Team 44

C.A. No. 22-000677

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Plaintiff-Appellant-Cross Appellee

v.

BETTER LIVING CORPORATION
Defendant-Appellee-Cross Appellant

-and-

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

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

Brief of Appellant, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union entered summary judgment in consolidated cases No. 17-CV-1234 and No. 21-CV-1776 and denied Fartown Association of Water Safety's ("FAWS") motion to dismiss state law claims on June 1, 2022. The district court had subject-matter jurisdiction pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1367 (supplemental). The United States Environmental Protection Agency ("EPA"), Better Living Corporation ("BELCO"), and FAWS all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides courts of appeals jurisdiction over appeals from final decisions of the district courts. Grants of summary judgment are final and thus appealable. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 506 (2015).

STATEMENT OF ISSUES PRESENTED

I. 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?

II. 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?

III. Did the District Court err when it vacated as arbitrary, capricious, or contrary to law EPA's determination that BELCO was not required to install filtration systems in Fartown despite the existence of the ERA?

IV. Did the District Court err in retaining jurisdiction over FAWS's remaining state law tort claims after resolving the federal claims?

STATEMENT OF THE CASE

I. Source and Discovery of the Contamination

In 1972, the Better Living Corporation ("BELCO") created a sealant coating used to prevent corrosion, which it trademarked as "LockSeal." LockSeal is made by combining two chemicals: liquid NAS-T and a powdered, non-toxic activation agent. When these two are combined, a chemical reaction is produced that makes a solid at room temperature: LockSeal. BELCO manufactured NAS-T and the activation agent at a factory (the "Site") in Centerburg, New Union from 1973 until 1998, at which point BELCO opened a new factory in northern New Union.

In the mid-1980s, NAS-T was found to be a probable carcinogen. Based on these studies, the EPA adopted a Health Advisory Level ("HAL") in 1995. The HAL limited the amount of NAS-T in drinking water to 10 parts per billion ("ppb"). The 10 ppb limit included a significant margin of error that ensured the level of exposure to NAS-T was nontoxic to humans. However, even if the amount of NAS-T in water is as low as 5 ppb, it is still detectable by the human nose due to the sour smell or taste produced. No further state or federal regulations regarding NAS-T beyond the HAL were created. NAS-T is not regulated under the Safe Drinking Water Act and is not currently monitored by the EPA as an unregulated contaminant in drinking water.

In 2013, residents of the town of Centerburg, New Union began complaining to the Centerburg County Department of Health ("DOH") that their water smelled sour. Centerburg is a town of approximately 4,5000 residents. An underground body of water, the Sandstone Aquifer, pumps water into the Centerburg Water Supply ("CWS"), a publicly owned source. As a result of

their complaints, the DOH began testing the public water supply for possible contaminants. The DOH knew that BELCO housed a facility in town that produced NAS-T, and included NAS-T in its testing protocol. The results found that the water in the CWS contained between 45-60 ppb of NAS-T. On September 17, 2015, DOH notified the citizens of Centerburg that they should cease drinking their tap water. BELCO began supplying Centerburg citizens with bottled water while the DNR began an investigation of the contamination at the Facility. The DNR did not have the resources and expertise to continue the investigation and referred it to the EPA on January 30, 2016.

II. Investigation, Record of Decision, and Consent Decree

In March 2016, EPA and BELCO entered into an agreement. BELCO would continue to provide bottled water for the citizens of Centerburg while the investigation continued into the cause of the NAS-T contamination. This process was known as the remedial investigation and feasibility study ("RI/FS"). BELCO investigated the sources of contamination, assessed the risks to human health and the environment, and evaluated remedial alternatives for the site. Through soil testing at the Site, BELCO determined that NAS-T entered the soil via sporadic spills from an unlined lagoon used to store wastewater and stormwater. The contamination migrated into the groundwater, causing a plume of NAS-T to infiltrate the Sandstone Aquifer.

To determine the extent of the plume, BELCO installed three successive lines of monitoring wells progressively further from Centerburg. The final five wells were installed approximately 1.5 miles south of Centerburg (.5 miles north of Fartown). When sampled, these wells showed no detectable amounts of NAS-T. Believing that the investigation had reached the end of the NAS-T plume, EPA did not require BELCO to continue installing additional wells. The RI/FS recommended no remediation of the plume, because remediation would take decades

and an estimated $45 million. Rather, BELCO was to implement filtration of the CWS and excavate the soils at the Site.

Based on the RI/FS and comments by the public, EPA selected a clean-up plan for the Site referred to as the Record of Decision ("ROD"). BELCO and EPA filed a Consent Decree in response to a cost recovery action EPA filed against BELCO. Pursuant to the CD, BELCO agreed to implement the ROD remedy selected by EPA. It was approved by the District Court and entered on August 28, 2017, after public comment. There were no objections. The CD stated that, upon completion of the clean-up, EPA would issue a Certificate of Completion ("COC") to BELCO. Issuance of the COC would prohibit EPA from further ordering BELCO to remediate the site without reopening the CD. The CD could only be reopened if new information not previously available was revealed that showed the clean-up plan was no longer protective of human health, or new, more stringent Regulatory Standards were established that the clean-up plan did not satisfy. The CD defined Regulatory Standards to include applicable or relevant and appropriate standards ("ARARs").

III. The Remediation Plan

Pursuant to the CD, BELCO installed and maintained a water filtration system known as CleanStripping to remove NAS-T from the CWS public well, excavated soils contaminated with NAS-T from around the lagoon at the Site, and conducted monthly sampling of the installed monitoring wells. There was no further remediation of the Sandstone Aquifer required in the CD. BELCO complied with these requirements, installing CleanStripping on Centerburg's public water well and completing soil excavation in late 2017, and monitoring the wells. For several years, the wells showed consistent test results with an exception in January 2018, where the wells closest to Fartown showed low levels (5-6 ppb) of NAS-T. Due to the years of

non-detection, and the low levels in 2018, the EPA issued the COC to BELCO in September 2018.

IV. NAS-T Spreads to Fartown

In 2016, some Fartown citizens (now members of FAWS) submitted sworn testimony that they noticed water from their private wells began to smell "off." Fartown is a rural community of approximately 500 residents, sitting 2 miles south of Centerburg. Fartown qualifies as an environmental justice community. Groundwater in the Sandstone Aquifer moves in a southernly direction, meaning that the groundwater underneath Centerburg eventually flows under Fartown.

After becoming aware of the CD, Fartown citizens requested that DOH sample and test their drinking water for NAS-T contamination. In February, 2019, DOH complied with this request but found no NAS-T in Fartown wells. Fartown citizens were unhappy with this result and requested that EPA order BELCO to extend testing down into Fartown. EPA declined due to the sampling results from wells close to Fartown, which had routinely shown no contamination. In December 2019, a group of Fartown citizens retained Central Laboratories to test their private wells. Central Laboratories took three samples from 75 wells (225 in total). 120 of these samples showed no detectable NAS-T, 51 showed between 1-4 ppb, and 54 showed between 5-8 ppb. Based on these results, some Fartownians again asked EPA to investigate their wells, but EPA declined to take further action due to the low levels of NAS-T.

V. The Environmental Rights Amendment

On November 3, 2020, the citizens of New Union passed the Environmental Rights Amendment to the State of New Union Constitution ("ERA"). The Amendment reads, "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." Order at 8. The

Amendment was passed through the New Union legislature, signed by the governor, and was passed by 71% of New Union citizens as a ballot measure. In January, 2021, EPA wrote to DNR to ask whether this new ERA constituted an ARAR for CERCLA purposes. On February 14, 2021, DNR responded with, "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."

VI. EPA Reopens the Consent Decree

On March 20, 2021, in response to the Central Labs results of NAS-T in Fartown and the passage of the ERA, EPA re-opened the CD and ordered BELCO to sample water from 50 wells in Fartown, supply bottled water to any Fartownian whose wells were positive for NAS-T, and further monitoring of those wells. BELCO challenged the demand, arguing that EPA did not have the right to reopen the CD because the ERA did not constitute an ARAR. On June 24, 2021, EPA issued a Unilateral Administrative Order ("UAO") directing BELCO to conduct the response actions. FAWS submitted a written request for EPA to order BELCO to install CleanStripping at each residential well that tested positive for NAS-T. EPA declined to include this requirement in the UAO due to the NAS-T levels being below the 10 ppb HAL. However, the EPA did order BELCO to install CleanStripping filtration on any well exceeding 10 ppb NAS-T concentration as well as supplying bottled water to any Fartownians with between 5-10 ppb.

BELCO refused to comply with the UAO. EPA began supplying the bottled water to Fartownians whose NAS-T concentrations were between 5-10 ppb and monitored the wells monthly. As of yet, no Fartown wells have tested above 8 ppb and 55% show no detectable NAS-T. On August 2, 2021, EPA made a motion against BELCO seeking to recover its costs incurred in Fartown as well as penalties for BELCO's violation of the UAO. BELCO still

contends that EPA did not have a right to reopen the CD, and thus the UAO was not legally justified.

VII. The FAWS Action

On August 30, 2021 FAWS filed a motion to intervene in the BELCO Action to assert a claim against EPA. That motion was granted on September 24, 2021. FAWS challenges the UAO as arbitrary, capricious, and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) for failing to compel BELCO to provide CleanStripping filtration systems.

On August 30, 2021, FAWS and 85 individual plaintiffs from Fartown filed an additional action against BELCO ("The FAWS Action"). This complaint is first a CERCLA cost recovery claim for the $21,500 FAWS spent on the Central Labs testing of their own private wells. FAWS also contends that BELCO's contamination of the Sandstone Aquifer constitutes negligence and a private nuisance under New Union law. FAWS asked the court to order BELCO to: (1) pay its response costs, (2) install CleanStripping on those wells which test positive for NAS-T, (3) remediate the Sandstone Aquifer, (4) pay Fartownians damages for loss of use and enjoyment of their property, and (5) pay punitive damages.

VIII. Current Litigation

At the request of all parties, the court consolidated the BELCO Action and FAWS Action. FAWS intends to seek dismissal of its state law claims from federal court once the CERCLA claims have been resolved. On December 30, 2021, after completing discovery on the CERCLA claims, all three parties moved and cross-moved for summary judgment on the CERCLA claims, with FAWS moving to dismiss any remaining state law claims without prejudice.

The District Court granted summary judgment in favor of BELCO with respect to reimbursement of FAWS's expenses in testing; in favor of EPA with respect to its determination

to reopen the CD and issue the UAO; in favor of FAWS as to vacating EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and the Court denies FAWS's motion to dismiss the remaining state law claims.

SUMMARY OF THE ARGUMENT

The district court properly held that costs incurred by FAWS were unnecessary and not reimbursable as response costs under CERCLA. 42 U.S.C. § 9607(a)(4)(B) provides that response costs are reimbursable only if "necessary to the containment and cleanup of hazardous releases." *United States v. Iron Mt. Mines*, 987 F. Supp. 1263, 1271-72 (E.D. Cal. 1997). Unless authorized by EPA*, investigative* costs incurred by private parties after EPA initiated remedial investigations are not necessary as they are duplicative of EPA's work. *La. Pac. Corp. v. Beazer Materials & Servs.,* 811 F. Supp. 1421, 1425 (E.D. Cal. 1993).

FAWS began testing well water in order to prove BELCO's liability. FAWS was not authorized by EPA to conduct tests. FAWS has not produced any evidence that at the time of testing of well-water in Fartown its actions were not duplicative of the EPA's testing approximately half a mile north. Therefore, the costs that FAWS incurred from testing well water were not necessary and thus are not reimbursable under § 9607(a)(4)(B).

The district court's holding that EPA properly identified the ERA as an ARAR and that reopening the CD was merited was also correct. First, the ERA meets the standards set forth under 42 U.S.C. § 9621(d) for use as an ARAR. The ERA was properly promulgated because it went through the proper channels under state law: It was adopted through the state legislature, signed by the Governor of New Union, and approved by citizens in the November election. The ERA is also self-executing: Rather than transfer authority to an agency that could make rules to

implement the ERA, the ERA created a new fundamental right as a safety net for New Union citizens. Addendum at 1, 4.

The ERA is more stringent than the current federal standards because it establishes a fundamental right not recognized in federal law, and thereby provides more stringent protection of that right. *See Lawrence v. Texas*, 539 U.S. 558, 565-68 (2003). Additionally, when a state ARAR is broader in scope than a federal ARAR, the state ARAR is considered more stringent. *United States v. Akzo Coatings of Am., Inc.* 949 F.2d 1409, 1443 (6th Cir. 1991). In granting a new fundamental right, the ERA is both broader in scope and more stringent than the National Contingency Plan ("NCP").

The ERA is relevant and appropriate because it addresses problems or situations sufficiently similar to those encountered at the CERCA site. The ERA references water free from human-caused pollutants, and NAS-T, in certain concentrations, is a contaminant with respect to Fartown's water. As the ERA is a relevant and appropriate ARAR, EPA's decision to reopen the CD was appropriate. The CD terms allowed for reopening when new, more stringent regulatory standards were established. Here, the more stringent "fundamental right" given to citizens for clean water satisfies this prong. Furthermore, the CD is subject to reopening if new information not previously known is revealed that implicates whether the original plan protects human health or the environment. Here, the results of the Central Laboratories testing showing NAS-T had spread into Fartown wells, which was previously unknown to EPA, satisfies this additional justification for reopening the CD.

Though the ERA justified reopening the CD, it did not require EPA to order CleanStripping. Regardless of whether the ERA requires EPA to select a remedial action that

eliminates *all* contaminants, EPA's determination to select a combination of remedial actions that did not include CleanStripping was a reasonable exercise of its discretion to select appropriate remedial actions under CERCLA.

This Court should only disturb the EPA's selection of remedial actions if EPA acted arbitrarily or capriciously. Courts defer to EPA's selection of remedial actions under CERCLA when the selection is not arbitrary, capricious, or contrary to law. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 748 (8th Cir. 1986). Here, EPA's selection of remedial actions for the portion of the Sandstone Aquifer underlying Fartown—monitored natural attenuation together with CleanStripping for wells in FAWS where sampling shows NAS-T concentrations above 10 ppb—was a reasonable exercise of EPA's discretion.

To clear the arbitrary and capricious bar, an agency must have relied only on relevant factors and must have not made a clear error in judgment. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's decision in this case was reasonable—not arbitrary and capricious—since EPA relied only on factors provided in CERCLA and acted rationally in accordance with the statute and the evidence before EPA.

CERCLA confers broad, albeit not unlimited, discretion to EPA regarding what methods to use for remedial actions: Rather than specify precisely what remedial action is required in a given case, CERCLA directs executive agencies to "select appropriate remedial actions determined to be necessary to be carried out . . . ." and provides factors for EPA's consideration. § 9621(a)-(b).

CERCLA does direct EPA to consider several factors when considering which remedial actions to select—factors that are sometimes at odds. On the one hand, EPA must consider

cost-effectiveness. *See* § 9621(a) (requiring consideration of short-term and long-term cost-effectiveness in the selection of remedial actions). On the other hand, EPA must consider whether a potential remedial action permanently and significantly reduces the hazards posed by waste, including hazards to human health. *See* 9621(b).

However, CERCLA does not cabin EPA's discretion regarding the timeframe within which a remedial action must be completed; CERCLA instead affords EPA broad discretion regarding how long a remedial action may be ongoing. *See* § 9621(d). Nor does CERCLA provide additional factors limiting EPA's discretion about how to implement an ARAR that consists of a general state goal; EPA instead has considerable discretion regarding how to meet that type of ARAR. *See* 40 C.F.R. § 300.400(g)(4) (2020) (discussing EPA's latitude regarding narrative state-law ARARs).

Even assuming that the ERA requires the complete removal of contaminants, EPA's decision regarding what remedial actions to require in the UAO was reasonable. EPA selected a combination of remedial actions that could meet that goal over time and that balanced consideration of the factors CERCLA directs EPA to contemplate—cost-effectiveness, effectiveness, and protection of human health and the environment. *See* 42 § 9621(b). EPA chose a combination of remedial actions—CleanStripping and monitored natural attenuation (MNA)--that together provide for complete removal of contaminants from the water that Fartown residents use. The remedial actions limit human exposure of NAS-T to levels far below the lowest levels at which negative health effects may occur, no evidence indicates that the combination is not effective at eliminating NAS-T in the long run, and combining CleanStripping and MNA is more cost-effective than ordering CleanStripping as the sole remedial action.

Furthermore, although the permissibility of EPA's selection of remedial actions does not depend on reading the ERA to require less than complete removal of NAS-T, such a reading would nonetheless be persuasively within EPA's discretion. EPA would be due *Skidmore* deference for a persuasive interpretation of the ARAR's meaning since EPA possesses "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In light of the text and intent of CERCLA and the ERA, interpreting the ERA to require less than complete remediation would be persuasive. In CERCLA and related regulations, a touchstone for whether a degree of remediation is proper is whether it is protective of human health and the environment. *See* 42 U.S.C. § 9621(b), (d); 40 C.F.R. § 300.430(e)(2)(i) (2020) ("Remediation goals shall establish acceptable exposure *levels* that are protective of human health and the environment . . . ."). Moreover, the text and intent of the ERA itself suggests that the ERA contemplates a degree of elimination, not necessarily complete elimination, of NAS-T. Read together, "clean," "healthful," and "free from" indicate that the ERA is meant to ensure protection of humans and the environment from contaminants that would cause harm—not necessarily all human-made substances. *See* Order at 4-5 (revealing that the sponsor of the ERA endorsed this interpretation).

Therefore, interpreting "free from" in the ERA to allow for a minimal, non-harmful levels of NAS-T would effectuate the ERA's intent by providing more-stringent protection to Fartown residents from concentrations of NAS-T that could harm their health than CERCLA on its own would require. Such an interpretation would also be consistent with CERCLA as a statutory scheme by contemplating degrees of remediation. Accordingly, this Court should hold that the ERA does not require complete elimination of NAS-T.

Finally, the district court properly retained jurisdiction of FAWS's state law tort claims. Supplemental jurisdiction applies when a claim is "so related to claims in the action ... that they form part of the same case or controversy." §1367(a). Under §1367(c), district courts *may* decline supplemental jurisdiction when the claim raises a novel or complex issue of State law. Courts have typically found state tort claims are not considered novel or complex, including specifically negligence and nuisance. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743-44 (11th Cir. 2006). Therefore, FAWS's state tort claims of nuisance and negligence are not novel or complex.

When deciding whether to retain supplemental jurisdiction over state law claims, courts have considered factors of judicial economy, convenience, and fairness. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In *Miller Aviation v. Milwaukee Cty. Bd. of Supervisors*, 273 F.3d 722 (7th Cir. 2001), the appellate court found that judicial efficiency would be undermined by the state court having to *duplicate the efforts* of the district court, and therefore remanded the case back to the district court for final consideration. *Id.* (emphasis added). Presently, the removal of FAWS's tort claims to state court will lead to unnecessary duplicative efforts by the state court in opposition of judicial efficiency, convenience, and fairness.

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed *de novo*. *Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007). Evidence is viewed in the light most favorable to the non-moving party, all reasonable inferences are drawing that party's favor, and weighing the evidence should be avoided. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a genuine

issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THE COSTS THAT FAWS INCURRED WERE UNNECESSARY AND NOT REIMBURSABLE AS RESPONSE COSTS UNDER 42 U.S.C. § 9607(A)(4)(B).

The district court correctly held the costs incurred by FAWS for testing and analysis of well water were non-reimbursable under CERCLA. § 9607(a)(4)(B) stipulates any person responsible for release of a hazardous substance from a disposal site selected by such person will be liable for any other *necessary* response costs by any other person *consistent* with the NCP. (emphasis added).

A. FAWS bears the burden of proof to recover response costs under § 9607(a)(4)(B).

The person seeking cost recovery bears the burden of proving necessity and consistency with the NCP. *La. Pac. Corp.,* 811 F. Supp. at 1425. However, "the detailed NCP provisions governing other response actions cannot reasonably be applied to preliminary monitoring and evaluation of a release of hazardous substances." *Marriott Corp. v. Simkins Indus., Inc.*, 825 F.Supp. 1575, 1583 (S.D. Fla. 1993). Therefore, response costs arising from investigations are generally recoverable regardless of their consistency with the NCP. *Palmisano v. Olin Corp.*, No. C-03-01607 RMW, 2005 U.S. Dist. LEXIS 48006, at 66-67 (N.D. Cal. June 24, 2005).

EPA concedes that FAWS meets some of the conditions necessary to make recovery of response costs under CERCLA possible—the site is a "facility," BELCO is a responsible party, there has been a release of a hazardous substance, and FAWS has incurred costs. *See Sycamore Indus. Park Assocs. v. Ericsson, Inc.,* 546 F.3d 847, 850 (7th Cir. 2008). However, FAWS's costs are not necessary and therefore not reimbursable under § 9607(a)(4)(B).

B. To be necessary under § 9607(a)(4)(B), costs must be incurred for the purpose of remediating a hazardous substance and cannot be duplicative.

To be deemed necessary, costs must be "necessary to the containment and cleanup of hazardous releases." *Iron Mt. Mines*, 987 F. Supp.at 1271-72. A response cost is only "necessary" if the cost is closely tied to the *actual cleanup* of hazardous releases. *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005).

In *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85 (2d Cir. 2000), Xerox drilled three monitoring wells on plaintiff's property and tested the well-water. *Id.* at 89. Testing revealed that water from the wells met New York State drinking water standards. *Id.* Later, experts were hired to evaluate the contamination on their property. *Id.* The court held that the expert fees were unrecoverable as response costs. *Id.* at 92. The court reasoned that "there is a requirement that experts' fees be incurred not merely in preparation for litigation but as a necessary cost of remediating a site." *Id.*

Unless authorized by the EPA*, investigative* costs incurred by a private party after the EPA has initiated a remedial investigation are not considered necessary as they are a duplicative of the EPA's work. *La. Pac. Corp.*, 811 F. Supp. at 1425 (emphasis added); *See Iron Mt. Mines*, 987 F.Supp. at 1272 (holding that testing was unnecessary when the owner was unable to provide substantial evidence that such testing was not duplicative).

Here, FAWS began water-testing after the DOH tests had found no detectable NAS-T. This evidence points to FAWS's testing being conducted with the intention of proving liability against BELCO rather than in response to any indication that further investigation was warranted. FAWS was not authorized by the EPA to conduct further tests. FAWS has not produced any evidence that, at the time of testing of well-water in Fartown, its actions were not duplicative of the EPA's testing approximately half a mile north, as well as the DOH testing that

occurred at Fartown wells the previous year. Therefore, this Court should uphold the district court's ruling as FAWS's response costs were purposed towards litigation, duplicative of the EPA's actions, unnecessary under 42 U.S.C. § 9607(a)(4)(B), and thus unrecoverable.

II. THE EPA WAS JUSTIFIED IN REOPENING THE CONSENT DECREE.

EPA is entitled to *Skidmore* deference regarding its determination that the ERA was suitable for use as an ARAR under CERCLA and thus merited reopening the consent decree. When an agency making an interpretive decision can "bring the benefit of specialized experience to bear on the subtle questions in [a] case, deference to the agency's persuasive interpretation is appropriate. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (discussing *Skidmore* deference). An agency interpretation is persuasive if, among other things, the agency thoroughly considered the issue and engaged in valid reasoning. *See Skidmore,* 323 U.S. at 140 (1944).

A. The district court properly upheld EPA's determination that the ERA constitutes an ARAR because the ERA meets the standards under 42 U.S.C. § 9621(d).

EPA properly determined that the ERA constitutes an ARAR. With respect to any hazardous substance or contaminant that remains onsite after remedial actions have taken place, any promulgated standard or requirement under State law more stringent than Federal standards is legally applicable to the hazardous substance or contaminant. 42 USC § 9621(d). The remedial action selected, upon completion, must at least attain such legally acceptable or relevant and appropriate requirements. *Id.*

1. The ERA is suitable for use as an ARAR because it was properly promulgated.

i. The ERA went through the proper legislative channels.

The ERA was properly promulgated because it went through the proper channels under state law. In the context of ARARs, "promulgated" refers to "laws imposed by state legislative

bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Azko.*, 949 F.2d at 1440 (6th Cir. 1991) (citing EPA, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance*, 52 Fed. Reg. 32495, 32498 (Aug. 27, 1987)).

In the present case, the ERA was adopted through the state legislature and signed by the Governor of New Union, as is the proper process for the addition of amendments to the New Union constitution. The ERA was then included in the November 3, 2020 election, with 71% of New Union citizens voting in favor of the amendment. Thus, the amendment is legally enforceable insofar as it complies with the legislative process and support from the citizens of New Union, meeting the standards for promulgation as laid out in *Azko*.

ii. The ERA is meant to be self-executing and no further legislation or regulation is required to make it effective.

"A constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation." *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 152, 101 N.E.2d 289, 291 (1951); *See also* 16 C.J.S. Constitutional Law § 48 (stating a constitutional provision is self-executing if it is complete and becomes operative without the aid of supplemental legislation). Even without the benefit of an express declaration of intent to be self-executing, constitutional provisions specifically prohibiting particular conduct are generally determined to be self-executing. *Robb v. Shockoe Slip Foundation*, 228 Va. 678, 681–82, 324 S.E.2d 674, 676 (1985). Criteria for determining whether a provision is self-executing include the absence of any directive to the legislature for future action, the legislative history as to the intended operation, and the consistency of self-execution within the scheme of rights. 16 Am. Jur. 2d Constitutional Law § 101.

The self-executing nature of the ERA weighs against BELCO's claim that further legislation or regulation is needed. First, there is no language in the amendment that directs the legislature to take future action. Second, an examination of the legislative history shows the intent of the legislature in adopting this amendment was for it to be self-executing. The legislative assembly addressed and confirmed that there were no restrictions to enact this legislation. Addendum at 3-6**.** The ERA was not intended to transfer authority to the state's environmental agency, which could then make regulations to implement it, *see* Addendum at 4. Instead, the legislature intended its creation of a new fundamental right to serve as a "safety net" ensuring that the protections in place did not fail. Addendum at 1. Thus, to find that the ERA requires additional legislation or regulation to become enforceable directly contradicts the purpose of the legislation itself, and ignores the wills and desires of the New Union citizens.

2. The ERA is suitable for use as an ARAR because by establishing a new fundamental right it is more stringent than current federal standards.

A broad prohibition is more stringent than a federal statute that sets minimum standards. *Azko*, 949 F.2d at 1443. Where a State ARAR is broader in scope than a Federal ARAR, the State ARAR is considered more stringent. *Id*. Under the NCP, remediating parties must conduct a RI/FS to develop appropriate remedies. § 300.430(d)–(e). Selected remedial actions must attain ARARs to assure implemented remedies are protective of human health. § 9621(d). Remedies must "eliminate, reduce, or control risks to human health and the environment." 40 C.F.R. § 300.430(a)(1) (2020). The State ERA grants "each and every person of [New Union] … a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." Order at 8.

Establishing a right as fundamental gives that right additional protections under the law. *See Lawrence*, 539 U.S. at 565–68 (discussing whether the Constitution confers a fundamental

right to consensual sodomy to establish if laws to prohibit sodomy should be struck down). When a right is fundamental, courts apply "strict scrutiny" to alleged infringements. *Bostic v. Shaefer*, 760 F.3d 352, 375 (4th Cir. 2014). Under strict scrutiny, laws that interfere with a fundamental right must be justified "by compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977). A decision to establish a right as fundamental in a state constitution will have the same effect, requiring a compelling interest and narrow tailoring to be found in cases of infringement. *See, e.g.*, *State ex rel. Bd. of Educ. For Grant County v. Manchin*, 179 W. Va. 235, 240 (1988).

In the present case, the ERA is broader than the current Federal standard, the NCP. Where the NCP merely requires remedies to eliminate, reduce, or control risks to human health, the ERA grants a fundamental right to clean air, clean water, and to a healthful environment. While it is true that BECLO's contention that the ERA mimics the NCP in regard to the ultimate goal of crafting a healthful environment for citizens, the New Union ERA goes further. The choice of language, namely "fundamental," must be viewed as intentional. As it is a well-known custom that deeming a right to be fundamental heightens the level of scrutiny used by courts, we must not ignore the purposeful and intentional choice of the New Union legislature to grant a new fundamental right to clean air, water, and a healthful environment.

The ERA removes the gray area that the NCP purposefully allows. The NCP merely requires that remedies to contaminants must do as little as reduce, or as much as eliminate, the pollutants or contaminants in question. This means that a remedial action can have a variety of goals. However, EPA must abide by the more stringent standards that the citizens of New Union have voted to enforce. That means ensuring that the remediation plan now includes abiding by the fundamental right granted to citizens to be free from human-caused contaminants that inhibit

their right to a healthful environment. In this regard, the ERA imposes a new duty on EPA to go beyond the NCP and ensure that the remediation plan that was in place conforms to this new, heightened standard of clean water that is "healthful," especially in regard to human-caused contaminants such as NAS-T.

3. The ERA is relevant and appropriate because it generally addresses problems similar to those encountered at the site.

The ERA, while not specific enough to be considered applicable, is relevant and appropriate to the NAS-T contamination at the CERCLA site. Relevant and appropriate requirements are "those cleanup standards … that, while not 'applicable' to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." 40 C.F.R. § 300.5 (2020). Applicable requirements, as defined by the NCP, are "those cleanup standards … promulgated under federal environmental or state environmental or facility sting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site." *Id*.

A promulgated standard survives a challenge of constitutional vagueness if it is drafted "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Azko*, 949 F.2d at 1441 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see also Grayned v. City of Rockford*, 408 U.S. 104, 110 (holding an ordinance was not unconstitutionally vague in part because it was "clear what the ordinance as a whole" prohibited). The vagueness doctrine is rooted in the idea of "fairness" and must be "sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1953).

EPA does not contend that the ERA likely does not satisfy standards of applicability. While the ERA puts forth a presumption of general applicability to various human-caused pollutants, NAS-T, sealants, or any other specified pollutant is not named within the amendment. However, the relevant and appropriate prong is satisfied as the amendment addresses the same problem found at the CERCA site. In the present case, the Consent Decree, RI/FS, and original remediation plan were established due to a NAS-T contamination in the water supply of neighboring Centerburg. After Fartown residents began to discover that NAS-T had indeed contaminated their private water supply as well, the ERA was passed specifically granting a fundamental right for citizens to have access to clean water free from human-caused pollutants. Thus, the ERA, while not mentioning NAS-T by name, sets a new standard that should easily be deemed applicable to the original investigation and remediation plan.

The ERA has clear implications on the problems and situations that are occurring at Fartown because of the NAS-T contamination. The purpose of the RI/FS study and the Consent Decree were to ensure that adequate investigation occurred to determine the effects and reach of NAS-T infiltrating the water supply of citizens surrounding the plant. The geographic reach of such contamination was not known at the time of the investigation. Thus, an amendment passed to heighten the scrutiny and standards of what kinds of pollutants or chemicals can be present in water (namely, "human-caused") is certainly applicable and relevant. While no exact chemicals are listed, the legislative intent is clearly centered around those human-caused pollutants such as NAS-T, which is both created by humans and entered water supplies due to human error.

The ERA additionally survives BELCO's challenge of constitutional vagueness. The ERA states, "Each and every person of this state has a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans."

Order at 8. The *Colton* standards are met; a plain reading of the amendment indicates that the prohibited conduct is that of contaminating or polluting the water and air of New Union citizens. The amendment is sufficiently specific by singling out contaminants and pollutants "caused by humans" rather than creating a general right to a clean environment. Thus, an ordinary person understands the ERA creates a new standard for future remediation plans in that it protects against human-caused contamination of water or air of New Union citizens.

Furthermore, the legislative history helps clear up any perceived vagueness in the amendment. While BELCO attempts to argue that "clean" is an unconstitutionally vague term, the legislative history shows that it is common knowledge that a public water supply will not be free from all substances outside of H2O. Addendum at 4-5**.** This legislation is meant to protect citizens and from those human-caused substances that infiltrate the water supply and cause harm. *Id.* The purpose of the amendment is clear, and a plain, common-sense reading should overcome a challenge that more specificity is needed for it to become enforceable.

B. Because the ERA is an applicable ARAR, EPA's decision to reopen the consent decree is appropriate.

The Consent Decree is a binding agreement. BELCO and EPA entered into a Consent Decree ("CD") based on the RI/FS, the Record of Decision ("ROD"), and the BELCO Action. Under this CD, BELCO agreed to implement the remedy selected by EPA in the ROD. The District Court approved the CD on August 28, 2017. There were no objections from FAWS, citizens of Fartown, citizens of Centerburg, or any other parties. This CD required EPA to issue a Certificate of Completion ("COC") to BELCO upon completion of the remediation plan. Once the COC is issued, EPA is no longer permitted to order BELCO into further remediation.

Under the terms of the Consent Decree, EPA is permitted to reopen it after the passage of the ERA. The CD sets forth two grounds upon which it can be reopened by EPA. The first allows

for the CD to be reopened when new information not previously known to EPA is revealed, showing that the original clean-up plan does not protect human health or the environment. The second allows for reopening of the CD when new, more stringent Regulatory Standards are established that the original clean-up plan does not satisfy. As EPA has properly deemed the ERA to be an ARAR under CERCLA, it stands that the second ground for reopening the CD is satisfied. The ERA constitutes a new, more stringent Regulatory Standard. It is not known if the original CD satisfied the ERA without the reopening of the CD and further testing efforts conducted in Fartown.

Furthermore, the results of Fartown testing justifies reopening the CD. Even if this Court does not believe that the ERA constitutes an ARAR, the new information that Fartown wells were contaminated satisfies the first ground for reopening the CD. NAS-T found in the private wells of Fartown citizens, when previous information indicated NAS-T had not reached that far, should be considered new information not known to EPA. If EPA had known that NAS-T had spread as far as Fartown, it would have likely expanded the testing range. This new information is grounds for reopening the CD to extend the RI/FS and conduct additional testing to ensure that the remediation plan is still protective of human health and the environment.

III. Regardless of whether the ERA requires EPA to select a remedial action that eliminates all contaminants, EPA's determination not to order CleanStripping was a reasonable exercise of its discretion to select appropriate remedial actions under CERCLA.

A. EPA's determinations regarding how to implement the ERA deserve deference; accordingly, the relevant issue is whether EPA acted arbitrarily and capriciously.

Courts defer to EPA's selection of remedial actions under CERCLA when that choice is within the scope of EPA's discretion—in other words, when the choice EPA makes is not arbitrary, capricious, or contrary to law—because selecting remedial actions involves agency-specific knowledge and expertise. *See Northeastern Pharm. & Chem. Co.*, 810 F.2d at

748 ("Because determining the appropriate . . . remedial action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA. The applicable standard of review is whether the agency's choice is arbitrary and capricious.").

Under the arbitrary and capricious standard, a reviewing court "is not to substitute its judgment for that of the agency" and may not disturb an agency action that is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 42. The scope of the standard is "narrow." *Id.*

To clear the arbitrary and capricious bar, an agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). When an agency's explanation reveals that the agency relied considered only relevant factors and did not make a clear error in judgment, the agency explanation satisfies the reasonableness standard. *Id*.

In this case, EPA's selection of remedial actions for the portion of the Sandstone Aquifer underlying Fartown—monitored natural attenuation together with CleanStripping for wells in FAWS where sampling shows NAS-T concentrations above 10 ppb—is a choice that involves agency-specific knowledge and expertise and that should thus be disturbed only if it was arbitrary or capricious. In making that choice, EPA relied only on factors within the contemplation of CERCLA and acted rationally in accordance with the statute and the evidence before EPA. Therefore, this Court should uphold EPA's determination.

B. In exercising its broad discretion under CERCLA to select appropriate remedial actions, EPA must consider cost, protection of human health, and the long-term effectiveness of a potential remedial action.

CERCLA confers broad discretion to EPA regarding what methods to use for remedial actions: Rather than specify precisely what remedial action is required in a given case, CERCLA directs executive agencies to "select appropriate remedial actions determined to be necessary to be carried out . . . ." § 9621(a). To determine what constitutes an appropriate remedial action, executive agencies should look to section 121 of CERCLA. *Id.* Though section 121 provides "[g]eneral rules" for making those determinations, *see* § 9621(b), CERCLA's factors are not formulas; an agency may even disregard the preferences outlined in section 121(b) so long as the agency explains the decision. *See* § 9621(b)(1) ("If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.)

CERCLA does direct EPA to consider several factors when selecting remedial actions. *See id.* (providing a list of factors for determining the appropriateness of a remedial action). And these factors are sometimes at odds. On the one hand, EPA must consider cost-effectiveness. *See* § 9621(a) (requiring consideration of short-term and long-term cost-effectiveness in the selection of remedial actions); § 9621(b)(1) (suggesting that cost-effectiveness is one of several primary factors EPA should consider in selecting remedial actions). A remedy is cost-effective when its "overall effectiveness"—which includes "long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness"—is proportional to its cost. 40 C.F.R. § 300.430(f)(ii)(D) (2020). On the other hand, EPA must consider whether a potential remedial action permanently and significantly reduces the hazards posed by waste, including hazards to human health. *See* § 9621(b) (directing EPA to select a remedial action that

is "protective of human health and the environment, that is cost effective, and that utilizes permanent solutions . . . to the maximum extent practicable.").

However, CERCLA does not provide factors cabining EPA's discretion regarding the timeframe within which a remedial action must be completed; rather, CERCLA affords EPA broad discretion regarding how quickly clean-up must occur. *See* § 9621(d). When federal or state standards—ARARs—apply, remedial actions must at least attain the standards in those ARARs. § 9621(d)(2)(A)(ii). However, CERCLA is silent as to *when* standards must be met, stating only that required standards must be attained "at the completion of the remedial action" *Id.* "Remedial action," in turn, means "those actions consistent with permanent remedy taken" in the event of a hazardous release and can include "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." 42 U.S.C. § 9601(24). It follows that a remedial action may be ongoing as long as monitoring that is reasonably required to ensure the effectiveness of the remedy continues to occur. *See id.; see also* 42 U.S.C. § 9604(c)(3), (6) (providing that clean-up action becomes operation or maintenance as opposed to remedial action after ten years—but only applying that limitation for purposes of state financial responsibility for operation and maintenance costs).

Nor does CERCLA provide additional factors limiting EPA's discretion about how to implement a narrative state-law ARAR; EPA's discretion about how to meet narrative ARARs is limited only by CERCLA's requirement consider factors such as cost-effectiveness and protection of human health. *See* 40 C.F.R. § 300.400(g)(4) ("Even if a state has not promulgated implementing regulations, a general goal can be an ARAR if it meets the eligibility criteria for state ARARs. However, EPA would have considerable latitude in determining how to comply with the goal in the absence of implementing regulations.").

In some cases, states promulgate specific guidance or rules that relate to narrative state standards—and when they exist, those additional criteria can steer EPA's discretion regarding how to implement narrative ARARs. *See* U.S. EPA Office of Solid Waste and Emergency Response, *CERCLA Compliance with Other Laws Manual: Part II. Clean Air Act and Other Environmental Statutes and State Requirements* (1989) (interim final), at 7-27. For instance, if a state had a surface water standard that was narrative in character (e.g., "no toxics in toxic amounts") and promulgated a specific method for applying the standards, EPA would consider the state's method of applying the standard when determining the appropriate remedy. *See id.*

C. EPA's selection of remedial actions—including its selection of monitored natural attenuation as the remedial method for wells testing below 10 ppb—was a reasonable means of balancing cost-effectiveness, protection of human health, and effectiveness of remediation.

Even if the ERA requires that remediation lead to complete removal of contaminants, EPA's decision regarding what remedial actions to require in the UAO was reasonable—because it did not disregard that goal and it balanced consideration of cost-effectiveness with protection of human health and the environment—the primary factors that CERCLA contemplates, *see* § 9621(b).

First, EPA chose a combination of remedial actions that together provide for complete removal of contaminants from the water that Fartown residents use. For wells where sampling indicated NAS-T levels above 10 ppb, CleanStripping effectively removes NAS-T. And for wells showing NAS-T levels below 10 ppb, monitored natural attenuation (MNA) can lead to the same result, albeit over a longer time period. MNA "essentially means allowing the groundwater to clean itself over time." *City of Wichita, Kansas v. Trustees of APCO Oil Corp. Liquidating Tr.*, 306 F. Supp. 2d 1040, 1078 (D. Kan. 2003). And when MNA is used after source control measures and without other remedial actions, it can be "sufficiently effective to achieve

remediation objectives at some sites." U.S. EPA Office of Solid Waste and Emergency Response, 9200.4-17P, *Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites* (1999), at 2.

EPA's selection of the two remedial actions as a pair is consistent with the customary use of MNA "in conjunction with active remediation measures." *Id.* Often, "for example, active remedial measures could be applied in areas with high concentrations of contaminants while MNA is used for low concentration areas." *Id.* In recognition of the limitations of "active ground-water restoration" to achieve the "final increment of cleanup," EPA "allows for the use of natural attenuation to complete cleanup actions in some circumstances." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01 (proposed March 8, 1990) (to be codified at 40 C.F.R. § 300.430(f)(5))

Additionally, in ordering the combination of MNA, CleanStripping, and the provision of bottled water, EPA relied on the factors that Congress intended. Requiring Clean-Stripping for every well in Fartown would not be cost-effective. That "CleanStripping systems for individual homes are costly - as much as $4,500 per household" is uncontested. Order at 16. While EPA concedes that CleanStripping may be more effective in the short term, the evidence in the record does not suggest that CleanStripping's long-term effectiveness and permanence outweigh the costliness of the systems—factors that are components of cost-effectiveness determinations, 40 C.F.R. § 300.430(f)(ii)(D).

Moreover, the combination of remedial actions that EPA ordered is protective of human health. The UAO requires CleanStripping for wells showing NAS-T sample levels that meet or exceed EPA's Health Advisory Level ("HAL") for NAS-T—a level that "incorporates a significant margin of error to ensure that level of exposure is non-toxic to humans." Order at 6.

And FAWS "has not introduced any evidence that these levels of contamination are harmful in drinking, let alone . . . [in] any of the non-drinking uses identified by FAWS." *Id.* at 16. Yet—notwithstanding the arguable over-protectiveness of the threshold above which EPA requires CleanStripping and the complete lack of evidence of negative health effects at levels below 10 ppb—EPA ordered the provision of bottled water to households whose wells show NAS-T concentrations between 5 ppb and 10 ppb. *Id.* at 9. By requiring bottled water for those households, EPA added an additional safety buffer beyond the margin of error the HAL for NAS-T incorporates, and thus clearly provided for the protection of human health.

The scope of EPA's discretion is broadened, rather than narrowed, by the ERA's narrative character. Just as a state law ARAR consisting of "no toxics in toxic amounts" calls for EPA to look to state supplementary guidance regarding implementation, here "clean water and . . . a healthful environment free from contaminants and pollutants caused by humans" requires fleshing out due to its nature as a narrative standard. In this case, however, New Union has not promulgated supplementary guidance for implementing the ERA. So it is reasonable for EPA to look to the text and intent of CERCLA, as it did here, in determining how to reach the ARAR.

D. Interpreting the ERA to require less than the complete elimination of NAS-T is persuasive given the structure, language, and intent of CERCLA and the ERA.

Although the permissibility of EPA's selection of remedial actions does not depend on reading the ERA to require less than complete removal of NAS-T, that reading is nonetheless within EPA's discretion.

When an agency possesses "a body of experience and informed judgment to which courts and litigants may properly resort for guidance," courts accord *Skidmore* deference to persuasive agency interpretations. *Skidmore*, 323 U.S at 140. Here, the EPA's experience and expertise accrued over more than forty years of implementing CERCLA constitute a "body of experience

and informed judgment" to which *Skidmore* deference is due. And interpreting the ERA to require less than complete remediation is persuasive in light of the statutory scheme and text of CERCLA and the ERA and the legislative intent of the ERA.

As an initial matter, the ERA is ambiguous and thus in need of interpretation. The legislative history reveals that legislators differed as to the meaning of the ERA. *See* Addendum at 4-5. While some legislators professed that the meaning was simple and straightforward, *id.* at 5, others offered that it was "unclear," *id.* at 6, "creates uncertainty," *id.* at 4, or was "simply not clear enough,"*id.* at 4. This confusion stemmed from a real ambiguity created by the contrast of the words themselves with common knowledge and common sense about regulation. For instance, the meaning of "free from" seems plain—but only considered out of context. Even Mr. Wright, who stated that the ERA contains "no uncertainty," admitted that "free from" admits of an interpretation other than its literal meaning: "Let's be clear: What is appropriate and desirable for a public water supply involves other chemicals, other substances." *Id.* at 4.

In the context of this ambiguity, the language and structure of CERCLA makes interpreting the ERA to require less than complete elimination of NAS-T persuasive.

Remediation under CERCLA is a matter of degree. *See* § 9621(b), (d). On a general level, the language of Section 121(b) suggests that the goal of remedial action is to reduce—not always to eliminate—the prevalence of hazardous substances; the provision directs executive agencies to assess various methods and solutions that will "result in a permanent and significant *decrease* in the toxicity, mobility, or volume of the hazardous substance . . . ." § 9621(b) (emphasis added).

The statutory provisions specifically governing ARARs also contemplates remediation by degree and not necessarily complete elimination. *See* § 9621(d) (entitled "*[d]egree* of cleanup")

(emphasis added); *see also* Order at 13 (citing § 9621(d)) (". . . selected remedial actions must attain (or waive) ARARs to assure an implemented remedy is *protective of human health and the environment*.") (emphasis added). The principle function of section 121 is to inform executive agencies' determinations of precisely how much remediation is required—in other words, how clean is clean. *See id.* Furthermore, the National Contingency Plan provides that "[r]emediation goals shall establish acceptable exposure *levels* that are protective of human health and the environment . . . ." 40 C.F.R. § 300.430(e)(2)(i).

Moreover, the text and intent of the ERA itself suggests that the ERA contemplates a degree of elimination, not necessarily complete elimination, of NAS-T. Read together, "clean," "healthful," and "free from" indicate that the ERA is meant to ensure protection of humans and the environment from contaminants that would cause harm. Mr. Wright, the sponsor of the ERA, endorsed this common-sense interpretation: "[I]f you look at the latter part of this amendment, clean would mean, for example, water that is free of contamination or pollution caused by humans that would make that water unhealthful or harmful to consume." Order at 5. Notably, no legislator endorsed the proposition that "free from" meant free from literally all human-made substances. Instead, as Mr. Wright pointed out, "free from" means free from substances that could "harm you. They should not do injury to your young children, to your wife or to your family in any way. They should be objectively perceived as 'clean.' That's what this means." *Id.* at 4.

Interpreting "free from" in the ERA to allow for levels of NAS-T that are below the HAL standard, which itself provides a significant margin of error as a safety buffer, would give effect to the ERA's intent by providing protection to Fartown residents from concentrations of NAS-T that could harm their health—protection more stringent than CERCLA on its own would require.

Such an interpretation would also be consistent with CERCLA as a statutory scheme by contemplating degrees of remediation. Accordingly, this Court should hold that the ERA does not require complete elimination of NAS-T.

IV. The District Court Properly Retained Jurisdiction over FAWS's State Law Claims.

The District Court properly retained jurisdiction of FAWS's state law tort claims. Courts determine whether to exercise supplemental jurisdiction over state-law claims using the framework established by §1367. Supplemental jurisdiction occurs when a claim is "so related to claims in the action ... that they form part of the same case or controversy." §1367(a). §1367(c) provides instances where district courts *may* decline supplemental jurisdiction including: **(1)** the claim raises a novel or complex issue of State law.

However, that declination is not mandatory. When deciding whether to retain supplemental jurisdiction over state law claims, courts have considered factors determined by the Supreme Court in *Gibbs*. 383 U.S. at 726. The *Gibbs* Court highlighted the factors of judicial economy, convenience, and fairness. *Id.* at 726 (citing *Erie R. Co*. v. *Tompkins*, 304 U.S. 64 (1938)).

A. <u>FAWS's State Tort Claim is Not a Novel or Complex Issue of Law.</u>

The District Court correctly determined that FAWS's state tort claims are not novel nor complex. Courts have typically found state tort claims are not considered novel or complex." *Parker,* 468 F.3d at 743. "Moreover, negligence, *nuisance*, and property damage claims have been held as not raising novel or complex issues of state law." *Id.* at 744 (citing *INX Intern. Ink Co. v. Delphi Energy & Engine Management Systems*, 943 F. Supp. 993, 997 (E.D. Wis. 1996)) (emphasis added).

In *Parker*, the appellate court found the federal and state law claims arose out of a common nucleus of operative fact. 468 F.3d at 743. Additionally, it determined that a new trial deciding damages alone does not raise novel or complex issues of state law. *Id.* at 744.

In the present case, the District Court properly found the FAWS's claims are not novel or complex issues. Like in *Parker*, FAWS's state tort claims of nuisance and negligence do not fall under the §1367(c)(1) instance where district courts may decline supplemental jurisdiction. Additionally, FAWS's argument of further discovery needed to determine damages is similarly unconvincing as the district court's decision follows that of the *Parker* court finding a new trial regarding damages in not novel nor complex.

B. Judicial Economy, Convenience, and Fairness Are Preserved by Retaining Supplemental Jurisdiction Over FAWS's State Law Tort Claims.

The District Court's exercise in discretion by retaining supplemental jurisdiction supports judicial efficiency, convenience, and fairness. In *Nowak v. Ironworkers Loc. 6 Pension Fund*, the court determined that if the dismissal of a federal claim occurs after there has been substantial expenditure in time, effort, and money, dismissing claims by rejecting supplemental jurisdiction may not be fair nor necessary. 81 F.3d 1182, 1191-92 (2d Cir. 1996).

In *Miller Aviation*, the appellate court determined that the district court, who had declined supplemental jurisdiction after disposal of original jurisdiction claims, should have instead exercised supplemental jurisdiction over the remaining claims due to the prior complex multifaceted litigation. *Id.* at 732. The appellate court found that judicial efficiency would be undermined by the state court having to *duplicate the efforts* of the district court, and therefore remanded the case back to the district court for final consideration. *Id.* (emphasis added); *see also* Parker, 468 F.3d at 746 (holding a court should retain jurisdiction over state law claims

where substantial judicial resources have already been committed, to prevent a substantial duplication of effort).

Presently, the removal of FAWS's tort claims to state court will lead to unnecessary duplicative efforts. Like the court in *Miller Aviation*, the District Court of New Union has already familiarized itself with the complex facts at issue. Declining to exercise jurisdiction over FAWS's state law tort claims will necessitate a state court to duplicate similar efforts. Therefore the appellate court should affirm the district court's retainment of supplemental jurisdiction under §1367.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of summary judgment in favor of EPA and reverse the district court's grants of summary judgment in favor of FAWS and BELCO.