

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant,

-and-

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

On Appeal from the United States District Court for the District of New Union in consolidated case nos. 17-CV01234 and 21-CV-1776, Judge Douglas Bowman.

**BRIEF OF DEFENDANT-APPELLEE-CROSS APPELLANT BETTER LIVING
CORPORATION**

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered summary judgment in consolidated cases 17-CV-1234 and 21-CV-1776 on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), and 28 U.S.C. § 1331 (federal question). The United States Environmental Protection Agency (“EPA”), Better Living Corporation (“BELCO”), and Fartown Association for Water Safety, et al. (“FAWS”), all filed timely Notices of Appeals pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts.

STATEMENT OF THE ISSUES

- 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?

STATEMENT OF THE CASE

A. CERCLA

Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) in 1980 with the purpose of “provid[ing] for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and cleanup of inactive hazardous waste disposal sites.” 96 P.L. 510, 94 Stat. 2767 (1980). CERCLA allows the federal government to intervene in responding to actual or threatened releases of hazardous substances from leaking or abandoned hazardous waste disposal sites. 42 U.S.C. § 9604(a). This section of CERCLA also authorizes EPA to determine the appropriate course of action for remediation. *Id.* EPA can also entrust responsibility for completing approved action or conducting an RI/FS to an owner/operator of the facility or another responsible party. *Id.*

EPA maintains oversight over the remediation even when responsibility for the remediation is given to another party. *Id.*; 40 C.F.R. § 300.400. In selecting an appropriate remedy, EPA must “select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable”. 42 U.S.C. § 9621(b)(1). To determine whether a remedy is “protective of human health and the environment,” EPA must identify federal, state, and local ARARS for the specific hazardous substances, pollutants, or contaminants from the release that will remain at the site post-remediation; analyzing each standard through the framework set out in 40 C.F.R. § 300.400(g). 42 U.S.C. § 9621(d)(2)(A). Upon completion of RI/FS process, EPA creates a remedial action plan and presents this plan for public comment. 40 C.F.R. § 300.430. After receiving public comment, EPA recognizes its final decision through entering the ROD in accordance with §

300.430(f)(5)(ii).

CERCLA also allows private parties responding to sites contaminated by hazardous materials to bring cost-recovery actions against four types of PRPs: current owners/operators of the facility, prior owners/operators of the facility, arrangers, and disposers. 42 U.S.C. § 9607(a)(1)-(4). For a private party seeking recovery under CERCLA from an owner/operator of the facility, the party must prove the following elements: : “(1) the site in question is a ‘facility’ as defined by CERCLA; (2) the defendant is a ‘responsible person’ for the spill as defined by CERCLA; (3) there was a release of hazardous substances; and (4) such release caused the Plaintiff to incur response costs.” *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 463 (7th Cir. 2012) (quoting *Envtl. Transp. Sys., Inc. v. Ensco, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992)). The party seeking recovery must also prove that the costs incurred were “necessary costs of response . . . consistent with the NCP.” 42 U.S.C. § 9607(a)(4)(B).

B. Statement of Facts

Centerburg and Fartown are both in the State of New Union, with Fartown sitting two miles south of Centerburg. R. at 5. Both towns use water from the Sandstone Aquifer, which flows southerly from Centerburg to Fartown. *Id.*

Over twenty years ago, BELCO operated a factory in Centerburg where they manufactured a sealant to prevent corrosion called LockSeal, which contains NAS-T. *Id.* at 5-6. In 1995 EPA adopted a Health Advisory Level (“HAL”) for NAS-T in drinking water for 10 parts per billion (“ppb”) after studies showed NAS-T to be a probable carcinogen. At 10 ppb, NAS-T is non-toxic to humans. *Id.* at 6. This standard takes into consideration a large margin of error in order to ensure the water is non-toxic to humans. *Id.*

In 2013, after Centerburgers complained that their water smelled “sour” or “off,” the Centerburg County Department of Health (“DOH”) tested the public water supply and found that the water contained between 45 and 60 ppb of NAS-T. *Id.* DOH informed Centerburgers to stop drinking the water and turned the investigation over to EPA. *Id.* With EPA oversight, BELCO agreed to complete a remedial investigation and feasibility study (“RI/FS”). *Id.* at 6-7. Through the RI/FS process, BELCO investigated the cause and extent of the NAS-T contamination, assessed risk to both human health and the environment, and agreed to evaluate proposed cleanup remedies for the Site. *Id.* at 6.

BELCO determined that the source of the NAS-T contamination was from an unlined lagoon used to store wastewater and stormwater in the 1980s and 1990s. *Id.* Through this lagoon, NAS-T entered the soil and migrated into the groundwater—creating a plume of NAS-T in the Sandstone Aquifer. *Id.* BELCO’s multi-year investigation regarding the extent of the plume showed no detectable levels of NAS-T from monitoring wells only half a mile north of Fartown. *Id.* at 7. The RI/FS recommended excavation of the soils at the Site, and implementation of filtration of Centerburg’s CWS. *Id.*

The BELCO Action

On June 30, 2017, EPA brought a cost recovery action against BELCO (Case No. 17-CV-1234; the “BELCO Action”). *Id.* BELCO and EPA immediately entered into and filed a Consent Decree (“CD”) in which BELCO agreed to design and implement the remedy selected by EPA in the ROD. *Id.* The United States District Court for the District of New Union took public comment and determined the CD to be fair and reasonable; the court approved the CD On August 28, 2018, the court approved the CD. *Id.* No citizens of Fartown or Centerburg objected to the RI/FS, the Proposed Plan or the entry of the CD. *Id.* The CD required that EPA issue

BELCO a Certificate of Completion (the “COC”) upon completion of the clean-up. *Id.* The CD prohibits EPA from ordering BELCO to further remediate the Site unless they reopen the CD. *Id.*

The CD allows for EPA to reopen it if:

- 1) Where new information not previously available or known to EPA is revealed, showing that the clean-up plan does not satisfy.
- 2) Where new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.

CD, § 13.3. The CD defines “Regulatory Standards” as “applicable or relevant and appropriate requirements under CERCLA (‘ARARs’).” CD, § 1.12; R. at 7.

BELCO followed all remedial efforts outlined in the CD; which included monthly sampling of the monitoring wells installed during the remedial investigation. R. at 7. BELCO completed soil excavation in 2017 and installed CleanStripping water filtration in Centerburg’s public water well, which is still operational. *Id.* at 8. EPA issued the COC to BELCO in 2018, after BELCO had collected monthly samples of the monitoring wells and identified only two individual detections of low NAS-T levels (5 and 6 ppb) occurring in the wells nearest Fartown. *Id.*

Reopening the CD

After the investigation and entry of the CD, Fartownians submitted sworn testimony that the water from their private wells occasionally smelled “off.” *Id.* In February 2019, DOH tested five private drinking wells but did not detect NAS-T. *Id.* Because of the extensive monitoring by BELCO and the lack of results from DOH tests, EPA declined to require BELCO to conduct further testing in Fartown. *Id.* In December 2019, 100 Fartownians formed FAWS and retained a private laboratory (Central Labs) to test their wells. *Id.* Of the 225 wells tested, only 51 wells had NAS-T concentrations of 1 to 4 ppb, and only 54 had NAS-T concentrations between 5 to 8 ppb. *Id.* The remaining 120 samples showed zero NAS-T detection. *Id.* None of the wells tested by

BELCO, DOH, or Central Labs showed any detection of unhealthy NAS-T concentrations above the HAL of 10 ppb. *Id.* Unsatisfied with these results, FAWS asked EPA to reopen the CD in May 2020. *Id.* In declining to reopen the CD, EPA cited the low, non-hazardous levels of NAS-T found by BELCO and DOH as well as the limited reopener provisions in the CD. *Id.*

In 2020, the citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution (“ERA”), which reads:

Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans.

N.U. CONST. art. I, § 7. R. at 8.

In March 2021, EPA re-opened the CD citing FAWS’ private laboratory testing and finding that the ERA was a change in the Regulatory Standards under the CD. *Id.* at 9. BELCO argued that the response action was inconsistent with CERCLA because EPA did not have the ability to reopen the CD since the ERA could not constitute an ARAR. *Id.* EPA did not heed to BELCO’s objections, issuing a Unilateral Administrative Order (“UAO”) directing BELCO to conduct proper response actions. *Id.* FAWS requested that EPA order BELCO to install CleanStripping at all residential wells that test positive for NAS-T or take further remedial actions to remove NAS-T from the water source. *Id.* EPA declined, citing the fact that no wells had tested above the HAL for NAS-T. *Id.*

After BELCO refused to comply with the UAO, EPA began supplying water to Fartownians whose wells exceeded 5 ppb of NAS-T and began monitoring the wells with monthly sampling. *Id.* at 10. This sampling has not revealed any unhealthy NAS-T levels. *Id.* On August 2, 2021, EPA made a motion seeking to recover its costs incurred in Fartown and for penalties for BELCO’s violation of the UAO. *Id.* BELCO’s answer argues that EPA did not have

the right to reopen the Consent Decree because the ERA cannot be properly considered an ARAR; thus, the UAO was without legal foundation. *Id.* The district court then granted FAWS' motion to intervene in the BELCO Action to assert a claim against EPA. *Id.* FAWS challenged the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). *Id.*

The FAWS Action

On August 30, 2021, FAWS and filed an action against BELCO in the United States District Court for the District of New Union (the "FAWS Action"; Dkt 21-CV-1776). *Id.* In relation to the \$21,500 that FAWS spent on testing and analysis, the complaint raised a cause of action for a CERCLA cost recovery claim against BELCO. *Id.* FAWS asked the district court to order BELCO to: "(1) pay its response costs; (2) install CleanStripping on their private wells that test positive for NAS-T; (3) remediate the Sandstone Aquifer; (4) pay them damages for the loss of use and enjoyment of their property and diminished property values; and (5) pay punitive damages." *Id.*

The district court exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331. *Id.* The court also exercised supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. *Id.*

C. Proceedings Below

Upon the parties' joint request, the district court consolidated the BELCO Action and FAWS Action. *Id.* All three parties moved and cross-moved for summary judgment on the CERCLA claims. *Id.* at 11. Opposed by both BELCO and EPA, FAWS also moved to dismiss any state law claims without prejudice "should the CERCLA claims be resolved by motion." *Id.*

The district court denied FAWS' motion to dismiss the state law claims and retained jurisdiction of the claims. *Id.*

On June 1, 2022, the United States District Court for the District of New Union issued an Order in 17-CV-1234 and 21-CV-1776 (consolidated cases) ruling on all four issues presented *supra*. *Id.* at 4-19. First, the district court held that FAWs' costs are not "necessary" CERCLA response costs, and thus are not reimbursable under the statute. *Id.* at 12-13. Second, the district court held that the ERA constitutes an ARAR and thus EPA had the authority to reopen the CD based on new Regulatory Standards. *Id.* at 15. Third, the district court held that EPA's interpretation of the ERA was contrary to law because the ERA contradicts EPA's determination that installation of CleanStripping technology on Fartown's wells is not required under the state ARAR. *Id.* at 17. Fourth, the district court chose to continue to exercise supplemental jurisdiction over the remaining state law claims. *Id.* at 18.

Following the issuance of the Order, BELCO, EPA and FAWS each sought leave to file an interlocutory appeal from different parts of the district court's order. *Id.* at 2. This Court granted leave to appeal based on the resolution of the federal law claims under CERCLA and jurisdictional issues surrounding the district court's decision to retain jurisdiction of the state law claims. *Id.*

SUMMARY OF THE ARGUMENT

The district court did not err in determining that BELCO was not liable for the costs incurred by FAWS in retaining Central Labs to sample and test 75 Fartown wells. CERCLA 107(a)(4)(B) requires a plaintiff seeking cost recovery to prove that the costs incurred were “any . . . necessary costs of response incurred . . . consistent with the [NCP].” *Young v. United States*, 394 F.3d 858, 863-64 (10th Cir. 2005); 42 U.S.C. § 9607(a)(4)(B). FAWS fails to prove that the costs incurred in of sampling and testing private Fartown wells were either “necessary cost[s] of response” or “consistent with the NCP.” For these reasons, FAWS is not entitled to recover any costs from BELCO.

The district court erred when it upheld EPA’s determination that the ERA constitutes an ARAR. Under 42 U.S.C. § 9621(d), a state environmental standard constitutes an ARAR 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.*, 949 F.2d 1409, 1440 (6th Cir. 1991). The ERA’s vagueness renders it improperly promulgated, it is not “applicable or relevant” to the already regulated contaminant, and it was not timely identified as a potential ARAR. Because the ERA does not constitute an ARAR, it was not proper for EPA to justify reopening the Consent Decree based on the ERA, and not proper for EPA to order further remedial action in the UAO. While ensuring citizens have a “clean” and “healthful” environment is an important mission, New Union must enact further legislative or regulatory action to affirmatively define what “clean” and “healthful” actually mean.

The district court erred when it vacated EPA’s determination to not require BELCO to install a filtration system in Fartown’s private wells despite the existence of an Environmental Rights Amendment for being arbitrary, capricious, or contrary to law. Arbitrary and capricious review is narrow, and a reviewing court must uphold an agency decision that is based on

reasoned decision-making. Under this standard, the district court's claim that the determination was arbitrary and capricious was meritless. The final decision was based in substantial evidence, sufficient facts, and adequate reason and judgment. The district court arriving at a contrary conclusion does not purport a capricious determination of the agency.

The district court correctly retained jurisdiction over the FAWS' remaining state law tort claims after resolving the federal claims. This Court should retain jurisdiction over the FAWS' state law tort claim because the claims are so substantially related to rise to the level of same controversy while also arising from a common nucleus of operative fact. Additionally, potential remedies would be inconsistent with EPA's prior remedial determinations. There is no need to dismiss the remaining pendent state law claims because nuisance and negligence are not novel or complex state law tort claims. Finally, this Court retaining jurisdiction is consistent with judicial economy, convenience, and fairness.

STANDARD OF REVIEW

This case concerns the district court's grant of summary judgment, which is a question of law. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. § 56(c). Questions of law are reviewed de novo by this Court. *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 961 (2018). This Court should afford no deference to the opinion and conclusions of the district court. *Turner v. Comm'r of Soc. Sec.*, 860 F. App'x 681, 683 (11th Cir. 2021).

ARGUMENT

I. The district court did not err when it determined that costs incurred by FAWS in sampling and testing private Fartown drinking water wells are not reimbursable as response costs under CERCLA.

In order for a plaintiff to monetarily recover from a PRP, the plaintiff bears the burden of proving that “any . . . necessary costs of response incurred . . . [were] consistent with the [NCP].”

Young v. United States, 394 F.3d 858, 863-64 (10th Cir. 2005); 42 U.S.C. § 9607(a)(4)(B); *see United States v. Hardage*, 982 F.2d 1436, 1447(10th Cir. 1992). For FAWS, a private party, to succeed in recovering costs from BELCO, FAWS must show that the costs incurred were both: 1) necessary costs of response and 2) consistent with the NCP. 42 U.S.C. § 9607(a)(4)(B).

Because FAWS cannot prove that the costs incurred meet any of these elements, FAWS is ineligible for cost recovery under CERCLA § 107(a)(4)(B). 42 U.S.C. § 9607(a)(4)(B).

A. The costs incurred by FAWS in retaining Central Labs to sample and test private wells were not in response to an actual threat to human health or the environment.

The \$21,500 incurred by FAWS in retaining Central Labs to sample 75 private Fartown wells was not a “necessary cost of response,” and, therefore, is not recoverable under CERCLA. Though not defined within CERCLA or its legislative history, the question of whether a cost incurred by a private party is a “necessary cost of response” has been litigated extensively. *See e.g. Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996) (holding that government-incurred costs of monitoring and oversight are necessary for remediation actions taken by private parties); *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (holding that PRPs who incur necessary costs of response can recover from over other PRPs); *Carson Harbor Vill., Ltd. v. Cty. of L.A.*, 433 F.3d 1260 (9th Cir. 2006); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004). Across circuits, federal courts have generally held that costs incurred by a private party are “necessary” if incurred in response to an actual threat to human

health or the environment. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (“[t]o be necessary under CERCLA [plaintiff] must establish that an actual and real threat exists prior to initiating a response action; [w]here the conditions at a site do not pose any plausible threat to the environment, the response cannot be deemed necessary, and recovery must be denied” (quoting *Yellow Freight Systems, Inc. v. ACF Industries, Inc.*, 909 F. Supp. 1290 (E.D.Mich. 1995)); see also *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). As held by the court in *Carson Harbor II*, a party can only recover costs associated with cleaning up or otherwise addressing the threat to human health or the environment. *Carson Harbor II*, 270 F.3d at 872.

In the case at hand, all results from BELCO and DOH testing showed that NAS-T levels in and near Fartown were far below the levels EPA deems harmful to human health. According to EPA, human exposure to NAS-T is non-toxic up to 10 ppb. R. at 6. Even though NAS-T can produce a “sour or stale smell” in concentrations as low as 5 ppm, the 10 ppm HAL set by EPA in 1995 “incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans.” R. at 6. As stipulated by the CD, BELCO completed monthly sampling of all monitoring wells. R. at 7. Between the installation of the wells nearest Fartown in January 2017 and EPA’s issuance of the COC in September 2018, low levels of NAS-T were only detected in the wells nearest Fartown in two individual samples—5 ppb and 6 ppb respectively. R. at 8. All other samples taken from the monitoring wells nearest Fartown showed no detection of NAS-T. R. at 7. In accordance with BELCO’s findings, the February 2019 testing completed by DOH of five Fartown wells also showed no detection of NAS-T. R. at 8.

Because all testing by BELCO and DOH showed NAS-T levels under HAL of 10 ppb, no actual threat to human health or the environment existed from the low levels of NAS-T in

Fartown wells. Because FAWS did not incur the \$21,500 cost of retaining Central Labs in response to an actual threat to human health or the environment, this cost was not a necessary cost of response. Therefore, FAWS is unable to recover the \$21,500 cost from BELCO.

B. Testing and sampling private Fartown wells were duplicative of action taken by EPA in remedial investigation.

Courts have also determined that a private party's response cost is not "necessary" if the cost goes toward an action that is duplicative of action taken by EPA or state agency. *See United States v. Iron Mt. Mines*, 987 F. Supp. 1263, 1271 (E.D. Cal. 1997); *City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Tr.*, 306 F. Supp. 2d 1040, 1092 (D. Kan. 2003) (courts will deny recovery when costs incurred are duplicative of other costs, wasteful, or unnecessary for addressing the specific release and hazardous material). A party's actions are duplicative of EPA when the action, taken without EPA authorization, occurs after EPA has already initiated a remedial investigation. *La. Pac. Corp. v. Beazer Materials & Servs.*, 811 F. Supp. 1421, 1422 (E.D. Cal. 1993).

In the present case, the monitoring wells and remedial efforts implemented by BELCO per the ROD and CD represent action taken by EPA to remediate NAS-T release in Sandstone Aquifer R. at 7. Remedial investigation and action were undertaken by BELCO in completing the RI/FS with oversight from EPA. As part of the RI/FS and compliance with the CD, BELCO installed monitoring wells and sampled each well monthly. R. at 7. EPA believed that the monitoring wells sufficiently reached the end of the NAS-T groundwater plume and did not direct BELCO to add more wells. R. at 7. Because EPA had engaged in remedial investigation and action, and FAWS did not receive EPA authorization to retain Central Labs for sampling and testing of Fartown wells, FAWS' actions were duplicative of EPA actions. Therefore, the \$21,500 incurred by FAWS in retaining Central Labs was not a "necessary cost of response"

under CERCLA § § 107(a)(4)(B). 42 U.S.C. § 9607(a)(4)(B).

C. The costs incurred by FAWS were inconsistent with the NCP.

Beyond failing to satisfy the requirements of “necessary cost of response,” FAWS is also unable to recover from BELCO because the costs incurred were not consistent with the NCP. EPA created the NCP “to establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants,” in accordance with CERCLA and Clean Water Act authority. 42 U.S.C. § 9605; 40 C.F.R. § 300.1, 40 C.F.R. § 300.3. CERCLA § 107(a)(4)(B) provides that a private party’s action must be consistent with the NCP to recover incurred costs from another party. 42 U.S.C. § 9607(a)(4)(B); *see e.g. Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 100 F.3d 792, 796 (10th Cir. 1996); *Young v. United States*, 394 F.3d 858 (10th Cir. 2005); *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1003 (9th Cir. 2010); *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 703-704 (6th Cir. 2006).

For a private party’s cost to be consistent with the NCP, 40 C.F.R. § 300.700(c)(i) explains that the action, “when evaluated as a whole,” must be “in substantial compliance with the applicable requirements in [40 C.F.R. § 300.700(c)(5)-(6)], and [result] in a CERCLA-quality cleanup.” 40 C.F.R. § 300.700(c)(i); *see Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827, 845-46 (3d Cir. 1995); *Bedford Affiliates v. Sills*, 156 F.3d 416, 427-28 (2d Cir. 1998). The provisions set out in § 300.700(c)(5)-(6) require a private party to provide a meaningful opportunity for public comment and “comply with all rules for worker health and safety; documentation and cost recovery requirements; identification of needs for the response, removal, or remedial site evaluations; selection of remedies; and operation and maintenance.” *August Mack Env'tl., Inc. v. United States EPA*, 841 F. App'x 517, 523 (4th Cir. 2021); *see* 40 C.F.R. §

300.700(c)(5), (6); *Outlet City, Inc. v. W. Chem. Prods., Inc.*, 60 F. App'x 922, 927 (3d Cir. 2003). Within § 300.700(c)(4), EPA clarifies that a PRP cannot evade liability for response costs because of a private party's "immaterial or insubstantial deviations" from the NCP requirements. 40 C.F.R. § 300.700(c)(4); *August Mack Env'tl., Inc. v. United States EPA*, 841 F. App'x 517, 523 (4th Cir. 2021); *Wilson Rd. Dev. Corp. v. Fronabarger Concreters*, 209 F. Supp. 3d 1093, 1116-1119 (E.D. Mo. 2016).

Regarding "substantial compliance" with the NCP, courts have held that failure to provide public notice or meaningful opportunity for public comment represents inconsistency with the NCP—barring the ability for a private party's recovery of response costs. *See Cty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1514 (10th Cir. 1991) (holding that absence of public comment bars plaintiff's recovery of costs incurred due to inconsistency with NCP); *Pub. Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999); *Union Pac. R.R. v. Reilly Indus.*, 215 F.3d 830, 835-36 (8th Cir. 2000); *Bedford Affiliates v. Sills*, 156 F.3d 416, 427-28 (2d Cir. 1998); *Norfolk S. Ry. v. Gee Co.*, 158 F. Supp. 2d 878, 883 (N.D. Ill. 2001). Though not mandated in the regulations, "private parties undertaking response actions *should* provide an opportunity for public comment concerning the selection of the response action." 40 C.F.R. § 300.700 (emphasis added.).

§ 300.700(c)(6)(iii), (iv) direct private parties to § 300.430, which sets out two main components of public participation. 40 C.F.R. § 300.430(c)(2), (f)(3). First, from subsections (c)(i), (ii), the private party undertaking response action "shall . . . to the extent practicable" interview parties affected by, or interested in, the hazardous situation, as well as provide opportunity for local officials and community members to voice their concerns. *Id.* Along these lines, the private party must also provide the public with access to information regarding site

remediation and prepare a plan for formal community relations, further opportunity for public involvement. *Id.* Second, the private party is instructed by the NCP to provide notice of the chosen remediation plan and provide opportunity for public comment. *Id.* at (f)(3).

In the case at hand, FAWS consists of 100 Fartown citizens. R. at 8. Apart from mentioning that “some Fartownians. . . submitted sworn testimony that they noticed the water from their private wells began to occasionally smell ‘off’ since at least 2016,” the record provides no indication of FAWS providing an opportunity for public comment via town hall or any other mechanism for public gathering. The record also does not indicate whether FAWS provided public notice its chosen action before deciding to spend \$21,500 on retaining Central Labs to sample and test the Fartown wells. R. at 6-8. Because there is no record of FAWS providing an opportunity for meaningful public comment, FAWS actions did not substantially comply with 40 C.F.R. § 300.700(c)(6). FAWS did not substantially comply with the NCP public comment provisions regarding retaining Central Labs, and therefore, FAWS’ actions were not in compliance with the NCP.

Because the \$21,500 cost incurred by FAWS in retaining Central Labs to sample and test 75 private Fartown wells was not neither a “necessary cost of response” nor “consistent with the NCP,” this Court should affirm the district court’s holding that FAWS cannot recover BELCO under CERCLA § 107(a)(4)(B). 42 U.S.C. § 9607.

II. The district court erred when it upheld EPA’s determination that the ERA constitutes an ARAR because the ERA’s vagueness renders it legally unenforceable, the ERA is not “applicable or relevant” to the already regulated contaminant, and was not timely identified as a potential ARAR.

EPA may reopen the Consent Decree if “new, more stringent Regulatory Standards are established that the clean-up plan does not satisfy.” CD, § 13.3. The Consent Decree’s definition of “Regulatory Standards” includes “applicable or relevant and appropriate requirements under

CERCLA ('ARARs')". CD, § 1.12. Under 42 U.S.C. § 9621(d), a state environmental standard constitutes an ARAR 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.*, 949 F.2d 1409, 1440 (6th Cir. 1991).

A. The ERA is not properly promulgated because its vagueness and lack of a quantifiable standard renders it legally unenforceable.

The ERA is not properly promulgated because its vagueness and lack of quantifiable standard inhibits ordinary people from understanding what conduct is prohibited. EPA defines "promulgated" as "laws imposed by State legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable. EPA Superfund Program; Interim Guidance on Compliance with Other ARARs; Notice of Guidance, 52 Fed. Reg. 32496 (Aug. 27, 1987) [hereinafter *Interim Guidance*]. A standard is vague and therefore legally unenforceable if it is not drafted "with sufficient definiteness that ordinary people can understand what conduct is prohibited..." *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1440 (6th Cir. 1991) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

The legislative history of the ERA demonstrates that even legislators were unsure of what conduct would be prohibited under the act. S.J. Res. A02137, NU Assemb. No. A10377, Environmental Rights Amendment Assembly at 4, 6 (2019). Legislators raised concern regarding what the ERA means for businesses, especially given that the ERA includes harms not presently known. *Id.* at 6. GMOs, pesticides on agricultural products, landfills, and trains could all fall under prohibited activities under the ERA. *Id.* at 5. The standardless ERA leaves these valuable industries at risk of prohibition and puts New Union's larger economy at great risk.

Ordinary people cannot understand what conduct is prohibited because the ERA fails to provide a quantifiable standard for determining what conduct is prohibited. The legislature

introduced two contradicting definitions of “clean” and “healthful” accompanied by contradicting ways to determine which conduct is prohibited under the act. First, proponents of the ERA stated that substances in water should be objectively perceived as “clean.” *Id.* They define “clean” as “healthful” and define “healthful” as “it will do no harm to consume the water.” *Id.* This definition queues up an objective approach to gauging what is “clean” and “healthful” but fails to establish quantifiable standards that could be applied.

The same proponents also conversely indicate that activities will be regulated in accordance with what citizens subjectively view as “harming people in the community....” and that “[e]ven odors could be an issue if sufficiently offensive and if they impact what the community would consider ‘clean’ air.” *Id.* at 5-6. This subjective approach based on the “expectation of their citizens” directly contradicts the proponents’ earlier statements regarding applying an objective approach to potential violations of the ERA. *Id.* at 5. By introducing both an objective and subjective mode of analyzing whether an action violates the ERA, the legislator contributes to the vagueness in guessing which activities would be allowed under the act.

Given the self-executing nature of the ERA, it is concerning that even the legislature could not come up with a consistent method of determination under the “simple” language of the ERA. Proponents for the act touted that it is “simple, it is not complicated, there are no curve balls. It is what it says.” *Id.* at 3. However, the simple, vague nature of the act in tandem with its self-executing nature stratifies this case from one of the leading cases regarding enforceable state ARAR’s. In *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1443 (6th Cir. 1991), the court held that Michigan’s Water Resources Commission Act (“WRCA”) constituted an enforceable state ARAR. The WRCA generally prohibits one from being able to “directly or indirectly to discharge into the waters of the state any substance which is or may become

injurious to the public health, safety, or welfare.” *Id.* at 1443. However, the court upheld the standard as not constitutionally vague because the WRCA “expressly requires the Water Resources Commission to ‘establish pollution standards for lakes, rivers, streams, and other waters of the state.’” *Id.* at 1441. While the WRCA requires further standards to be established by a regulating body, the ERA does not. The simplicity of the ERA thus invalidates its ability to qualify as an ARAR. Without an accompanying body of law designated to set quantifiable standards, the ERA is not “sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited” and therefore renders the ERA legally unenforceable. *Id.* (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). Not only does the ERA’s vagueness render it legally unenforceable, but it also is not relevant or appropriate to BELCO, NAS-T, and the established remedial efforts.

B. The ERA is not “relevant or appropriate” because EPA is already regulating NAS-T and protecting the people from potential hazards related to the CERCLA site.

Since EPA is already regulating NAS-T, the ERA is not “relevant or appropriate” because it does not “address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site.” *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F3d 534, 544 (6th Cir. 2001).

The ERA is well-suited and intended to act in a gap-filling role to cover new, unregulated contaminants. R. at 15. However, NAS-T is not a new, unregulated contaminant. EPA is already regulating NAS-T and its potential negative effects on the environment and human health. While the ERA may serve a valuable purpose in covering currently unregulated contaminants, it is inapplicable to the BELCO site because no gap-filling is needed regarding the regulation of NAS-T.

The Senate Report also explained that the Amendment is necessary in situations where

current regulations are insufficient in protecting the people from “unclean” and “unhealthful” air and water. Senate Report, p. 1. However, EPA’s CD already established regulations requiring that BELCO mitigate high, unhealthful levels of NAS-T by installing CleanStripping and completing soil excavation. R. at 7. There is nothing in the record to demonstrate that high, dangerous levels of NAS-T have been discovered after the remedial efforts occurred. Further, EPA’s refusal to require BELCO to install CleanStripping or take other remedial actions demonstrates that EPA did not reopen the CD because of danger to human health. R. at 9. Therefore, the CD is still completing its objective of providing clean, healthful water to the people. The ERA is not “relevant or appropriate” to the CERCLA site because the remedial measures are already sufficient in protecting the people’s right to “clean” water and a “healthful” environment.

The CD also acts as a prospective regulation against future dangers to human health by allowing EPA to reopen the CD “[w]here 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.” CD, § 13.3. The ERA is not needed to act as a gap filling role in protecting citizens from any future dangers to human health. The ERA fails the third element of an ARAR by failing to be “relevant and appropriate” because it doesn’t address problems similar to the BELCO Site. However, even if this Court determines that the ERA is a potential ARAR, the ERA cannot be a state ARAR because it was not timely identified as a potential ARAR.

C. The ERA was not timely identified as a potential ARAR because it did not exist during the remedial process.

The ERA could not be timely identified as a potential ARAR because it did not exist during the remedial process. “States are required by CERCLA to identify State ARARs ‘in a timely manner,’ that is, in sufficient time to avoid inordinate delay or duplication of effort in the

remedial process.” *Interim Guidance*.

The ERA was not identified as an ARAR in the RI/FS Report. It was not identified as an ARAR in the 2017 Record of Decision, or in the 2017 Consent Decree, or in the 2018 Certificate of Completion. In fact, the ERA did not even exist until two years after EPA issued the COC to BELCO for successfully completing remedial efforts. R. at 8-9. This did not provide BELCO with an opportunity—let alone sufficient time—to avoid duplication of effort in the remedial process. Therefore, the ERA cannot constitute an ARAR because it was not timely identified as a potential ARAR. The ERA’s failure to meet the elements of a proper state ARAR, in addition to EPA’s inconsistent pronouncements, demonstrates that EPA is not entitled to deference regarding its interpretation of whether the ERA constitutes an ARAR.

D. EPA is not entitled to deference because its interpretation of whether the ERA constitutes an ARAR is not persuasive.

EPA’s interpretation of whether the ERA constitutes an ARAR is not persuasive. EPA’s interpretation of whether the state environmental standard constitutes an ARAR must be given deference “according to its persuasiveness.” *See United States v. Mead Corp.*, 533 U.S. 218, 221 (2001). The persuasiveness of the interpretation rests “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 219. EPA originally declined to compel BELCO to conduct further testing based on the DOH’s February 2019 testing which did not detect NAS-T in the tested wells. R at 8. EPA once again refused to reopen the CD after FAWS’ private testing conducted by Central Labs only found low, unarmful levels of NAS-T in around half of the private wells tested. R at 8. EPA then reopened the CD based on the same testing and “the possible endangerment including potential carcinogenic effects, and the presence of odors from NAS-T.” R at 9. However, EPA refused to

require BELCO to install CleanStripping at the residential wells that had tested positive for NAS-T, citing the fact that both the FAWs testing and EPA's testing found no wells that contained above the HAL for NAS-T. R at 9. This directly contradicts EPA's statements that they reopened the CD because of possible endangerment. This is inconsistent with EPA's earlier and later pronouncements and undermines the validity in EPA's decision to reopen the CD. Therefore, EPA's decision to reopen the CD is not persuasive and should therefore be given limited deference.

III. The district court erred when it vacated EPA's determination that BELCO was not required to install filtration systems on Fartown's private wells despite the decision being based in substantial evidence which led to a reasonable conclusion based on the administrative record.

The district court erred when it vacated EPA's determination that BELCO was not required to install filtration systems on Fartown's private wells because the decision was based in substantial evidence and lead to a reasonable conclusion. The scope of review courts utilize when reviewing challenges to agency decisions is arbitrary, capricious, or contrary to law and the court is not to substitute its judgment for that of an agency. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA arrived at the conclusion regarding BELCO's obligation as a result of substantial evidence founded through adequate investigation and testing. EPA's findings demonstrated sufficient facts to support the ultimate decision to not require BELCO to install filtration systems on Fartown's private wells. *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991). The court cannot reasonably find the agency's decision as arbitrary because the findings were based in reason and judgment. *Bd. of Supervisors v. Razz Halili Tr.*, 320 So. 3d 490, 495 (Miss. 2021). Finally, despite the court arriving at an alternate conclusion, EPA's decision cannot be set aside because it was not grossly erroneous as to imply bath faith. *Friends of the Everglades v. S. Fla. Water*

Mgmt. Dist., 570 F.3d 1210, 1228 (11th Cir. 2009).

A. The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency.

“The scope of review under the ‘arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of an agency.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court may set aside an agency action if the court determines that the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 362 (2018). EPA’s findings were not an abuse of discretion based on their research and monitoring conducted which determined an ‘acceptable’ level of ppb of NAS-T was 5ppb, which none of the private wells in Fartown exhibited. R. at 8. Although the residents of Fartown contend that there was a noticeable ‘sour smell’, after extensive monitoring and testing by EPA, there were no findings to support these claims. R. at 9. EPA followed its applicable procedures to test for water contaminants and did not find evidence to support the claims of the Fartown’s residents, therefore their determination not to require BELCO to install filtration systems for the private wells was supported and in accordance with the law and practices of the agency. R. at 9. Furthermore, EPA’s determination was supported by substantial evidence.

B. The determination made by EPA is based on substantial evidence, despite the court coming to a contrary final decision.

EPA’s decision to not require BELCO to install a filtration system in Fartown’s private wells is based in substantial evidence. “Under the substantial evidence test, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s decision from being supported by substantial evidence.” *330 Concord St. Neighborhood Ass’n v.*

Campsen, 424 S.E.2d 538, 540 (Ct. App. 1992). The substantial evidence test demonstrates that a reasonable mind could accept a conclusion as adequate to support a valid determination.

Radebaugh v. State, 397 P.3d 285, 287 (Alaska 2017). Under EPA's oversight, BELCO proceeded to investigate the extent of the plume and whether there were any detectable traces of NAS-T found in the wells in question. R. at 7. BELCO installed three lines of monitoring wells, when sampled, these wells showed no detectable amounts of NAS-T. R. at 7. Consequently, a reasonable mind could conclude there is sufficient evidence to support the valid conclusion that a filtration system is not necessary for the private wells in question. Equally important, EPA'S ultimate decision demonstrated sufficient facts to arrive at the final conclusion.

C. EPA's decision cannot be reasonably considered arbitrary because their findings were sufficiently based in reason and judgment.

EPA's findings demonstrated sufficient facts to support the ultimate decision to not require BELCO to install a filtration system on Fartown's private wells. "An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991). Testimony from FAWS stated that the private wells began exhibiting signs of NAS-T, but upon investigation, the DOH tested the well water and found no traces of the contaminant. R. at 7. Therefore, EPA determined that BELCO was not required to install filtration systems on these wells. In 2019, FAWS retained Central Labs to test their wells, resulting in all wells being below the requisite level that is considered a danger to human life. R. at 8. Only wells that had concentrations exceeding 10 ppb, required the installation of CleanStripping filtration system. R. at 7. To be admissible as scientific knowledge under Fed. R. Evid. 702, expert opinion testimony must be derived by the scientific method and "supported by appropriate validation." *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d

295, 310 (D. Vt. 2007). BELCO sufficiently presented enough findings of fact and conclusions of law to make an adequate agency decision based on substantiated scientific research and monitoring.

EPA's decision cannot reasonably be considered arbitrary because the findings were based in reason and judgment. An arbitrary decision is defined as an act that is "not done in accordance to reason or judgment but depending on the will of the agency alone." *Bd. of Supervisors v. Razz Halili Tr.*, 320 So. 3d 490, 495 (Miss. 2021). Capricious is defined as "act done without reason in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Burks v. Amite Cnty. Sch. Dist.*, 708 So. 2d 1366, 1370 (Miss. 1998). EPA clearly demonstrated their findings were based on reason and judgment. Sufficient testing was conducted and revealed both the absence of contaminants and any traceable contaminants falling short of the 10 ppb which is considered a hazard for human consumption. R. at 8. EPA's decision was sufficiently based in reason and judgment that adhered to the standards set out by the agency to protect the health and safety of the population of Fartown.

An example, in *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, the court utilized a hypothetical to demonstrate how multiple interpretations can be found reasonable, and the court cannot say that one interpretation is arbitrary and capricious because it interpreted a conclusion differently than the agency. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009). "A court cannot substitute its judgment of what might be a better regulatory scheme, or overturn a regulation because it disagrees with it, if the Agency's reasons for adopting it were not arbitrary and capricious." *All. Against IFQS v. Brown*, 84 F.3d 343, 344 (9th Cir. 1996). The hypothetical was considering the issue: "[t]wo buckets sit side by side, one

with four marbles, and one with none. A person puts two marbles from the first bucket into the second bucket. Has the marble mover ‘added any marbles to buckets?’” *Friends of the Everglades*, 570 F.3d at 1228. One may argue that there are now marbles in a bucket where there were previously none, so an addition occurred. *Id.* Another may argue that there are still only four marbles, so no addition had occurred. *Id.* Whatever position one comes to, doesn’t make the other side’s argument unreasonable. *Id.*

D. EPA’s decision was not founded in bad faith nor so grossly erroneous to constitute being set aside for being arbitrary, capricious or contrary to law.

Although the district court came to an alternate conclusion based on EPA’s findings, it does not inherently mean that EPA’s findings were capricious. An agency’s decision shall be final and conclusive and not set aside unless the decision is arbitrary and capricious, or so grossly erroneous as to necessarily imply bad faith and not supported by substantial evidence. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665 (Fed. Cir. 1992). The ERA in New Union states that “each and every person of this state shall have a fundamental right to clean air and clean water and to a healthful environment free of contaminants and pollutants caused by humans”. EPA contends that the ERA does not specifically define “clean” or “healthful” and does not provide any “measurable standard of this”, and therefore EPA’s findings that the minute contamination does not rise to the level of hazardous is based in scientific findings and good faith. EPA has determined that the drinking water of the private wells in Fartown constitutes “clean water” under their interpretation, which allows for a level of contamination that does not rise to a level of hazard determined by scientific research and findings. R. at 7. EPA reasons that requiring water entirely free of any contaminants would result in invalidating countless permits under the Clean Air Act, 33 U.S.C. § 1251 and Clean Water Act, 42 U.S.C. § 7401, which allow “safe” levels of contamination. The district court's contrary determination does not disqualify

EPA's determination, and cannot deem their findings and arbitrary and capricious, and contrary to law because the conclusion was sufficiently based in reason, judgment and supported by the necessary facts and conclusions.

IV. This Court should retain jurisdiction over FAWS' remaining state law tort claim because the claims are so related to warrant supplemental jurisdiction.

The district court correctly retained jurisdiction over the FAWS' remaining state law tort claims after resolving the federal claims. This Court should retain jurisdiction over the FAWS' state law tort claim because the claims are so substantially related to rise to the level of same controversy and also arising from a common nucleus of operative fact. Additionally, potential remedies would be inconsistent with EPA's prior remedial determinations. There is no need to dismiss the remaining pendent state law claims because nuisance and negligence are not novel or complex state law tort claims. Finally, this Court retaining jurisdiction is consistent with judicial economy, convenience, and fairness.

A. All the claims in this case are so related to rise to the level of constituting the same controversy and arising from a common nucleus of operative facts.

The district court did not err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claim. This particular state law claim should remain in this Court because all the claims are so related that together, they form the controversy. A federal court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Although the remaining claims are state law issues, the claims are substantially related to all the other issues in this case. They are so intertwined and will affect the outcome of the other federal issues that they should

be decided together. Consistent with the claims being related, the dispute also arises out of a common nucleus of operative facts.

The district court should retain jurisdiction over the FAWS' remaining state law tort claim because all the disputes arise out of a common nucleus of operative fact. "In determining whether two disputes arise from a 'common nucleus of operative fact,' [courts] have traditionally asked whether 'the facts underlying the federal and state claims substantially overlapped. *Scott Brettschneider v. City of N.Y.*, No. 15-CV-4574-CBA-SJB, 2020 U.S. Dist. LEXIS 188647, at *36 (E.D.N.Y. Aug. 25, 2020). Both the present federal and state claims stem from the same set of facts. The state law claims regarding the damages are a result of the alleged CERCLA violations and are indistinguishable. Separating these claims implies a solely casual relationship, which is not present in this case. *Id.* Supplemental jurisdiction is warranted, and therefore this Court should retain jurisdiction and make the final determinations for all claims.

B. Potential remedies would be inconsistent with EPA's prior remediation determinations.

This Court should exercise supplemental jurisdiction over FAWS' remaining state law tort claim because potential remedies would be inconsistent with EPA's prior remedial determinations. This Court should, "apply standards developed under federal law, while attempting to avoid any inconsistencies with state law that would create procedural difficulties for practitioners." *Accounting Principals, Inc. v. Manpower, Inc.*, 599 F. Supp. 2d 1287, 1291 (N.D. Okla. 2008). FAWS has sought injunctive relief in connection with its tort claims, including compelling BELCO to remediate the aquifer. However, EPA has already determined the proper remedy, and BELCO has sought to comply with the remedial efforts established during the CD. FAW's new request for relief would be inconsistent with EPA's prior determination and would undermine EPA's monitoring of the site. Additionally, this Court has

continuing jurisdiction over the BELCO Action to enforce the CD. Maintaining the state law claims will avoid any inconsistencies that may result otherwise. Having inconsistent determinations would create further substantial issues and undermine a plethora of other EPA decisions.

C. There is no need to dismiss the remaining pendent state law tort claims because nuisance and negligence are not novel or complex state law tort claims.

There is no need to dismiss the remaining pendent state law claim because nuisance and negligence claims are not novel or complex state law claims. If federal-law claims are eliminated before trial, courts typically dismiss remaining pendant state law claims concerning “novel or complex” issues of state law. *See, eg., Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1152-53 (D.C. Fl. Jan. 6, 2020) (class action suit involving state environmental tort claims). Although the question of whether the ERA was properly identified as an ARAR is a novel state law claim, this question is irrelevant to the determination of damages arising from the nuisance and negligence claims. The crux of the relief rests upon instead lies upon the simple nuisance and negligence claims that are not complex or novel state law claims. Additionally, “generally, state tort claims are not considered novel or complex,” and this case is no different. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006).

D. Retaining jurisdiction is consistent with judicial economy, convenience and fairness.

The state tort claim adequately satisfies the factors considered when determining whether a federal court should retain jurisdiction over pendant state law claims. The factors to consider are “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)). Convenience indicates the need for retaining jurisdiction. The Eleventh Circuit has noted, “as far as the parties are concerned, it would be most convenient to try every claim in a

single forum.” *Sabal Constr. v. W. World Ins. Co.*, No. 2:20-cv-989-SPC-KCD, 2022 U.S. Dist. LEXIS 192517, at *3 (M.D. Fla. Oct. 21, 2022). It would be nonsensical to split these claims up between federal and state courts and cause an added strain on state courts needing to reconsider a previously established record.

The state law tort claim is consistent with judicial fairness, which warrants the exercise of supplemental jurisdiction. “Fairness considerations weigh in favor of exercising supplemental jurisdiction because the parties are at such a late stage of the litigation” *Alvarez v. City of Oxnard*, No. CV 19-8044 PSG (JCx), 2021 U.S. Dist. LEXIS 260396, at *10 (C.D. Cal. Dec. 1, 2021). As stated above in the ‘Statement of Facts’ section, litigation commenced in 2017 and has been ongoing resulting in a plethora of hearings and judicial determinations. This case brought before this Court is implicit of lengthy litigation. It would be unfair for all parties involved for this Court to require the process to start over for this claim alone.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court’s determination that costs incurred by FAWS are not reimbursable under CERCLA. This Court should also reverse the district court’s decision that the ERA constitutes an ARAR. Additionally, this Court should reverse the district court’s decision to vacate EPA’s determination on the grounds of it being arbitrary, capricious, or contrary to law. Finally, this Court should affirm the district court’s decision to retain jurisdiction over the state law tort claim.