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

FARTOWN ASSOCIATION FOR WATER SAFETY, et al.,
Plaintiff-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 of Appellee-Cross Appellant & Defendant-Appellee, BETTER LIVING CORPORATION

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union granted summary judgment in consolidated cases 17-CV-1234 and 21-CF-1776 on June 1, 2022. The district court exercised jurisdiction over these cases pursuant to 5 U.S.C. § 702 (appeals of agency action), 42 U.S.C. § 9613 (granting jurisdiction to district courts for CERCLA claims), 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1337 (supplemental jurisdiction). Better Living Corporation, Fartown Association for Water Safety, and the Environmental Protection Agency each filed a timely notice 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 (appellate jurisdiction over final decisions of district courts), given that grants of summary judgment are final. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Are costs incurred by FAWS in sampling, testing, and analyzing private well water with trace levels of NAS-T reimbursable under CERCLA?

II. Is the ERA an ARAR, such that it allowed EPA to reopen the CD and order BELCO to undertake further remedial action?

III. Did EPA act arbitrarily and capriciously when it determined BELCO was not required to install filtration systems in private wells with less than 10 parts per billion of NAS-T?

IV. Did the district court abuse its discretion when it retained jurisdiction over FAWS's state-law claims after resolving the CERCLA and APA claims?

STATEMENT OF THE CASE

A. The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is the Nation's superfund law. While other environmental statutes limit the release of substances into the environment, CERCLA provides for the removal and remediation of these substances after they have been released into the environment. There are two classes of regulated substances under CERCLA. First, a "hazardous substance" is a substance that is listed under the Clean Water Act ("CWA"), *see* 33 U.S.C. § 1321(b); *id.* § 1317(a), RCRA, *see* 42 U.S.C. § 6917, the Clean Air Act ("CAA"), *see id.* § 7412(b), the Toxic Substances Control Act ("TSCA"), *see* 15 U.S.C. § 2606, or CERCLA itself, *see* 42 U.S.C. § 9602. *Id.* § 9601(14); 40 C.F.R. § 300.5. Second, "pollutants" and "contaminants" more broadly include harmful substances, even without listing. 42 U.S.C. § 9601(33). As discussed below, certain response actions are available only for the release of listed hazardous substances.

At its core, CERCLA provides three routes to secure the removal or remediation of substances: (1) the Environmental Protection Agency ("EPA") can order an abatement of hazardous substances; (2) EPA can settle with any person to undertake a response action;[1] or (3) EPA or another party can undertake a response action, and (potentially) sue for response costs.

First, under CERCLA § 106, where there is an "immediate and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility," EPA may order, or seek an injunction to require, a

[1] There are two kinds of response actions: removal and remedial actions. 42 U.S.C. § 9601(25). Removal actions are actions taken to physically remove hazardous substances from the environment, but also include actions to monitor or evaluate hazardous substances. *Id.* § 9601(23). Remedial actions, on the other hand, are actions "consistent with a permanent remedy," and include various treatment methods. *Id.* § 9601(24).

potentially responsible party ("PRP")[2] to abate the threat. *Id.* § 9606(a). If a person "without sufficient cause, willfully violates, or fails or refuses to comply with" such an order, EPA may seek court enforcement of the order and fines. *Id.* § 9606(b).

Second, under CERCLA § 122, EPA may enter into settlement agreements with PRPs under which the PRP performs the response action to a release or threatened release of hazardous substances or, pollutants, or contaminants. *Id.* § 9622(a); *id.* § 9604 (a). When EPA enters into such an agreement, the agreement is entered into in a U.S. district court "as a consent decree" ("CD"). *Id.* § 9622(d)(1)(A). EPA "need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree." *Id.* Further, entry into a CD "shall not be construed as an admission of liability for any purpose . . . ." *Id.* § 9622(d)(1)(B). Entry into a CD requires that the agency give the public an opportunity for comment, *id.* § 9622(d)(2), and the district court in which the CD was filed has the power to enforce the CD. *Id.* § 9622(d)(3).

Third, under CERCLA § 107, EPA, states, Indian tribes, and private parties[3] may undertake a response action themselves and then sue a PRP for the costs of that action. *Id.* § 9607(a)(4). While PRPs are liable to governments for "*all* costs of removal or remediation" that are "*not inconsistent* with the national contingency plan [("NCP")]," *id.* § 9607(a)(4)(A) (emphasis added), PRPs are liable to private parties only for "*necessary*" response costs that are "*consistent* with the [NCP]," *id.* § 9607(a)(4)(B) (emphasis added). While EPA is authorized to respond to releases of pollutants or contaminants that present an "imminent and substantial danger to the

[2] There are four classes of PRPs: (1) current owners or operators of vessels or facilities; (2) past owners or operators of facilities from which hazardous substances were disposed; (3) arrangers of hazardous waste disposal or treatment; and (4) those who accept hazardous substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a).

[3] "Private parties" refers to all parties other than EPA, Indian tribes, and states.

public health or welfare," *id.* § 9604(a)(1)(B), neither governments nor private parties may recover response costs for releases of pollutants or contaminants; recovery of response costs from PRPs is limited to releases of hazardous substances, *see id.* § 9607(a), (b).

When EPA cleans a site itself, orders an abatement, or settles with a PRP, it must determine the "appropriate remedial actions" for the site at issue. *See id.* § 9621(a). This process begins with a remedial investigation or feasibility study ("RI/FS"). *Id.* § 9604(a); 40 C.F.R. § 300.430. "The purpose of the remedial investigation . . . is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives." *Id.* § 300.430(d). "The primary objective of the feasibility study . . . is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected." *Id.* § 300.430(e). Early in the RI/FS stage of a remedial action, the agencies conducting the cleanup must identify "applicable or relevant and appropriate requirements" ("ARARs"), *see* 42 U.S.C. § 9621(d)(2)(A); 40 C.F.R. § 300.430, and "other advisories, criteria, or guidance to be considered for a particular release," ("TBCs"), *id.* §300.400(g)(3), which specify the levels of pollutants acceptable at a site following a remedial action.

ARARs may come from either federal or state law. 42 U.S.C. § 9621(d)(2)(A). For state law to be an ARAR, it must be a "promulgated standard" that is "more stringent than any Federal standard," and "that has been identified . . . by the State in a timely manner," and "is legally applicable to . . . or is relevant and appropriate under the circumstances of the release or threatened release of [the] hazardous substance . . . ." *Id.* Conversely, a TBC consists of "advisories, criteria, or guidance . . . developed by the EPA, other federal agencies, or states that may be useful in developing CERCLA remedies." 40 C.F.R § 300.400(g)(3). In other words,

before agencies can select a remedy, they must know and understand how clean site must be; and for that, they must look to external sources of law, which include ARARs and TBCs.

Regulations establish three, multi-factored criteria for selecting a remedy: threshold criteria, primary balancing criteria, and modifying criteria. *Id.* § 300.430(f)(1)(i). The threshold criteria consist of ensuring "[o]verall protection of human health and the environment and compliance with ARARs . . . ." *Id.* § 300.430(f)(1)(i)(A). The primary balancing criteria consist of "long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost." *Id.* § 300.430(f)(1)(i)(B). Finally, the modifying criterium includes only "[s]tate and community acceptance." *Id.* § 300.430(f)(1)(i)(C). Once the agency identifies a preferred alternative, it submits that alternative to the public for review and comment; it then reviews the public comments to determine whether the proposed alternative should be selected as the remedial action. *Id.* § 300.430(f)(1)(ii), (2)–(4). Next, the agency documents its selection of an alternative in a Record of Decision ("ROD"), which includes an explanation of the agency's weighing of the criteria. *Id.* § 300.430(f)(5). Finally, when an agency selects an alternative that "results in hazardous substances, pollutants, or contaminants remaining at the site," it must review the selected alternative every five years to ensure it remains protective of human health and the environment. 42 U.S.C. § 9621(c); *see also* 40 C.F.R. § 300.430(f)(4)(ii).

Thus, CERCLA makes several important distinctions between federal, state, and private authority. EPA is given the most authority; it can initiate cleanups and can settle with PRPs to conduct cleanups of both hazardous substances and pollutants and contaminants. When either EPA or state government sues for response costs, they have a lighter burden. Conversely, private parties may only recover "necessary" response costs when they clean up hazardous substances.

Likewise, CERCLA distinguishes between federal and state cleanup requirements. When states seek to use state law as an ARAR, it must be more stringent and pass several other tests. Finally, while governments are vested with more power throughout the cleanup process, CERCLA also relies on public input at several key points. In other words, CERCLA allows for input from non-federal actors but gives wider latitude to EPA in conducting cleanup actions.

B. NAS-T Contamination in New Union

1. BELCO, NAS-T, and the Sandstone Aquifer

Two towns in the state of New Union, Centerburg and Fartown, are at the center of this controversy. Centerburg has a population of about 4,500; Fartown has a population of about 500. Record at 5. Fartown lies two miles south of Centerburg. From 1973 to 1998, the Better Living Corporation ("BELCO") manufactured Nitro-Acetate Titanium ("NAS-T") at a factory in Centerburg, which BELCO still owns ("the Site"). *Id.* at 6. NAS-T is a chemical used in a sealant product manufactured by BELCO. *Id.*

In 1995, based on various medical studies that found NAS-T to be a "probable human carcinogen," EPA adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). *Id.* at 6. Health advisories are promulgated under the Safe Drinking Water Act ("SDWA") and are not binding. 42 U.S.C. § 300g-1(b)(1)(F). ("[EPA] may publish health advisories (which are not [national primary drinking water] regulations) or take other appropriate actions for contaminants not subject to any national primary drinking water regulation."). EPA's HAL "incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans." Record at 6. NAS-T is detectible by smell at 5 ppb. *Id.*

In 2013, citizens of Centerburg discovered that their drinking water smelled "off." *Id.* In 2015, the City tested the public water supply and found concentrations of NAS-T between 45 and 60 ppb. *Id.* BELCO then began supplying Centerburgers with bottled water. *Id.* EPA began

an investigation into the source of the NAS-T in January 2016, and in March 2016, EPA and BELCO entered into an agreement under which BELCO would continue to supply bottled water to Centerburg and would conduct an RI/FS. *Id.*

BELCO's RI/FS revealed that the NAS-T had entered groundwater from the Site and created a plume of NAS-T in the Sandstone Aquifer. *Id.* at 5–6. Both towns draw their water from the Sandstone Aquifer. *Id.* at 5. Groundwater in the Aquifer moves southward, towards Fartown. *Id.* BELCO installed monitoring wells along the Aquifer to investigate the extent of the NAS-T contamination. *Id.* at 7. The final five wells were installed half a mile north of Fartown; these wells showed no NAS-T contamination when tested in 2017. *Id.*

Pursuant to CERCLA and following the results of the RI/FS, EPA released a Proposed Plan to the public for comment, and in June 2017, it selected a clean-up plan and issued a ROD. *Id.* Accordingly, EPA sued BELCO under CERCLA ("the BELCO Action"), and the parties immediately filed a CD, under which BELCO conducted a remedial action: first, it installed CleanStripping—a filtration system—in the public water system in Centerburg; next, it excavated soils at the Site to prevent any further leaching into the groundwater; and finally, it conducted monthly sampling from the monitoring wells. *Id.* Because it was impracticable to fully remediate all groundwater in the Aquifer, the remedial action relied in part on "monitored natural attenuation" ("MNA"). *Id.* Importantly, no resident of Centerburg or Fartown objected to the RI/FS, the Plan, or the entry of the CD. *Id.* The installation of CleanStripping in Centerburg and soil excavation at the Site took place by the end of 2017. *Id.* at 8. In September 2018, EPA concluded that the cleanup was completed and issued a Certificate of Completion to BELCO. *Id.*

2. Fartown and Low Levels of NAS-T

As early as 2016, residents of Fartown noticed that their water smelled "off." *Id.* at 8. Fartownians' drinking water comes from private wells; there is no public water system. *Id.* at 5.

Importantly, the only time the monitoring wells closest to Fartown detected any NAS-T was in January 2018, when two of the five wells detected 5 ppb and 6 ppb, respectively. *Id.* at 8. Fartownians took no action, however, until 2019, when they requested that the Centerburg Department of Health ("DOH") test their wells. *Id.* DOH tested five wells but did not detect any NAS-T. *Id.* EPA declined to order further testing when requested to do so, given that the monitoring wells had not detected harmful levels of NAS-T. *Id.*

Following EPA's refusal, some Fartownians (now organized as the Fartown Association for Water Safety ("FAWS")) hired a private company to test their wells. *Id.* The company took three samples from each of 75 wells; 120 samples showed no NAS-T, 51 samples showed 1 to 4 ppb, and 54 samples showed 5 to 8 ppb. *Id.* Thus, all sampling was well below the 10 ppb threshold established in the HAL. FAWS paid $21,500 for the testing. *Id.*

Citing the testing results, in May 2020, FAWS requested that EPA reopen the CD and order BELCO to take further remedial action. *Id.* The CD could only be reopened (1) if there was new information that showed "the clean-up plan was no longer protective of human health or the environment"; or (2) "[w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." *Id.* at 7 (quoting CD § 13.3). The CD defines "Regulatory Standards" to include ARARs. *Id.* (citing CD § 1.12). EPA declined to reopen the CD at that time. *Id.* at 8.

3. Reopening the CD

In November 2020, New Union adopted an Environmental Rights Amendment ("ERA") to its state Constitution, which 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." *Id.* (quoting N.U. Const. art. I, § 7).

In January 2021, EPA asked the New Union Department of Natural Resources ("DNR") whether the ERA constituted an ARAR. *Id.* at 9. DNR responded that "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.* at 9. EPA then reopened the CD, citing its understanding that the ERA was an ARAR. *Id.* It then issued a Unilateral Administrative Order ("UAO") on June 24, 2021, directing BELCO to (1) "[s]ample 50 private wells in Fartown, selected by EPA, each month"; (2) supply bottled water to Fartown households for which sampling shows between 5 ppb and 10 ppb of NAS-T concentrations; and (3) install CleanStripping on the private wells which have NAS-T concentrations over 10 ppb. *Id.* (quoting UAO § 3.2). BELCO declined to comply with the UAO out of its understanding that the passage of the ERA did not authorize EPA to reopen the CD. *Id.* at 10.

EPA began distributing water bottles and conducting testing in the interim. *Id.* Notably, since EPA began testing Fartownians' private wells in 2021, no wells have tested above 8 ppb. *Id.*

C. The Litigation Below

After EPA began its response under the UAO, it motioned in the BELCO Action to recover its response costs incurred in Fartown and for penalties under CERCLA. *Id.* FAWS intervened in the BELCO Action and claimed that EPA acted arbitrarily and capriciously under the APA in selecting its remedy because EPA did not require the installation of CleanStripping on all FAWS's members' private wells. *Id.*

FAWS sued BELCO ("the FAWS Action") for response costs under CERCLA and negligence and private nuisance under New Union law. *Id.* While FAWS acknowledged that it preferred to litigate those claims in state court, it nonetheless filed them in federal court out of concern for allegations of "claim splitting." *Id.* The district court consolidated the BELCO

Action and the FAWS Action. *Id.* After discovery, all parties moved for summary judgment on the CERCLA and APA claims. *Id.* at 11. FAWS sought to dismiss its state-law claims. *Id.*

The District of New Union granted summary judgment to BELCO on the issue of FAWS's response costs, to EPA on the issue of reopening the CD, and to FAWS on the issue of EPA's chosen remedy. *Id.* at 18. Finally, the district court denied FAWS's motion to dismiss its state-law claims. *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly determined that FAWS's response costs were not reimbursable under CERCLA. However, it incorrectly held that the ERA was an ARAR; but alternatively, it correctly held that EPA did not act arbitrarily and capriciously in declining to completely remove all NAS-T in Fartown's wells. Finally, the district court acted within its discretion by electing to retain state-law claims after disposition of the federal claims.

First, FAWS's response costs are not reimbursable under CERCLA. Response costs are reimbursable only when the private party establishes four elements, *see Carson Harbor Vill. v. Cnty. of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006); relevant here, the plaintiff must prove a release of a hazardous substance and that the response costs incurred were "necessary."

A hazardous substance under CERCLA must be designated as such pursuant to CERCLA, the CWA, the CAA, RCRA, or TSCA. 42 U.S.C. §§ 9601(14), 9602. NAS-T is not listed under any of these statutes and is solely regulated by EPA's HAL, which is a legally unenforceable standard promulgated under the SDWA. Therefore, NAS-T is not a "hazardous substance" under CERCLA, and FAWS cannot recover its response costs. Further, a response cost is only "necessary" if it is incurred in response to "an actual threat to human health or the environment," *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001), and the incurred costs do not duplicate EPA's or the PRP's response efforts, *United States v. Iron Mountain*

Mines, Inc., 987 F. Supp. 1263, 1272 (E.D. Cal. 1997). FAWS's response costs were not necessary because, at the time of FAWS's testing, there was no reason to believe that Fartown's water was unsafe to drink with levels of NAS-T below 10 ppb and because FAWS's testing duplicated EPA's monitoring efforts.

Second, the ERA is not an ARAR. A state environmental standard may be an ARAR when that standard is "(1) properly promulgated, (2) more stringent than federal standards, [and] (3) legally applicable or relevant and appropriate . . . ." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991). EPA's position that the ERA is an ARAR is unpersuasive and thus should not receive deference, because there is nothing to suggest EPA thoroughly considered its decision, because EPA's interpretation that a constitutional provision can be an ARAR is not a longstanding agency interpretation; and because the validity of EPA's reasoning is questionable.

The ERA was not properly promulgated because, as a state constitutional provision, it is not "legally enforceable" against private parties. *Cf.* 40 C.F.R. § 300.400 (g)(4). A reading of other states' environmental rights provisions confirms this understanding. Both Pennsylvania and Montana have similar provisions, but neither allows for enforcement against private parties. Next, the ERA is not more stringent than the federal HAL. While the ERA does provide a fundamental right, it offers no discernible standard on its own; any court attempting to interpret the ERA would be forced to look to external sources of law—here, the HAL—to interpret what "clean" means. Thus, the ERA would merely duplicate the federal standard. Finally, the ERA is not "relevant and appropriate." Determining whether an environmental standard is "relevant and appropriate" requires a multi-factor balancing test; factors are weighed according to whether the potential ARAR addresses a chemical, location, or action. *See* 40 C.F.R. § 300.400(g)(2). Here,

the ERA does not address a chemical, location, or action; rather, it broadly prescribes a healthy environment. Likewise, the balance of factors suggests the ERA adds little, if anything, to the cleanup goals at the Site.

Third, EPA's decision to require CleanStripping in wells with NAS-T levels only over 10 ppb was not arbitrary and capricious. An agency acts arbitrarily and capriciously when it does not consider all the relevant factors to its policy choice. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983). The relevant factors in this case require EPA to (1) consider whether the proposed remedy complies with the ARAR and protects human health and (2) balance a set of factors to determine cost-effectiveness. *Cf.* 42 U.S.C. § 9621(d)(2)(A); 40 C.F.R. § 300.430(f). Although BELCO disagrees with the district court's determination that the ERA is an ARAR, even if it were, EPA's selected remedy protected human health and was the most cost-effective choice.

EPA's remedy complied with the ARAR and was protective of human health. Neither the ERA nor CERCLA requires that *all* contaminants be removed during remediation. Thus, EPA's reliance on the HAL's standard of 10 ppb as a basis for its selected remedies was reasonable. EPA even accounted for smell by providing water bottles for owners of wells testing between 5 and 10 ppb. EPA also properly balanced the prescribed factors, finding that the cost of CleanStripping was disproportionately high compared to the negligible additional human health benefits it would provide. Because Fartownians' health was never threatened and CleanStripping was substantially more expensive than the selected remedy, EPA reasonably chose the most cost-effective option.

Finally, the district court did not err in retaining jurisdiction over FAWS's state law tort claims. When the supplemental jurisdiction statute permits district courts to exercise discretion,

see 28 U.S.C. § 1367(a), (c), reviewing courts consider whether "judicial economy, convenience, fairness, and comity" balance in favor of retaining jurisdiction. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996). The first three factors strongly suggest the district court did not abuse its discretion: the parties and the court have already put a "tremendous amount of work" into the cases, Record at 18; it would be inconvenient to get a new court up-to-speed on the facts and issues; and it would be fundamentally unfair for FAWS to bring state-law claims in federal court with the sole purpose of tolling the state statute of limitations, *see* Record at 10. Any comity owed to New Union courts is negligible, given that it is not clear that the state-law claims would be so novel as to warrant dismissal. Thus, the district court did not abuse its discretion in retaining jurisdiction over FAWS's state-law claims.

STANDARD OF REVIEW

Review of the district court's grants of summary judgment on CERCLA claims are de novo, *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257 (3d Cir. 1992); *United States v. Colorado*, 990 F.2d 1565, 1574 (10th Cir. 1993), as is review of an APA claim that agency action was arbitrary and capricious, *Select Specialty Hosp.—Bloomington, Inc. v. Burwell*, 757 F.3d 308, 311 (D.C. Cir. 2014). On cross-motions for summary judgment, courts "resolve all factual disputes and any competing, rational inferences in the light most favorable to the party against whom summary judgment has entered." *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996). Finally, review of the district court's exercise of supplemental jurisdiction is for abuse of discretion. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009).

ARGUMENT

I. FAWS'S COSTS FOR MONITORING GROUNDWATER CONTAMINATION ARE NOT REIMBURSABLE UNDER CERCLA BECAUSE NAS-T IS NOT A "HAZARDOUS SUBSTANCE," AND FAWS'S COSTS WERE NOT "NECESSARY"

"CERCLA is not a general vehicle for toxic tort claims." *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005). Rather, a private plaintiff suing for response costs under CERCLA must establish: "(1) the property at issue is a 'facility' . . . (2) a 'release' or 'threatened release' of a 'hazardous substance' has occurred; (3) the 'release' or 'threatened release' has caused the plaintiff to incur response costs that were 'necessary' and 'consistent with the [NCP]'; and (4) the defendants are in one of four classes of persons subject to liability . . . ." *Carson Harbor Vill. v. Cnty. of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006) (quoting 42 U.S.C. § 9607(a)). Here, the district court correctly granted summary judgment for BELCO and denied FAWS response costs, because (A) NAS-T is not a hazardous substance under CERCLA, and (B) FAWS's costs were not "necessary."

A. NAS-T is not a "hazardous substance" under CERCLA because it is not listed as such under any federal statute

"CERCLA defines as hazardous any substance so designated by the EPA pursuant to [CERCLA § 102] or by any of four other environmental statutes," namely, the CWA, the CAA, RCRA, and TSCA. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992); *see also* 42 U.S.C. § 9601(14). "A finding that the substance in question meets the federal definition of hazardous [is] a predicate to liability." *Mid Valley Bank v. N. Valley Bank*, 764 F. Supp. 1377, 1389 (E.D. Cal. 1991); *see also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) ("The question of liability centers around the determination of whether a release of a hazardous substance has occurred.").

NAS-T is not listed as hazardous or toxic pursuant to any federal environmental statute. Indeed, as the district court noted: "[T]here are no further state or federal regulations regarding NAS-T beyond the HAL." Record at 6. The HAL, however, was promulgated pursuant to the SDWA, *see* 42 U.S.C. § 300g-1(b)(1)(F), which does not trigger classification as a hazardous substance, *cf. id.* § 9601(14). Absent listing under CERCLA, RCRA, TSCA, the CWA, or the CAA, NAS-T is not a "hazardous substance" under CERCLA, and FAWS cannot recover response costs for its release.

B. Alternatively, FAWS's costs in sampling and testing were not "necessary" because there was no actual threat to human health or the environment, and because FAWS's testing duplicated EPA's response efforts

Private parties suing for response costs under CERCLA § 107 may recover only "necessary costs of response incurred . . . consistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(B).[4] For costs to be necessary, a release must present "an actual threat to human health or the environment," *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001); *see also Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703 (6th Cir. 2006), and private response actions may not duplicate EPA's or PRPs' efforts to respond to a release of a hazardous substance, unless authorized by EPA, *see United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997).

First, FAWS's costs were not necessary because FAWS was aware there was no threat to human health or the environment at the time it undertook its testing. In *City of Colton, Inc. v. American Promotional Events, Inc.-West*, Colton detected a hazardous substance in its municipal supply wells in concentrations that exceeded a non-enforceable state advisory level. 614 F.3d

[4] A private party's response actions are consistent with the NCP when the action is both "in substantial compliance with the applicable requirements" in 40 C.F.R. § 300.700(c)(5) and (6), "and results in a CERCLA-quality cleanup." 40 C.F.R § 300.700(c)(3)(i). This element is not at issue here.

998, 1003 (9th Cir. 2010). Colton then removed the contaminated wells from service and initiated a treatment program. *Id.* The district court concluded that the City's response costs were not "necessary" because there was no evidence the substance posed a threat to public health or the environment. *City of Colton v. Am. Promotional Events, Inc.-W.*, 2006 WL 5939684, *8 (C.D. Cal. 2006), *aff'd* on other grounds 614 F.3d 998 (9th Cir. 2010); *see also Regional Airport Auth. of Louisville*, 460 F.3d at 704–05 (holding that plaintiff's response costs were not "necessary," in part because lead levels were in concentrations lower than acceptable risk levels). Conversely, in *Village of Milford v. K-H Holding Corp.*, Milford was required by state agencies to monitor its water supply wells after it discovered hazardous substances. 390 F.3d 926, 930 (6th Cir. 2004). It continued using its water because the water continuously met federal safe drinking water standards. *Id.* In response to a claim for response costs for monitoring the wells, the Sixth Circuit held that while "water's safeness for drinking may be an appropriate factor to consider in determining whether particular response costs were reasonable," where "there may be potential for further contamination, some response costs will almost always be reasonable, to ensure that the water remains safe." *Id.* at 934–35. Thus, the court held that such monitoring costs were "necessary." *Id.* at 935.

Like in *City of Colton*, NAS-T levels in Fartown posed no actual threat to human health, and unlike in *Village of Milford*, FAWS had reason to know their water was sufficiently safe. Here, the monitoring wells detected non-harmful concentrations of NAS-T moving toward Fartown in 2018. Record at 8. And EPA had informed FAWS that the monitoring wells had not detected harmful levels of NAS-T migrating toward Fartown. DOH's tests confirmed the results from BELCO's monitoring wells. *See id.* Thus, at the time the testing took place, there was no reason to suspect an actual threat to human health or the environment. Further, FAWS's testing did not

uncover any evidence of a threat to human health or the environment; the levels of NAS-T discovered were well below the HAL. And as explained below, EPA was already monitoring and was bound to continue monitoring the Aquifer to ensure Fartown's water remained safe for drinking.

Second, FAWS's costs were not "necessary" because they were duplicative of EPA's and BELCO's efforts to remediate the site, including their ongoing monitoring efforts. In *Wilson Road Development Corp. v. Fronabarger Concreters, Inc.*, when plaintiffs sought reimbursement for costs associated with testing for contamination on property already known to be contaminated, the Eastern District of Missouri held that testing conducted to "prove what was already known" was duplicative of testing already done by EPA and PRPs. 209 F. Supp. 3d 1093, 1115 (E.D. Mo. 2016). Notably, EPA was already planning on testing the site and "had no use for the limited data given to it by plaintiffs." *Id.* at 1114. Likewise, because PRPs had already entered into a CD with EPA, plaintiffs' testing was improper since plaintiffs were not involved in the remediation efforts; they had no business overseeing another party's liability. *See id.* at 1115. Conversely, in *Village of Milford*, monitoring activities were not impermissibly duplicative of tests conducted by PRPs when: the plaintiff had been directed by state agencies to conduct monitoring activities, state agencies relied on the plaintiff's studies to determine PRP liability, and the prior tests conducted by the PRP had been used to deny responsibility for contamination. 390 F.3d at 935.

Like the *Wilson Road* plaintiffs, FAWS's testing costs are duplicative of ongoing EPA efforts to remediate the site. FAWS's testing simply confirmed that low levels of NAS-T were migrating towards Fartown; it merely proved what BELCO's monitoring wells had already shown. Additionally, because EPA is legally obligated to monitor CERCLA sites where

pollutants remain onsite every five years, *see* 42 U.S.C. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii), FAWS's testing duplicated efforts EPA was already bound to take. Unlike in *Village of Milford*, EPA did not give FAWS approval to conduct its testing, and BELCO's monitoring wells were not used to deny responsibility, but to monitor the NAS-T plume. And after FAWS's testing, but before the passage of the ERA, EPA declined to take any action, Record at 8, suggesting that FAWS's testing was irrelevant when conducted. In other words, FAWS's testing did not add any new information that was helpful to ongoing remediation efforts. Thus, FAWS's testing was impermissibly duplicative of EPA's efforts to remediate the site and monitor the site.

In sum, FAWS undertook testing without authorization by state or federal agencies, and the agencies had satisfied themselves that the water in Fartown was not contaminated to such a degree that it would harm its residents. FAWS duplicated ongoing monitoring efforts without any indication that such testing was needed to prevent a threat to human health. At the time they were taken, these costs were plainly not "necessary." To hold otherwise would incentivize private parties to police EPA's response efforts without any indication that their actions would produce evidence of harmful contamination.

II. EPA WAS BARRED FROM REOPENING THE CD BECAUSE THE ERA DOES NOT MEET THE ELEMENTS OF AN ARAR, AND EPA IS NOT ENTITLED TO DEFERENCE

The parties agreed that EPA could reopen the CD in two instances; the second of these—and the one relied upon by EPA in reopening the decree, Record at 6—is when "more stringent Regulatory Standards are established that the clean-up plan does not satisfy." Record at 7 (quoting CD § 13.3). The CD defines "Regulatory Standards" to include ARARs. *Id.* A state-established standard "constitutes a state ARAR to which the remedy must comply if it is (1) properly promulgated, (2) more stringent than federal standards, [and] (3) legally applicable or relevant and appropriate . . . ." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440

(6th Cir. 1991); *see also* 42 U.S.C. § 9621(d)(2)(A); 40 C.F.R. § 300.5. An analysis of whether the ERA constitutes an ARAR begins with a discussion of deference.

A. Any deference owed to EPA's interpretation that the ERA is an ARAR is not dispositive, given that EPA's position is unpersuasive

The district court held that EPA was entitled to deference "according to its persuasiveness." Record at 13 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 219–20 (2001)). "*Skidmore*," or "*Mead*" deference is triggered for less formal agency interpretations, and gives weight to the agency decision depending 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," *Mead*, 533 U.S. at 228 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

EPA should be accorded no deference for its determination that the ERA constitutes an ARAR for three reasons. First, there is nothing to suggest EPA thoroughly considered its decision. EPA did not draft any official document to explain its decision, *cf. Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (granting internal guidance memoranda "respect" under *Skidmore*), and reached only legal conclusions, *cf. Sierra Club v. Trump*, 929 F.3d 670, 693 (9th Cir. 2019) (refusing *Skidmore* deference when agency memoranda lacked legal analysis). Without providing explanation in the administrative record to explain its reasoning, *cf.* Record at 9, EPA simply reopened the CD after concluding the ERA was an ARAR. Second, there is nothing to suggest EPA's acceptance of the ERA as an ARAR comports with longstanding interpretations. C*f. Alaska Dep't of Env't Conservation*, 540 U.S. at 488 (implying *Skidmore* deference was particularly appropriate where the administrative interpretation was longstanding). While other states have adopted similar constitutional provisions, *see infra* Part II.B, EPA has never treated these as ARARs. Instead, EPA's

determination here was impromptu. Third, the validity of EPA's reasoning is questionable, given that the ERA was not "promulgated," is not "more stringent" than federal standards, and is not "relevant and appropriate" to the Site.

B. The ERA is not a "promulgated standard, requirement, or limitation" under CERCLA

Per EPA regulations, for an ARAR to be "promulgated," it must be "of general applicability" and "legally enforceable."[5] 40 C.F.R. § 300.400(g)(4); *see also Akzo Coating of Am.*, 949 F.2d at 1440. The district court concluded that the ERA was self-executing, and hence, was legally enforceable. Record at 14. But even if the ERA is self-executing generally, it does not follow that it is legally enforceable against private parties. Most constitutional provisions, without some clear indication that they apply to private actors, are enforceable only as a check on government legislative or executive action. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding the Fourteenth Amendment only protects against state action); *United States v. Nelson*, 277 F.3d 164, 175–76 (2d Cir. 2002) (noting the consensus that the Thirteenth Amendment applies to actions of private individuals).

For example, while several states have constitutionalized a right to a clean and healthy environment,[6] no state has held that a right to a healthy environment is enforceable against

[5] The "of general applicability" element is not at issue here. "Of general applicability" means a requirement "must be applicable to all remedial situations described in the requirement, not just CERCLA sites." ARARs Under State Laws, 55 Fed. Reg. 8,746, 8746 (Mar. 8, 1990). The ERA, if held to be legally enforceable, plainly would apply to all remedial situations; there is nothing to suggest it was passed specifically to address a single CERCLA site.

[6] These states are Pennsylvania, Hawaii, Illinois, Massachusetts, and Montana. *See* John C. Dernback et al., Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1192 (2015). Massachusetts and Hawaii are distinguishable in that they expressly require legislative action and interpretation. *See* Mass. Const. amend art. 97 (amending Mass. Const. amend art. 49); Haw. Const. art. 11, § 9.

private parties absent express language.[7] Montana's and Pennsylvania's provisions, which most closely resemble the ERA, are illustrative.

Pennsylvania's provision reads, in relevant part: "The people have a right to clean air [and] pure water . . . . Pennsylvania's public natural resources are the common property of all the people . . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." Pa. Const. art. I, § 27. The Pennsylvania Supreme Court has held that this provision is self-executing against the state and its municipalities. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 974 (Pa. 2013) (plurality). Indeed, "[the first sentence] places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." *Pa. Env't Defense Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017). Thus, while Pennsylvania's provision is more specific than the ERA, it remains that the broadest clause—when considered alone—provides only a limitation on governmental action.

Montana's provision is even more like New Union's, and again, is not enforceable against private parties. It reads: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ." Mont. Const. art. 2, § 3. Again, however, while the right has been held to be a fundamental right, Montana courts have held only that the right can be enforced against the state government. *See N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 288 P.3d 169, 174 (Mont. 2012) ("The right to a clean and healthful environment is a fundamental right, and a statute that impacts that right to the extent that it

[7] Illinois has language that expressly allows private enforcement, *see* Ill. Const. art. 11, § 2; even still, courts have merely held that the provision alters the injury requirements for environmental nuisance cases, and does not create a private cause of action. *See City of Elgin v. Cnty. of Cook*, 660 N.E.2d 875, 891 (Ill. 1995).

interferes with the exercise of that right, is subject to strict scrutiny . . . ." (citations omitted)); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1093 (Mont. 2007) (avoiding the question of whether Art. 2, § 3 was self-executing against private parties); *Shammel v. Canyon Res. Corp.*, 167 P.3d 886, 888 (Mont. 2007) (same).

Presumably, the New Union legislature was not ignorant of these other states' provisions when developing the ERA; yet, it did not specify in the text whether the right was self-executing or whether it was enforceable against private parties. Despite suggestions in the legislative history that private parties may be liable, *see* Addendum at 6, this court should align with other courts to have considered such issues and hold that the ERA acts only as a check on government action and is not enforceable against private parties.

C. The ERA is not more stringent than federal standards because it does not supply a more demanding cleanup standard than the HAL

Even if the ERA is enforceable, it must still be more stringent than federal standards to qualify as an ARAR. In *Akzo*, the Sixth Circuit held that Michigan's groundwater anti-degradation law was more stringent than the federal SDWA because it was "[1] broader in coverage and . . . [2] as or more demanding in terms of cleanup requirements" than federal laws. *Akzo Coatings of Am.*, 949 F.2d at 1443. It reasoned that while the SDWA applied to a limited number of substances, Michigan's law applied to any potentially injurious substance. *Id.* Further, the cleanup requirements were "more demanding" because they required pollutants to return to normal background levels, whereas the SDWA specified concentrations for each regulated pollutant (which could be higher than background levels). *Id.* at 1443–44. While the ERA is broader in coverage—in that it could apply to situations not currently covered by federal laws—its cleanup requirements are not more demanding. In stark contrast to the statute at issue in *Akzo Coatings,* which required that pollutants return to their original background levels, the ERA

provides no pre-determined, discernible level to which pollutants must return after a release. *See* 949 F.2d at 1443–44. The ERA only requires that water be "clean"; the meaning of "clean" or "free of contaminants and pollutants" is, at best, malleable. Adding no clarity, the legislative history simply suggests that "clean" water means "not harmful" and does not mean "free of any or all substances besides H_2O." Addendum at 4. "Not harmful" merely replaces one vague standard for another.

To determine what levels of a substance are "not harmful" would almost certainly require looking to external sources of law. For instance, although not ruling on a CERCLA issue, the *Robinson Township* court, in discussing what "clean air" and "pure water" mean with regards to the Pennsylvania Constitution, noted: "We recognize that, as a practical matter, air and water quality have relative rather than absolute attributes." 83 A.3d at 953. Thus, "as with any other technical standards, the courts generally defer to agency expertise in making a factual determination whether the benchmarks were met." *Id.* Likewise, a New Union court would almost certainly look to other law to determine the acceptable levels of a particular substance in water for that water to be considered "clean." Thus, a court would likely apply the same standard as prescribed by state or federal regulations.[8] In other words, because the ERA's standards are so broad and vague, for any given situation the ERA would necessarily borrow from other law. Here, the only law on-point is the HAL. *See* Record at 6. Thus, with respect to NAS-T, the ERA

[8] This conundrum is likely why CERCLA itself, its regulations, and EPA guidance suggest that an ARAR must come from a statute or a regulation, rather than Constitutional law or common law. *See* 42 U.S.C. § 9621(d)(2)(A) ("under a State environmental or facility siting law"); 40 C.F.R. § 300.400(g)(5) ("When identifying a requirement as an ARAR, the lead agency and support agency shall include a citation to the statute or regulation from which the requirement is derived."); U.S. EPA, CERCLA COMPLIANCE WITH OTHER LAWS MANUAL: PART II 7-2 (1989) ("Legally enforceable requirements are State regulations or statutes . . . ."). This fact alone should lead this court to be cautious in taking the unprecedented step of finding that a state constitutional provision is an ARAR.

would simply impose the same levels as the HAL. This would not, however, negate the ERA's gap-filling function, *see* Addendum at 6, given that the HAL is not itself enforceable, *see* 42 U.S.C. § 300g-1(b)(1)(F). Because the ERA would mirror the HAL, it cannot be said to be more demanding.

D. The ERA is not relevant and appropriate, since it is not "well suited" to the chemical, the location, or the action

All parties agree that the ERA is not "applicable" to the Site. Record at 15.[9] Thus, for the ERA to constitute an ARAR, it must be "relevant and appropriate." EPA regulations define "relevant and appropriate" as "substantive requirements" that, "while not 'applicable'" to a CERCLA site, "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is *well suited* to the particular site." 40 C.F.R. § 300.5 (emphasis added). EPA regulations establish that the following factors should be compared between a CERCLA action or site and the regulation "to determine relevance and appropriateness": purpose; medium; substances; actions or activities; variances, waivers, or exemptions; type of place; type and size of the structure or facility; and use or potential use of affected resources. *See* 40 C.F.R. § 300.400(g)(2). "The pertinence of each of the[se] factors will depend, in part, on whether a requirement addresses a chemical, location, or action." *Id.*

For instance, in *Akzo Coatings*, addressing an alternative argument, the Sixth Circuit held that Michigan's groundwater anti-degradation law was "relevant and appropriate." 949 F.2d at 1446. There, EPA adopted "soil flushing"—"a method by which the contaminated soil is flushed with water and the resulting flushate is treated to designated cleanup levels"—as a primary method of removing hazardous substances from contaminated soil. *Id.* at 1419, 1420–21.

[9] Under EPA regulations, to be "applicable," a law must "specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site." 40 C.F.R. § 300.5. The ERA plainly fails this specificity requirement.

Michigan's groundwater anti-degradation law prohibited direct or indirect discharges of any injurious substance into waters of the state. *Id.* at 1440. The court held this statute was "relevant and appropriate" because the medium it protected, the substances it regulated, and its overall objective "pertain[ed] to the conditions" of the CERCLA site at issue, given that soil flushing would potentially trigger the provisions of the state statute. *Id.* at 1446; *see id.* at 1445 (illustrating why the state statute was legally "applicable").

Application of the regulatory factors suggests the ERA is not relevant and appropriate, in part because it does not address a chemical, location, or action. While some factors tilt towards a finding that the ERA is relevant and appropriate—namely, purpose ("clean" water and a "healthful" environment) and medium (water)—the remainder are either inapplicable or tilt towards a finding that the ERA is not relevant and appropriate. Because the ERA is so broad, it is not well suited to and indeed has nothing to say about the regulated actions or activities, the type of place regulated, the type and size of the structure or facility regulated, or the use of affected resources. Unlike Michigan's groundwater anti-degradation statute addressed in *Akzo Coatings*, which prohibits certain actions—namely, discharging injurious substances into groundwater—the ERA contains no such chemical-specific, location-specific, or action-specific prohibitions or regulations. In essence, because the ERA speaks so broadly, it is ill-suited for dealing with situations at CERCLA sites. To be "relevant and appropriate," a law must add something to the CERCLA cleanup analysis. Otherwise, it cannot be said to be "well" suited. Here, the ERA adds nothing.

In sum, the ERA fails to satisfy the elements of an ARAR, and any deference to EPA does not overcome these conclusions. This conclusion makes good policy sense. The point of an ARAR is to identify a threshold that a remedial action must reach before a site is deemed clean.

See 42 U.S.C. § 9621(d)(2). The ERA supplies only a general standard—"clean"—which does little to nothing to provide such a threshold. With "clean" as the goal, EPA and BELCO cannot know when the remedial work is done. Because the ERA would fail its purpose as an ARAR, EPA could not reopen the CD and could not issue the UAO or seek recovery of its response costs and penalties. The district court's grant of summary judgment for EPA should be reversed.

III. EPA'S DECISION TO REQUIRE LIMITED CLEANSTRIPPING IN FARTOWN WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THE ERA IS NOT AN ARAR AND, ALTERNATIVELY, EPA CONSIDERED AND APPROPRIATELY BALANCED ALL RELEVANT FACTORS

The arbitrary and capricious judicial review standard is deferential to agencies. "[A] court may not substitute its own policy judgment for that of the agency," especially when an agency determination relies on agency expertise. *FCC. v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). A court will only find an agency decision arbitrary and capricious when "there has been a clear error of judgment," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or where the agency has not acted within the "zone of reasonableness." *Prometheus Radio Project*, 141 S. Ct. at 1158. To remain within the zone of reasonableness, the agency need only consider and appropriately balance the relevant factors and provide a reasoned explanation for its decision. *State Farm*, 463 U.S. at 43. FAWS does not argue that EPA failed to provide a reasoned explanation; thus, the only issue here is whether EPA considered the relevant factors.

This court need not reach a decision on whether EPA acted arbitrarily and capriciously if it correctly finds that the ERA does not constitute an ARAR. But even if the ERA is an ARAR, based on EPA's justification, as provided in the administrative record, EPA was patently reasonable in considering and weighing the relevant factors.

A. The ERA is not an ARAR

As shown in Part II, the ERA is not an ARAR. Accordingly, EPA could not have reopened the CD, and whether EPA acted arbitrarily or capriciously in deciding not to completely remove NAS-T from Fartown's wells is moot because vacation of EPA's decision to reopen the CD would invalidate the UAO.

B. Even if the ERA is an ARAR, EPA considered and appropriately balanced all relevant factors; EPA's remedy is protective of human health and is cost-effective

When selecting a remedy under CERCLA, EPA must consider: (1) whether the remedy is protective of human health and the environment and compliant with ARARs, (2) cost-effectiveness, and (3) community acceptance.[10] 40 C.F.R. § 300.430(f); 42 U.S.C. § 9621(a)–(b).

1. Requiring CleanStripping for wells testing over 10 ppb complies with the ERA and is protective of human health because NAS-T has not been shown to be harmful at lower levels

Assuming, *arguendo*, the ERA constitutes an ARAR, EPA must consider whether a selected remedy complies with the ERA's standard. *Cf.* 40 C.F.R. § 300.430(f). The ERA establishes a right to "clean water and to a healthful environment free from contaminants," N.U. Const. art I, § 7, but provides no definition for "clean." As applied to CERCLA, the plain meaning of "clean" is ambiguous.

"Clean" surely cannot mean "free or [*sic*] any or all substances besides H_2O." *See* Addendum at 4. Such an interpretation would set an impossible standard for EPA. Practically, EPA cannot

[10] This modifying criterium is not relevant in EPA's selection of remedies under the UAO. Community sentiments are typically offered during the feasibility study and the notice and comment period for the proposed plan and are typically limited to acceptance or rejection offered during the public notice and comment period. *See Emhart Indus., Inc. v. New England Container Co., Inc.*, 274 F. Supp. 3d 30, 41 (D.R.I. 2017). No Fartown community members objected to the Proposed Plan or the Consent Decree during the public comment period in 2017. Record at 4–5. Any community disagreement that arose after entering the CD is outside of the scope of the remedy-selection provision.

ensure that every molecule of NAS-T is removed from the Sandstone Aquifer. *Cf.* Use of Maximum Contaminant Level Goals for Ground-Water Cleanups, 55 Fed. Reg. 8,750, 8,752 (Mar. 8, 1990) ("[I]t is [scientifically] impossible to detect whether 'true' zero has actually been attained."); *Ohio v. U.S. EPA,* 1520, 1530, 1535 (D.C. Cir. 1993). Thus, an ARAR that imposes this "true zero" standard would be technically impossible to satisfy, and ERA's definition of "clean" cannot be a "true zero" standard. The legislative history supports this interpretation.

The ERA's legislative history provides some context for the meaning of "clean." During the legislative assembly, a sponsor of the bill explained that "clean" means "free from contamination or pollution caused by humans that would make that water unhealthful or harmful to consume." Addendum at 5–6. In other words, according to the New Union legislature, "clean" means "not harmful to human health." *Id.*

Determining levels of NAS-T that are "not harmful" to human health is a scientific decision. EPA has the unique expertise to make this determination. *United States v. Akzo Coatings*, 949 F.2d 1409, 1432 (6th Cir. 1991) ("CERCLA has properly left the scientific decisions regarding toxic substance cleanup to . . . the EPA administrator and his staff."). Despite being "[un]equipped to engage in the same technical evaluations" as EPA, *Akzo*, 949 F.2d at 1432, the district court inserted its own interpretation and held that "clean" must at least require "the removal of illegally discharged chemicals that can be perceived by smell and may be toxic at higher levels." Record at 16. It should have deferred to EPA.

EPA looked to the HAL of 10 ppb to set the standard because it is the only prevailing scientific standard that identifies potentially threatening levels of NAS-T. *See* Record at 6. The medical studies upon which the HAL is based are the only studies known to EPA that address the toxicity of NAS-T. *Id.* In setting the HAL, EPA incorporated a significant margin of error to

ensure that exposure levels below the HAL are safe. *Id.* Under the prevailing science, water containing levels of NAS-T below 10 ppb is "clean" and "not harmful," and FAWS offers no evidence to prove otherwise. This court, therefore, should defer to EPA's policy choice to use the HAL a threshold for a requirement to use CleanStripping.

Even if the odor that NAS-T produces at levels as low as 5 ppb could be considered "harmful" to human health, EPA's remedy protected human health from this "harm" by providing water bottles to residents whose wells tested between 5 to 10 ppb. *Id.* at 9–10. Thus, contrary to the district court's holding, EPA's selected remedy adequately addressed issues of both toxicity and smell.

Moreover, EPA's remedy was also protective of human health under CERCLA. The ERA's standard is virtually indistinguishable from CERCLA's standard. CERCLA does not require the complete removal of all released hazardous substances, pollutants, or contaminants. It only requires cleanup standards that "allow for unlimited use and unrestricted exposure." 40 C.F.R. § 300.430(f)(4)(ii); *Ohio v. U.S. EPA*, 997 F.2d at 1535 (citing 40 C.F.R. § 300.430(f)). A site is clean under CERCLA when the contaminant is no longer "present in an amount appreciable enough" to threaten human health and protection. *Id.* Put differently, a site is clean when exposure is "not harmful" to health.

Because EPA's selected remedy was based on the HAL and provided protection even beyond that level, it is adequately protective of human health and ensures "clean water" under CERCLA and the ERA.

2. *EPA's remedy was cost-effective because MNA paired with supplying water bottles is as effective and less costly than CleanStripping*

EPA must also consider the cost-effectiveness of proposed remedies. 40 C.F.R. § 300.430(f)(1)(i)(B). Cost-effectiveness is determined by balancing five factors: "long-term

effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost." *Id.* § 300.430(f)(1)(i). Put simply, the balancing test requires a comparison of overall effectiveness, measured by balancing the first four criteria with cost. *Id.* § 300.430(f)(1)(ii)(D); 42 U.S.C. § 9621(b)(1); *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 546 (6th Cir. 2001) ("A remedy is cost-effective if its costs are proportional to its overall effectiveness."). A long term or permanent option, for example, is not cost-effective where the additional benefits to human health are so marginal that they cannot justify a disproportionately higher cost; EPA may select a non-permanent option when a permanent option is so disproportionately costly. *Id.* § 9621(f)(1)(ii)(D); *Ohio v. U.S. EPA*, 997 F.2d 1520, 1532 (D.C. Cir. 1993).

All parties agree that installing CleanStripping on private wells in Fartown would be costly. For instance—though the record is unclear as to how many private wells FAWS's members own—at $4,500 per well, installation of CleanStripping for the 75 wells that were originally tested would total more than $300,000. *See* Record at 8, 16. These costs do not even include short- and long-term maintenance costs, which could be substantial. Considering the cost of CleanStripping, EPA ultimately chose the far less costly option of MNA for wells testing for NAS-T at levels lower than 10 ppb paired with providing water bottles for owners of wells testing between 5 ppb and 10 ppb. Record at 9.

When EPA chooses a more costly option, the court looks at how effective that option is in reducing the threat to human health. In *United States v. Puerto Rico Industrial Development Co.*, EPA selected a more expensive "air sparging" option over MNA because EPA had determined that "the total volume of the plume might increase if natural attenuation fails." 18 F.4th 370, 383 (1st Cir. 2021). Similarly, in *City of Wichita v. Trustees of APCO Oil Corp. Liquidating Tr.*

("*APCO*"), defendants argued that selecting a more costly pump system over MNA was not consistent with the NCP because MNA was less costly and quicker. 306 F. Supp. 2d 1040, 1085 (D. Kan. 2003). The court found that the more costly option was reasonable because EPA expected further migration of contaminants. *Id.* at 1085. In both cases, the threat of increased contamination justified EPA's selection of a more costly remedy.

By contrast, no party in this case has indicated that there is any danger of the plume increasing in volume or toxicity. The monitoring wells closest to Fartown have consistently tested negative for NAS-T, and the private wells in Fartown have consistently tested at levels of contamination below 10 ppb, without any indication of increased contamination. *See* Record at 8, 10. Although installing CleanStripping would produce the short-term benefit of reducing the volume of NAS-T in and the odor emanating from Fartown private wells, the long-term benefit of CleanStripping and MNA is largely the same: eventual remediation of the site. The short-term benefit of reduction in the volume and odor of NAS-T on its own is not substantial enough to show that CleanStripping is so effective as to justify the disproportionately greater cost. Further, provision of bottled water adequately addresses short-term concerns.

Additionally, the goal of CERCLA remediation is not complete removal of all contamination; a release must be remediated only until it no longer poses a threat to human health and complies with the relevant ARARs. 42 U.S.C. § 9621(d)(1); 40 C.F.R. § 300.430(f). Adding filters to all contaminated private wells in Fartown goes beyond CERCLA's standard and the goal of this site remediation. There is no evidence that filtering out low levels of NAS-T would produce any appreciable short- or long-term health benefits or that it would be more protective of human health in the long term. All in all, EPA was reasonable in selecting its

remedy because the cost of providing CleanStripping to all private wells far outweighed any marginal increase in efficacy.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE THE FACTORS OF JUDICIAL ECONOMY, CONVENIENCE, AND FAIRNESS WEIGH IN FAVOR OF RETAINING JURISDICTION

The district court retained jurisdiction over FAWS's negligence and private nuisance claims brought under New Union law after resolving the federal claims. District courts have supplemental jurisdiction over state-law claims that are part of the same "case or controversy" as claims within the original jurisdiction of a federal court. 28 U.S.C. § 1367(a). "The district courts *may* decline to exercise supplemental jurisdiction over a claim . . . if . . . (1) the claim raises a novel or complex issue of State law, . . . [or] (3) the district court has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c).[11] A court's decision to exercise supplemental jurisdiction under this provision is "purely discretionary" and is reviewed for abuse of discretion. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639–40 (2009). Courts will "rarely overturn this 'purely discretionary' call." *Starkey v. Amber Enters., Inc.*, 987 F.3d 758, 765 (8th Cir. 2021) (citation omitted). An appellate court reviewing a district court's decision to retain jurisdiction balances the values of judicial economy, convenience, fairness, and comity. *See, e.g.*, *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996); *see also Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (establishing these factors prior to passage of the supplemental jurisdiction statute).

[11] Notably, FAWS lacks any defensible argument that the district court even had discretion to decline supplemental jurisdiction. Under the plain meaning of "dismissal," the federal claims were not dismissed. *See Trs. of Constr. Indus. & Laborers Health and Welfare Tr. v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 926 (9th Cir. 2003) (noting that courts apply (c)(3) for dismissals for failure to state a claim and for grants of summary judgment to the defendant). Further, as explained below, the state-law claims are not particularly novel. Regardless, even if one of these statutory triggers is met, the district court did not abuse its discretion.

In re Paoli Railroad Yard PCB Litigation illustrates the application of these factors.[12] There, plaintiffs brought both CERCLA claims and state-law tort claims. 35 F.3d 717, 737 (3d Cir. 1994). After six years of litigation and extensive discovery, plaintiffs voluntarily dismissed their CERCLA claim after the district court granted summary judgment against them, and they sought to dismiss their state-law claims to state court. *Id.* The court held that judicial economy, convenience, and fairness justified the district court retaining jurisdiction over state-law claims. *Id.* at 737–38. In particular, the court emphasized that plaintiffs chose to file their state-law claims in federal court and that a voluntary dismissal of their claims could be an unfair attempt to forum shop. *Id.* at 738. FAWS's actions resemble those in *Paoli R.R*.

First, both convenience and judicial economy suggest the district court did not abuse its discretion. In considering judicial economy and convenience, courts consider factors such as the resources already expended on resolving the claims, *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1506 (3d Cir. 1996), and the federal court's familiarity with the background facts of the claims presented, *Powers v. United States*, 783 F.3d 570, 577 (5th Cir. 2015). There has already been "a tremendous amount of work" put into resolving these claims, Record at 18, and the court is already quite familiar with the facts. What is more, if this court affirms the district court as to the reopening of the CD, then the district court will have continuing jurisdiction to enforce the CD. It would be inefficient and inconvenient to split these claims when they derive from the same set of facts and when the court would continue in a supervisory role.

[12] While this case applies the law existing prior to the supplemental jurisdiction statute, the factors courts considered in determining whether a district court abused its discretion are the same.

Next, the fairness factor also suggests the district court did not abuse its discretion. Fairness turns on whether exercising, or declining to exercise, supplemental jurisdiction would cause undue hardship or prejudice to the parties. *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992). Here, FAWS admits it used supplemental jurisdiction to "avoid any contentions of 'claim splitting'" and to halt the running of the state statute of limitations on these claims. Record at 10. Like in *Paoli R.R.*, it would be fundamentally unfair for FAWS to seek dismissal of the claims it chose to bring in federal court after resolution of the federal claims by the district court. *See Mendoza v. Murphy*, 532 F.3d 342, 347 (5th Cir. 2008) (explaining that a plaintiff cannot claim unfairness when they create the circumstances of that "unfairness" by filing in federal court in hopes of receiving a benefit); *Cucwa v. Lawley*, 731 Fed. App'x 408, 416 (6th Cir. 2018) (holding a plaintiff cannot request that a district court decline supplemental jurisdiction over claims it brought in federal court due to the "doctrine of invited error"). To hold otherwise would allow parties to exploit federal courts to preserve the timeliness of state-law claims, then discard them when they no longer benefit the party's ulterior motive of forum shopping.

Finally, the comity factor is not implicated here. Even if it were, it would not be so strongly implicated as to overcome the other factors. Comity refers to federalism concerns and to the interest in allowing state courts to decide issues of state law. *See Parker & Parsely Petroleum Co.*, 972 F.2d at 588–90. Declining jurisdiction might be especially appropriate when the state claims are particularly novel or complex. *See Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 124 (2d Cir. 2006). Yet, state-law tort claims are not generally novel or complex. *See Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743–44 (11th Cir. 2006). The only argument FAWS advances is that the ERA may alter its tort claims, *see* Record at 18, but it is not clear whether

FAWS pled this, *cf.* Record at 10. Besides, like the Montana courts that have considered this issue, *see Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1093 (Mont. 2007); *Shammel v. Canyon Res. Corp.*, 167 P.3d 886, 888 (Mont. 2007), a New Union court may well invoke the canon of constitutional avoidance and simply apply New Union tort law without reaching the issue of whether the ERA alters state-law tort claims. As such, the district court's exercise of jurisdiction over the state-law claims would not significantly infringe on New Union's interests.

In sum, the district court did not abuse its discretion. Resolution of garden-variety tort claims after considerable resources have been put into this case by the federal courts does not infringe on any major sovereign interest of New Union. Further, the fact that FAWS created the circumstances at issue makes the fairness issue nearly dispositive to this analysis; FAWS cannot seriously argue against the exercise of supplemental jurisdiction when FAWS itself sought supplemental jurisdiction in the first place.

CONCLUSION

For the foregoing reasons, this Court should uphold the district court's grant of summary judgment in favor of BELCO on the issue of FAWS's costs; reverse the district court's grant of summary judgment in favor of EPA on the issue of whether the ERA is an ARAR; reverse the district court's grant of summary judgment in favor of FAWS on the issue of whether EPA acted arbitrarily and capriciously in not requiring complete removal of NAS-T from Fartown's drinking water; and uphold the district court's discretionary decision to retain state-law claims.