TEAM 24

MEASURING BRIEF

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
Intervenor Plaintiffs-Appellants-Cross Appellants.

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

Brief of Appellants, FARTOWN ASSOCIATION FOR WATER SAFETY

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JURISDICTIONAL STATEMENT

The United States District Court for the District of New Union entered summary judgment in consolidated cases 17-CV-1234 and 21-CV-1776. The District Court exercised subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action) and 28 U.S.C. § 1331 (federal question), and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The U.S. Environmental Protection Agency ("EPA"), Better Living Corporation ("BELCO"), and Fartown Association for Water Safety ("FAWS") all filed timely Notices of Appeal. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of district courts. The District Court's grant of summary judgment was final, so this Court has jurisdiction over this appeal.

STATEMENT OF ISSUES PRESENTED

I. Were FAWS's costs for monitoring groundwater contamination reasonable and reimbursable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")?

II. Was EPA's interpretation that the Environmental Rights Amendment ("ERA") constitutes an Applicable or Relevant and Appropriate Requirement ("ARAR") under CERCLA correct, which EPA contends allowed it to reopen the Consent Decree it has with BELCO and require BELCO to provide bottled water to Fartownians who have low levels of Nitro-Acetate Titanium ("NAS-T") in their private wells?

III. Was EPA's application of the ERA as an ARAR arbitrary and capricious where EPA determined that the ERA did not require BELCO to install filtration systems on those same Fartown private wells?

IV. Was the District Court correct to retain jurisdiction of the remaining state law claims after the Court has resolved all of the federal claims in this matter?

STATEMENT OF THE CASE

I. The Comprehensive Environmental Response, Compensation and Liability Act

CERCLA applies to releases of pollutants or contaminants into the environment "which may present an imminent and substantial danger to the public health or welfare." 42 U.S.C. § 9604(a)(1). CERCLA broadly defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). CERCLA defines "pollutant or contaminant" as:

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

42 U.S.C. § 9601 (33).

CERCLA gives EPA broad authority to remove, remediate, and respond to the release of such pollutants and contaminants as necessary to protect public health or welfare and the environment. *Id.* An owner or operator of a facility at which such hazardous substances, pollutants, or contaminants were disposed of is liable for: (A) all costs of a CERCLA removal or remedial action incurred by the United States Government; (B) necessary response costs incurred by any other person consistent with the National Contingency Plan ("NCP"); (C) damages for and reasonable costs of assessing injury to, destruction of, or loss of natural resources resulting from the release; and (D) the costs of health assessments and health effects studies related to the CERCLA action. 42 U.S.C. § 9607(a).

All remedial actions under CERCLA must "at least attain" any federal environmental laws or "any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or

limitation . . . and that has been identified to the President by the State in a timely manner" that are legally applicable or relevant and appropriate to the remedial action. 42 U.S.C. § 9621(d)(2)(A). This provision of CERCLA allows states to promulgate environmental requirements that, if legally applicable or relevant and appropriate to the release of a hazardous substance, pollutant, or contaminant, must be enforced in CERCLA remedial actions. *Id.*

II. NAS-T Contamination in the Sandstone Aquifer and CERCLA Response

BELCO is the corporation responsible for manufacturing LockSeal, a sealant coating made with NAS-T. R. at 9. The EPA became involved with BELCO following an initial investigation into NAS-T contamination in the Sandstone Aquifer, an underground water source from which residents of the rural community of Fartown, New Union and the town of Centerburg, New Union source their tap water and drinking water. R. at 9. FAWS is a community advocacy group composed of 100 residents of Fartown that formed in response to NAS-T contamination in the Fartown residents' private water wells. R. at 11.

The Sandstone Aquifer is an underground body of water that flows underground from Centerburg south to Fartown. R. at 2. The Aquifer is a source of drinking water and tap water for the residents of both towns. Centerburg residents receive water from the Centerburg Water Supply, which pumps water from the Sandstone Aquifer before treating and distributing the water to the residents of Centerburg. R. at 2. The residents of Fartown, however, obtain their water from private wells that pump water directly from the Sandstone Aquifer. R. at 2.

BELCO manufactured the two components of LockSeal, liquid NAS-T and a non-toxic powdered activation agent, at its factory in Centerburg from 1973 until 1998. R. at 2–3. From the 1980s to early 1990s, the factory was the source of multiple NAS-T spills and the location of an unlined wastewater storage lagoon. R. at 9. Over time, NAS-T from the spills and the lagoon at

the factory entered the soil around the factory and gradually seeped into the Sandstone Aquifer. R. at 9.

In the mid-1980s, a number of published medical studies showed NAS-T to be a probable human carcinogen. R. at 9. In response to those medical studies, EPA adopted a 10 parts per billion ("ppb") Health Advisory Level for NAS-T in drinking water, which EPA believed provided a sufficient margin of error to prevent toxicity to humans. R. at 9. Because NAS-T is rarely used in applications other than BELCO's LockSeal, the Health Advisory Level is the only federal or state regulation specifically addressing NAS-T. R. at 9. Even though EPA's accepted exposure level for NAS-T is 10 ppb, the human nose can detect the sour or stale smell of NAS-T in water at concentrations as low as 5 ppb. R. at 9.

EPA first began investigating the extent of the NAS-T contamination of the Aquifer after a state investigation discovered that the Centerburg Water Supply was contaminated with NAS-T at concentrations of 45 to 60 ppb. EPA and BELCO subsequently agreed that BELCO would conduct a Remedial Investigation and Feasibility Study to determine the extent of the NAS-T contamination at the factory and its spread to the Sandstone Aquifer. R. at 9.

The monitoring wells EPA required BELCO to install and monitor as part of the agreement never reached the portion of the Sandstone Aquifer beneath Fartown. R. at 10. Instead, the EPA agreement required BELCO to monitor the plume of NAS-T contamination with monitoring wells that progressed from Centerburg south to approximately half a mile north of Fartown. R. at 10. EPA did not direct BELCO to install monitoring wells in Fartown because the wells closest to Fartown did not show any detectable amounts of NAS-T during the initial investigation. R. at 10.

As part of the Remedial Investigation and Feasibility Study, BELCO recommended excavation of the soils around the BELCO factory and filtration of the Centerburg Water Supply.

R. at 10. BELCO did not recommend remediation of the NAS-T contamination in the Sandstone Aquifer because it determined that pumping and treating the water in the Aquifer was not economically feasible. R. at 10. Furthermore, BELCO did not recommend any treatment of Fartown residents' water supply because BELCO's initial investigation did not extend to Fartown and thus did not show that the NAS-T contamination had spread to Fartown. R. at 10.

Following the Remedial Investigation and Feasibility Study, EPA issued a Proposed Plan and selected a cleanup plan which addressed the NAS-T contamination in and around Centerburg through the Record of Decision ("ROD"). R. at 10. EPA subsequently brought a cost recovery action against BELCO, and immediately thereafter, EPA and BELCO entered into a Consent Decree in which BELCO agreed to implement the Centerburg cleanup plan EPA selected. R. at 7. The Consent Decree required BELCO to: (1) install and maintain a "CleanStripping" water filtration system in the Centerburg Water Supply public well, (2) excavate the NAS-T-contaminated soils at its factory and the lagoon at the factory; and (3) sample the monitoring wells installed during the Remedial Investigation and Feasibility Study. R. at 7. The District Court took public comment and determined the Consent Decree was fair and reasonable. R. at 7. The Consent Decree did not address NAS-T contamination in Fartown.

As required by the Consent Decree, BELCO sampled the monitoring wells along the Sandstone Aquifer for 13 months. R. at 8. About six months into the Consent Decree, two of the samples showed a spread of NAS-T to the final line of wells closest to Fartown. R. at 8. Despite the detections showing NAS-T at levels of 5 to 6 ppb near Fartown, EPA issued a Certificate of Completion for the Consent Decree 13 months after parties entered into the Consent Decree. R. at 8.

As soon as Fartown residents became aware of the Consent Decree, they requested that the Department of Health ("DOH") sample and test their drinking water for NAS-T contamination. R. at 8. Some residents of Fartown testified that their water smelled "off" since at least 2016. R. at 8. The DOH sampled five Fartown wells after EPA had issued the Certificate of Completion to BELCO. R. at 8. The DOH was unable to detect NAS-T in the five wells it sampled, and EPA declined to order BELCO to expand its NAS-T testing into Fartown. R. at 8. Following EPA's refusal to order BELCO to test the Fartown wells for NAS-T contamination, the Fartown residents formed FAWS and hired Central Laboratories, Inc. ("Central Labs") and paid them $21,500 to test their private wells. R. at 8.

In contrast to the DOH's test results, Central Labs' more extensive series of 225 samples from 75 private Fartown drinking water wells showed NAS-T in concentrations of 5 to 8 ppb in 54 samples and 1 to 4 ppb in another 51 samples. R. at 8. Despite the Central Labs results showing that the NAS-T plume had reached beyond BELCO's initial monitoring wells to the private wells of Fartown residents, EPA again declined FAWS's subsequent request for EPA to reopen the Consent Decree and order BELCO to investigate the spread of the contamination plume to Fartown. R. at 8.

Even though EPA had issued a Certificate of Completion to BELCO before the Central Labs results showed that the NAS-T plume had spread to Fartown wells, the Consent Decree explicitly allowed EPA to reopen the Decree on two grounds:

> 1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan is no longer protective of human health or the environment; or
>
> 2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

Consent Decree. § 13.3. R. at 8. The Consent Decree further defined new "Regulatory Standards" as including those standards considered to be "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." Consent Decree § 1.12.

After the EPA declined FAWS's initial request to reopen the Consent Decree based on the Central Labs test results showing the spread of NAS-T to Fartown residents' wells, the citizens of New Union passed the ERA. R. at 8. The Amendment, which was passed by the New Union legislature, signed by the New Union governor, and finally passed as a ballot measure with 71% of voters in favor of the Amendment, 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.

EPA determined the ERA was a new Regulatory Standard and subsequently reopened the Consent Decree with BELCO. R. at 9. EPA also referred to new information when reopening the Consent Decree, including NAS-T odors in Fartown residents' wells, the Central Labs test results showing NAS-T contamination in Fartown wells, the probable carcinogenic effects of NAS-T, and the fact that Fartown is an environmental justice community. R. at 9.

In response to the new regulatory requirements of the ERA and the new information related to unmitigated NAS-T contamination of Fartown residents' drinking water, EPA requested that BELCO sample private wells in Fartown, supply bottled water to Fartown residents with NAS-T in their wells, and conduct continued monitoring of Fartown wells. R. at 9. BELCO declined to comply with EPA's requests and challenged EPA's determination that the ERA was an ARAR that allowed EPA to reopen the Consent Decree. R. at 9. BELCO ultimately refused to take any response actions to remedy the NAS-T contamination in Fartown. R. at 9.

In response to BELCO's refusal to comply with the response actions EPA requested, EPA issued a Unilateral Administrative Order ("UAO"), in which EPA selected 50 private wells in

Fartown and required BELCO to sample the wells, provide bottled water to households where the samples show NAS-T contamination between 5 and 10 ppb until the testing reveals levels of 4 ppb or lower, and install CleanStripping filtration on wells with NAS-T contamination exceeding 10 ppb. R. at 9. BELCO then refused to comply with the UAO and EPA began sampling Fartown residents' water with results that have been largely consistent with the results FAWS obtained through Central Labs. R. at 10. While EPA refuses to provide bottled water to Fartown residents whose wells show NAS-T concentrations below 5 ppb, EPA has provided water to residents with NAS-T contamination in excess of 5 ppb. R. at 10.

BELCO does not dispute its responsibility for the NAS-T contamination in Fartown, but instead disputes its responsibility for the costs and duties related to investigating and remediating the contamination. R. at 10.

III. Proceedings Below

These consolidated cases arise from two cases in the District Court for the District of New Union in which the three parties sought resolution of several claims regarding EPA's decision-making authority and the duty of BELCO to investigate and remediate NAS-T contamination in the Sandstone Aquifer. R. at 4. These issues arise under CERCLA, 42 U.S.C. § 9601, *et seq.*, the New Union Constitutional Environmental Rights Amendment, N.U. Const. art. I, § 7, and New Union's state laws on negligence and private nuisance.

EPA brought its initial CERCLA cost recovery action against BELCO for costs related to the investigation and remediation of NAS-T contamination in Centerburg. R. at 7. EPA later made a motion in the same cost recovery action seeking additional cost recovery for remediation in Fartown and penalties for BELCO's violation of EPA's UAO. R. at 10. FAWS moved to intervene in EPA's cost recovery action to assert a claim against EPA for its refusal to compel BELCO to

provide CleanStripping filtration in Fartown wells that test positive NAS-T contamination, a decision FAWS challenges as arbitrary, capricious, and contrary to law. R. at 9.

FAWS and 85 additional plaintiffs from Fartown then filed a separate action against BELCO in the District Court alleging various claims against BELCO under CERCLA and New Union's state laws of negligence and private nuisance. R. at 10. FAWS's first claim was a CERCLA cost recovery action in which FAWS sought to recover the $21,500 it incurred to investigate the NAS-T contamination in Fartown. R. at 10. FAWS's second claim, brought under New Union's state negligence and private nuisance laws, asked that the District Court order BELCO to: (1) pay the $21,500 FAWS spent to investigate the NAS-T contamination; (2) install CleanStripping on Fartown wells that test positive for NAS-T; (3) remediate the continuing NAS-T contamination in the Sandstone Aquifer; (4) pay damages to Fartown residents for their loss of use and enjoyment of their property and diminished property values; and (5) pay punitive damages to FAWS and the additional Fartown residents who are party to this case. R. at 10.

The District Court consolidated the two actions at the joint request of the parties. R. at 10. Following discovery on the CERCLA claims, each of the parties moved and cross-moved for summary judgment on the CERCLA claims. R. at 11. FAWS additionally moved to dismiss the remaining state law claims without prejudice if the District Court resolved the CERCLA claims by motion. R. at 11. BELCO and EPA opposed FAWS's motion to dismiss the state law claims without prejudice. R. at 11.

The District Court upheld EPA's determination that the New Union ERA is an ARAR under CERCLA and correspondingly upheld EPA's UAO requiring BELCO to take further remedial and investigative action to address the NAS-T contamination. R. at 2. The District Court vacated as arbitrary, capricious, and contrary to law EPA's determination that BELCO is not

required to install CleanStripping filtration on Fartown residents' wells. R. at 2. The District Court determined that the response costs FAWS incurred to investigate the NAS-T contamination in Fartown wells were not reimbursable under CERCLA. R. at 2. Finally, the District Court denied FAWS's motion to dismiss without prejudice the state law claims FAWS brought and elected to retain supplemental jurisdiction over the remaining state law claims. R. at 2.

BELCO appeals from the District Court's decision to uphold EPA's unilateral administrative order. R. at 2. Both EPA and BELCO appeal the District Court's order vacating EPA's determination that BELCO is not required to install CleanStripping filtration in Fartown wells. R. at 2. Finally, FAWS appeals the District Court's determination that FAWS's response costs are not reimbursable and appeals the District Court's decision to maintain supplemental jurisdiction over the remaining state law claims and deny FAWS's motion to dismiss those claims without prejudice. R. at 2.

SUMMARY OF THE ARGUMENT

FAWS's actions in sampling, testing, and analyzing water samples are response costs under CERCLA that BELCO is required to reimburse. EPA was correct in its determination that the ERA constitutes an ARAR that allowed EPA to reopen the Consent Decree. EPA's determination that the ERA did not require BELCO to install water filtration systems in Fartown was arbitrary and capricious. Finally, the District Court should not have exercised supplemental jurisdiction over the state law tort claims.

First, the District Court erred in holding that costs incurred by FAWS in sampling, testing, and analyzing water samples of its members' private wells are not reimbursable as response costs under CERCLA. Response costs are reimbursable where they are "necessary" and "consistent with the national contingency plan." *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008) (citing 42 U.S.C. § 9607(a)). FAWS's actions were necessary: they were not

duplicative of efforts made by EPA or the Centerburg County DOH, and were closely tied to the cleanup of NAS-T. FAWS's actions were also consistent with the NCP: the testing and analysis of water quality samples was leading to an eventual "CERCLA-quality cleanup," which has been delayed by this litigation. Because the actions meet the requirements of reimbursable response costs under CERCLA, the District Court erred in holding that BELCO is not responsible for reimbursement.

Second, the District Court did not err in upholding EPA's decision to reopen the Consent Decree because the Environmental Rights Amendment is an Applicable or Relevant and Appropriate Requirement under CERCLA that authorized EPA to reopen the Consent Decree and order BELCO to perform further remedial action. All remedial actions under CERCLA are required to attain the requirements of State environmental laws that are: (1) properly promulgated; (2) more stringent than any Federal standard; (3) legally applicable or relevant and appropriate; and (4) timely identified. 42 U.S.C. § 9621(d)(2)(A). The Environmental Rights Amendment was properly promulgated as a legally enforceable measure of general applicability, is more stringent than any applicable or relevant and appropriate federal standards, is relevant and appropriate to the NAS-T contamination of the Sandstone Aquifer, and was timely identified by EPA. Because the Consent Decree defined new Regulatory Standards, including applicable or relevant and appropriate requirements under CERCLA, as a ground upon which EPA could reopen the Consent Decree, and because the Environmental Rights Amendment is an applicable and relevant and appropriate requirement under CERCLA, the District Court did not err in allowing EPA to reopen the Consent Decree and order BELCO to perform further remedial action.

Third, once EPA established that the ERA was an ARAR, EPA was required to ensure that any remedial action under CERCLA complied with the ERA. Remedial measures executed under

CERCLA are required to waive or attain applicable state law requirements when remediating. When EPA ignores those state law directives, there are federalism and deep environmental concerns, and courts should sharply scrutinize agency action that neglects to comply with those laws. In this case, EPA's failure to require BELCO to rid Fartown water of *all* NAS-T, instead simply requiring that Fartown water be filtered to *low levels* of NAS-T, was arbitrary and capricious, an abuse of discretion, and contrary to law. The legislative history of the ERA makes plain that the thrust of the Amendment was to make sure that water-contamination cleanup projects went beyond federal standards like those prescribed by the Clean Water Act. Instead, New Union created a more stringent clean water standard, and EPA failed to incorporate that standard into the CERCLA cleanup in Fartown. For that reason, the District Court correctly concluded that EPA's UAO was arbitrary and capricious.

Finally, the District Court erred in retaining jurisdiction over the state law claims that remained after the disposition through summary judgment of all federal claims. Federal district courts may only exercise supplemental jurisdiction over state law claims where they are "so related that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Even where a court finds the claims to be part of the same case or controversy, the federal court "may decline to exercise supplemental jurisdiction" when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). That is clearly the case here. All federal law claims had been resolved before trial through summary judgment. When determining whether to retain jurisdiction over state law claims, a court must consider "judicial economy, convenience, fairness, and comity." *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138

(2d Cir. 1994)). The balance of factors here indicates that the remaining state law tort claims would be best resolved in a state court.

This Court should reverse the District Court's grants of summary judgment on Issues 1 and 4, and affirm the District Court's grants of summary judgment on Issues 2 and 3 in favor of FAWS.

STANDARD OF REVIEW

As to the first three claims, this Court reviews a district court's grant of summary judgment de novo. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 292 (3d Cir. 2015). The court "review[s] the administrative record directly, according no particular deference to the judgment of the District Court.'" *Roberts v. United States*, 741 F.3d 152, 157–58 (D.C. Cir. 2014) (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 814 (D.C. Cir. 2002)); *see also Supreme Oil Co. v. Metro. Transp. Auth.*, 157 F.3d 148, 151 (2d Cir. 1998). "[W]hen an agency action is challenged, the entire case on review is a question of law," *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993), and the typical summary judgment standard "does not apply." *Resolute Forest Prods., Inc. v. USDA*, 130 F. Supp. 3d 81, 89 (D.D.C. 2015). Because issue four relates to the District Court's decision to retain supplemental jurisdiction over state law claims, the abuse of discretion standard applies. *Divert v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT COSTS INCURRED BY FAWS IN SAMPLING, TESTING, AND ANALYZING WATER SAMPLES OF ITS MEMBERS' PRIVATE WELLS ARE NOT REIMBURSABLE AS RESPONSE COSTS UNDER CERCLA BECAUSE FAWS'S RESPONSE COSTS WERE NECESSARY AND CONSISTENT WITH THE NATIONAL CONTINGENCY PLAN.

FAWS is entitled to recover $21,500 against BELCO as a response cost under CERCLA. Potentially responsible parties can be liable to private parties where the non-governmental plaintiff

is able to prove five elements: (1) "the site in question is a 'facility' as defined by CERCLA," (2) "the defendant is a responsible party," (3) "there has been a release or there is a threatened release of hazardous substances," (4) "the plaintiff has incurred costs in response to the release or threatened release," and (5) "any costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan.'" *Sycamore Indus. Park Assocs.*, 546 F.3d at 850 (citing 42 U.S.C. § 9607(a); *Envt'l Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990)); *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012) (citing 42 U.S.C. § 9607(a)(4)(B); *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 386 (7th Cir. 1995)).

The first four elements are easily satisfied. It is uncontested by any of the three parties that the Site and the Sandstone Aquifer are CERCLA-defined facilities; BELCO is the responsible party; there was a release of NAS-T at the Site and subsequently into the Aquifer; and FAWS spent $21,500 on water testing. Therefore, only the fifth element is at issue before the Court.

a. FAWS's response costs were necessary because they were closely tied to the actual cleanup and not duplicative of EPA's response.

CERCLA requires that response costs incurred by a non-governmental actor be related to a necessary action. *See* 42 U.S.C. § 9607(a) (4)(B); 42 U.S.C. § 9601(23)–(25). There are numerous definitions for "necessary" depending on the jurisdiction. Some courts have held that actions are necessary where they are not duplicative of the EPA's actions in response to the release of the hazardous substance and the actions are "closely tied to the actual cleanup" of the hazardous substance. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997); *Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1114–15 (E.D. Co. 2016); *see also Walnut Creek Manor, LLC v. Mayhew Ctr.*, 622 F. Supp. 2d 918, 929 (N.D. Ca. 2009). Others have held that "[a]ll response costs not inconsistent with the NCP are

recoverable, essentially removing the necessity prong. *United States v. Kramer*, 757 F. Supp. 397, 436 (D. N.J. 1991) (citing 42 U.S.C. § 9607(a)(4)(A)); *see also Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 632 (E.D. Mo. 1996). Still, other courts have held that, for response costs to be deemed necessary, the costs must only be "closely tied to the *actual cleanup* of hazardous releases." *Young v. United States*, 394 F.3d 858, 863–64 (10th Cir. 2005) (emphasis in original); *see also Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004); *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 297 (3d Cir. 2000); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669–70 (5th Cir. 1989).

The District Court below implemented the most restrictive of the tests for necessity above, requiring a finding that the actions were not duplicative, and the actions were closely tied to the cleanup. Even when applying the most restrictive of the tests, the costs were necessary. However, the District Court should have applied the test adopted by the majority of circuits: that necessary costs are "closely tied to the actual cleanup…" which is the second prong of the test applied by the District Court. Even if the Court here finds that the test applied by the District Court is the proper test, the actions taken by FAWS meet the requirements of necessary response costs.

i. FAWS's actions in Fartown were not duplicative of EPA's or DOH's actions in Centerburg.

Courts have found actions to be duplicative of the EPA or other agency's actions only if they occur at the same time and do not seek to uncover any information different than or beyond that of the EPA or the agency, or if they occur after the EPA or other agency informed the private parties that it would be conducting its own investigation. *See Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal. 1993). FAWS's actions were not duplicative of the EPA or the Centerburg County DOH's actions.

The DOH worked with EPA during the testing and subsequent remediation in Centerburg from 2013 through September of 2018. In January of 2018, the two monitoring wells closest to Fartown detected NAS-T at "low levels" of 5 ppb and 6 ppb, respectively. EPA issued the Certificate of Completion in September of 2018, knowing that NAS-T was detected in the aquifer near Fartown, the only water source for Fartownians.

In February of 2019, after the Certificate of Completion was issued, the DOH tested five wells in Fartown at the request of Fartownians but found no NAS-T contamination. The Fartownians were not satisfied and asked EPA to order BELCO conduct further testing. EPA declined. After EPA declined to investigate or order BELCO investigate, FAWS was formed with the purpose of determining whether the drinking water of Fartownians was contaminated. The group retained Central Labs to test private wells and Central Labs took three samples each from 75 wells in Fartown. The study found detectable levels of NAS-T in 105 of 225 samples. With this information, FAWS again asked EPA to investigate, but EPA declined once more.

The timeline shows that the actions taken by FAWS occurred after, and only because, the agencies declined to investigate the contamination of Fartown's sole water source. FAWS's actions occurred after the close of the Consent Decree and BELCO's remediation actions, and FAWS's actions were far more thorough and extensive than the actions taken by the DOH or EPA. The results show conclusively that the action revealed information beyond what was shown by the agency actions.

FAWS's actions were not duplicative of actions taken by EPA or DOH.

ii. The actions were closely tied to the cleanup of NAS-T because they addressed the NAS-T contamination in the Sandstone Aquifer.

Under CERCLA, investigatory costs intended "to assist with and help plan the eventual remediation and cleanup efforts" are necessary and "recoverable even absent any subsequent

recoverable response costs." *Walnut Creek Manor, LLC*, 622 F. Supp. 2d at 929; *Yankee Gas Servs. Co. v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 242 (D. Conn. 2012). In short, there must be "some nexus between the alleged response cost and an actual effort to respond to environmental contamination." *See, e.g., Young*, 394 F.3d at 863; *Wilson Road Dev't Corp.*, 209 F. Supp. 3d at 1112–14; *Atl. Richfield Co. v. United States*, 181 F. Supp. 3d 898, 911 (D. N.M. 2016). The Ninth Circuit has a slightly different standard, however: "In determining whether response costs are 'necessary,' we focus not on whether a party has a business or other motive in cleaning up the property, but on whether there is a threat to human health or the environment and whether the response action is addressed to that threat." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001).

In *Walnut Creek Manor*, the actions at issue were "soil and groundwater testing to obtain further information" about the contamination. 622 F. Supp. 2d at 923. This occurred after numerous reports were made on the contamination at the property. *Id.* at 921–23. Still, the court in *Walnut Creek Manor* held that the costs were recoverable because they were "preliminary efforts to investigate the site and the extent to which the site is polluted in order to make recommendations for future remediation action." *Id.* at 929.

The actions taken by FAWS meet the requirements of these tests. The health of the Fartown residents was threatened by the existence of NAS-T in their wells, which was not being addressed by the DOH or EPA. It is uncontested that NAS-T is a probable human carcinogen, so FAWS's actions were necessary to ensure the residents of the environmental justice community of Fartown were not being harmed. FAWS's actions were investigatory, just as those taken by Walnut Creek Manor. FAWS was focused on identifying contamination in an area that was not adequately surveyed in the DOH or EPA's responses to the NAS-T contamination. As such, there is a

significant nexus between the testing performed in Fartown and the actual cleanup of NAS-T in New Union. FAWS acted to ensure the water of Fartown residents was safe: since the testing showed elevated levels of NAS-T, FAWS is now seeking to remediate the issue.

FAWS's actions were closely tied to the cleanup of NAS-T in Fartown.

b. FAWS's response costs were consistent with the National Contingency Plan.

For response actions to be "consistent with the NCP," the actions must comply with 40 C.F.R. § 300.700(c)(5)–(6) and result in a "CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(i). No party alleges that the requirements of subsections 5 and 6 were violated, so those requirements will not be discussed.

Courts have adopted a five-element test to determine whether a "CERCLA-quality cleanup" has occurred, which is satisfied when the cleanup: (1) "protects human health and the environment," (2) "utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable," (3) "is cost-effective," (4) "satisfies Applicable and Relevant or Appropriate Requirements ("ARARS") for the site," and (5) "provides opportunity for meaningful public participation." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001); *see also* 40 C.F.R. § 300 *et seq*. The fourth element will be discussed below, as the parties disagree over the existence of an applicable ARAR.

NAS-T is harmful to human health, so, conversely, testing for and treatment of NAS-T would protect human health. FAWS requests that BELCO install filtration systems, which is a permanent solution, and cost-effective. Finally, there has been ample opportunity for public participation, as FAWS is a community group of affected residents.

Both the requirements are met for the actions taken by FAWS to be determined to be consistent with the NCP. Because the actions were both necessary and consistent with the NCP, the costs stemming from the actions are reimbursable response costs under CERCLA.

II. THE DISTRICT COURT WAS CORRECT IN UPHOLDING EPA'S DECISION TO REOPEN THE CONSENT DECREE AND REQUIRE FURTHER REMEDIAL ACTION IN ITS UNILATERAL ADMINISTRATIVE ORDER BECAUSE THE ENVIRONMENTAL RIGHTS AMENDMENT IS AN APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENT.

The District Court did not err in determining that the ERA is a new regulatory standard and ARAR under CERCLA, which authorized the EPA to reopen the Consent Decree and require BELCO to perform further remedial action. Section 13.3 of the Consent Decree between BELCO and EPA allows EPA to reopen the Consent Decree "[w]here new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." CD, § 13.3. The Consent Decree includes "applicable or relevant and appropriate requirements under CERCLA ('ARARs')" in its definition of the "Regulatory Standards" that would allow the EPA to reopen the Consent Decree. CD, § 1.12. State environmental standards that are ARARs must be "(1) properly promulgated; (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991) (citing 42 U.S.C. § 9621(d)(2)(A)). Remedial actions under CERCLA "shall require … a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation." 42 U.S.C. § 9621(d)(2)(A). Deference should be given to an administrative judgment that is thoroughly considered, validly reasoned, and consistent with earlier and later pronouncements. *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Because the ERA (1) was promulgated by the New Union legislature as a legally-enforceable measure of general applicability, (2) is more stringent than federal environmental laws in that it secures "a fundamental right to … a healthful environment free from contaminants and pollutants caused by humans," (3) applies more stringent standards to NAS-T than federal requirements, and (4) was timely identified by EPA in accordance with the terms of the Consent Decree, it is an ARAR. Because the ERA is an ARAR, the EPA has the authority to reopen its Consent Decree with BELCO and require BELCO attain the new standard established by the ERA. Furthermore, EPA's decision to reopen the Consent Decree requires deference by this Court. EPA's decision that the ERA is an ARAR was thoroughly considered, based on valid reasoning, and consistent with EPA's earlier and later pronouncements, including the Consent Decree. Thus, the District Court did not err in determining that the ERA is an ARAR and accordingly upholding the EPA's decision to reopen the Consent Decree to require BELCO to perform further remedial action in the UAO.

a. <u>The Environmental Rights Amendment was properly promulgated by the New Union legislature as a measure of general applicability that is legally enforceable.</u>

The ERA was properly promulgated because it is a self-executing measure of general applicability that is legally enforceable. State environmental standards properly "promulgated" in accordance with CERCLA's definition of an ARAR are those "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Akzo Coatings of Am.*, 949 F.2d at 1440 (citing EPA, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance*, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987)). Furthermore, general goals qualify as enforceable ARARs even if they contain no specific numerical standards or implementing regulations. *Akzo Coatings of Am.*, 949 F.2d at 1442. The legislative history of the ERA defines

the rights created by the Amendment as "self-executing," which means the requirements of the ERA are binding and enforceable without needing any further regulations or legislation to take effect. N.U. ASSEMB., A10377, at 6 (N.U. 2019–2020).

The ERA was properly promulgated because it was passed by the New Union legislature, signed by the governor, and finally passed as a ballot measure with 71% support. The ERA is of general applicability because it protects the right of "each and every person of" the State of New Union to "a healthful environment free from contaminants and pollutants caused by humans," and thus applies to every person in New Union. It sets a standard of an "environment free from contaminants and pollutants caused by humans," which thus sets the numerical standard for contaminants and pollutants that are harmful to consume and caused by humans at a level of zero, which is enforceable against any human who causes contaminants or pollutants to enter the environment. The legislative history makes clear that the Amendment is self-executing and needs no further legislation or regulation to be applicable and enforceable. Because it is a self-executing legal requirement and there is no ambiguity about who the Amendment applies to or the enforceability of the standards set out by the Amendment, the ERA was properly promulgated.

b. <u>The Environmental Rights Amendment is more stringent than federal standards because it sets a standard for an environment "free from contaminants and pollutants caused by humans."</u>

The ERA is more stringent than federal standards because it both is broader in scope and has more stringent limits on NAS-T and other contaminants than any federal ARARs. A state ARAR exists "[w]here no Federal ARAR exists for a chemical, location, or action, but a state ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR." *Akzo Coatings of Am.*, 949 F.2d at 1443 (citing EPA, *National Oil and Hazardous Substances Pollution Contingency Plan; Proposed Rule*, 53 Fed. Reg. at 51435). In *Akzo Coatings*, the Sixth Circuit held that a Michigan environmental law, which prohibited the degradation of groundwater "from

local background groundwater quality," was more stringent than federal standards under the Safe Drinking Water Act, which limited the concentration of pollutants to numerical standards based on the substances. 949 F.2d at 1444. The court in *Akzo* reasoned that the Michigan law, which defined "local background groundwater quality" as "the condition of the local groundwater 'having virtually no influence by discharges,'" was more stringent than the Safe Drinking Water Act because the Michigan law was "broader in coverage and, depending on the site, as or more demanding in terms of cleanup requirements than the [Safe Drinking Water Act]." *Id.* at 1443–44.

The ERA is the most stringent ARAR for regulating NAS-T. Despite its status as a "probable human carcinogen," the only federal standard for NAS-T is the Health Advisory Level of 10 ppb adopted by the EPA in 1995; "there are no further state or federal regulations regarding NAS-T beyond the [Health Advisory Level]. R. at 3. Furthermore, the NCP, "the means by which the EPA implements CERCLA," sets no standard for regulating NAS-T; instead, it directs the remediating party in CERCLA actions to consider, among other factors, "overall protection of human health and the environment" and "reduction of toxicity, mobility or volume through treatment." *Ohio v. EPA*, 997 F.2d 1520, 1525 (D.C. Cir. 1993); *Sealy Conn., Inc. v. Litton Indus.*, 93 F. Supp. 2d 177, 184 (D. Conn. 2000) (citing 40 C.F.R. § 300.430(e)(9)(iii)).

The ERA is broader in coverage and has more demanding environmental requirements than applicable federal laws. While the Michigan law in *Akzo* required that the groundwater have "*virtually* no influence by discharges," the ERA is more protective in that it requires the protection of every person in the State of New Union's "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 (emphases added). The New Union legislature defined "clean" as "free of contamination or pollution caused by humans that would make that water unhealthful to or harmful to consume."

N.U. ASSEMB., A10377, at 6 (N.U. 2019–2020). Unlike the 10 ppb Health Advisory Level for NAS-T, the ERA requires a stricter standard for the regulation of NAS-T because it requires water that is free from human-caused contaminants and pollutants in the environment "that would make the water unhealthful or harmful to consume" and the presence of NAS-T, as a carcinogen, would make the water unhealthful or harmful to consume. *Id.* Even though EPA has determined that NAS-T in lower is "safe," NAS-T at certain concentrations is carcinogenic; therefore, the ERA requires that waters in New Union be free from NAS-T.

Furthermore, unlike the NCP, which instructs remediating parties to "consider" vague goals such as "overall protection of human health and the environment" and "reduction" of pollutants "through treatment," the ERA establishes a clear, measurable standard of an environment free from NAS-T and other human-caused contaminants and pollutants that could harm the health of human beings and the environment. Because the ERA covers all human-caused contaminants and pollutants and sets a more demanding standard for the regulation of NAS-T than any applicable federal requirement, the ERA is more stringent than any federal ARAR.

c. <u>The ERA is both "legally applicable" and "relevant and appropriate" to the NAS-T cleanup of the Sandstone Aquifer.</u>

The ERA is both applicable and relevant and appropriate to NAS-T because it applies to all "contaminants and pollutants caused by humans" and is relevant and appropriate in situations related to the contamination of water and the environment in the State of New Union. N.U. Const., art. I, § 7. The NCP defines "applicable requirements" as "those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that 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 NCP further defines "relevant and appropriate"

requirements as "those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not 'applicable' to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at 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.

In *Akzo Coatings of Am.*, the Sixth Circuit interpreted a Michigan law that prohibited any person discharging "into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare." 949 F.2d at 1440 (internal quotes omitted) (quoting M.C.L.A. § 323.6(a)). The *Akzo* court held that the Michigan law was applicable to a cleanup of soils contaminated with toxic chemicals despite the fact that the Michigan law was not directed at specific hazardous substances and instead broadly addressed "any substance which is or may become injurious." *Id.* at 1445. Furthermore, the *Akzo* court held that "even if Michigan's anti-degradation law were not applicable" to the CERCLA site, "its consideration would certainly be 'relevant and appropriate'" to the cleanup of the CERCLA site. *Id.* at 1446. The court reasoned that the Michigan law was "relevant and appropriate" based on a number of factors in the Michigan law that were "well-suited to the site at issue and therefore 'appropriate' in" the case, including "the environmental media ('groundwater'), the type of substance ('injurious') and the objective of the potential ARAR ('protecting aquifers from actual or potential degradation')." *Id.*

The ERA is an applicable requirement because it applies to all "contaminants and pollutants caused by humans." Because NAS-T is a chemical product created and patented by BELCO that has contaminated the water in the Sandstone Aquifer, it is a contaminant caused by humans. Like the Michigan law in *Akzo* that addressed "any substance which is or may become

injurious," and was applicable to soils contaminated with toxic chemicals, the ERA addresses a broad category of "contaminants and pollutants caused by humans" and is thus applicable to the contamination of NAS-T in the Sandstone Aquifer.

Furthermore, the ERA is "relevant and appropriate" to BELCO's cleanup of the Sandstone Aquifer because it addresses "problems or situations sufficiently similar to those encountered at the CERCLA site" and its "use is well suited to the particular site." The same factors that made the Michigan law in *Akzo* "well-suited" and "therefore 'appropriate'" to the toxic soil site—environmental media, type of substance, and the objective of the potential ARAR—make the ERA applicable to the Sandstone Aquifer site. First, it protects water and a healthful environment, and in this case, BELCO has caused NAS-T to contaminate the Sandstone Aquifer, which is the source of drinking water and thus is an important environmental resource for Fartownians. Second, the type of substance addressed by the ERA is human-caused contaminants and pollutants; NAS-T is a human-caused contaminant and pollutant. Finally, the objective of the ERA is to protect the fundamental right of every person in New Union to clean air, clean water, and a "healthful environment free from contaminants and pollutants caused by humans," which includes the rights of the people to drinking water free from NAS-T. Because it is applicable to human-caused contaminants like NAS-T and is relevant, appropriate, and useful to the problems at the Sandstone Aquifer, the ERA is both "applicable" and "relevant and appropriate."

d. <u>The ERA was identified within the time allowed by the Consent Decree and within sufficient time to avoid delay or duplication of the remedial process.</u>

The ERA was identified in a timely manner because it was identified within sufficient time to avoid delay or duplication of the remedial process. An ARAR is identified "in a timely manner" when it is identified "in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." EPA, *Superfund Program; Interim Guidance on Compliance with Applicable*

or Relevant and Appropriate Requirements; Notice of Guidance, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987). The terms of the Consent Decree allows the EPA to reopen the Consent Decree "where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy. CD § 13.3.

The EPA identified the ERA in a timely manner. The citizens of New Union passed the ERA on November 3, 2020. After seeking and receiving advice from the Department of Natural Resources in the months following the passage of the Amendment, the EPA reopened the Consent Decree on March 20, 2021, based on its determination that the ERA was an ARAR. BELCO was able to implement the remedy required by the Consent Decree and attain a Certificate of Completion for the first part of the remediation before the EPA reopened the Consent Decree. Therefore, EPA's identification of the ERA as an ARAR did not delay efforts in BELCO's remedial process.

Furthermore, none of the remedial actions the EPA required from BELCO in the original Consent Decree would be duplicated by the response actions EPA is requiring based on the ERA. In the original Consent Decree, the EPA required BELCO to perform CleanStripping of NAS-T at the Centerburg Water Supply public water well, excavate NAS-T-contaminated soils from around the lagoon near the BELCO factory, and conduct monthly sampling of the monitoring wells between Centerburg and Fartown. Pursuant to the more stringent requirements of the ERA, the EPA reopened the Consent Decree and is now requiring BELCO to sample and analyze water from *private* wells in Fartown, supply bottled water to Fartownians with NAS-T contaminated wells, and monitor Fartown wells. Because the EPA is requiring BELCO to perform different remedial actions in different places based on more stringent requirements, none of BELCO's remedial actions will be duplicated by reopening the Consent Decree and requiring further remediation.

III. THE DISTRICT COURT CORRECTLY DECIDED THAT EPA'S APPLICATION OF THE ERA WAS ARBITRARY AND CAPRICIOUS.

EPA's determination that Fartown wells presenting 10ppb or less of NAS-T did not require remediation was arbitrary and capricious, contrary to the language and purpose of the ERA, and not decided pursuant to waiver of the ERA as an ARAR. Reviewing courts "shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (citing 5 U.S.C. § 706(2)(A)). The EPA's decision to not require BELCO to install water filtration systems in Fartown homes was arbitrary, capricious, and not made in accordance with law. As such, the District Court correctly ruled that the portion of the UAO requiring only that BELCO supply Fartownians with bottled drinking water should be vacated. Furthermore, FAWS is entitled to a reopening of the CD between BELCO and EPA, as well as a new UAO consistent with the ERA.

a. EPA's failure to comply with the ERA constituted an abuse of discretion and its decision to excuse BELCO from installation of filtration systems was contrary to law.

Under CERCLA, a state environmental requirement or standard constitutes a state ARAR to which a CERCLA remedy must comply. *Akzo Coatings of Am., Inc.*, 949 F.2d at 1440. General requirements containing no specific numerical standards, or any implementing regulations at all, can still be enforceable ARARs of the state in which hazardous waste site is located, for purposes of consideration and adoption of a remedy under CERCLA. *Id.* at 1442.

The scope of review under CERCLA, if available, is the arbitrary and capricious standard provided by 5 U.S.C. § 706, the Administrative Procedure Act. *Indus. Park Dev. Co. v. E.P.A.*, 604 F. Supp. 1136, 1442–43 (E.D. Pa. 1985). Agency action will be set aside as arbitrary and capricious "only if the agency has: (1) relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an

explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996); *United States v. Burlington N. R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999). Although the Court is not permitted to substitute its judgment for that of the agency, it must make substantial inquiry into facts to ensure that agency demonstrates rational connection between facts found and choice made. *Bedford Cnty. Mem'l Hosp. v. Health & Hum. Servs.*, 769 F.2d 1017 (4th Cir. 1985).

Here, the ERA is the exact sort of "environmental requirement" that constitutes an ARAR under CERCLA. Both the text of the Amendment ("free from contaminants and pollutants caused by humans") and the legislative history make clear that the ERA was meant to go above and beyond what was required by the Clean Water Act or any other federal regulation. Although the ERA's "no-pollution" standard does not contain any numerical requirements, EPA's compliance with that standard is still required.

Because the EPA suit was initiated under CERCLA, this Court must use the "arbitrary and capricious" standard in reviewing EPA's decisions. The District Court correctly concluded that EPA's decision to excuse BELCO from installation of CleanStripping filters on all Fartown homes was arbitrary and capricious. Specifically, the second test under *State Farm* requires that an agency consider all important aspects of the problem, not the least of which is compliance with relevant state constitutional law. The legislative history of the ERA makes clear that the state of New Union was interested in affording its citizens *more* protection than existing federal environmental policies provided. When EPA determined that 10 ppb of NAS-T was a level sufficiently low enough to terminate BELCO's filtration responsibilities, EPA failed to consider the ERA as it applies to clean

water in Fartown. Furthermore, EPA demonstrated no "rational connection" between its treatment of the ERA as an ARAR, and its refusal to require BELCO to install CleanStripping on all Fartown wells.

Therefore, EPA's application of the ERA as an ARAR was arbitrary and capricious, and this Court must affirm the District Court's ruling.

b. EPA did not waive compliance with the ERA and thus was required to attain the standards of the ERA.

Because the EPA did not waive compliance with the ERA, EPA's remedial action was required to attain the requirements of the ERA. A remedial action "must comply with state ARARs that are more stringent than applicable federal standards unless the ARARs are waived." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

The ERA constituted an ARAR. Therefore, the Consent Decree entered into between the EPA and BELCO for cleanup of Fartown wells under CERCLA had to comply with the ERA, unless EPA waived the ARAR and New Union either did not challenge waiver or the waiver was upheld in court. Here, there is no evidence that the EPA waived its responsibilities under the ERA. Rather, EPA correctly identified the ERA as an ARAR and failed to comply with its demands, nonetheless. Because the EPA did not waive its responsibility to comply with the ERA as an ARAR, the agency was required to remediate the NAS-T contamination to the level prescribed by the ERA.

Because the EPA did not waive the requirements of the ERA, and the final UAO did not comply with the ERA standard, this Court must order that the Consent Decree be reopened such that EPA can require BELCO to remediate consistent with the ERA.

c. EPA must require BELCO to install CleanStripping filtration to attain the standards of the ERA.

If EPA's proposed Consent Decree has not achieved New Union's ARARs, this Court is required to remand the Consent Decree to EPA with instructions to amend its proposed remedial actions so as to attain the state's ARARs. If a court determines that a remedial action must conform to a state ARAR, "the remedial action shall be so modified and the State may become a signatory to the decree." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1457 (6th Cir. 1991). Once a court determines that a Consent Decree "will not attain state ARARs, the court should remand the decree with orders to EPA to make appropriate changes using the agency's expertise and the guidelines of the state ARARs." *Id.*

Here, the proper remedy for EPA's non-compliance with the ERA is for this Court to remand the Consent Decree to EPA so that EPA can issue a new UAO consistent with the ERA. As was the case in *Akzo*, it is possible that New Union itself could become a party to the new Consent Decree to ensure that the CD conforms to the standards required by the ERA.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN RETAINING JURISDICTION OVER FAWS'S STATE LAW TORT CLAIMS.

The District Court below should not have retained jurisdiction over FAWS's tort claims for negligence and private nuisance that were solely grounded in New Union state law. A federal district court's decision to retain jurisdiction over state court claims is reviewed under an abuse of discretion standard. *Mars, Inc. v. Kabushiki–Kaisha Nippon Conlux*, 24 F.3d 1368, 1375 n. 4 (Fed. Cir. 1994); *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998).

Federal courts only have jurisdiction over state law claims that are "so related … that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Courts have found claims to be so substantially related as to constitute the same case or controversy where the claims "derive from a common nucleus of operative fact," such that

"the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

Even where a court finds the claims to be part of the same case or controversy, the federal court "may decline to exercise supplemental jurisdiction" in four circumstances: (1) "the claim raises a novel or complex issue of State law," (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," (3) "the district court has dismissed all claims over which it has original jurisdiction," or (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c).

Even if a court finds that claims are sufficiently part of the same case or controversy, the court has the discretion to decline to exercise supplemental jurisdiction. *United Mine Workers of Am.*, 383 U.S. at 726 (citing *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950)). When determining whether to retain jurisdiction over state law claims, a court must consider "judicial economy, convenience, fairness, and comity." *Nowak*, 81 F.3d at 1191 (citing *Purgess*, 33 F.3d at 138). "When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction…." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 345 (1988) (citing *United Mine Workers of Am.*, 383 U.S. at 726–27).

The elements of a federal CERCLA claim are substantially dissimilar from the elements of state law negligence and private nuisance claims; the claims, therefore, do not "derive from a common nucleus of operative fact." The parties must put forth different evidence to litigate the federal law claim than they would for the state law claims. As such, the claims are not sufficiently

related as to constitute the same case or controversy. The District Court abused its discretion in extending supplemental jurisdiction over the state law tort claims.

Even if the Court here finds that the federal and state law claims were sufficiently related as to constitute the same case or controversy, the District Court still should have declined to extend jurisdiction to the state law claims because all federal law claims were resolved early in the litigation. Because the federal law claims had been resolved through summary judgment, the balance of factors indicates that the remaining claims would be properly resolved in state court.

The District Court should have dismissed the state law negligence and private nuisance claims because the claims are not so substantially related to the federal law CERCLA claims to constitute the same case or controversy and, further, all federal law claims were resolved by summary judgment before proceeding to a trial.

CONCLUSION

FAWS respectfully requests that this Court (1) reverse the District Court's grant of summary judgment to BELCO, which held that FAWS's groundwater monitoring costs are not reasonable and reimbursable under CERCLA, (2) affirm the District Court's grant of summary judgment that the ERA constitutes an ARAR that allowed EPA to reopen the Consent Decree, (3) affirm the District Court's grant of summary judgment that EPA's application of the ERA as an ARAR was arbitrary and capricious, and (4) reverse the District Court's decision to retain supplemental jurisdiction over state tort claims and grant FAWS' motion to the remand those remaining claims to state court.