BRIEF 16 NON-MEASURING

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
C.A. No. 22-000677

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Plaintiff-Appellant-Cross Appellee,
v.
BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,
and
FARTOWN ASSOCIATION FOR WATER SAFETY, et. al.,
Intervenor Plaintiffs-Appellants-Cross Appellants.

FARTOWN ASSOCIATION FOR WATER SAFETY, et. al.,
Plaintiffs-Appellants,
v.
BETTER LIVING CORPORATION
Defendant-Appellee.

On Appeal from 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 for BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated case nos. 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had jurisdiction pursuant to 42 U.S.C § 9659, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq*., and 28 U.S.C. § 1367. The United States Environmental Protection Agency, Better Living Corporation, and Fartown Association for Water Safety, 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 pursuant to 28 U.S.C. § 1291 which grants appellate court jurisdiction over final decisions of district courts. Moreover, a Federal Agency determination appeal must be brought in the federal court's jurisdiction and a district court's appealability is pursuant to U.S.C. § 1291. An order granting summary judgment is a final decision. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

ISSUES PRESENTED

I. Can this Court affirm the district court's grant of BELCO's motion for summary judgment when FAWS incurred response costs after the EPA began its own remedial investigation, FAWS' response costs did not include actual cleanup costs, FAWS' investigation did not uncover any information different from the EPA, and FAWS' response costs were incurred to oversee BELCO's compliance in remediating NAS-T contamination without any involvement from FAWS in the remediation work?

II. Can this Court affirm the district court's decision to uphold the EPA's determination that the ERA constitutes an ARAR, and accordingly find that the EPA's reopening the CD based on that ARAR and ordering further remedial action in the UAO was proper?

III. Can this Court reverse the district court's ruling which vacated as arbitrary, capricious, an abuse of their discretion, or not in accordance with law the EPA's decision not to order

BELCO to install filtration systems in Fartown where the EPA's decision was within federal regulations and guidelines via adequate data collection and interpretation?

IV. Can this Court affirm the district court's discretion to retain jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims when FAWS' federal and state law claims arise from the same operative facts, the district court has expended a substantial amount time in preparing the state-law claims, and FAWS' negligence and private nuisance claims are not novel or complex?

STATEMENT OF THE CASE

A. The Statement of the Facts

An underground body of water, the Sandstone Aquifer, lies beneath two towns in the State of New Union. (R. at 5.) Centerburg has approximately 4,500 residents and Fartown has approximately 500 residents about 2 miles south of Centerburg. *Id.* Groundwater in the Sandstone Aquifer moves downgradient underneath Centerburg then flowing under Fartown. *Id*.

Centerburgers receive tap water from the Centerburg Water Supply ("CWS") that pumps its supply from the Sandstone Aquifer before treating it. *Id.* Fartownians are not connected to the CWS and use private drinking water wells that pump directly from the Sandstone Aquifer. *Id.*

In 1972, Better Living Corporation ("BELCO") patented and trademarked a sealant named "LockSeal," made by combining the chemical, NAS-T, with a non-toxic "activation agent" resulting in LockSeal. *Id.* BELCO manufactured NAS-T at a factory (the "Facility" or "Site") in Centerburg from 1973 through 1998. (R. at 6.) In 1995, the EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb") even though the human nose can detect NAS-T in water at concentrations as low as 5 ppb. *Id.* There are no further state or federal regulations regarding NAS-T and the chemical is not regulated

under the Safe Drinking Water Act ("SDWA"), nor is the EPA monitoring it as an unregulated contaminant in drinking water. *Id.*

In 2013, Centerburgers began complaining to the Centerburg County Department of Health ("DOH") that their water smelled "off" so DOH began testing the water supply in January 2015. *Id.* Testing showed the water in the CWS contained between 45 and 60 ppb NAS-T so DOH notified residents to cease drinking the tap water on September 17, 2015. *Id.* BELCO voluntarily began supplying all Centerburgers with bottled water. *Id.* The New Union Department of Natural Resources ("DNR") began an investigation of the contamination at the Facility on September 22, 2015; yet, citing a lack of resources and expertise, the investigation was referred to the EPA on January 30, 2016. *Id.*

In March 2016, the EPA and BELCO agreed that BELCO would continue providing bottled water and to investigate the cause and extent of the NAS-T contamination. *Id.* After which, BELCO agreed to evaluate proposed clean-up remedies for the Site. *Id.* Through this process, known as Remedial Investigation and Feasibility Study ("RI/FS"), BELCO concluded that NAS-T entered the soils from sporadic spills and from an unlined lagoon, eventually creating a plume of NAS-T in the Sandstone Aquifer. *Id.*

BELCO investigated the extent of the plume under EPA oversight from July 2016 through January 2017 by installing three successive lines of monitoring wells from Centerburg towards Fartown. (R. at 7.) The final five wells were installed approximately half a mile north of Fartown and showed no detectable amounts of NAS-T, so the EPA did not require BELCO to install any additional wells. *Id.* The RI/FS estimated that remediation of the NAS-T plume in the Sandstone Aquifer by pumping and treating the water would take decades and cost over 45

million dollars, which was not feasible. *Id.* Instead, the RI/FS recommended excavation of the soils at the Site and implement filtration of Centerburg's CWS. *Id.*

In June 2017, the EPA selected a clean-up plan for the Site through a Record of Decision (the "ROD"), based on the RI/FS and the comments it received after issuing a Proposed Plan to the public. *Id.* BELCO agreed to implement the remedy selected by the EPA and the court approved and entered the CD on August 28, 2017, after no citizens of Fartown or Centerburg objected to it, the RI/FS, or the Proposed Plan. *Id.*

Upon completion of the clean-up, the EPA was required to issue BELCO a Certificate of Completion (the "COC"). *Id.* Further, the CD dictates that the EPA is not permitted to order BELCO to further remediate the Site without the EPA "reopening" the CD. *Id.* The two grounds set forth in the CD upon which the EPA can reopen it are (1) where new information not previously available or known to the 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, § 13.2 *Id.* Additionally, the CD defines Regulatory Standards to include, "applicable or relevant and appropriate requirements under CERCLA" ('ARARs'). CD, § 1.12. *Id.*

To remediate the situation pursuant to the CD, BELCO (1) installed and maintained a water filtration system known as "CleanStripping;" (2) excavated soils contaminated with NAS-T; and (3) conducted monthly sampling of the monitoring wells. *Id.* Notably, the CD does not require further remediation of the plume in the Sandston Aquifer. *Id.* BELCO's monitoring well test results were largely consistent with prior results. *Id.* at 8. In January 2018, there were two exceptions where NAS-T was detected in the final line of wells closest to Fartown at low levels

of 5 and 6 ppb. *Id.* Considering the multiple non-detects and low numbers found in the final line of wells, the EPA issued the COC to BELCO in September 2018. *Id.*

Still, some members of FAWS submitted sworn testimony that they noticed that their water began to occasionally smell "off" since at least 2016. *Id.* Becoming aware of the investigation and entry of the CD, they requested that DOH sample and test their water. In February 2019, DOH tested five wells in Fartown and there was no detection of NAS-T. *Id.* In May 2019, FAWS again asked the EPA to order BELCO to conduct further testing in Fartown. *Id.* Again, the EPA declined, citing the non-detects in sampling from the monitoring wells. *Id.*

In December 2019, approximately 100 residents of Fartown formed FAWS and paid $21,500 for Central Laboratories, Inc. ("Central Labs") to test their wells. *Id.* Central Labs took 225 samples from 75 wells and reported the results in March 2020 revealing that 120 wells showed no detectable levels of NAS-T; 51 showed concentrations of 1 to 4 ppb; and 54 showed concentrations of 5 to 8 ppb. *Id.* In May 2020, FAWS used these results to write to the EPA again and ask it to reopen the CD to further investigate their wells and to remediate the plume of contamination. *Id.* However, the EPA declined to take further action on June 10, 2022, citing the low levels of NAS-T and the limited reopener provisions in the CD. *Id.*

After the citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"), the EPA wrote to DNR in January 2021 to inquire if the ERA constitutes an ARAR for CERCLA purposes. *Id.* at 9. The DNR responded on February 14, 2021, stating that the EPA should identify the ERA as an ARAR where it provides guidance consistent with CERCLA and where it is not inconsistent with any state or federal regulations. *Id.* Notably, New Union does not have a State Memorandum of Agreement regarding ARARs. *Id.*

On March 20, 2021, citing the 2020 Central Labs results and the passage of the ERA, the EPA re-opened the CD and ordered BELCO to sample and analyze water from 50 private wells in Fartown, supply bottled water to any household whose well tested positive for NAS-T, and continue monitoring Fartown wells. *Id.* Prior to reopening the CD, the EPA included in its administrative record the new information relied upon to reopen the CD. *Id.*

In addition, prior to the EPA issuing the Unilateral Administrative Order ("UAO"), FAWS submitted a request for the EPA to order BELCO to install CleanStripping at each well that tested positive for NAS-T or take other actions to remove NAS-T entirely. *Id.* The EPA expressly declined to include this requirement. *Id.*

The EPA began supplying water to Fartownians whose wells tested positive for NAS-T more than 5 ppb and monitoring those wells through monthly sampling when BELCO refused to comply with the UAO. *Id.*at 10. Still, that sampling was largely consistent with the sampling done by FAWS, showing approximately 55% of samples having non-detect levels of NAS-T, 25% in the 1 to 4 ppb range, and 20% in the 5 to 8 ppb range. *Id.* Moreover, just as before, no Fartown wells tested above 8 ppb. *Id.*

All members of FAWS reside in New Union and BELCO is a Delaware Corporation with a principal place of business in Centerburg, New Union. *Id.* The parties stipulate that (1) all parties have standing and that the case is not mott; (2) that the CD and UA are final agency actions; and (3) that FAWS had exhausted its administrative remedies. *Id.*at 11.

B. Court Proceedings and Disposition Below

On June 30, 2017, the EPA brought a cost recovery action against BELCO (Case No. 17-CV-1234; the "BELCO Action"), immediately after which BELCO and the EPA entered and filed a CD. *Id*. at 7. On November 3, 2020, the citizens of New Union passed the ERA. *Id*. at 8. On March 20, 2021, the EPA re-opened the CD, ordering BELCO to sample and analyze water

from 50 private wells in Fartown. *Id*. at 9. On June 24, 2021, over BELCO's objection, the EPA issued a UAO. *Id*. On August 2, 2021, the EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and for penalties for BELCO's violation of the UAO. *Id*. at 10. Next, FAWS filed a motion to intervene in the BELCO Action on August 30, 2021, to assert a claim against the EPA. *Id*. This Court granted that motion on September 24, 2021. *Id*.

At the parties' joint request, the Court subsequently consolidated the BELCO Action and FAWS Action. *Id*. On December 30, 2021, after completing discovery on the CERCLA claims, all three parties moved and cross-moved for summary judgment on the CERCLA claims, with FAWS additionally moving to dismiss any remaining state law claims without prejudice should the CERCLA claims be resolved by motion. *Id*. at 11. BELCO and the EPA opposed FAWS' motion to dismiss. *Id*.

The court granted summary judgment in favor of BELCO with respect to reimbursement of FAWS' expense in testing; in favor of the EPA with respect to its determination to reopen the CD and issue the UAO; in favor of FAWS as to vacating the EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and the court denied FAWS' motion to dismiss the remaining state law claims. *Id*. The parties stipulate that (1) all parties have standing and that the case is not moot; (2) that the CD and UAO are final agency actions; and (3) that FAWS had exhausted its administrative remedies. *Id*.

STANDARD OF REVIEW

A court of appeals reviews a district court's grant of summary judgment as de novo. *Young v. United States*, 394 F.3d 858, 860 (10th Cir. 2005). When examining whether a state environmental standard constitutes a state ARAR the EPA's interpretation of what constitutes an ARAR under CERCLA must be given deference "according to its persuasiveness." *United States*

v. Mead Corp., 533 U.S. 218, 219 (2001). The weight accorded to an administrative determination "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Id*. A court when reviewing an appeal of an Administrative Procedure Act ruling, must review the trial court's determination under the scope of evaluating whether the agency determination was a capricious ruling or an abuse of their discretion. 28 USCS § 1491(b)(4) A court of appeals reviews a district court's exercise of supplemental jurisdiction for abuse of discretion. *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 738 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

Agency Promulgations are not and cannot be an exact science. Therefore, their decisions are subject to more variance than judicial decisions. Nonetheless, when diligently operating in their official capacity it is in the best interest of our nation, its people, and future outcomes if agencies, such as the EPA in the case at bar, are offered broad deference in their decision-making process and approach. The judicial branch historically and traditionally only intervenes and promulgates against agencies when the agency's decision is against national interest, citizen interest, or precedent for a string of bad precedents to proceed.

First, this Court is to determine whether the EPA's determination that costs incurred by FAWS are not reimbursable as response costs under CERCLA. The incurred response costs did not uncover any information different from the EPA. Therefore, if this Court were to do anything different than affirm the district court, the judicial system would set precedent for any costs, whether these costs render a different outcome or not, to be reimbursable to private citizens. Thus, likely burdening taxpayers and federal funds.

Second, this Court is to determine whether the EPA's determination of opening the Consent Decree and ordering further remedial action in the UAO was proper. The ERA cannot properly be considered an ARAR and therefore the EPA did not have the legal right to reopen the CD. BELCO complied with every aspect of the NCP therefore BELCO substantially complied with all applicable requirements. For this court to affirm the district court's order would be detrimental to res judicata and our precedent as it lays.

Third, this Court is to determine whether the district court's ruling that the EPA's determination not to require BELCO to install filtration systems was indeed not in accordance with governing federal and agency law. Sufficient caselaw indicates that broad deference should be afforded the judicial branch when reviewing agency determinations. Moreover, there is sufficient caselaw supporting the notion that when an agency has adequately and diligently collected data for its determination, the data shall be respected, and given even more weight by the judicial branch. Therefore, this court must reverse to avoid inconsistent opinions and judicial inefficiency.

Lastly, this Court is to determine whether the district court's determination to retain FAWS' state law tort claim after resolving federal claims was an abuse of their discretion. Maintaining and retaining supplemental jurisdiction over state-law claims after federal claims have been resolved, promotes judicial efficiency and maximizes of our societal resources and needs. Supplemental jurisdiction is a discretionary invocation only at the court's approval. There must be a blatant abuse of discretion outlined, one the present case will not show. Therefore, this Court should proffer deference to the district court and affirm its decision.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF BELCO'S MOTION FOR SUMMARY JUDGMENT REGARDING FAWS' RESPONSE COSTS BECAUSE BELCO IS A FACILITY, BELCO IS A RESPONSIBLE PARTY, AND THERE WAS A RELEASE OF A HAZARDOUS SUBSTANCE, BUT FAWS' COSTS WERE NOT NECESSARY.

The District Court did not err when it determined that costs incurred by FAWS in sampling, testing, and analyzing well water sampled of its members' private drinking wells are not reimbursable as response costs under CERCLA because FAWS incurred response costs after the EPA began its own remedial investigation; FAWS' response costs do not include actual cleanup costs; FAWS' investigation did not uncover any information different from the EPA; and FAWS' response costs were incurred to oversee BELCO's compliance in remediating NAS-T contamination without any involvement from FAWS in the remediation work.

Congress enacted CERCLA in part to allow private parties to recoup costs incurred for the cleanup of hazardous substances from another party that was responsible for the contamination. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986). Because CERCLA claims allow for private parties to recover money, it is necessary that the claims be properly vetted so that only applicable costs are reimbursed to prevent claimants from submitting fraudulent costs for the purpose of enhancing their property.

Review of a grant of summary judgment is de novo. *Young v. United States*, 394 F.3d 858, 860 (10th Cir. 2005).

A private party cannot recover response costs under CERCLA if (1) the site in question is not a "facility" as defined by CERCLA; (2) the defendant is not a responsible party; (3) there has not been a release or threatened release of hazardous substances; (4) the plaintiff has not incurred costs in response to the release or threatened release; and (5) the costs incurred were not

"necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. 2012).

The parties have no dispute as to BELCO constituting a facility, that BELCO is a responsible party, that there has been a release of a hazardous substance, and that FAWS incurred costs. However, FAWS has failed to establish that its costs were necessary and consistent with the national contingency plan.

FAWS did not sufficiently establish that the response costs it incurred were necessary. Necessary costs are costs that are "necessary to the containment and cleanup of hazardous releases." *United States v. Iron Mt. Mines*, 987 F.Supp. 1263, 1271 (E.D. Cal. 1997) (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992).

Response costs incurred by a private party after the EPA has begun a remedial investigation are not necessary to the containment and cleanup of hazardous substances because they are duplicative. *Id.* at 1272. In *Iron Mountain Mines, Inc.*, a mining company caused hazardous acid mine drainage that infiltrated the water supply. *Id.* at 1266. While the EPA was investigating the water supply contamination, the mining company performed its own investigation. *Id.* at 1272. The EPA requested water quality data compiled by the mining company stating that the data would assist in the EPA's own investigation. *Id*. The mining company argued that this request for its data was a distinct matter from the EPA's own investigation. *Id.* However, the court held that EPA's interest in the mining company's data did not establish a separate and distinct matter. *Id*. Thus, the mining company's response costs for its investigation were duplicative. *Id.*

Response costs are not necessary to the containment and cleanup of hazardous substances if they are not "closely tied to the actual cleanup of hazardous releases." *Young*, 394 F.3d 858,

863 (10th Cir. 2005). In *Young*, plaintiffs incurred response costs to determine the amount of lead and arsenic that had seeped onto their land from an adjacent smelting company. *Id.* at 862. Despite learning of the hazardous substances on their land, the plaintiffs did nothing to remove the substances. *Id.* at 861. The court reasoned that because the plaintiffs made no attempt to remove the lead and arsenic, then their response costs were not necessary to the containment and cleanup of hazardous substances. *Id.* at 865.

Response costs for investigations that do not uncover information different from the EPA are not necessary to the containment and cleanup of hazardous substances. *Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc.,* 811 F.Supp. 1421, 1425 (E.D. Cal. 1993) (citing *United States v. Hardage,* 750 F. Supp. 1460, 1511-17 (W.D.Okla. 1990), *aff'd* 982 F.2d 1436, 1447-48 (10th Cir. 1992). In *Louisiana-Pacific Corp.,* the plaintiff owned and operated a sawmill site and landfill. *Id.* at 1423. The defendant operated a log processing plant adjacent to the sawmill site and landfill. *Id*. The defendant dumped large amounts of a hazardous substance into the water shared between the two properties. *Id*. The plaintiff then used the contaminated water throughout its sawmill operations. *Id*. The EPA investigated both sites to develop a remediation plan of the contaminated water. *Id*. The plaintiff would not consent to the EPA's plan, so it conducted its own investigation at the same time. *Id*. The plaintiff then sought recovery for its investigation costs from the defendant. *Id*. The court reasoned that because the plaintiff's investigation was not designed to uncover any information different from that of the EPA, the plaintiff's own investigation was not necessary to the containment and cleanup of hazardous substances. *Id*. at 1425-26.

The response costs incurred are not necessary to the containment and cleanup of hazardous substances if they are incurred to oversee a responsible party's compliance with its

remedial obligations without "direct involvement" in the responsible party's remediation work. *Black Horse Lane Assocs., L.P. v. Dow Chem Corp*, 228 F.3d 275, 298 (3d Cir. 2000). In *Black Horse Lane Assocs., L.P.*, a paper products company contaminated its property with a hazardous substance. *Id.* at 279. Before the remediation work was performed, it sold its business to another company. *Id.* The new purchaser was aware of the contamination and entered into an agreement with the paper products company establishing that the paper products company would be solely responsible for the cleanup of the contamination at its own expense. *Id.* While the paper products company was remediating, the new purchaser conducted its own investigation to determine if the paper products company was completing its remedial obligations within a reasonable time. *Id.* Because the new purchaser was not involved in the cleanup and only performed an investigation to oversee the remediation efforts of the paper products company, the court concluded that its response costs were not necessary to the containment and cleanup of hazardous substances.

FAWS incurred response costs after the EPA began its own remedial investigation. In *Iron Mountain Mines, Inc.*, the mining company proceeded with its own investigation at the same time as the EPA and believed that because the EPA requested copies of its data that its investigation was distinct from that of the EPA. *Iron Mt. Mines, Inc.,* 987 F.Supp. 1263 at 1272 Here, FAWS did not begin its own investigation until December 2019, well after the EPA began its investigation in March 2016. (R. at 8.) Additionally, not only did the EPA not request data from the FAWS investigation, but it also expressly advised FAWS it declined to do further testing. *Id*. Because FAWS incurred response costs after the EPA began its remedial investigation, its response costs are duplicative and therefore not necessary to the containment and cleanup of hazardous substances.

FAWS' response costs do not include actual cleanup costs. In *Young*, the plaintiffs' response costs only involved costs incurred to determine the extent of a lead and arsenic contamination. *Young*, 394 F.3d 858 at 861. Similarly, FAWS' response costs only include costs incurred for sampling the extent of any potential NAS-T contamination in its water supply. (R. at 8.) As such, FAWS' response costs did not include actual cleanup costs, so its response costs are not necessary to the containment and cleanup of hazardous substances.

FAWS' investigation did not uncover any information different from the EPA. In *Louisiana-Pacific Corporation*, a company proceeded to test the same contaminated water as the EPA to develop a remediation plan. Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc., 811 F.Supp. 1421 at 1423. Here, FAWS proceeded to test the same contaminated water that traveled from Centerburg to Fartown as the EPA and only discovered that half of its tested wells contained 8 ppb of NAS-T or less. (R. at 8.) This is consistent with the findings the EPA had in January 2018 in the final line of wells closest to Fartown which showed 5-6 ppb. (R. at 7.) Because FAWS did not uncover any information different from the EPA, its responses costs are not necessary to the containment and cleanup of hazardous substances.

FAWS' response costs were incurred to oversee BELCO's compliance in remediating NAS-T contamination without any involvement from FAWS in the remediation work. In *Black Horse Lane Assocs., L.P.,* a non-responsible party purchased land that was contaminated by a responsible party. *Black Horse Lane Assocs., L.P.,* 228 F.3d 275 at 279. In this matter, FAWS did not purchase land from a responsible party; however, BELCO was a responsible party in allowing contaminated water to travel from its land to the water supply that FAWS accesses. (R. at 7.). In *Black Horse Lane Assocs., L.P,* the non-responsible party tested the same contaminated land that the responsible party was remediating. *Black Horse Lane Assocs., L.P.,* 228 F.3d 275 at

279. Similarly, FAWS incurred response costs by hiring a laboratory to test wells that receive water from the same water source that BELCO was responsible for remediating. (R. 8.) In *Black Horse Lane Assocs., L.P.,* the non-responsible party was not involved in the cleanup process. *Black Horse Lane Assocs., L.P.,* 228 F.3d 275 at 279. Similarly, FAWS was not involved in the BELCO cleanup process. (R. at 1-19.) In *Black Horse Lane Assocs., L.P.*, the non-responsible party performed testing after a cleanup plan was in place. *Black Horse Lane Assocs., L.P.,* 228 F.3d 275 at 278. In this matter, not only was a cleanup plan already in place, but BELCO was issued a Certificate of Completion. (R. at 8.) Because a cleanup process was already in place and because FAWS was not involved in the BELCO cleanup process, its response costs were incurred as an oversight to BELCO's compliance with the remediation plan. As such, FAWS' response costs are not necessary to the containment and cleanup of hazardous substances.

FAWS may argue that its response costs were necessary because it had a right to know about NAS-T in its water supply. Unfortunately, it is not feasible to keep every potential contaminant out of the public water supply. Because of this, the EPA manages a report of primary drinking water contaminants and their maximum contaminant levels. *National Primary Drinking Water Regulations,* U.S. Envt'l Prot. Agency, https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations (last visited Nov. 21, 2022), This report advises the acceptable level of contaminants in the public water supply. Having contaminants in the water supply does not mean the water is not safe. Additionally, it is not feasible for every citizen to know every possible contaminant in their water supply especially when those contaminants are not at an unsafe level. FAWS testing showed what BELCO and EPA already knew, that NAS-T was found in trace amounts (less than 10 ppb) that are non-toxic to humans. (R. at 8.)

For the reasons set forth above, the order of this Court should be to affirm the district court's grant of BELCO's motion for summary judgment regarding FAWS' response costs.

II. THIS COURT SHOULD DENY THE DISTRICT COURT'S GRANT OF THE EPA'S DECISION TO REOPEN THE CONSENT DECREE BASED ON ITS DETERMINATION THAT THE ERA IS AN ARAR.

The District Court erred when it determined that the EPA could reopen the CD based on its determination that the ERA constituted an ARAR because its interpretation that the ERA constitutes an ARAR was incorrect. The ERA cannot be an ARAR because it is immeasurable.

CERCLA does not define ARARs, but the statute does require that remedial actions at Superfund Sites result in a level of cleanup or standard of control that at least meets the legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements. 42. U.S.C. § 9621(d)(2)(A). *Ohio v. United States EPA*, 997 F.2d at 1526.

A. The EPA does not have the legal right to reopen the CD because the ERA does not meet the CERCLA ARAR requirements.

A state environmental standard constitutes a state ARAR to which the 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. 42 U.S.C. § 9621(d). *Containerport Group, Inc. v. American Fin. Group, Inc*., 128 F. Supp. 2d 470, 482 (E.D. OH 2001). Here, the parties do not dispute whether the environmental standard was timely identified.

A state law is a state ARAR if it is legally enforceable, a comparable federal statute does not exist, and it pertains to the conditions of the remediation site. *Id*.

The state environmental standard was not properly promulgated because it does not provide any measurable standard for any specific situation, including the remediation at issue. Laws imposed by state legislative bodies and regulations developed by state agencies that are generally

applicable and legally enforceable are promulgated. *United States v. Akzo Coating of Am.*, 949 F.2d 1409, 1440 (6th Circ. 1991).

The ERA is not properly promulgated because it is too vague to be legally enforceable. A standard is constitutionally vague when it is not drafted with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Id*. at 1441. In *Akzo,* the state of Michigan appealed from the entry of a consent decree pursuant to CERCLA that would require Potentially Responsible Parties (PRPs) to engage in remedial work to clean up a hazardous waste site. *Id*. at 1416. Michigan Water Resources Commission Act ("WRCA"), provides, in part: "It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters." *Id*. at 1440. The court reasoned that the act was properly promulgated because it was sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited it was properly promulgated. *Id*. at 1441.

The instant case is distinguished from *Akzo*. Here, the ERA reads: "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. Record at 5. Absent some further legislative or regulatory action by New Union to define "clean" or "healthful," the ERA does not provide any measurable standard for any specific situation. *Id*. at 14. The standard lacks sufficient definiteness to be properly promulgated.

The state environmental standard is not more stringent than federal standards because the ERA is consistent with federal regulations. Further, New Union does not have a State

Memorandum of Agreement regarding ARARs. *Id*. at 9. When no federal ARAR exists for a specific purpose, but a state ARAR does, or when a state ARAR is broader in scope than a federal ARAR, the state ARAR is considered to be more stringent. *Akzo Coating of Am.*, at 1443. Returning to *Akzo*, the court noted that the WRCA Act, while not directly comparable to the Safe Drinking Water Act (SDWA), was more stringent because the SDWA provisions applied only to a limited number of substances while the WRCA applied to any substance which is or may become injurious to human health. *Id*. The court found that the WRCA's cleanup requirements implemented by means of that Act's accompanying regulations are equally or in some cases more demanding and thus not less stringent than under SDWA. *Id*. Michigan's anti-degradation law broadly prohibits the direct and indirect discharge of any injurious or potentially injurious substances, whereas federal statutes only contain specific requirements. *Id*. Because no federal statutes are directly comparable to Michigan's anti-degradation law, Michigan's anti-degradation law is more stringent. *Id*.

In the instant case, there are no further state or federal regulations regarding NAS-T beyond the HAL. The chemical is not regulated under the SDWA, nor is the EPA monitoring it as an unregulated contaminant in drinking water. (R. at 6.) Because the chemical is not regulated nor monitored by the EPA there is no established ARAR established. As such, there is no measure of the ERA as written. Further, if it were to be read as an ARAR it would not be more stringent than any federal environmental standards where it essentially mirrors the first criteria to be analyzed pursuant to the NCP by a remediating party when determining viable alternatives. *Sealy Conn. Inc. v. Litton Indus.*, 93 F.Supp. 2d 177, 184 (D.C. Conn. 2000).

The environmental standard is not legally applicable or relevant and appropriate because there is no measure imposed for its general applicability. Under § 121 of CERCLA, a cleanup

must comply with all legally applicable or relevant and appropriate requirements, including any State environmental requirements that are more stringent than the governing federal requirement. *Amoco Oil Co. v. Borden, Inc*., 889 F.2d 664, 671 (5th Cir. 1989). The federal government is obligated to ensure that CERCLA cleanups comply with state environmental law that is an ARAR. *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 831 (1991 U.S. App.).

In *Fort Ord Toxics Projects, Inc. v. California EPA* plaintiffs sued the state and federal government agencies to enforce the agencies to comply with a provision of the state environmental law prior to conducting a CERCLA cleanup of the military installation at a military fort. *Id*. at 829. Relevant and appropriate requirements are those substantive requirements that, while not applicable, nonetheless address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site. *Ohio v. United States EPA*, 997 F.2d 1520, 1526 (D.C. Cir. 1993). Remedial actions under the NCP must meet all legally applicable, relevant, and appropriate standards and must prioritize the protection of human health over either permanency or cost. *Id*.

In *Ohio*, the plaintiffs petitioned for review of the EPA changes to the NCP as inconsistent with the CERCLA arguing that the EPA should require remediation plans to meet a Maximum Contaminant Level Goals (MCLGs) for all relevant contaminants and should not allow plans to substitute the Maximum Contaminant Level (MCL) standard for contaminants with an MCLG of zero. *Id*. at 1530. The court held that ARARs, which include the MCLs and MCLGs, must be measurable and attainable, and MCLGs set at zero are not scientifically measurable and therefore not attainable. *Id*.

B. BELCO's response action must be considered consistent with the NCP because it substantially complies with the ARARs.

The NCP is EPA's regulatory template for a CERCLA quality clean-up. *County Line Inv. Co. v. Tinney*, 933 F.2d at 1514. It sets performance standards, identifies methods for investigating the environmental impact of a release or threatened release, and establishes criteria for determining the appropriate extent of response activities. *OHM Remediation* Servs. v. Evans *Cooperage Co.*, 116 F.3d at 1579. All activities undertaken by the Settling Defendant pursuant to the consent decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. The Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD. *R.I. Res. Recovery Corp. v. R.I. Dep't of Envtl. Mgmt.*, No. CA 05-451 ML, 2006 U.S. Dist. LEXIS 56072 (D.R.I. July 26, 2006). As explained by the Akzo court, CERCLA creates a mechanism by which state environmental laws which are more stringent than federal standards may be incorporated into the consent decree. *Id*. at 10. This mechanism described in § 9621(f), precludes other means of enforcing state environmental laws on the site of remediation because "the language of CERCLA and the legislative history of that act indicate that once the consent decree is entered by a federal court-giving the decree the force of law-alternative state remedies may not be pursued. *Id*. at 12.

In *R.I. Res. Recovery Corp*, Defendant filed a motion to dismiss, arguing that the CD, on its own terms, disposes of the issues by requiring Plaintiff to comply with all state and federal laws, not merely the ARARs. *Id*. at 8. The court relied on several key selections from the CD and CERCLA to resolve the question of Defendant's enforcement rights in the Superfund Site. *Id*. at 9. Defendant argued that the first sentence of the CD mandates compliance with all state and federal laws, and that the second sentence requires compliance with the ARARs as defined in the

ROD. *Id*. Plaintiff's interpretation of that language is that the first sentence establishes that federal and state laws apply to the Site generally, and the second sentence sets forth that, as to environmental laws, the ARARs alone control. *Id*. The court found Plaintiff's argument to be supported by case law.

Turning to the instant case, BELCO and the EPA entered into and filed a CD. *Id.* at 7. Pursuant to the CD, BELCO agreed to design and implement the remedy selected by the EPA in the ROD. *Id.* After taking public comment and determining it to be fair and reasonable, the lower court approved and entered the CD. *Id.* The CD further dictates that upon issuing the COC, the EPA is not permitted to order BELCO to further remediate the Site without the EPA reopening the CD, explicitly setting forth two grounds upon which the EPA can reopen it: (1) where new information not previously available or known to the 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. *Id.*

Under the NCP, the remediating party is required to conduct a RI/FS to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. *Sealy Conn., Inc*. at 183. A private party response action will be considered consistent with the NCP if the action when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of 40 C.F.R. § 300.700(c), and results in a CERCLA-quality clean-up. *Id*. at 186.

> In addition to performing the RI/FS, the remediating party: (1) provide for worker health and safety (*40 C.F.R. § 300.150*); (2) document the costs incurred during remediation (*40 C.F.R. § 300.160*); (3) identify any applicable or relevant and appropriate requirements ("ARARs") (*40 C.F.R. § 300.400(g)*; (4) provide reports of releases of hazardous materials, (*40 C.F.R. § 300.405(b)*,*(c)* and *(d)*); (5) perform a remedial preliminary assessment and a remedial site inspection (*40*

> *C.F.R. § 300.420*); (6) conduct a remedial preliminary assessment and a remedial site inspection (*40 C.F.R. § 300.430*); (7) develop a remedial design consistent with the selected remedy and implement the remedial action (*40 C.F.R. § 300.435*); and (8) provide for public comment and community relations (*40 C.F.R. §§ 300.155*; 300.430(c); 300.430(f)(2),(3), and (6); 300.435(c)).

Id.

In *Sealy*, Plaintiff sued to recover its remediation costs under § 107 of CERCLA to recover its cost of remediating the soil and groundwater contamination on a part of the real property it owns. *Id*. at 180. Plaintiff had satisfied the purpose of the RI component of the NCP in that the site was adequately characterized such that the efficacy of the remedy selected could be evaluated as being of CERCLA quality, but it never prepared any report or document which it considered a feasibility study. *Id*. at 184. Plaintiff contended that it otherwise complied with this additional requirement. *Id*. The court reviewed the evidence and concluded that Plaintiff substantially complied with the NCP. *Id*. at 187. The court held that to preclude Plaintiff from recovery based on its failure to prepare a feasibility study under the circumstances would ignore the equitable component that Congress and the EPA built into the cleanup costs' decisions. *Id*.

In the instant case, BELCO installed three successive lines of monitoring wells progressively further from Centerburg and closer to Fartown. (R. at 7.) The EPA did not direct BELCO to install any additional wells and based on BELCO's investigation the RI/FS estimated remediation of the NAS-T plume in the Sandstone Aquifer by pumping and treating the water would take decades and cost over $45 million and was therefore not feasible. *Id*. The facts of this case are distinguished from *Sealy* because BELCO essentially complied with every aspect of the NCP. (R. at 7.) As such, BELCO substantially complied with all applicable requirements.

Here, New Union does not have a State Memorandum of Agreement regarding ARARs. *Id.* Because the ERA cannot properly be considered an ARAR the EPA did not have the legal right to reopen the CD. (R. at 10.)

III. The District Court blatantly erred when vacating EPA's Decision Not to Order BELCO to Install Filtration Systems in Fartown. Ruling the decision as arbitrary, capricious, an abuse of their discretion or not in accordance with law.

The district court erroneously vacated a logically data-driven order administered by the EPA which did not require BELCO to install CleanStripping on residential wells in Fartown testing below 10ppb. The EPA conducted a plethora of sufficient field tests in the FAWS surrounding areas and arrived at its decision in accordance with stipulations explicitly enumerated in the Clean Air Act ("CAA"), Clean Water Act ("CWA"), and other federal regulatory guidelines. Moreover, when viewed in a light most favorable to the agency, the EPA stayed within the scope of federal regulatory schemes which deem a certain threshold of contamination in water to be safe for consumption. In its determination, the EPA abided by federal standards and regulations and therefore was wrongly scrutinized by the district court where broad deference should have been proffered to the agency in its sound determination. The ERA statute, requiring close to no contamination in drinking water, is attainable and detrimental to societal interests for consumption and for the water industry manufacturers and producers.

First, the EPA's decision is in accordance with and premised on federal regulatory provisions and guidelines. The CAA and CWA explicitly enumerate some "safe" levels of contamination in water discharge. (R. at 13). The EPA, in its determination, conceded that N.U. CONST. art 1 § 7 changed the landscape as to its interpretation of the situation at hand. (R. at 13). Nonetheless, since the district court ruled and sided with the language of the ERA and therefore deemed the EPA's determination not to order CleanStripping as an abuse of discretion and contrary to the state law, Petitioners encourage the court to deem that the ERA statute conflicts with federal regulations and is likely preempted by federal regulatory provisions. (R. at 13.) This Court, upon evaluation, should overturn the district court's holding because it sets a

precedent of state statutes diminishing federal guidelines and regulations, this holding would not be judicially efficient or constitutional moving forward.

Second, the EPA's decision not to require BELCO to install CleanStripping was data and cost driven. (R. at 13.) The estimated cost of the CleanStripping systems is $4,500 per household. (R. at 13.) Given the costs and lack of evidence presented by FAWS in their argument, the Court should hold deference in the decision rendered by the EPA and overturn the district court's ruling. When an agency promulgates a decision based on the grounds of sufficient data collection and interpretation, made in good faith, and conducted with due diligence, the courts are to offer broad deference regarding their computation and almost always hold for the agency when battling litigation.

In sum, the district court abused its discretion when it erroneously ruled that the EPA abused its discretion and rendered a decision not in accordance with the law.

A. The ERA statute is in contradiction with federal regulations and guidelines. Therefore, the EPA should have been afforded broad deference with its decision, or the statute should be preempted.

A federal agency in administering decisions may interpret the ambiguous terms of a statute so long as the interpretation was done in good faith and derived with cohesive logic. *American Bankers Association v. National Credit Union Administration,* 271 F.3d 264, 266 (D.C. Cir. 2001). Moreover, a *Chevron* analysis should be used when evaluating whether an agency exercised the requisite authority in interpreting a statute. *Chamber of Commerce of the United States v. National Labor Relations Board,* 271 F.3d 154, 155 (4th Cir. 2013).

When considering if there are sufficient grounds to strike down an agency's decision, the district court must consider whether the agency interpreted the statutory provision at hand in a manner consistent with their administrative position. *American Bankers,* F.3d at 266. The court upheld the

National Credit Union Administration's decision, which issued a ruling regarding member standards interpreting from an ambiguous statute on several key issues. *Id*. The court reasoned that if the agency's reasoning is reasonable and implicitly in conjunction with the silence of the statute, the agency is afforded that level of deference. *Id*.

Enhancing societal interests is at the forefront of agency regulations. *Chevron* Congressional intent is a pertinent factor when reviewing an agency's determination based upon federal regulatory standards. *Chevron,* F.3d at 154. In *National Labor Relations Board*, the district held that the NLRB lacked the power to promulgate regulations about unfair labor practices. *Id*. On appeal, the court affirmed the decision while evaluating a two-prong chevron analysis. The chevron analysis requires the court to evaluate congressional intent, text, and structure regarding the agency's promulgation of the statute. *Id*.

In the case at hand, it is unchallenged that the EPA's decision not to order BELCO to install CleanStripping was derived from concrete and unambiguous federal regulations and standards. R. at 13. On appeal, the court in *Banker* affirmed the lower court's reasoning that broad deference should be proffered to agency's administrative decisions based on statutory language which does not cover the issue at hand. *American Bankers,* F.3d at 266. Similarly here, the language of the New Union ERA Statute is likely infallible and regardless of whether the statute is overturned or not, the ability for entirely "pure" drinking water is almost unattainable nationally. *Id*. Therefore, the EPA's decision in following federal guidelines which deem some levels of contamination in consumer water as safe, was not in contrary to the law and should be upheld rather than struck down due to the district court's precedence offering broad levels of deference in agency rulings. *Id*. Without the reversal of the district court's ruling, this court would open up an unimaginable number of channels for independent states to invoke statutes that are nearly impossible for federal agencies to abide by. *Id*. Should this Court

reverse, federal guidelines will likely continue to outweigh state provisions and continue the notion of continuity between one nation. *Id*.

B. The EPA's decision of not to order BELCO to install water filtration was derived from an abundance of collected data. Precedent indicates that data driven agency decisions should be proffered broad deference by the courts.

"An agency's ruling must be based on evidence that is sufficient in volume and quality to sharply define the issues and that provide enough information for the agency to make a reasoned choice among available alternatives." *WildEarth Guardians v. U.S. Bureau of Land Management*, 870 F.3d 1222, 1223 (4th Cir. 2017). Moreover, the APA explains that agencies may not create regulations that are made without a rational foundation in facts or law. *ACA International v. FCC*, 885 F.3d 687, 688 (D.C. Cir. 2018).

Although data interpretation is a rather subjective, data measurement is keener to objective than subjective. *WildEarth,* F.3d at 1224. An agency that promulgates a regulation based upon diligent data collection and a good-faith data interpretation is typically afforded deference in regard to its decision-making prowess. *Id*. In *WildEarth,* the district court held for the plaintiffs when the US Bureau of Land Management promulgated a regulation that juxtaposed their business stance. *Id*. On appeal, the court reversed the district court and held for the agency on the basis that an agency's decision which is derived from concrete data collection and analysis, will be proffered broad deference by the courts since data interpretation is a subjective metric by which nearly all individuals are likely to disagree upon. *Id* at 1226.

An agency's decision and regulation must be rooted in a rational foundation through relevant law or facts. *ACA International,* F.3d at 688. Expansive or infringing regulations promulgated by agencies are likely not to be upheld in the eyes of the court because an agency's decision must be derived through a cohesive and traceable thought process. *Id.* The court in ACA

struck down two promulgations reasoning them to be over-broad and irrationally derived to being upheld. *Id.* The court reasoned that an agency has a duty to develop a theory as to how their promulgation will affect the public at large and assess whether the promulgation is one that is easy for the public at large to abide by and follow through with. *Id.*

In the case at hand, this Court should reverse the district's ruling for two distinct reasons supported by caselaw. First, the EPA issued a consent decree and promulgated several regulations for BELCO to abide by prior to the closing of the decree. (R. at 5.) BELCO in turn followed the requisite guidelines and their acts were deemed satisfactory by EPA prior to the closing of the decree. (R. at 5.) Moreover, the CAA and CWA explicitly outline that some levels of particles in water are deemed to be federally safe for human consumption. (R. at 6.) Therefore, likely yielding the largest and most irrational premise in the case at hand is that the ERA which requires no contamination in consumable water.

The testing and evaluations conducted by the EPA were thorough and the results yielded immediately prompted the EPA to enact certain directives for BELCO to abide by. (R. at 6.) Cost-efficacy must be evaluated and interpretated by this Court in evaluating whether abiding to the ERA is indeed a feasible criterion. (R. at 12.) BELCO has explicitly motioned that money is a key factor in its approach to alleviating all liability they may have accrued. R. at 6. This court should side with efficacy and pragmatism, consistent with the EPA's decision in not ordering filtration systems due to the water's satisfaction of federal regulatory guidelines. This court has a choice between the due-diligent realism displayed by the EPA or abiding by a statute derived from infallible logic and unreachable requirements. Affirming the district court ruling would set out an unprecedent ruling and ruin not only agency's operations and decisions but any water manufacturer or distributor severally.

IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S RETENTION OF JURISDICTION OVER THE REMAINING STATE-LAW CLAIMS BECAUSE THE DISTRICT COURT HAS BROAD DISCRETION.

The district court did not err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims because negligence and private nuisance claims are not novel or complex matters; the CERCLA claims were not dismissed for lack of subject matter jurisdiction; the CERCLA claims were resolved on merits; the federal district court has expended a substantial amount of time in preparing the state-law claims; and supplemental jurisdiction in federal environmental claims, to include CERCLA claims, is preferred.

A federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The district court may exercise its discretion to decline supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of state law,
> (2) the claim substantially predominates over the claim or claims over which the court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

A court of appeals reviews a district court's exercise of supplemental jurisdiction for abuse of discretion. *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 738 (11th Cir. 2006). "A district court does not abuse its discretion when it has a range of choices and the court's choice does not constitute a clear error of judgment." *Estate of Amergi v. Palenstinian Auth.,* 611 F.3d 1350, 1365 (11th Cir. 2010).

The parties have no dispute that the district court had supplemental jurisdiction under 28 U.S.C. § 1367(a). Here, FAWS has failed to demonstrate that the district court abused its discretion in retaining supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(1), (3)-(4).

A. The district court did not abuse its discretion in retaining jurisdiction over the remaining state-law claims because they are not novel or complex.

The district court did not err in retaining jurisdiction over the remaining state-law claims because negligence and private nuisance claims are not novel or complex matters. State tort claims are not considered novel or complex. *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 743-44 (11th Cir. 2006).

Negligence and private nuisance claims are state tort claims; therefore, they are not considered novel or complex. *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 743-44 (11th Cir. 2006). In *Parker*, a plaintiff's assertions involved federal claims as well as state-law claims of negligence, negligence per se, nuisance, and trespass. *Id.* at 743. The federal and state law claims were resolved at trial. *Id.* at 737. The defendant appealed the matter because of the damages amount awarded for the state-law claims and argued that the case should be remanded to state court since the only issues remaining were the state-law claims. *Id.* at 744. The district court agreed with the defendant and remanded the case to state court. *Id*. However, the appellate court held that negligence, nuisance, and trespass claims are state tort claims so they are not novel or complex and ruled for the federal district court to retain jurisdiction over the state-law claims. *Id.*

Despite a claim raising a novel or complex issue, a district court is not required to decline supplemental jurisdiction. *Dream Palace v. County of Maricopa,* 384 F.3d 990, 1022 (9th Cir. 2004). In *Dream Palace*, the Arizona legislature enacted a broad licensing and regulation ordinance to govern the conduct of adult entertainment businesses. *Id.* at 996. The Arizona

legislature and Maricopa County Board of Supervisors devoted significant time and resources to researching and debating the adoption of the ordinance. *Id*. Among other things, the ordinance included the application process for business licenses, allowed hours of operation, and governed the type of activities and dances allowed in the businesses. *Id.* at 997. Additionally, at Maricopa County's urging, the Arizona legislature expressly gave authority to Arizona counties to oversee the licensing and regulations of both new and previously established adult entertainment businesses. *Id.* at 998. An adult entertainment business challenged this ordinance in federal court under First Amendment rights as well as state-law claims. *Id.* at 999. The district court resolved the federal claims and elected to decline jurisdiction of the state-law claims because of their delicate and complex nature. *Id.* at 1022. The adult entertainment business appealed the district court's refusal to retain jurisdiction over the state-law claims. *Id*. The appellate court held that the district court had the discretion to retain and decide the novel and complex state-law issues, but that it did not abuse its discretion in declining jurisdiction. *Id.*

FAWS' negligence and private nuisance claims are state law tort claims and are not novel or complex. In *Parker*, the plaintiff asserted negligence and nuisance claims. *Parker*, 468 F.3d 733 at 743. Equally, FAWS' asserted negligence and nuisance claims. (R. at 10). In *Parker*, the appellate court ruled that negligence and nuisance claims are general state law tort claims and the district court should retain supplemental jurisdiction over the state-law claims since they were not novel or complex. *Parker*, 468 F.3d 733 at 743. Here, the district court is well within its discretion to retain jurisdiction over the negligence and nuisance claims asserted by FAWS.

Even if FAWS' negligence and nuisance claims were novel and complex, the district court would possess discretion to retain jurisdiction over the state-law claims. In *Dream Palace*, a newly enacted ordinance was at issue. *Dream Palace v. County of Maricopa,* 384 F.3d 990 at

996. In this matter, standard negligence and nuisance claims are at issue. (R. at 10.) In *Dream Palace*, the state and local governments expended significant time determining the parameters and intricacies of the ordinance. *Dream Palace v. County of Maricopa,* 384 F.3d 990 at 996. Here, it is not necessary for FAWS to debate any intricacies of well-established negligence and nuisance state law. (R. at 10.) In *Dream Palace,* the constitutionality of the ordinance's very existence was analyzed. *Dream Palace v. County of Maricopa,* 384 F.3d 990 at 999. In this matter, there is no constitutional issue regarding the existence of nuisance and negligence claims, and, at most, there is a novel question of whether the ERA constitutes an ARAR, which is not pertinent to the negligence and nuisance claims in this matter. (R. at 10.) In *Dream Palace*, the appellate court held that, even with the many intricate issues of state law involved, the district court still possessed discretion to retain jurisdiction over the state law claims. *Dream Palace v. County of Maricopa,* 384 F.3d 990 at 1022. Here, the negligence and nuisance claims raised by FAWS are not novel and complex in and of themselves, and even if the ERA was found to constitute an ARAR and raise a novel issue, the discretion to retain jurisdiction remains with the district court.

B. The district court did not abuse its discretion in retaining jurisdiction over the remaining state-law claims because the dismissal of federal claims does not require the dismissal of supplemental state-law claims.

The district court did not err in retaining jurisdiction over the remaining state-law claims after the federal claim was dismissed because the district court was not required to decline jurisdiction. The dismissal of federal claims does not require the dismissal of supplemental state-law claims. *Palmer v. Hospital Auth. of Randolph*, 22 F.3d 1559, 1566 (11th Cir. 1994).

If a federal claim fails on merits, the district court is not required to decline jurisdiction on the supplemental state-law claims. *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995). In *Rodriguez*, an employee raised a Title VII sexual harassment claim and

associated state-law claims against her former supervisor and company. *Id.* at 1169. The court analyzed the federal Title VII claim and concluded that Title VII was not applicable to the matter at issue because, at that time, Title VII claims did not apply to individual harassers nor did the company have appropriate notice of the harassment. *Id.* at 1170. Despite the swift dismissal of the federal claim on its merits, the court elected to retain jurisdiction of the state-law claims. *Id.* at 1171. The appellate court upheld the jurisdiction stating that the court had the "raw power" to retain jurisdiction over the state-law claims after the dismissal of the federal claim. *Id.* at 1177.

The CERCLA claims in this matter were resolved on their merits. In *Rodriguez*, an employee's Title VII sexual harassment claim was dismissed on merits because Title VII did not apply to individual harassers and the company did not have adequate notice to be responsible for the harassing employee's conduct. *Rodriguez*, 57 F.3d 1168 at 1170. Here, the CERCLA claims were resolved based on the merits of FAWS' response cost claims, the EPA's decision not to order BELCO to install filtration systems, and whether the ERA is an ARAR (R. at 11-17.) In *Rodriguez*, the court was authorized to retain jurisdiction over the state-law claims after it dismissed the federal claim on merits. *Rodriguez*, 57 F.3d 1168 at 1170. Because the federal claims in this matter were also resolved on merits, the court has the power to retain jurisdiction.

C. The district court did not abuse its discretion in retaining jurisdiction over the remaining state-law claims as it furthers judicial economy, and the claims would be expected to be tried together.

The district court did not abuse its discretion to retain jurisdiction over the remaining state-law claims because the court expended considerable time in preparing the state-law claims arising from the same operative facts. The common law factors of judicial economy and whether all claims would be expected to be tried together are evaluated under U.S.C. § 1367(c)(4). *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 745 (11th Cir. 2006).

1. The district court should retain jurisdiction over the remaining state-law claims because the court has expended considerable time.

There is judicial economy in the district court retaining jurisdiction because the district court has expended considerable time in preparing the state-law claims. To promote judicial economy, a district court should retain jurisdiction when it has expended substantial judicial resources. *Graf v. Elgin, Joliet and Eastern Ry. Co.,* 790 F.2d 1341, 1347-48 (7th Cir. 1986).

A federal court should maintain jurisdiction over remaining state-law claims after all federal claims have been dismissed if the federal court has expended considerable time in preparing the state-law claims. *Nowak v. Ironworkers Loc. 6 Pension Fund,* 81 F.3d 1182, 1188 (2d Cir. 1996). In *Nowak,* a claimant sought disability benefits under an ERISA claim and state-law breach of contract claims. *Id.* at 1186. After a federal magistrate judge oversaw the matter from April 6, 1994, until May 12, 1995, the court dismissed the ERISA claims and elected to maintain supplemental jurisdiction over the state-law claims. *Id.* at 1185 - 87. The federal court considered the thirteen months it spent familiarizing itself with the facts of the case to be more than a considerable amount of time. *Id.* at 1191. As such, to remand the state-law claims would go against the values of judicial economy. *Id.* at 1191-92.

In this matter, the federal district court has expended a substantial amount of time in preparing the state-law claims. In *Nowak*, the federal court expended thirteen months on state-law claims constituting more than a substantial amount of time. *Nowak,* 81 F.3d 1182 at 1185-87. Here, the federal district court has been involved in FAWS' state-law claims from August 30, 2021, to June 1, 2022, a total of nine months. (R. 10, 18). Because this is only four months less than the court in Nowak and because the court in Nowak ruled that the amount of time it expended was more than substantial, the court here has expended a substantial amount of time on

the state-law claims. Because the district court has expended a substantial amount of time on the state-law claims, the district court should retain jurisdiction to further judicial economy.

2. The district court should retain jurisdiction over the remaining state-law claims because the claims derive from the same operative facts.

This district court should retain jurisdiction because the federal environmental and state-law nuisance claims derive from the same operative facts and, thus, would be expected to be tried together. *State of N.Y. v. Shore Realty Corp.,* 759 F.2d 1032, 1050 (2d Cir. 1985) (*citing Gibbs*, 383 U.S. at 728).

Supplemental jurisdiction in federal environmental claims, to include CERCLA claims, is preferred. *Green Hills (USA), L.L.C. v. Aaron Streit, Inc.,* 361 F. Supp. 2d 81, 88 (E.D.N.Y. 2005). In *Green Hills*, the purchaser of a piece of property commenced an action against the seller surrounding the improper disposal of hazardous waste under both a federal environmental act and state-law nuisance claims. *Id.* at 84. The court found that because the federal claims and state-law claims were interdependent on one another by nature, they should be tried in the same suit. *Id.* at 89.

FAWS' supplemental state-law claims derive from the same operative facts as its CERCLA claims. In *Green Hills*, the federal environmental claims and state-law claims derived from the improper disposal of hazardous waste on a parcel of property. *Green Hills (USA), L.L.C.,* 361 F. Supp. 2d 81 at 84. In the case at bar, FAWS' federal and state-law claims derive from BELCO's contamination of a sandstone aquifer. (R. at 6). In *Green Hills*, the court held that because the federal environmental claims and state-law claims derived from the same operative facts, they should be tried in the same suit. *Green Hills (USA), L.L.C.,* 361 F. Supp. 2d 81 at 89. Similarly, in this matter, since the federal environmental claims and state-law claims derive from the same operative facts, they should be tried in the same suit.

FAWS may argue that when it filed suit in federal court regarding its state-law claim that it had all intentions of removing the state-law claims to state court after the resolution of the CERCLA claims. However, the Supreme Court has ruled that supplemental jurisdiction is "a doctrine of discretion, not of the plaintiff's right." *United Mine Workers v. Gibbs,* 383 U.S. 715, 726. As such, maintaining supplemental jurisdiction over state-law claims after the federal claims have been resolved is at the court's discretion, and not FAWS'. For the above reasons, this court should affirm the district court's discretion to retain jurisdiction over the remaining state-law claims.

CONCLUSION

For the reasons set forth above, the order of this Court should be to affirm the district court's grant of BELCO's motion for summary judgment regarding FAWS' response costs; deny the district court's order upholding EPA's Unilateral Administrative Order directing BELCO to take additional investigation and response actions; reverse the District Court's ruling which erroneously stated that the EPA's decision was not in accordance with the law; and affirm the district court's discretion to retain jurisdiction over the remaining state-law claims.