smellable" range of NAS-T at 5 ppb or higher with bottled water and continued to monitor those wells through monthly sampling. R. at 10. Sampling revealed only safe or non-detectable levels of NAS-T. R. at 10.

D. Proceedings Below

In August 2021, the EPA motioned to recover costs for BELCO's violations of the UAO. R. at 10. BELCO repeated its prior answer that the EPA's re-opening was legally improper. R. at 10. FAWS intervened in the action, challenging the UAO as arbitrary, capricious, and contrary to the Administrative Procedure Act ("APA") for failing to compel BELCO to provide CleanStripping to FAWS private wells which test positive for NAS-T, based on its interpretation of the ERA. R. at 10.

For its part, FAWS filed a separate action against BELCO and argued it was entitled to the $21,500 fee it incurred from Central Labs' testing as part of CERCLA response costs. R. at 10. FAWS' complaint also alleged negligence and private nuisance allegations. R. at 10. The United States District Court for the District of New Union consolidated the BELCO Action and FAWS Action. R. at 11. After discovery on the CERCLA claims ended, all parties moved and cross-moved for summary judgment, and FAWS moved to dismiss any state law claims without prejudice. R. at 11. The district court issued an order: (1) granting summary judgment in favor of BELCO for reimbursement of FAWS's expenses in testing; (2) granting summary judgment in favor of the EPA for its determination to reopen the CD and issue the UAO; (3) granting summary judgment in favor of FAWS and vacating the EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and (4) denying FAWS' motion to dismiss the remaining state law claims. R. at 18.

SUMMARY OF THE ARGUMENT

The costs incurred by FAWS were not response costs under CERCLA but rather, were litigation costs. Litigation expenses are response costs only if they provide a significant benefit to the cleanup effort and contribute to a statutory purpose other than reallocation of costs.

Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 91-92 (2d Cir. 2000). FAWS' testing could not have benefited the entire cleanup in any way as it occurred long after the completion of the EPA's ordered remediation. Moreover, the purpose of the testing was undoubtedly to prepare for this litigation, as FAWS completed the testing just prior to intervening in this action. Even if FAWS costs were response costs, they were voluntary and outside the scope of the consent decree and thus, not recoverable. Furthermore, allowing FAWS to recover for voluntary response actions where an investigation has already occurred and where harm from contamination is unlikely to happen again would frustrate the purpose of CERCLA.

Next, The EPA properly determined that the ERA was an ARAR within the meaning of CERCLA, and thus, properly reopened the consent decree to issue the UAO. A state requirement constitutes a state ARAR for which a 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." *Azko Coatings of Am., Inc.*, 949 F.2d at 1440 (citing 42 U.S.C. § 9621(d)). New Union followed the appropriate legislative process when enacting the ERA which established access to clean air and water as a fundamental right to its citizens. Moreover, while not legally applicable, the ERA is relevant to the CERCLA site in this case as it sufficiently addresses NAS-T as a contaminant to the regulated environmental media, water. The fourth factor, timely identification, does not apply to the ERA as the CD explicitly allows for reopening when new regulatory standards are established.

The EPA's decision not to order BELCO to install filtration systems in Fartown was not arbitrary or capricious as it was based on the EPA's correct identification and application of the ERA as an ARAR. The EPA appropriately interpreted the ERA as providing a fundamental right to safe and healthful water for New Union citizens by looking to the act's legislative history as

Congress intended. *United States v. Burlington N. R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999). The EPA's UAO ensured Fartown residents had access to healthful water and to bottled water for any of the wells testing within the smellable range of NAS-T.

Finally, it is purely within the district court's discretion to exercise supplemental jurisdiction over the remaining state law claims. *Carlsbad Tech., Inc. v. HIF Bio, Inc*., 556 U.S. 635, 639 (2009). The remaining state law claims of nuisance and negligence are neither novel nor complex as state law tort claims. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). Further, courts have consistently held no predomination in cases with federal CERCLA claims and state tort claims that seek the same remedy and require a shared element of proof, and this case is no different. *White v. Cnty. of Newberry*, 985 F.2d 168, 172 (4th Cir. 1993).

The district court dismissed the federal CERCLA claims on a motion for summary judgment before trial, after extensive resources were spent on pre-trial litigation. The district court recognized that dismissal of the state law claims would be wasteful of the "substantial judicial resources" spent and "substantial duplication of effort." *See generally Graf v. Elgin.,* 790 F.2d 1341, 1347–48 (7th Cir.1986). Accordingly, dismissing the state claims for a new proceeding at the state level would be duplicative and a waste of resources.

In light of the facts, case law, and the following arguments, the court should find in favor of the EPA on each issue.

STANDARD OF REVIEW

A court reviews de novo a lower court's grant of a motion for summary judgment. *See* Fed.R.Civ.P. 56(c); *Morrison Enter*., 302 F.3d at 1133. *Skidmore* deference can apply to agency interpretations not entitled to *Chevron* deference. *United States v. Mead Corp.,* 533 U.S. 218,

234 (2001). The level of deference given to an agency under *Skidmore* depends on "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." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.,* 353 F.3d 1051, 1059-60 (9th Cir. 2003), *amended on reh'g sub nom. Wilderness Soc'y v. U.S. Fish & Wildlife Serv.,* 360 F.3d 1374 (9th Cir. 2004) (quoting *Skidmore,* 323 U.S. at 140). The Government must uphold the EPA's decision in its response action under CERCLA "unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 668 (7th Cir. 2014) (citing 42 U.S.C. § 9613(j)(2) (West 2022)). Finally, review of the district court's decision to retain supplemental jurisdiction is for abuse of discretion. *Lucero v. Trosch,* 121 F.3d 591, 598 (11th Cir.1997) ("As a practical matter, the district court is in the best position to weigh the competing interests set forth in § 1367(c) and *Gibbs* in deciding whether it is appropriate to exercise supplemental jurisdiction.").

ARGUMENT

I. The district court correctly determined that the costs incurred by FAWS' voluntary and independent sampling, testing, and analyzing of Fartown's private wells were not reimbursable as response costs under CERCLA.

CERCLA provides that responsible parties are liable for response costs. 42 U.S.C. § 9607(a)(4). Response costs are "the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005). To recover response costs, a plaintiff must show: "(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." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1269 (10th Cir. 2017). Additionally, any non-governmental plaintiff must prove that the costs incurred are 'necessary' and 'consistent with the national contingency plan.' *Young*, 394 F.3d at 863.

The costs FAWS incurred by sampling the Fartown residents' private wells are not recoverable under CERCLA. The costs are neither necessary nor consistent with the National Contingency Plan ("NCP") because they were voluntary and outside the scope of the consent decree. Rather, they are litigation costs because of their purpose and the timing of their preparation. Finally, policy considerations suggest these costs are not recoverable response costs under CERCLA.

A. The costs incurred by FAWS are not response costs as defined by CERCLA because they are litigation costs, not removal costs intended to clean up contamination.

Under CERCLA, response costs are "payments by responsible parties for the costs of cleaning up a contamination or a threatened contamination for which they are responsible." *United States v. Lowe*, 118 F.3d 399, 401 (5th Cir. 1997). Litigation expenses are not response costs unless they "significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Gussack Realty Co.,* 224 F.3d at 91-92.

In *Redland Soccer Club, Inc. v. Department of Army of United States*, the plaintiffs conducted a health risk assessment and obtained expert testimony about contamination risks from the landfill under a soccer field. 55 F.3d 827, 839-42 (3d Cir. 1995). The court held that the plaintiff's costs were not recoverable response costs because the costs supported litigation, not remediation. The plaintiff's actions occurred long after the EPA and remediating party concluded their remediation and response efforts at the contaminated site. *Id.* at 850.

In *Black Horse Lane Ass'n v. Dow Chemical Corp.*, the plaintiffs paid for an environmental consultant to review and analyze the progress of remediation efforts just before initiating litigation. 228 F.3d 275, 290–91 (3d Cir. 2000). The reviewing court rejected the that the cost of hiring the consultant was recoverable under CERCLA, because it concluded that the plaintiffs hired the consultant not to "detoxify the Property or to prevent or minimize the release of hazardous substances" but rather to review reports and documents. *Id.* The court concluded, based on this purpose, "they constitute litigation costs, not environmental costs*." Id*.

These cases show how the timing and purpose of parties' expenditures matter for cost recovery under CERCLA. Here, FAWS seeks to recover its costs for its independent and voluntary sampling of Fartown residents' private wells. R. at 10. Just as in *Redland Soccer Club, Inc.,* where the costs supported litigation over remediation and occurred long after the main remedial actions, FAWS costs are not response costs either because FAWS did not begin testing their wells until over a year after the EPA's ordered remediation efforts were completed. R. at 8. Additionally, and similar to the situation in *Black Horse Lane Ass'n.*, where plaintiffs' costs supported litigation efforts but not remediation efforts, FAWS hired an independent lab to sample wells that had been previously tested. R. at 7-8. Further, FAWS paid Central Labs for their services on June 10, 2020, shortly before intervening in the action. R. at 8. Thus, the purpose of the well sampling was not to "significantly benefit[] the entire cleanup effort" but rather to prepare for litigation ahead. *Gussack Realty Co.,* 224 F.3d at 91-92. Therefore, FAWS sampling costs were litigation expenses and not costs associated with the cleanup of the contamination.

B. Even if FAWS' independent sampling costs are CERCLA response costs, they were voluntary and outside the scope of the consent decree.

The NCP provides that a response action "will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable" federal regulation requirements and results in a CERCLA-compliant cleanup. *Young*, 394 F.3d at 864. All response actions taken according to an EPA order or consent decree are presumptively consistent with the NCP. *Morrison Enter. v. McShares, Inc., 302 F.3d 1127, 1136-37 (10th Cir. 2002)*; *see also Bancamerica Commercial. Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 798 (10th Cir.), *amended*, 103 F.3d 80 (10th Cir. 1996) (explaining that for response actions to be consistent with the NCP, parties only needed to satisfy the requirements of the EPA's order).

The EPA and BELCO entered into a CD in which BELCO agreed to implement the EPA's chosen remedy. R. at 6-7. The CD required the installation and maintenance of a water filtration system at the CWS public water well and the excavation of the contaminated soil in the abandoned lagoon site. R. at 7. Importantly, the decree also required monthly sampling of the monitoring wells. *Id*. BELCO satisfied each of these requirements. R. at 8. Thus, as in *Morrison Enterprises* and *Bancamerica Commercial Corp.,* any actions outlined in the CD were consistent with the NCP. R. at 8. FAWS' independent sampling, however, was not part of the CD requirements and thus was inconsistent with the NCP.

In addition, response costs must be "necessary to the containment *and* cleanup of hazardous releases." *Young*, 394 F.3d at 863. Further, actions that incur necessary response costs must be "closely tied to the actual cleanup" to be a necessary response cost. *Key Tronic Corp. v. United States,* 511 U.S. 809, 811 (1994) (stating that actions such as studies prepared by plaintiffs' legal counsel are not closely tied to the actual cleanup and thus unrecoverable "even where such costs may have 'aided the EPA' or 'affected the ultimate scope and form of the

cleanup.'") A cost is considered "necessary" if there is "some nexus between [it] and an actual effort to respond to environmental contamination." *Trinity Indus. Inc., v. Greenlease Holding Co.*, 903 F.3d 333, 352 (3d Cir. 2018) (holding that there was a nexus between the costs [the plaintiff] incurred and its effort to investigate and remediate the contamination at the [contaminated site] because the consent decree directed the actions, which were not excessive).

Here, while voluntary removal efforts can sometimes qualify as necessary response costs, FAWS' independent well sampling does not because it was not closely tied to the actual cleanup. In *Key Tronic Corp.,* voluntary removal efforts were unrecoverable because the site at issue no longer faced a hazardous threat, and removal efforts occurred long after the threat ended. 511 U.S. at 818. Similarly in this case, the sampling performed by Central Labs for FAWS was not closely tied to the actual cleanup of the contaminated site, either geographically or temporally. Central Labs obtained samples from Fartown wells at least two miles from the contaminated facility in Centertown. R. at 5. The sampling by Central Labs began in December 2019, over a year after BELCO completed the ordered remediation. R. at 8. Additionally, while in *Trinity Industries. Inc.,* there was a nexus between the consent decree directed actions and the incurred costs, here, there is no nexus between FAWS' sampling costs and remediation of the contaminated areas. FAWS' well sampling was not directed by the CD and were outside the scope of efforts to remediate the contamination. R. at 6-8. Thus, the costs incurred by FAWS in sampling the private wells of Fartown residents were not necessary or consistent with the NCP.

C. Policy considerations and CERCLA's purpose as enacted, counsel against qualifying FAWS' expenditures as reimbursable response costs.

Congress enacted CERCLA in 1980 due to industrial pollution's release of hazardous materials and the resulting environmental and health effects. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The purpose of CERCLA is to encourage the cleanup of hazardous waste and to

put the cost of cleanup efforts on the parties responsible for the contamination. *Chevron Mining Inc.*, 863 F.3d at 1269; *Young*, 394 F.3d at 862. Notably, the statute grants the President power to direct the cleanup of hazardous sites through federal agencies. *Key Tronic Corp.,* 511 U.S. at 814.

Allowing a plaintiff to recover for voluntary response actions where an investigation has already occurred and where harm from contamination is unlikely to happen again would frustrate the purpose of CERCLA. Doing so, also conflicts with Supreme Court jurisprudence in this area. *See generally Key Tronic Corp.,* 511 U.S. 809, *Bestfoods*, 524 U.S. 51; *Exxon Corp. v. Hunt,* 475 U.S. 355 (1986) (affirming that the purpose of CERCLA is to promote the cleanup of hazardous waste and allow the federal government to hold responsible parties accountable.) In this case, both goals are satisfied, where the EPA issued a UAO that addressed NAS-T to ensure it was at safe levels and held BELCO responsible for the necessary response costs. R. at 6-9. Reimbursing FAWS' for its superfluous testing serves neither purpose.

Moreover, policy counsels against FAWS' reimbursement request. CERCLA is premised upon the cooperation between states and the federal government to ensure the cleanup of hazardous waste. *Exxon Corp.,* 475 U.S. at 359. Allowing reimbursement for unnecessary costs incurred by private testing not required by the state or federal government is inconsistent with the policy considerations behind CERCLA. Thus, these costs are not considered response costs and are not recoverable under CERCLA. As such, we ask the court to affirm the district court's decision to deny FAWS reimbursement for the $21,500 incurred by FAWS for voluntary testing of Fartown residents' private wells.

II. The District Court Correctly Upheld the EPA's Determination that the ERA Constitutes an ARAR under CERCLA, and Accordingly Determined that the EPA Properly Reopened the Consent Decree.

The EPA correctly interpreted the ERA as an ARAR and reopened the Consent Decree. CERCLA requires that remedial actions at least meet ARAR federal (or stricter state) requirements to ensure the implemented remedies adequately protect human health and the environment. 42 U.S.C. § 9621(d). A state requirement constitutes a state ARAR for which a 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." *Azko Coatings of Am., Inc.*, 949 F.2d at 1440 (citing 42 U.S.C. § 9621(d)). Additionally, the EPA's interpretation of what constitutes an ARAR under CERCLA calls for deference "according to its persuasiveness." *Mead Corp.*, 533 U.S. at 218-20 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Because the ERA satisfies the four requirements under CERCLA, the EPA properly determined that the ERA constitutes an ARAR. First, the State passed the ERA following proper legislative procedures, thus satisfying the requirement that the ERA be properly promulgated. R. at 8. Second, the ERA is more stringent than any federal regulations because it gives New Union citizens a fundamental right to clean and healthful water and air. R. at 8. Third, though the ERA is not "applicable" to this case, it is "relevant and appropriate" because it regulates NAS-T, which is an unregulated contaminant under federal law. R. at 14. The fourth requirement, timely identification, is irrelevant because the consent decree specifically allows for its reopening when "new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." N.U. CONST. art. I, § 7; *Missouri v. Independent Petrochemical Corp.*, 104 F.3d 159,

162 (8th Cir. 1997). Therefore, the EPA properly determined the ERA to be an ARAR and reopened the Consent Decree.

A. New Union properly promulgated the Environmental Rights Amendment when it followed the proper legislative procedure to pass the Amendment.

To qualify as an ARAR, the ERA must be properly promulgated. *Azko Coatings of Am., Inc.*, 949 F.2d at 1440. According to the EPA, proper promulgation refers to "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Id.* For a potential ARAR to be generally applicable, the "standard must be generally applicable on its face" and not site specific. *Ohio v. U.S. Env't Prot. Agency*, 997 F.2d 1520, 1528 (D.C. Cir. 1993); *see also Containerport Grp., Inc. v. Am. Fin. Grp., Inc.*, 128 F. Supp. 2d 470, 482 (S.D. Ohio 2001). For a potential state ARAR to be legally enforceable, it "must be issued in accordance with state procedural laws or standards and … [be] enforceable under state law." *Azko Coatings of Am., Inc.,* 949 F.2d at 1441 n.31. Additionally, because "the term 'promulgated' is unambiguous," courts may look to the plain and ordinary meaning of the word. *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1201 (D.C. Cir. 1996). The dictionary definition of promulgate is "to publish" or "to announce officially." *Promulgate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Based on these definitions, the ERA is both generally applicable and legally enforceable. The ERA is generally applicable on its face as it applies to "[e]ach and every person" and to any contaminant or pollutant caused by humans. N.U. CONST. art. I, § 7. It is legally enforceable because it passed through New Union's legislature, received signature from the governor, and appeared in the 2020 election as a ballot measure. R. at 8. Thus, the ERA is both generally applicable and legally enforceable, and accordingly, was properly promulgated within the meaning of CERCLA.

B. The ERA is more stringent than applicable federal standards because it has broader applicability and creates a fundamental right to clean and healthful air and water where no federal standard does.

CERCLA provides that nothing in the statute shall be "interpreted as preempting any state from imposing any additional liability or requirements with respect to the release of hazardous substances . . . ." 42 U.S.C. § 9614(a). EPA guidance clarifies that "where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51394 (Dec. 21, 1988) (to be codified at 40 C.F.R. pt 300); *Azko Coatings of Am., Inc.*, 949 F.2d at 1443. In *Azko Coatings*, for example, the court found that because the potential state ARAR applied to "any substance" that negatively affected human health and the environment and applied to all state waters, the state ARAR was broader than any federal regulations, and therefore also more stringent than any federal ARAR. *Azko Coatings of Am., Inc.*, 949 F.2d at 1443.

Here, the ERA is broader than any federal ARAR. As in *Azko Coatings*, the ERA does not limit its application to a specific list of hazardous substances but applies to any "contaminants and pollutants cause by humans." N.U. CONST. art. I, § 7. Moreover, the senate report refers to the ERA as a gap filler to "the existing statutes and regulations [which] are insufficient to protect the people from exposure to unclean or unhealthful air and water." Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 9 (2020). The ERA applies to contaminants and pollutants that might otherwise go unregulated by federal ARARs and is thus broader than any federal ARAR.

BELCO argues that the ERA cannot be deemed more stringent than any federal ARARs because its criteria for remediation is the same as the NCP, a multiagency strategy that is the

means by which the EPA implements CERCLA. *See Sealy Conn. Inc. v. Litton Indus.*, 93 F.Supp.2d 177, 184 (D.C. Conn. Feb. 9, 2000) (listing the first factor of remediation under CERCLA's NCP as "overall protection of human health and the environment"); *Ohio*, 997 F.2d at 1525 (explaining the role of the NCP under CERCLA). However, the ERA does more than just protect human health and the environment. The ERA established a fundamental constitutional right for New Union citizens to access clean and healthful water and air where comparable federal ARARs do not. R. at 8. A constitutional right is broader and more protective in scope than a statutory right. For example, the ERA's legislative history explains that even sufficiently offensive smells might come under the purview of the ERA, whereas federal requirements might not reach them. Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 5-6 (2020). Accordingly, the ERA is more stringent than federal ARARs.

C. The ERA is relevant and appropriate to address the contaminated CERCLA site.

CERCLA requires that ARARs either be "legally applicable to the hazardous substance or pollutant or contaminant concerned" or "relevant and appropriate under the circumstances of the release or remedial action selected . . . ." *Azko Coatings of Am., Inc.*, 949 F.2d at 1440. The NCP defines legally applicable requirements as standards that "specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site." *Ohio*, 997 F.2d at 1526. Here, the ERA is not legally applicable to the CERCLA site as the act does not explicitly include NAS-T, CleanStripping, Fartown, or the odor resulting from the NAS-T in Fartown's private wells. It is, however, relevant and appropriate.

The NCP defines relevant or appropriate requirements as standards that "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." *Id.* at 1526. The court in *Azko* considered the environmental

media, the type of substance, and the objective of the potential ARAR to determine whether the state law in that case was relevant and appropriate. 949 F.2d at 1446. The court noted that the environmental media was groundwater; the type of substance was injurious; and the potential ARAR's objective was to protect the aquifers from degradation. *Id.* Each of these factors, the court explained, made the state law relevant because it "pertain[ed] to the conditions" of the contaminated site, and appropriate because it was "well-suited to the site at issue." *Id.*

Here, the ERA is relevant and appropriate to the conditions of BELCO's contaminated site. The environmental media, the type of substance, and the objective of the ERA are each relevant to the CERCLA site in this case. First, the ERA regulates water, the contaminated environmental media at issue. *See* N.U. CONST. art. I, § 7. ("every person . . . shall have a fundamental right to clean air and water . . . ."). Second, the ERA regulates human caused contaminants, the type of substance at issue with NAS-T. N.U. CONST. art. I, § 7 (establishing the fundamental right to clean air and water "free from contaminants and pollutants caused by humans"). Third, the objective of the ERA is to provide a fundamental right to clean and healthful air and water, free of contaminants caused by humans, and was enacted precisely for the dangerous conditions imposed by contaminants like NAS-T. Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 9 (2020). There is no doubt based on these factors that the ERA is also appropriate because it is "well-suited to the site at issue." *Azko Coatings of Am., Inc.*, 949 F.2d at 1446. Because the ERA is relevant to the CERCLA site, the EPA may appropriately apply it as an ARAR to this case.

Therefore, the ERA is an ARAR as defined by CERCLA, because it was properly promulgated under the state legislative process, it is more stringent than federal ARAR standards, and it is relevant and appropriate to address the contamination from the BECLO

facility. Further, the timely identification factor does not apply to the ERA because the CD explicitly allows reopening when "new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." N.U. CONST. art. I, § 7; *See Missouri v. Independent Petrochemical Corp.*, 104 F.3d 159, 161-62 (8th Cir. 1997) (holding that the rules of contract interpretation required the court to look to the 'freeze' provision in the consent decree rather than relying on the NCP's definition of the 'timely' period). Therefore, the EPA properly reopened the CD once it was determined that the ERA constituted an ARAR under CERCLA. Thus, the court should affirm the District Court's grant of summary judgement and should order BELCO to comply with the requirements of the order.

III. The EPA's decision not to order BELCO to install filtration systems in Fartown was not arbitrary or capricious because it was based on an appropriate interpretation and application of New Union's ARAR.

The EPA's determination that BELCO need not provide CleanStripping to Fartown residential wells that had perfectly healthy water and safe levels of NAS-T was based upon an appropriate construction of New Union's ARAR, and an agency order that is entitled to deference. Because the EPA properly interpreted and applied the ERA as an ARAR in its UAO, we ask that this Court reverse the district court's order vacating the portion of the UAO requiring bottled water, and grant summary judgment to the EPA.

Based on the standard of review principles set forth under the APA and CERCLA, a reviewing court may only set aside the EPA's remedial actions if "the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A) *see also* § 9613(j)(2) (holding that a court "shall uphold [the EPA's] decision in selecting the response action unless the

objecting party can demonstrate, on the administrative record" that the action was arbitrary or capricious).

The scope of review under the arbitrary and capricious standard is narrow. *See Maier v. EPA*, 114 F.3d 1032, 1039 (10th Cir. 1997) ("While our inquiry into the basis of the agency's action is 'searching and careful, our review is ultimately a narrow one.'") (internal citations omitted). The EPA's UAO should only be set aside if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, (1983). Moreover, a reviewing court must not substitute its judgment for that of the agency's, because "federal courts have neither the time nor the expertise" to make "scientific decisions regarding toxic substance cleanup." *Akzo Coatings of Am., Inc.*, 949 F.2d at1426. Indeed, reviewing courts afford particular deference to the agency where, just as with NAS-T, the issue involves technical or scientific matters within the agency's specialized expertise. *Utah Env't Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008); *see also Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . . a reviewing court must generally be at its most deferential.").

In light of these rigorous review principles, FAWS has not met its heavy burden in showing the EPA's order was arbitrary or capricious.

A. <u>The EPA's interpretation of the ERA as an ARAR was appropriate</u>

The EPA's interpretation of the Environmental Rights Amendment was proper given the amendment's purpose and legislative history, and the UAO more than satisfied the ERA as it

constituted an ARAR under CERCLA. The court should defer to the EPA's interpretation and its good-faith remedial response in its UAO.

1. *The EPA's interpretation of the Environmental Rights Amendment was neither arbitrary nor capricious given its consideration of the Amendment's legislative history and its purpose to provide safe and healthful water to New Union citizens.*

The EPA appropriately interpreted the ERA as providing a fundamental right to safe and healthful water for New Union citizens. The agency "relied on factors which Congress intended it to consider" by looking to the ERA's legislative history which helps to define what "clean" water means under the ERA. *United States v. Burlington N. R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999); *see also United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (The Court "may consider reliable legislative history where" it "assists in discerning what [the enacting body] actually meant."). Legislative history and other tools of statutory construction help resolve textual ambiguities, especially where, as with the ERA, there "is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application." *Gayle*, 342 F.3d at 94.

And in any case, the EPA's interpretation is entitled to deference. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1205 (2d Cir. 1992) (conceding that a reviewing court should defer to the EPA's reasonable construction of CERCLA, and its interpretation should be "followed so long as it 'is based on a permissible construction of the statute' and there are [not] compelling indications that it is wrong.") (internal citations omitted).

The ERA provides 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 stated purpose of the amendment is to "protect public health and the environment ensuring clean air and water, including and not limited to, harms from contaminants and pollutants caused by humans." Environmental Rights Amendment, S. A02137, 2019-2020 Cong. (2020).

Here, the critical question is what "clean" water and air mean under the ERA. The amendment's text and purpose are written broadly, and at first glance, might appear to guarantee 100% pure water and air free from any chemicals or pollutants. Its legislative history, however, clarifies that it was written more narrowly to provide a fundamental right to water and air that is *safe* and *healthful* for New Union citizens.

New Union's legislators were understandably concerned about the ERA's vague language. During the 2019-2020 Environmental Rights Amendment, fellow legislators questioned Mr. Wright, the Amendment's sponsor, on the meaning of "clean" water under the Amendment:

- Q: Does "clean" mean that the water …. doesn't have any additives – any chemicals added to it? What is "clean"?
- A: "[T]he intent is very clear, that you should be able to consume water through your public water supply *without any harm*. *That doesn't mean that the water is free o[f] any or all substances* besides H2O …. Let's be clear: What is appropriate and desirable for a public water supply involves other chemicals, other substances. But *they should not harm you.* They should not do injury to your young children, to your wife or to your family in any way." What is "clean"?
- Q: "So, it's your view that the word 'clean' means not harmful?
- A: 'Clean' certainly *means healthful to human beings*, healthful to our fellow creatures in the environment. 'Healthful' means that *it will do no harm to consume that water*. (emphasis added).

See Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 4-5 (2020. This contemporaneous dialogue confirms that the EPA's interpretation of the ERA was accurate, that is, the amendment was enacted to guarantee New Union citizens a constitutional right to healthful water. *See Hadden v. Bowen*, 851 F.2d 1266, 1268 (10th Cir. 1988) (citations omitted) (describing how the "weight given an item of legislative history" depends in-part "upon whether

it is a contemporaneous expression of legislative intent"). "Clean" does not mean *totally free* from any pollutants like NAS-T, but rather, that the water must not be "something that poisons you, that causes disease, or convulsion." *See* Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 5 (2020).

FAWs interprets the ERA as requiring superfluous filtration of already safe and healthful water. This interpretation accords neither with the clear legislative history, nor reality. Adopting FAWS' interpretation would chafe against the effective operation of other federal environmental statutes including the Clean Water Act and the Clean Air Act, which both allow safe levels of pollution or contamination. *See BP Expl. & Oil, Inc. v. U.S. E.P.A.*, 66 F.3d 784, 796 (6th Cir. 1995) (explaining that the Clean Water Act's requirement that the EPA choose the "best" technology doesn't mean that the chosen technology must be the best pollutant removal"); *see also Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001) (noting that the Clean Air Act instructs the EPA to set air quality standards which are attainable and *sufficient* to protect the public health); *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2600 (2022) (explaining that the National Ambient Air Quality Standards (NAAQS) under the Clean Air Act require that the EPA set limits for the "*maximum safe* amount of [] pollutants in the air."). These statutes and their operation confirm the reality that air and water will often inevitably be contaminated by some pollutant. The requirement for the EPA in administering these statutes is to ensure the level of contamination is not unsafe or unhealthful for humans, not that contamination is at zero.

As the agency entrusted with administering CERCLA's remedial provisions and interpreting states' ARARs, the EPA's interpretation of the ERA as requiring water and air safe for humans accords with this mandate and is entitled to deference. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) considerable deference is

due to an agency's interpretation of a statute it is charged with administering). This court should correct the district court's failure and defer to the agency's reasonable interpretation of the ERA.

2. The EPA's remedial response under its UAO was based on its appropriate construction of the ERA as an ARAR.

The EPA, just as it properly interpreted the meaning of the ERA, issued a remedial response sufficient to meet the ERA as it constitutes an ARAR. Under section 121 of CERCLA, the EPA is required is to administer remedial actions which result in a cleanup level that meet states' ARARs and that is protective of human health and the environment. *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001); 42 U.S.C. § 9621(d)(1)-(2)(A). Specifically, section 9621(d)(2)(a) ensures that CERCLA's clean-up process respects states' interests in restoring their lands from hazardous pollutants. In fact, it is in the "spirit of cooperative federalism" that the EPA cleanup plans under CERCLA comply with states' environmental laws that are ARARs. *See* 42 U.S.C. § 9621(d)(2)(A)(ii); *see also New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006) ("Given …. the spirit of cooperative federalism running throughout CERCLA and its regulations, we may safely say Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination.").

The EPA's UAO complies with New Union's ERA as an ARAR. As explained above, New Union's ERA provides New Union citizens with a fundamental right to safe and healthful water. As the ERA constitutes an ARAR, the EPA's remedial response must ensure that NAS-T is at safe levels and that the water is not unhealthy for New Union residents. NAS-T's HAL, a.k.a., it's nontoxic limit, including a significant margin of safety, is 10 ppb. R. at 6.

As an initial point, FAWS cannot point to a single well exceeding this safe limit. See R. at 8. However, the EPA recognizes that NAS-T can be detected by smell at levels as low as 5

ppb. *See* R. at 6 (noting that the human nose can detect NAS-T in water at concentrations as low as 5 ppb, where it produces a sour or stale smell). And the EPA concedes that sometimes smells, if "sufficiently offensive," can rise to the level of being subject to the ERA and therefore part of the state's ARAR. *See* Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 6 (2020) ("odors could be an issue [under the ERA] if sufficiently offensive and if they impact what the community would consider "clean" air).

Central Labs' sampling of 75 Fartown private wells revealed 54 samples testing at 5-8 ppb, aka within the "smellable" range of NAS-T. R. at 8. When the EPA reopened the CD, it included in its administrative record the presence of odors from NAS-T in these wells. R. at 9. The record is silent as to whether the wells testing in the smellable range were so offensive or impactful as to bring them within the ERA's purview. Out of respect for the cooperative federalism nature of CERCLA remedies, the EPA issued a UAO that responded to these odors by supplying any Fartown household with bottled water for each resident until testing of NAS-T fell below the "smellable" range at 4 ppb or lower. R. at 9. The agency further explained to FAWS that it would not supply CleanStripping technology to each residential well testing positive for NAS-T because FAWS' 2019 results and the EPA's own sampling had not found levels testing above the HAL for NAS-T. R. at 9. In light of this justified record, the EPA's response was not arbitrary or capricious.

Even if the district court thought the EPA's better response would have been to supply the wells testing between 4-8 ppb with the CleanStripping technology, that does not make the EPA's choice legal error. *See Murtha*, 958 F.2d at 1205 ("Thus, to be accorded deference, EPA's construction of CERCLA need not be one we would have chosen, nor the only reasonable one permitted by the Act's language."); *see also Rocky Mountain Peace & Just. Ctr. v. U.S., Fish &*

Wildlife Serv., 40 F.4th 1133, 1155–56 (10th Cir. 2022) (explaining under the arbitrary and capricious standard, "a court is not to substitute its judgment for that of the agency.").

This Court should defer to the EPA's remedial response in light of the ERA as it constitutes an ARAR. *See* Environmental Rights Amendment, S. A02137, 2019-2020 Cong. 6 (2020) (Mr. Wright: "This amendment will serve to allow the courts – or an agency …. to apply a framework giving us peace of mind and a healthful environment"). The EPA has "peace of mind," that its UAO ensures Fartown's well water does not exceed the safe and healthful limit of NAS-T. It also ensures residents homes that are testing within the "smellable" range of NAS-T have an alternative water source until they can no longer smell NAS-T in their water. Based on the record before the agency and this Court, this is not the kind of situation where the EPA "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Burlington N. R. Co.*, 200 F.3d at 689. The Court should reverse and grant summary judgment in favor of the EPA on this issue.

IV. The District Court did not Abuse its Discretion and Correctly Retained Jurisdiction of the Remaining State Tort Claims.

It is purely within the district court's discretion to exercise supplemental jurisdiction. *Carlsbad Tech., Inc. v. HIF Bio, Inc*., 556 U.S. 635, 639 (2009). Jurisdiction is proper over all claims that form the same case or controversy as the claim for which the court exercises original jurisdiction. § 1367(c). The statute further sets forth instances in which the court can choose to decline supplemental jurisdiction, including: if a state claim raises novel or complex issues; if the state claim substantially predominates over the federal claims; when the district court dismisses all claims over which it had original jurisdiction; and other exceptional circumstances. *Id.* To decide whether to exercise supplemental jurisdiction, the court must also consider common law factors such as judicial economy, convenience, fairness, and comity. *Brookshire Bros. Holding v.*

Dayco Prod., Inc., 554 F.3d 595, 601–02 (5th Cir. 2009). Generally, courts should decline jurisdiction over state law claims when the court has dismissed related federal law claims before trial. *Id.* at 602. However, this rule is not mandatory, and the district court retains discretion and authority to exercise jurisdiction if the case's specific circumstances suggest jurisdiction is proper. *Id*. The court should weigh the statutory requirements and the common law factors on a case-by-case basis. *Seabrook v. Jacobson*, 153 F.3d 70, 71–72 (2d Cir. 1998).

The circumstances, in this case, support the district court's decision to retain supplemental jurisdiction over the state law tort claims for negligence and private nuisance. The remaining claims are not novel or complex and do not predominate over the federal claims. Further, dismissal of the federal claims does not require dismissal of the state claims because the common law factors weigh in favor of retaining jurisdiction. Thus, the district court properly retained jurisdiction over the state tort claims.

A. The remaining claims of nuisance and negligence are not novel or complex; thus, it is within the court's discretion to retain jurisdiction over the claims.

A district court can choose to dismiss supplemental claims that are novel or complex. § 1367(c). However, state tort claims are generally not considered novel or complex. *Scrap Metal Processors, Inc.*, 468 F.3d at 743-44. Specifically, courts have held that negligence and nuisance claims do not raise novel or complex issues of state law. *Id.* at 744 (stating that state claims for negligence, nuisance and trespass were not novel or complex)*; see also Smith v. Amedisys Inc.,* 298 F.3d 434, 447 (5th Cir. 2002) (holding that even after dismissal of all federal claims and even though the state claims provided different remedies, the district court's decision to retain jurisdiction was proper). In the context of CERCLA, Courts hearing federal CERCLA claims alongside state tort claims have also found that the state claims did not raise novel or complex issues and, as such, can properly retain jurisdiction. *See State of Cal. ex rel. Cal. Dep't of Health*

Servs. v. B & R Davis Fertilizers, Inc., No. 93-15145, 1994 U.S. App. WL 377788, at 3 (9th Cir. 1994) (holding that the district court properly exercised supplemental jurisdiction over state claims for nuisance and injunctive relief under a state statute because they did not raise novel or complex issues of state law and arose out of the same facts as the CERCLA claim).

Here, FAWS brought claims under CERCLA and state claims for negligence and private nuisance. R. at 10. FAWS argues that the state law claims involve novel and complex issues because they require interpretation of the ERA. R. at 18. Just as the Fifth and Eleventh circuits found that state tort claims connected to a CERCLA claim were not novel or complex, FAWS' negligence and private nuisance claims are not novel or complex. *Smith,* 298 F.3d at 447; *Parker,* 468 F.3d at 743-44. Additionally, just as the Ninth Circuit in *State of Cal. ex rel. Cal. Dep't of Health Services* held that a state claim filed in connection with a CERCLA claim was not novel or complex because the claims arose out of the same issue; here, FAWS' state claims also arise out of the same issues as the CERCLA claim because all claims relate back to the alleged contamination of Fartown residents' wells. No. 93-15145 at 3. Further, and like in *Smith*, where the state law provided different remedies from the federal claims, this did not make the state claims novel or complex. Therefore, while FAWS' claims for negligence and private nuisance may require consideration of the ERA, this does not make the claims novel or complex and require those claims' dismissal.

B. The state tort claims do not predominate the federal claims.

A state law claim predominates over a federal law claim when the state claim is the "real body of a case, to which the federal claim is only an appendage." *Parker*, 468 F.3d at 744. Furthermore, where claims share a common element of proof, state law claims generally do not predominate. *White*, 985 F.2d at 168. Courts have consistently held no predomination in cases

with federal CERCLA claims and state tort claims. *Id.* at 172 (holding that state claims for inverse condemnation, negligence, strict liability, and trespass did not predominate over the federal CERCLA claim because all claims shared the common element of proving that the County engaged in the release of hazardous materials that contaminated plaintiff's wells); *see also State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (stating that a public nuisance claim does not predominate over a CERCLA claim because CERCLA grants injunctive relief, just as a public nuisance claim would, and thus it is proper for the court to exercise supplemental jurisdiction).

In this case, FAWS intervened and filed additional claims, including a CERCLA response cost action and state negligence and nuisance claims in federal court. R. at 10. Just as in *Shore Realty Corp.,* both the CERCLA claim and the state tort claims seek the same remedy of monetary damages for costs related to the contamination of the wells. *Id.* Thus, because the state and federal claims request the same remedy, the state claim does not predominate. Furthermore, just as the court in *White* found that the state claims did not predominate because of the shared element of proof, the claims here all require proof of contamination and harm to the wells by BELCO. R. at 10. Therefore, because the claims seek the same remedy and contain a shared element of proof, the state law claims for nuisance and negligence do not predominate over the CERCLA claim.

C. The common law factors of judicial economy, convenience, fairness, and comity weigh in favor of the district court retaining jurisdiction despite dismissing all federal claims.

The district court must consider factors such as judicial economy, convenience, fairness, and comity when deciding whether to retain supplemental jurisdiction after dismissing federal claims. *Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1191 (2d Cir. 1996). In line with these principles, the Supreme Court has rejected the view that courts must have jurisdiction

over the original jurisdiction claim throughout all proceedings for the court to decide on a supplemental claim. *Rosado v. Wyman*, 397 U.S. 397, 405 (1970). Courts have consistently held that retaining state law claims is proper when the court has committed "substantial judicial resources" such that dismissing the case for consideration in state court would cause "substantial duplication of effort." *See generally Graf,* 790 F.2d at 1347–48 (7th Cir. 1986); *see also Enercomp, Inc. v. McCorhill Publ'g, Inc*., 873 F.2d 536, 545–46 (2d Cir. 1989) (explaining how a refusal to exercise supplemental jurisdiction even after the dismissal of the federal claims would conflict with considerations of judicial economy because the case was already well known to the federal judge, would cause undue delay to plaintiffs, and the case "involved over eleven months of pretrial litigation."); *see also Starkey v. Amber Enterprises, Inc.*, 987 F.3d 758, 765 (8th Cir. 2021) (holding supplemental jurisdiction proper for state claims even after federal claims were dismissed at summary judgment because of the similarity of elements and proof between federal and state claims, and the alignment with principles of comity and fairness). Additionally, courts favor supplemental jurisdiction for federal environmental claims such as CERCLA because CERCLA and state nuisance claims come from "a common nucleus of operative facts and the plaintiff would ordinarily be expected to try them all in one proceeding." *Parker*, 468 F.3d at 746-47.

Here, the district court granted BELCO's motion for summary judgement on the CERCLA response cost claim, in in favor of EPA on for the costs and penalties claim against BELCO for failure to comply with UAO, and granted FAWS' motion vacating a portion of the UAO. R. at 1l. Thus, the court resolved all federal CERCLA claims before trial. R. at 11. The dismissal came after the parties completed discovery on the CERCLA claims and all parties motioned for summary judgment those claims. R. at 11. Just as in *Enercomp, Inc.,* where there

was extensive pretrial litigation, the parties here have undergone pretrial discovery on the CERCLA issues, as well as extensive investigation and analysis on the EPA's part, which resulted in exhaustion of administrative remedies. R. at 6-7. Moreover, the decisions in *Parker* and *Starkey* to retain jurisdiction because CERCLA claims favor supplemental jurisdiction counsel in favor of retaining FAWS' state claims under the same theory. And just as the court reasoned in *Starkey,* dismissing the claims for a new proceeding at the state level would be duplicative and a waste of resources.

Thus, despite dismissing the federal claims before trial, the district court properly retained jurisdiction. The state law claims are not novel or complex, do not predominate over the federal claims, and the common law factors support the district court adjudicating the state tort claims. Therefore, we ask the court to affirm the district court's decision to retain jurisdiction of the state tort law claims and proceed with discovery.

CONCLUSION

This Court should affirm the district court's grant of summary judgement based on its determination that the FAWS sampling costs were not recoverable response costs under CERCLA, and that the EPA properly reopened the CD because the ERA constitutes an ARAR. The Court should reverse the district court's decision that the EPA's determination not to install filtration systems in Fartown was contrary to law. Finally, the Court should affirm the district court's decision to retain jurisdiction over the state law claims.