No. C.A. No. 22-00067

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,

Fartown Association for Water Safety,
INTERVENOR PLAINTIFFS-APPELLANTS-CROSS-APPELLANTS

Fartown Association for Water Safety,
PLAINTIFFS-APPELLANTS

v.

Better Living Corporation, DEFENDANT-DEFENDANT-APPELLEE.

ON INTERLOCUTORY APPEAL FROM THE
DISTRICT COURT OF NEW UNION

BRIEF FOR THE PLAINTIFF-APPELLANT-CROSS-APPELLEE

JOHN DOE
Counsel of Record
D, E & F LLP

TEAM 35
Counsel of Record
A, B & C LLP

QUESTIONS PRESENTED

1) Did the District Court err when it determined that costs incurred by FAWS in sampling, testing and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA?
2) Did the District Court err when it upheld EPA's determination that the ERA constitutes an ARAR, and, accordingly finding that EPA's reopening the Consent Decree based on that ARAR and ordering further remedial action in the UAO was proper?
3) Did the District Court err when it vacated as arbitrary, capricious or contrary to law EPA's determination that BELCO is not required to install filtration systems in Fartown despite the existence of the ERA?
4) Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

CONSTITUTIONAL PROVISIONS

JURISDICTION

The United States District Court for the District of New Union entered its final judgement in this case on June 1, 2022. The United States Environmental Protection Agency invokes the Court's jurisdiction under 28 U.S.C. § 1292(b).

OPINIONS BELOW

The opinion of the United States District Court for the District of New Union granting petitioner's is unreported.

STATEMENT OF THE CASE

Centerburg is a town in the State of New Union of approximately 4,500 residents. *United States Environmental Protection Agency v. Better Living Corp., Fartown Association For Water Safety, et al.,* No. 22-000677 2 (C.A. June 1, 2022). Fartown, a rural community of approximately 500 residents also in the State of New Union, sits on Highway 6 about 2 miles south of Centerburg. *Id.* The Sandstone Aquifer is an underground body of water that lies about 300 feet beneath both Centerburg and Fartown. *Id.* Groundwater in the Sandstone Aquifer moves slowly downgradient in a southerly direction, meaning groundwater underneath Centerburg eventually flows under Fartown. *Id.*

Citizens of Centerburger receive tap water from the Centerburg Water Supply ("CWS"), a publicly owned source. *Id.* CWS pumps its supply water from the Sandstone Aquifer, then treats it before distribution to Centerburgers. *Id.* On the other hand, citizens of Fartown are not connected to the CWS and instead use private drinking water wells in each of their homes that pump directly from the Sandstone Aquifer. *Id.*

In 1972, BELCO patented a sealant coating used to prevent corrosion, which it trademarked under the name "LockSeal." *Id.* Lockseal is made by combining two chemicals, the first is the liquid NAS-T. *Id.* The second is a powdered non-toxic "activation agent," which when combined with NAS-T produces a chemical reaction that makes a solid at room temperature, LockSeal. *Id.* BELCO manufactured NAS-T and its activation agent at a factory (the "Facility" or "Site") in Centerburg from 1973 through 1998, when it opened a new factory in northern New Union and shuttered the old factory. *Id* at 3. BELCO still owns the property in Centerburg, which it uses for storage and training activities. *Id*.

A variety of medical studies published in the mid-1980's showed NAS-T to be a probable human carcinogen. *Id*. Based on these studies, EPA in 1995 adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"), which incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans. *Id*. Even if NAS-T is not toxic at or below the HAL, the parties agree that the human nose can detect NAS-T in water at concentrations as low as 5 ppb, where it produces a sour or stale smell. *Id*.

Beginning in 2013, Centerburgers began complaining to the Centerburg County Department of Health ("DOH") that their water smelled "sour" or "off." *Id*. Prompted by these complaints, in January of 2015 DOH began testing the public water supply for chemical contamination. *Id*. DOH included NAS-T in its testing protocol because of the existence of the BELCO Facility in town. *Id*. DOH determined that the water in the CWS contained between 45 and 60 ppb NAS-T. *Id*. On September 17, 2015, DOH notified the residents of Centerburg to cease drinking their tap water. *Id*. At the same time, BELCO voluntarily began supplying all Centerburgers with bottled water while the state investigated the contamination. *Id*.

The New Union Department of Natural Resources ("DNR") began an investigation of the contamination at the Facility on September 22, 2015. *Id*. Citing a lack of resources and expertise, however, DNR referred the investigation and remediation to EPA on January 30, 2016. *Id*.

In March 2016, EPA and BELCO entered into an agreement where BELCO agreed to continue to provide bottled drinking water to residents of Centerburg and to investigate the cause of and extent of the NAS-T contamination. *Id*. After this investigation, BELCO agreed to evaluate proposed cleanup remedies for the Site. *Id*. Through this process, known as a remedial investigation and feasibility study ("RI/FS"), BELCO investigated the sources of the contamination, assessed risk to human health and the environment and evaluated remedial alternatives for the Site. *Id*.

BELCO began its investigation by identifying the source of the NAS-T contamination. Through soil testing at the Site and studying records of operation at the Facility, BELCO concluded that NAS-T entered the soils from sporadic spills and from an unlined lagoon used to store wastewater and stormwater in the 1980s and early 1990s. This contamination eventually migrated to the groundwater, creating a plume of NAS-T in the Sandstone Aquifer.

Under EPA oversight, BELCO also investigated the extent of the plume. From July of 2016 through January of 2017, BELCO installed three successive lines of monitoring wells progressively further from Centerburg and closer to Fartown. The final five wells were installed approximately half a mile north of Fartown (1.5 miles south of Centerburg); when sampled, these five wells showed no detectable amounts of NAS-T. Consequently, believing that it had reached the end of the NAS-T plume, EPA did not direct BELCO to install any additional wells. Based on this investigation, BELCO's RI/FS recommended no remediation of the plume, but rather excavation of the soils at the Site to remediate the source area and the implementation of filtration

of Centerburg's CWS. The RI/FS estimated that remediation of the NAS-T plume in the Sandstone Aquifer by pumping and treating the water would take decades and cost over $45 million, and was therefore not feasible.

Based on this RI/FS and the comments received by EPA after it issued a Proposed Plan to the public, in June of 2017 EPA selected a clean-up plan for the Site through what is known as a Record of Decision (the "ROD"). On June 30, 2017, EPA brought a cost recovery action against BELCO (Case No. 17-CV-1234; the "BELCO Action"), immediately after which BELCO and EPA entered into and filed a Consent Decree ("CD"). Pursuant to the CD, BELCO agreed to design and implement the remedy selected by EPA in the ROD. This Court approved and entered the CD on August 28, 2017, after taking public comment and determining it to be fair and reasonable. No citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan or the entry of the Consent Decree.

Pursuant to the CD, upon completion of the clean up, EPA would be required to issue to BELCO a Certificate of Completion (the "COC"). *Id*. The Consent Decree further dictates that upon issuing the COC, EPA is not permitted to order BELCO to further remediate the Site without EPA "reopening" the CD. The CD explicitly sets forth two grounds upon which EPA can reopen it:

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

CD, § 13.3. Relevant to this dispute, the Consent Decree defines Regulatory Standards to include, among other things, "applicable or relevant and appropriate requirements under CERCLA ('ARARs')." CD, § 1.12. *Id*.

Pursuant to the CD, BELCO (1) installed and maintained a water filtration system known as "CleanStripping" to remove NAS-T at the CWS public water well; (2) excavated soils contaminated with NAS-T from around the abandoned lagoon at the Site; and (3) conducted monthly sampling of the monitoring wells installed during the investigation. *Id*. The Consent Decree does not require further remediation of the plume in the Sandstone Aquifer. *Id* at 4. BELCO installed CleanStripping on Centerburg's public water well in September of 2017 (which is still in operation) and completed the soil excavation in December of 2017. *Id*. Over the following several years, BELCO's monitoring well test results were largely consistent with prior results. *Id*.

Some Fartownians (now members of FAWS) submitted sworn testimony that they noticed that the water from their private wells began to occasionally smell "off" since at least 2016. *Id*. When they became aware of the investigation and entry of the CD, they immediately requested that DOH sample and test their drinking water for NAS-T contamination. *Id*. In February of 2019, DOH tested five private drinking water wells in Fartown, but did not detect NAS-T. *Id* at 5. Not satisfied with that result, in May 2019 a group of these Fartownians then asked EPA to order BELCO conduct further testing in Fartown. *Id*. Citing the non-detects in sampling from the monitoring wells to the north of Fartown, EPA declined. *Id*.

Frustrated by EPA, in December of 2019 approximately 100 Fartownians formed FAWS and retained Central Laboratories, Inc. ("Central Labs") to test their private wells. *Id*. Central Labs took three samples each from 75 private wells in Fartown. Results from Central Labs' 225 samples, reported in March of 2020, were varied: 120 showed no detectable levels of NAS-T; 51 showed

concentrations of 1 to 4 ppb; and 54 had detections of NAS-T in the 5 to 8 ppb range. *Id*. Based on those results, in May 2020 FAWS wrote to EPA again and asked it to reopen the CD and order further investigation of their wells and for remediation of the plume of contamination. *Id*. On June 10, 2020, EPA declined to take further action, citing the low levels of NAS-T and the limited reopener provisions in the CD. *Id*.

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

N.U. CONST. art. I, § 7.

As with all Constitutional Amendments in New Union, the Amendment was passed by the New Union legislature, signed by the governor, and was then included in the November 3, 2020, election as a ballot measure. *Id*.

In January of 2021, EPA wrote to DNR to ask whether it believed that the ERA constitutes an ARAR for CERCLA purposes. *Id*. On February 14, 2021, DNR responded, stating 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*.

On March 20, 2021, citing the 2020 Central Labs results and the passage of the ERA, which EPA deemed to be a change in the Regulatory Standards under the Consent Decree, EPA re-opened the Consent Decree and ordered BELCO to sample and analyze water from 50 private wells in Fartown. *Id* at 6.

Prior to reopening the Consent Decree, EPA included in its administrative record the new information relied upon to reopen the CD, the fact that Fartown is an environmental justice community, the possible endangerment including potential carcinogenic effects, and the presence of odors from NAS-T. *Id*. The response actions demanded by EPA consisted of sampling of private wells in Fartown, supplying bottled water to any Fartownian whose well returned positive results for NAS-T, and the continuing monitoring of Fartown wells. *Id*. EPA then held a conference with BELCO in an attempt to get BELCO's agreement to perform these tasks. *Id*. BELCO challenged EPA's demand, arguing that EPA did not have the legal right to reopen the Consent Decree because the ERA did not and legally could not constitute an ARAR, and, as such, the response action ordered was inconsistent with CERCLA. *Id*. On June 24, 2021, over BELCO's objection, EPA issued an order, referred to as a Unilateral Administrative Order ("UAO"), directing BELCO to conduct the response actions noted above. *Id*.

In addition, prior to EPA issuing the UAO, FAWS submitted in writing a request for EPA to order BELCO to install CleanStripping at each residential well that had tested positive for NAS-T or take other remedial actions sufficient to remove NAS-T entirely from their water supply. *Id*. EPA expressly declined to include this requirement in the UAO on grounds that FAWS' 2019 results and EPA's own sampling results found no wells in Fartown testing above the HAL for NAS-T. *Id*. This request, and EPA's response and justifications, were similarly fully noted in EPA's administrative record.

The relevant directives to BELCO in the UAO are:

1. Where Sample 50 private wells in Fartown, selected by EPA, each month.
2. For any well where sampling shows NAS-T concentrations between 5 ppb and 10 ppb, supply such households with sufficient monthly bottled water for each resident until testing reveals levels of 4 ppb or lower.

3. For any well where sampling shows NAS-T concentrations exceeding 10 ppb, install CleanStripping filtration on the well.

UAO, § 3.2.

BELCO refused to comply with the UAO. *Id* at 6. Thus, on July 7, 2021, EPA began supplying water to Fartownians whose wells tested positive for NAS-T in excess of 5 ppb and monitoring those wells through monthly sampling. *Id*. That sampling has been largely consistent with the sampling done by FAWS, showing approximately 55% of samples having non-detect levels for NAS-T, 25% in the 1 to 4 ppb range and 20% in the 5 to 8 ppb range. *Id*. No Fartown wells have tested above 8 ppb. *Id*.

On August 2, 2021, EPA made a motion in the BELCO Action seeking to recover its costs incurred in Fartown and for penalties for BELCO's violation of the UAO. *Id*. BELCO answered, arguing that because the ERA cannot properly be considered an ARAR, EPA did not have the right to reopen the Consent Decree, and thus the UAO was without legal foundation. *Id*.

FAWS filed a motion to intervene in the BELCO Action on August 30, 2021, to assert a claim against EPA. *Id*. The District Court granted that motion on September 24, 2021. *Id*. FAWS challenges the UAO as arbitrary, capricious and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), to the extent that it failed to compel BELCO to provide CleanStripping filtration systems on FAWS' members' private wells, which FAWS argues is required under the ERA. *Id*.

Separately on August 30, 2021, FAWS and 85 individual plaintiffs from Fartown filed an action against BELCO in District Court (the "FAWS Action"; Dkt 21-CV-1776). *Id*. The complaint's first cause of action is a CERCLA cost recovery claim against BELCO for the $21,500 FAWS spent on testing and analysis. *Id*. FAWS' complaint further contends that BELCO's

contamination of the Sandstone Aquifer constituted negligence and a private nuisance under New Union state law. *Id*.

SUMMARY OF ARGUMENTS

1. The District Court did not err when it determined that costs incurred by FAWS were not reimbursable as response costs under CERCLA. In March of 2020, low levels of NAST-T were reported from Central Lab. Although FAWS contends that conducting their own investigation was necessary and reasonable, there was no scientific evidence that further water contamination testing needed to be conducted. Although some contamination was found in the wells in Fartown, presence of some contamination does not alter regulatory standards. Thus, the EPA should be left to conduct efficient investigations and execution of CERCLA cleanups, as opposed to private parties.

2. The District Court did not err by finding that the ERA constitutes an ARAR, and therefore a Regulatory Standard for the purpose of reopening the Consent Decree because it meets the four-part test as determined by 42 U.S.C. § 9621(d). "Under 42 U.S.C. § 9621(d), supra, a state environmental requirement or standard constitutes a state ARAR to which the remedy must comply if it is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

3. The District Court erred when it granted FAWS motion vacating the portion of the UAO that requires only bottled water, rather than filtration or some other remedy that removes NAS-T from Fartown's wells. Pursuant to the standard in *Alaska Dept. of Envtl. Conservation v. E.P.A* the EPA's path to their decision may be reasonably discerned because the legislative history makes it clear that (1) no tangible harm to human health has been demonstrated within the contemplated meaning of the ERA (2) the ERA was intended to address drinking water, not water used in

cooking and bathing; and (3) odor alone without corresponding detrimental health affects is not sufficient to constitute harm under the ERA. Thus, this court should not overrule the EPAs decision. 4. The District Court correctly decided to maintain jurisdiction over the state tort claim despite having resolved the federal CERCLA claim. The Court should maintain jurisdiction over the pendent state court claims because this situation meets the requirements of 28 U.S.C.A. § 1367. There is a federal claim in federal court due to federal question jurisdiction (the CERCLA claim) which shares a common nucleus of operative fact with a pendent state claim (the state tort claims) therefore, it is proper for the court to exercise supplemental jurisdiction over the state tort claims.

ARGUMENT

1. The District Court Did Not Err When it Determined That Costs Incurred by FAWS in Sampling, Testing and Analyzing Well Water Samples of Its Members' Private Drinking Water Wells Are Not Reimbursable as Response Costs Under CERCLA.

According to the Environmental Protection Agency (EPA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment." 42 U.S.C. § 9601 et seq. (1980). Liability under CERCLA is established when the following four elements are met: "(1) the site in question is a 'facility' as defined by CERCLA; (2) the Defendant is a "responsible person" as defined by CERCLA; (3) there was a "release or threatened release" of hazardous substances; and (4) such release caused the Plaintiff to incur response costs." *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). If there is more

than one responsible person, the court can "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). A non-governmental plaintiff additionally "must show that any costs incurred in responding to the release were 'necessary' and 'consistent with the national contingency plan.'" *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. July 24, 2012). CERCLA provides that any person who accepts or accepted hazardous substances for transport to disposal or treatment facilities, from which there is a threatened release of a hazardous substance, shall be liable for the costs incurred by any other person. *See* 42 U.S.C. § 9607(a)(4)(B).

The first issue presented is whether CERCLA entitles FAWS to recover $21,500 against BELCO as a response cost. It must be determined whether FAWS' response actions were "necessary" and "consistent with the national contingency plan." Necessary costs are costs that are "necessary to the containment and cleanup of hazardous releases." *U.S. v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1272 (E.D. Ca., Oct. 28, 1997). Investigative costs incurred by a private party after the EPA has initiated a remedial investigation are not considered necessary because they are duplicative of the EPA's own actions. *See, e.g., Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421, 1425 (E.D. Ca. Jan. 27, 1993). Further, legal fees and litigation-related costs "are not recoverable," only "work that is closely tied to the actual cleanup" may constitute a necessary cost of response. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004).

There must be some evidence that the response actions were taken to remediate and clean up hazardous releases. *See Wilson Road Dev't Corp. v. Fronabarger Concreters, Inc.,* 209 F.Supp.3d 1093, 1114-15 (E.D. Mo. Sept. 16, 2016). There needs to be direct involvement in the responsible party's remediation and detoxification efforts. *Id*. at 1113. The Court in *Wilson Road*

Dev't Corp. v. Fronabarger Concreters, Inc. refused to grant summary judgment that plaintiffs did not incur any response costs because those costs were paid out of a non-party checking account. *See Wilson Rd. Dev.*, 971 F.Supp.2d 896. In the case *G.J. Leasing Co v. Union Electric Co.*, the Seventh Circuit determined a private party's response "costs were not necessary" where it appeared "very low levels of contamination" were discovered on the property in question and "only a small expenditure would be necessary to remove enough of the substance to make the [site] safe for its current use." *Id.* CERCLA foreclosed recovery where the plaintiff, "decide[d] to incur enormous costs to eliminate the contamination utterly" and to "charge those costs to whoever was responsible for the current very low level of contamination ...." *Id.*

In the present case, BELCO argues that the testing of the perimeter wells that lie between Centerburg and Fartown from July 2016 through January 2017 showed no significant contamination in the Sandstone Aquifer that reached wells in Fartown. Thus, FAWS is not subject to recovery. According to FAWS, the test results from Central Lab indicated that NAS-T had reached the wells in Fartown, and testing was necessary. FAWS further argued that NAS-T was making its way to Fartown by some path out of the monitoring wells and its members had a right to know about exposure levels. FAWS contends that conducting their own investigation was necessary and reasonable. In response, BELCO argues that there was no scientific evidence supporting further testing. BELCO further contends that even if there were "trace" amounts of contamination in the Fartown wells, that would not have justified testing, bottled water, and installation of individual, expensive filtration systems on private wells.

EPA joins BELCO's argument based on policy grounds. EPA argues that it would frustrate CERCLA and EPA's authority under the statute if private parties initiated response actions where it would be highly unlikely that harmful contamination would result. Although further testing

revealed the presence of contamination, such investigations by laypersons interferes with the EPA's ability to conduct efficient investigations and execution of CERCLA cleanups. Further, the EPA argued that at the time measures were taken, the ERA was not yet adopted and thus there was no legal basis to justify the testing. The EPA argues that the reasonableness of response measures must be based on objective evidence that the testing would produce beneficial information.

Here, there was no indication that further testing was needed by the EPA, given the prior test results. Results from Central Labs' 225 samples, reported in March of 2020, were varied: 120 showed no detectable levels of NAS-T; 51 showed concentrations of 1 to 4 ppb; and 54 had detections of NAS-T in the 5 to 8 ppb range. The low levels of NAS-T indicated that no further investigation or remediation was "necessary." FAWS conducted the tests at its own expense when such tests were not needed. The CD explicitly sets forth two grounds upon which EPA can reopen it: 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. The EPA's own sampling results found no wells in Fartown testing above the HAL for NAS-T. Therefore, presence of some contamination does not alter regulatory standards and further investigation was not needed. Thus, the district court did not err when it determined that FAWS' testing costs are not "necessary" CERCLA response costs and will not be compensated.

2. The District Court did not err when it upheld EPA's determination that the ERA constitutes an ARAR, and found that EPA's reopening of the Consent Decree based on that ARAR and ordering further remedial action in the UAO was proper.

The EPA may reopen the Consent Decree "where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy." CD, § 13.3. The Consent Decree defines "Regulatory Standards" to include "ARARs." CD, § 1.12. ARAR refers to an Applicable

or Relevant and Appropriate Requirement. "ARARs determine the extent of clean-up required for a contaminated site." *Containerport Grp., Inc. v. Am. Fin. Grp., Inc.*, 128 F. Supp. 2d 470, 482 (S.D. Ohio 2001). The Court should find that the ERA constitutes an ARAR, and therefore a Regulatory Standard for the purpose of reopening the Consent Decree because it meets the four-part test as determined by 42 U.S.C. § 9621(d). "Under 42 U.S.C. § 9621(d), supra, a state environmental requirement or standard constitutes a state ARAR to which the remedy must comply if it is (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

To meet the properly promulgated requirement, the law must be "imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Id*. General applicability is met if the standard can be "generally applicable on its face, and if so, the standard is a potential ARAR." *State of Ohio v. U.S. E.P.A*., 997 F.2d 1520, 1528 (D.C. Cir. 1993). ERA is generally applicable on its face because it stands to create a fundamental right to clean water and air that "as with all fundamental rights, this right would be self-executing and so would not require further definition in regulation or statute." Per the legislative history, the amendment allows courts or an agency to "apply a framework giving us peace of mind and a healthful environment." *Id*. Since the legislature casts this amendment as complete with no further need for definition, it could be generally applied on its face because there is nothing left beyond what appears facially to alter the application. The ERA can be implemented as it appears on its face, so it meets the general applicability requirement. Secondly, the ERA has been properly promulgated because it is legally enforceable. The bill was passed through the legislature following the appropriate procedure; thus, it is a legally enforceable amendment. R. 8.

Since the ERA meets the general applicability and legally enforceable prongs of the properly promulgated standard, it meets the first requirement to constitute an ARAR.

Secondly, the ERA is more stringent than the current federal standards because there are no restrictions on the Legislature's ability to enact appropriate legislation to ensure clean air, clean water or a healthy environment. R. 3. Since there is no existing restriction, the ERA represents a new standard that grants a fundamental right where presently there is no right. Since it is creating greater protection than already exists federally, it is more stringent than the current federal standard.

Thirdly, to constitute an ARAR, the regulation must be legally applicable or relevant and appropriate to the site that needs to be cleaned. This means "any hazardous substance or pollutant that remains on-site must be treated to attain all standards which are "legally applicable" to the substance or "relevant and appropriate" for purposes of the release. § 4A:108. Legally Applicable or Relevant and Appropriate Requirements, Managing Envtl. Risk § 4A:108 (2022-2023). In *U.S. v. Akzo Coatings of America, Inc,* the court found that the legally applicable or relevant and appropriate standard was met when the effect of the behavior outlined in the remediation plan was in line with the goals of the law in question. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409 (6th Cir. 1991). In *Akzo*, the court noted that "because soil flushing diffusely discharges toxicants from the soil into the ground, the anti-degradation rules are legally applicable." *Id*. Here, the ERA is relevant because it provides a benchmark to provide protection in the arena of environmental contamination and the community is being impacted by environmental contamination. The Senate committee stated "This Amendment is necessary and justified by the fact that on occasion, the existing statutes and regulations are insufficient to protect the people from exposure to unclean or unhealthful air and water." R. 15. Since the purpose of the statute is to fix a deficiency in existing legislation, the ERA is relevant and necessary to addressing the

contamination situation. The committee stated "the Amendment will serve as a safety net to ensure the protection of our residents do not fail." *Id*. Characterizing the ERA as a 'safety net' underscores its relevance to the current community situation because a safety net is something necessary for fixing an issue. Thus, the ERA meets the legally applicable or relevant standard to qualify as an ARAR.

Fourthly, the ERA qualifies as an ARAR because it satisfies the timely identified test. "Lead and support agencies shall identify and communicate their respective potential ARARs and TBCs . . . in a timely manner, i.e., no later than the early stages of the comparative analysis." 40 CFR § 300.515(d)(1). This means the law "must be identified in sufficient time to avoid inordinate delay or duplication of effort in the remedial process." *United States v. Akzo Coatings of Am., Inc.*, 719 F. Supp. 571, 584 (E.D. Mich. 1989), aff'd, 949 F.2d 1409 (6th Cir. 1991). Here, there is no indication that the ERA was identified in an insufficient time to avoid inordinate delay or duplication of effort in the remedial process because the ERA was approved on November 3, 2020. The remedial action to reopen the consent decree was initiated on March 20, 2021. This identification of the need to reopen the consent decree due to the new standard offered by the fundamental right was timely because it occurred within a reasonable time to order the response needed to decontaminate the area. It was within time to actually carry out the necessary remediation, before any other steps were taken that would make implementing the RI/FS unfeasible. Thus, the timely identification requirement is satisfied.

Because the ERA was (1) properly promulgated, (2) more stringent than federal standards, (3) legally applicable or relevant and appropriate, and (4) timely identified, it constitutes an ARAR which justified the reopening of the Consent Decree.

3. The District Court Erred When It Concluded That the Unilateral Administrative Order Contradicted the Environmental Rights Act.

The District Court erred when it granted FAWS motion to vacate the portion of the UAO that requires that only bottled water—as opposed to CleanStripping filtration systems—be provided to Fartown residents as a result of de minimis levels of NAS-T present in a portion of the towns private wells. The EPAs conclusion that bottled water was sufficient remediation levels NAS-T scientifically determined to be non-toxic to human health was not arbitrary, capricious or contrary to law because it was not contrary to the intent of the Environmental Rights Act ("ERA").

The ERA, an amendment to the Constitution of the state of New Union, states that "[e]ach and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminations and pollutants caused by humans." N.U. CONST. art. I, §7. Where a challenge is made to an EPA enforcement order under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), courts must determine "whether the Agencies action was 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.'" *Alaska Dep't of Env't Conservation v. E.P.A.,* 540 U.S. 461, 496-97 (2004); *Sackett v. E.P.A.,* 566 U.S. 120, 131 (2012). Even when an agency explains its decision with "less than ideal clarity," a reviewing court will not upset the decision on that account "if the agency's path may reasonably be discerned." *Alaska Dept. of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 497 (2004).

In the present matter, the legislative history of the ERA makes it clear that (1) no tangible harm to human health has been demonstrated within the contemplated meaning of the ERA (2) the ERA was intended to address drinking water, not water used in cooking and bathing; and (3) odor alone without corresponding detrimental health affects is not sufficient to constitute harm under the ERA.

i. No Tangible Harm to Human Health has Been Demonstrated Within the Contemplated Meaning of the ERA.

Levels of NAS-T present in Fartown water are objectively not harmful to human health. Based on a variety of medical studies, the EPA adopted a Health Advisory Level for NAS-T in drinking water of 10 parts per billion ("ppb"). *United States Environmental Protection Agency v. Better Living Corp., Fartown Association For Water Safety, et al.,* No. 22-000677 2 (C.A. June 1, 2022). This rating incorporates a significant margin of error to ensure that the level of exposure is non-toxic to humans. *Id* at 3. *Id* at 5. Central Labs took samples from 75 private wells in Fartown. *Id*. 120 showed no detectable levels of NAS-T, while 51 showed concentrations of 1-4 ppb and 54 had levels between 5-8 ppb. *Id*. The parties do not dispute that the level NAS-T never exceeded 8 ppb in any well tested in Fartown. Thus, based on the objective science used to conclude the safe level of NAS-T present in drinking water, none of the wells in Fartown contained levels which could cause harm to humans.

FAWS asserts the bottled water provided by BELCO is insufficient and CleanStripping is necessary because the EPA's decision that filtration is not required below 10 ppb is arbitrary, capricious, and contrary to law. *Id* at 13. They contend that the current levels—where present—do not constitute "clean water" under the ERA because the "water used in cooking, bathing, showering, cleaning and other household tasks smell[s] bad." *Id*. This argument fails for two reasons. All studies performed in NAS-T addressed its safety *for human consumption*. Even though the levels of NAS-T present in Fartown's water fall below the required 10 ppb, the EPA has already ordered that bottled drinking water be provided to residents. *Id*. Thus, the issue at hand is whether levels at or below 8 ppb are safe for cooking and bathing. No scientific evidence was presented within the record to support the conclusion that 8 ppb is somehow unsafe for human contact when 10 ppb has been scientifically determined to be non-toxic to humans. Thus, FAWS presents no

objective evidence to support their claim beyond an occasional bad smell. Furthermore, the assertion that the Fartown water is not clean within the meaning of the ERA simply because it "smells bad" is not supported by objective evidence

ii. The ERA was Intended to Address Drinking Water, Not Water Used Exclusively to Cook and Bathe.

The levels of NAS-T present in Fartown wells fall within the definition of "clean" as articulated within the testimony of the legislative history for the ERA. The legislative intent is clear—the term "clean" is meant to address drinking water. While the Act does not provide definitions for the terms "clean" or "healthful," the legislative history of the Act proves helpful in determining the legislative intent behind the Act. According to the legislative history of the ERA, the justification for the passage of the Act is "[o]ngoing water contamination and air quality pollution have highlighted the importance of clean drinking water . . ." and "protect the overall health of the people and environment, in particular from harms caused by unnatural, human-made or human-caused contaminants and pollutants." NU Assembly No. A10377 (2020).

When questioned about the lack of clarity and definitions of key terms in the Act during his testimony before the Nu Assembly, Mr. Wright—who sponsored the Act—stated that the term "clean" meant that citizens "should be able to consume water through [their] public water supply without any harm." *Id*. In addition, he stated "That doesn't mean that the water is free of any and all substances besides H2O." *Id*. The key, he stated, what that "they should not harm you." *Id*. Furthermore, he stated that the terms "clean" and "healthful" should be determined on an objective basis. *Id*. "Clean" meant "healthful to human beings . . .." "Healthful" meant that "it will do no harm to consume the water." *Id*. Addressing the latter part of the Amendment, he stated that "clean would mean, for example, water that is free of contamination or pollution caused by humans that would make the water unhealthful or harmful to consume." *Id*.

The intent is clear—the ERA terms "clean" and "healthful" are intended to address drinking water, not water that comes into contact with humans via bathing or cooking. Furthermore, the objective standard for determining whether drinking water is "clean" and "healthful" has been met in the instant matter, because all objective, scientific evidence presented in the record illustrates that concentrations of NAS-T that are less than 10 ppb are safe for human consumption in drinking water. Mr. Wright plainly stated that the standard for "clean" does not mean that the water is free of any and all substances. Thus, even if the issue being adjudicated was whether the drinking water in Fartown was "clean" within the meaning of the ERA, the objective standard would be satisfied. However, the EPAs UAO already requires that BELCO provide bottled drinking water to residents of Fartown whose wells contained any detectable level of NAS-T, so the safety of the drinking water is not at issue. In addition, FAWS has presented no evidence that concentrations of NAS-T below 10 ppb cause any tangible harm to human health. Thus, the EPAs determination that BELCO was not required to install filtration systems in Fartown wells with concentrations of NAS-T exceeding 10 ppb was not arbitrary, capricious, or contrary to law because it does not contradict the legislative intent of the ERA.

iii. Odor Alone Without Corresponding Detrimental Health Affects is Not Sufficient to Constitute Harm Under the ERA.

Odor alone does not constitute harm under the ERA. During testimony before the Nu Assembly regarding the passage of the ERA, the issue of odor was briefly addressed in relation to a nearby landfill. "Even odors could be an issue if they impact what the community would consider 'clean' air" said Mr. Wright regarding this issue. NU Assembly No. A10377 (2020) (testimony of Wright). Does this oblique reference to the odor emitted by a landfill indicate that the intent of the ERA was to include displeasing odors? Again, the conversation returned to "harm" when legislators were addressing this topic. *Id*. First, the smell of water was never addressed by the

legislature. The issue was only contemplated in the context of nuisance odor emitted by landfills. Second, even if the court were to apply the "sufficiently offensive" standard proposed in the legislative history of the Act, there is no precedent for addressing such a claim, and the EPA should not be expected to extrapolate legislative intent from such an oblique reference. Third, the reference was not sufficient to establish that an odor caused by NAS-T, with no corresponding scientific evidence to support any adverse effect to human health, constitutes harm under the ERA. Thus, the EPA's UAO was not arbitrary, capricious, or contrary to law because water odor alone was not reasonably contemplated as a harm under the ERA.

In conclusion, this court should overturn the District Court's order granting FAWS motion vacating the portion of the UAO that requires only bottled water, rather than filtration or some other remedy that removes NAS-T from Fartown's wells. Pursuant to the standard in *Alaska Dept. of Envtl. Conservation v. E.P.A*, the EPA's path to their decision may be reasonably discerned because the legislative history makes it clear that (1) no tangible harm to human health has been demonstrated within the contemplated meaning of the ERA (2) the ERA was intended to address drinking water, not water used in cooking and bathing; and (3) odor alone without corresponding detrimental health affects is not sufficient to constitute harm under the ERA. Thus, this court should not overrule the EPAs decision.

4. The District Court did not err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims.

Though the CERCLA claims were previously resolved, the supplemental state law claims should remain under the jurisdiction of this Court because they satisfy the requirements for exercising supplemental jurisdiction. "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they

form part of the same case or controversy under Article III of the United State Constitution. Such supplemental jurisdiction shall include claims that involved the joinder or intervention of additional parties." 28 U.S.C.A. § 1367(a). Here, the state claw claims are the supplemental or pendent claims being asserted, and the claim with original jurisdiction is the CERCLA claim.

The exceptions mentioned above are: (b) "In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 133 and (c) "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the 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.A. § 1367.

Thus, the analysis of whether this Court should retain jurisdiction depends on the issue of whether it can validly exercise supplemental jurisdiction over the pendent state claims. The first step in the analysis is to determine whether we have a situation with more than one claim, where the federal court has valid jurisdiction via diversity jurisdiction or federal question jurisdiction over at least one of the claims. Here, this is satisfied because the District Court has original jurisdiction via federal question jurisdiction over the CERCLA claim, because CERCLA is a federal law.

The next requirement for supplemental jurisdiction states that the Court should continue to exercise jurisdiction over the remaining state court claims if "the state and federal claims [] derive from a common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The justification to exercise supplemental jurisdiction over a claim "lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them." Erie *R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

"The test for a 'common nucleus of operative facts' is not self-evident. Indeed, '[i]n trying to set out standards for supplemental jurisdiction and to apply them consistently, we observe that, like unhappy families, no two cases of supplemental jurisdiction are exactly alike.'" *Lyon v. Whisman*, 45 F.3d 758 (3d Cir. 1995) (quoting *Nanavati v. Burdette Tomlin Memorial Hosp.,* 857 F.2d 96, 105 (3d Cir.1988)." Thus, courts look at this issue in a very fact specific manner. "State law claims do not derive from a common nucleus of operative facts if there is almost no factual or legal overlap between the state and federal claims." *Chelsea Condo. Unit Owners Ass'n v. 1815 A. St., Condo*. Grp., LLC, 468 F. Supp. 2d 136, 141 (D.D.C. 2007). "State and federal claims share a common nucleus of operative facts if the claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding." *Id*.

Here, the CERCLA federal claim and state law tort claims share a common nucleus of operative fact because: (1) principles of judicial economy support that they be tried together in one proceeding and (2) there is considerable factual and legal overlap between the state and federal claims. There has been considerable litigation conducted already in investigation both sets of claims. The townspeople who have been impacted by Belco's failure to remediate the

contamination have already attempted to take their claim to its conclusion via the federal process and requiring this town, which is an environmental justice city, to separate those efforts would cause repetition. Second, the issues being decided in both sets of claims overlap extensively. The courts are dealing with the same set of evidence (the contamination levels and resulting inaction on Belco's part) and would therefore continue to draw on the same resources to analyze both sets of issues. For this reason, it makes sense from a judicial economy perspective to keep the state tort claims with this Court as they have already familiarized themselves with the evidence and issues at hand.

Because the CERCLA claim represents a claim in federal court because of federal question jurisdiction, and there is a common nucleus of operative fact between the CERCLA claim and the remaining state tort claims, the District Court did not err when it retained jurisdiction over the supplemental state tort claims.

CONCLUSION

For the reasons stated above, this Court (1) should find that the response costs under CERCLA were not reimbursable, (2) should interpret the ERA as an ARAR which justifies the reopening of the Consent Decree and (3) should **overturn** the District Court's order granting FAWS motion vacating the portion of the UAO that requires only bottled water rather than filtration or some other remedy that removes NAS-T from Fartown's wells AND (4) retain jurisdiction over the state tort claims.

Respectfully Submitted,

Date: November 21, 2022