NON-MEASURING BRIEF **Team No. 50**

In the UNITED STATES COURT OF APPEALS
for the TWELFTH CIRCUIT

C.A. No. 22-000677

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

and

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

v.

BETTER LIVING CORPORATION,
Defendant-Appellee-Cross Appellant.

On APPEAL from the
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION
consolidated case Nos. 17-CV-1234 and 21-CV-1776, Judge Douglas Bowman.

Brief of Appellant,
FARTOWN ASSOCIATION FOR WATER SAFETY, et al.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

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 on June 1, 2022. The district court exercised original jurisdiction over the CERCLA claim under 28 U.S.C. § 1331, and supplemental jurisdiction over the associated state law claims under 28 U.S.C. § 1367. The EPA, BELCO, and FAWS all filed timely Notices of Appeal pursuant to Federal Rule of Appellate Procedure 4. 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 as this is an appeal from a final decision disposing of all parties' claims.

STANDARD OF REVIEW

The standard of appellate review for a motion for summary judgment in the district court is de novo. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 722 (7th Cir. 1998). As such, each issue in this appeal is subject to this standard.

As to issue three, judicial review under the arbitrary and capricious standard is deferential with a presumption in favor of finding the agency action valid." *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). However, the reviewing court must still conduct a "searching and careful" review to determine if the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989)

As to issue four, an appellate court's review of whether a district court had supplemental jurisdiction is reviewed de novo; however, the decision to exercise jurisdiction over pendent state claims is reviewed for abuse of discretion. *Trs. of the Constr. Indus. & Laborers Health & Welfare*

Trust v. Desert Valley Landscape & Maint., Inc., 333 F.3d 923, 925 (9th Cir. 2003); *see also Landefeld*, at 1182.

STATEMENT OF ISSUES PRESENTED

I. Is BELCO liable to FAWS for costs incurred sampling, testing, and analyzing well water of its members' drinking water under CERCLA since the expenses were necessary and consistent with the national contingency plan?

II. Is the EPA's determination to reopen the Consent Decree and order further remedial action in the UAO proper since the agency identified a new relevant standard when the ERA was passed?

III. Is the EPA's determination that BELCO is not required to install filtration systems in Fartown, despite the existence of the ERA, arbitrary, capricious, or contrary to law due to the evidence available to them and the legislative intent of the ERA?

IV. Is the District Court's retention of the state claims an abuse of discretion due to the novel state law issues of the case?

STATEMENT OF THE CASE

I. Statement of Facts

In 1972, Better Living Corporation ("BELCO") filed a patent on a sealant coating with the use of preventing corrosion called "LockSeal." Lockseal contains two chemical ingredients: the liquid NAS-T and a powdered activation agent. R. at 5. When combined, the two produce a chemical reaction that becomes a solid at room temperature. *Id*. In 1973, BELCO began manufacturing NAS-T and the activation agent at a factory in Centerburg, New Union. *Id.* at 6. BELCO continued using this facility until 1998 when they moved to Northern New Union. *Id*.

Though NAS-T is not regulated under the Safe Drinking Water Act, medical studies published in the mid-1980's showed it to be a probable human carcinogen. *Id*. Based on these studies, in 1995 the Environmental Protection Agency ("the EPA") adopted a Health Advisory Level ("HAL") for NAS-T in drinking water of 10 parts per billion ("ppb"). *Id*. Even below the HAL, the human nose can detect a sour or stale smell in water at concentrations as low as 5 ppb of NAS-T. *Id*.

In 2013, Centerburg residents began to notice a sour smell in their water. *Id*. In response, the Department of Health ("DOH") began testing the Centerburg Water Supply for contamination in January 2015. *Id*. The DOH determined the water contained between 45 and 60 ppb NAS-T. *Id*. On September 17, 2015, the DOH notified the residents of Centerburg to stop drinking their tap water. *Id*. At this time, BELCO began distributing water bottles to Centerburg residents. *Id*. In March of 2016, the EPA and BELCO entered into a remedial investigation and feasibility study ("RI/FS") where BELCO agreed to continue providing bottled drinking water to the residents of Centerburg and to investigate the cause and extent of the contamination. *Id*.

Through soil testing and studying operation records at the facility, BELCO concluded NAS-T entered the soils from sporadic spills and an unlined lagoon used to store wastewater and stormwater in the 1980s and early 1990s. *Id*. The contamination eventually found its way into the groundwater and created a plume of NAS-T in the Sandstone Aquifer. *Id*. The Sandstone Aquifer is the sole and direct water source for all citizens of Fartown. *Id*. at 5. In July of 2016, BELCO began installing three successive lines of well to monitor the contamination in and around Centerburg, completing the project in January of 2017. *Id*. at 7. The final wells—those closest to Fartown—were approximately half of a mile north of Fartown, and at the time these wells showed no detectable amounts of NAS-T. *Id*. The EPA did not direct BELCO to install any additional

wells. *Id*. Based on the investigation, BELCO recommended no remediation of the NAS-T plume in the Sandstone Aquifer, but instead to filter Centerburg's Water Supply and excavate soil near the facility. *Id*.

On June 30, 2017, the EPA brought an action against BELCO. *Id*. As a result, BELCO and the EPA entered into and filed a Consent Decree. *Id*. Pursuant to the Consent Decree, BELCO was to implement whatever remedy was selected by the EPA. *Id*. On August 28, 2017, the Consent Decree was approved by the court. *Id*. The Consent Decree required BELCO to install and maintain a water filtration system at the Centerburg Water Supply, excavate contaminated soil around the facility, and conduct monthly sampling of the wells. *Id*. As a result of these tasks being completed and very little NAS-T being detected in the monthly sampling, the EPA closed the Consent Decree in September of 2018. *Id* at 8.

In 2016, some Fartown residents began to notice the water from their private wells smelled "off." *Id* at 8. They requested the Department of Health ("DOH") sample and test their drinking water for NAS-T contamination. *Id*. In February of 2019, the DOH tested five wells in Fartown, but did not detect NAS-T in any of them. *Id*. In May of 2019, Fartown asked the EPA to order BELCO to conduct further testing in Fartown. *Id.* But the EPA declined to do so on grounds that the Consent Decree was closed and could only be reopened if either (1) "new information not previously available or known to the EPA [was] revealed" or (2) "new, more stringent Regulatory Standards [have been] established." *Id*. at 7-8.

In response to the inaction by the EPA, in December of 2019, 100 Fartown residents formed Fartown Association for Water Safety ("FAWS") and hired Central Laboratories, Inc. ("Central Labs") to test their private wells. *Id*. Central Labs took samples from private wells in Fartown and returned the following results:

- 24% of samples returned concentrations of NAS-T between 5 and 8 ppb
- 23% of samples returned concentrations between 1 and 4 ppb
- 53% of samples detected no NAS-T

Id. Given these concentrations, in May of 2020 FAWS again requested the EPA to order further investigation into the Fartown wells. *Id.* But, again, the EPA declined. *Id*.

In November of 2020, New Union passed the Environmental Rights Amendment ("ERA") which provides "a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." *Id*. In response to this amendment, the EPA asked the New Union Department of Natural Resources ("DNR") if the ERA constitutes an applicable or relevant and appropriate requirement ("ARAR") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *Id*. at 9. On February 14, 2021, the DNR responded that the ERA was an ARAR under CERCLA. *Id*.

In March 2021, citing the FAWs-funded 2020 Central Labs results which showed NAS-T contamination in Fartown and the passage of the ERA, the EPA reopened the Consent Decree. *Id*. The EPA requested BELCO sample private wells in Fartown for NAS-T, supply bottled water to any Fartown residents who's well returned positive results, and then to continue monitoring any contaminated wells going forward. *Id*. BELCO challenged the EPA's demand and claimed they did not have the right to reopen the Consent Decree. *Id*.

On June 24, 2021, the EPA issued a Unilateral Administrative Order ("UAO") directing BELCO to perform the actions included in the reopened Consent Decree. BELCO refused. *Id*. On July 7, 2021, the EPA began supplying water to the Fartown residents whose wells showed contamination. *Id*. at 10. The EPA tested the Fartown wells and returned the results that:

- approximately 20% of the samples were in the 5 to 8 ppb range,

- 25% of samples had between 1 to 4 ppb of NAS-T,
- and 55% of samples had no NAS-T. *Id.*

As of the date of this action, BELCO still refuses to perform the actions directed by the EPA's UAO. *Id*. at 9.

II. Procedural History

On June 30, 2017, the EPA filed case number 17-CV-1234 ("the BELCO Action"), a cost recovery claim against BELCO for the agreed upon measures in the Consent Decree *Id*. at 7. On August 2, 2021, the EPA moved to file a second cost recovery claim in the BELCO Action for fines and incurred costs resulting from BELCO's refusal to comply with the UAO. *Id*. at 10. On August 30, 2021, FAWS moved to intervene in the BELCO action to assert a claim against the EPA. *Id.* The court granted that motion on September 24, 2021. *Id*.

Separately, on August 30, 2021, FAWS and 85 individual Fartown residents filed case number 21-CV-1776 ("the FAWS ACTION") against BELCO. *Id*. The Plaintiffs' claims in FAWS Action were threefold: (1) a cost recovery pursuant to CERCLA; (2) a negligence claim regarding BELCO's contamination of the Sandstone Aquifer; and (3) a private nuisance claim regarding that same contamination. *Id*. At the parties' joint request, the court consolidated the BELCO Action (17-CV-1234) and the FAWS Action (21-CV-1776). *Id*. On June 1, 2022, the lower court entered summary judgment in the consolidated matter. *Id*. at 18. That decision found:

(1) that BELCO was not bound to reimburse FAWS's testing expenses;

(2) that the EPA was correct to reopen the Consent Decree and issue the UAO;

(3) that the EPA's decision not to require installation of CleanStripping technology on Fartown's wells; and

(4) that the remaining state claims should not be dismissed. *Id*.

Each party filed a timely interlocutory appeal from different parts of the district court's order. *Id* at 2. This Court granted an appeal to consider the resolution of the federal law claims under CERCLA and the jurisdictional issues surrounding the District court's decision to retain jurisdiction of the state law claims. *Id.*

SUMMARY OF THE ARGUMENT

First, the district court erred in granting summary judgment since a reasonable juror could find that costs incurred by FAWS in sampling, testing, and analyzing Fartown wells in December 2019 are reimbursable as response costs under CERCLA. Pursuant to CERCLA, potentially responsible parties such as BELCO can be liable to private parties for response costs incurred by those private parties. *See* 42 U.S.C. § 9607 (a)(4)(B). Here, whether BELCO is liable for FAWS expenses turns on the costs incurred were "necessary" and "consistent with the national contingency plan." *Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 977 (N.D. Ill. July 24, 2012) (citations omitted); *see also* R. at 11. The response actions taken by Fartown in December 2019—the testing of the Fartown wells—necessary because they are not "duplicative" of the work performed by the EPA as those actions were in cases such *Iron Mountain Mines*. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1271–72 (E.D. Cal. 1997) (citations omitted). Prior to this time, no testing had ever been in Fartown despite the fact that its sole water source contained an NAS-T plume. Additionally, the actions were necessary because they had a clear nexus to the contamination and fall squarely within the "classic examples" of reimbursable costs recognized by the 10th Circuit. *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005). Moreover, courts have found that this issue is a question of fact for the jury to decide. *Carson Harbor Vill., Ltd. v. Unocal Corp*., 270 F.3d 863, 888 (9th Cir. 2001). Therefore, the lower court erred in granting summary judgment and should be overruled.

Second, the district court properly determined that the EPA had the authority to categorize the ERA as an ARAR that allowed for the reopening of the Consent Decree and the subsequent UAO. The EPA has authority recognize a state environmental standard as an ARAR to which a cleanup remedy must comply if: (1) it was properly promulgated, (2) it is more stringent than federal standards, (3) it is legally applicable or relevant and appropriate, and (4) it was timely identified. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1440 (6th Cir. 1991); *Pierson Sand & Gravel, Inc. v. Pierson Twp.*, 89 F.3d 835 (6th Cir. 1996). The ERA was properly promulgated. Further, it is clearly a more stringent standard analogous to those at issue in *Akzo*. *See Akzo*, at *1443*. Given that the EPA quickly identified the new relevant standard, it is clear the agency properly exercised its authority to reopen the consent decree. Therefore, the district courts determination should be upheld.

Third, the district court properly determined that the EPA was arbitrary and capricious in not requiring BELCO to install CleanStripping. To sustain an agency's final action under the arbitrary and capricious standard of review, the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. *See Am. Petroleum Inst. v. E.P.A.*, 540 F.2d 1023, 1029 (10th Cir. 1976). Here, the EPA failed to use the evidence available to it in the administrative record as well as the Central Labs testing results before it made the decision to not require BELCO to install CleanStripping on the Fartown wells that tested positive for NAS-T. The legislative history of the ERA makes clear that its intended purpose was to entitle each and every person of New Union the right to clean water free from unregulated toxic chemicals, including "non-natural, human-caused pollutants and contaminants." Therefore, this Court should uphold the district court order vacating the EPA's harmful decision.

Lastly, the District court erred in retaining jurisdiction over the remaining state law tort claims after the federal law claims were settled. In cases, such as this, where all federal claims in a case have been dismissed, the state law claims should be dismissed as well. *Brzak v. UN*, 597 F.3d 107, 113 (2d Cir. 2010). Further, the novel issues of state law at issue in this case only heighten the importance of returning these issues to the state court. *Ganley v. Jojola*, 402 F. Supp. 3d 1021, 1082 (D.N.M. 2019). The state law being examined in the case is a novel issue that has not been heard by the state and retention of the state claim "would be an inappropriate exercise of pendent jurisdiction and a waste of judicial resources" as highlighted by *Rounseville v. Zahl*, 13 F.3d 625, 628 (2d Cir. 1994). Further, since the federal law claims have been settled and the case is not yet trial ready, the most judicially efficient option would be to allow the state court to complete the discovery process and hear the case. *Raucci v. Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990). The District court's decision to retain jurisdiction after all federal claims were dismissed over a novel state law issue in a case that is not ready for trial was an abuse of discretion.

ARGUMENT

I. THERE IS A GENUINE DISPUTE OF MATERIAL FACT OVER WHETHER FAWS'S RESPONSE COSTS WERE NECESSARY AND CONSISTENT WITH THE NATIONAL CONTINGENCY PLAN.

This Court reverse the district court's grant of summary judgment because there is a genuine dispute of material fact as to whether FAWS's response costs were necessary. Under CERCLA, potentially responsible parties ("PRPs") can be liable to private parties for response costs incurred by those private parties. *See* 42 U.S.C. § 9607 (a)(4)(B). BELCO, a PRP[1], would

[1] It is not in dispute that BELCO is a potentially responsible party. CERCLA defines a PCP as "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." 42. U.S.C. § 9607 (a)(4)(A). Given the EPA's findings

thereby be responsible for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id*. Whether a response cost is necessary is a question of fact for a jury to decide. *Carson Harbor Vill.,* at 888 (holding that summary judgment was improper because there is a genuine issue of material fact concerning whether the alleged response costs were necessary.)

To recover for such response costs, non-governmental plaintiffs must show that: 1) the site in question is a "facility" under CERCLA; 2) the defendant is a PRP; 3) there has been a release or threatened release of hazardous substances; 4) the plaintiff has incurred costs in response to the release or threatened release; and 5) the costs incurred were "necessary" and "consistent with the national contingency plan." *Forest Park Nat. Bank & Trust*, at 977 (citations omitted); *see also* R. at 11.

It is not in dispute that the site in question was a facility, that BELCO is a responsible party, that there was a release of a hazardous substance (NAS-T), and that FAWS incurred costs in response to that release. Accordingly, at issue here is solely that fifth issue identified by the *Ditchfield* court—whether FAWS's incurred costs were "necessary" and "consistent with the national contingency plan." For the reasons below, summary judgment should be reversed because there is a genuine dispute of material fact concerning whether FAWS's testing costs were necessary and consistent with the national contingency plan.

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of any subsequent Consent Decree, BELCO fits this definition. *See* District court Order at 7.

A. FAWS's response costs were necessary because they were not duplicative and because there was a clear nexus between the testing and response to the hazardous release.

Necessary costs are costs that are "necessary to the containment and cleanup of hazardous releases." *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992) (citing *1272 Daigle v. Shell Oil Co., 972 F.2d 1527, 1535–37 (10th Cir.1992)). Generally, "investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA" are not considered necessary because they are "duplicative" of the work performed by the EPA. *Iron Mountain Mines*, at 1271–72 (citations omitted). However, response actions are necessary if they are "closely tied to the actual cleanup of hazardous releases." *Young*, at 863; *see also Hardage*, 982 F.2d at 1448 (stating "[w]e too have recognized costs cannot be deemed 'necessary' to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination.")

Further, costs are necessary when they are incurred in response to a threat to human health or the environment. *Carson Harbor Vill.*, at 871. Moreover, for response costs to be "necessary," a plaintiff "must establish that an actual or real public health threat exists prior to initiating a response action." *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994), aff'd, 54 F.3d 379 (7th Cir. 1995). However, response costs can be "necessary" even though the agency responsible for the cleanup never approved the response actions taken. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

i. FAWS's testing of Fartown wells were not duplicative because the EPA had never tested any Fartown wells at the time of the incurred costs.

Response actions may be "duplicative" and thus unrecoverable under CERCLA "if they occur at the same time as the EPA's own actions and do not seek to uncover information different than or above and beyond that of the EPA; or if they occur after the EPA had already informed the

private parties that it would be conducting its own investigation." *Louisiana-Pacific Corp. v. Beazer Materials & Servs. Inc.*, 811 F.Supp. 1421, 1425 (E.D. Ca. Jan. 27, 1993)).

For example, in *Louisiana-Pacific Corp.*, the court found that the private parties' response costs were duplicative, unnecessary, and therefore ineligible for reimbursement because the private parties' investigations were "essentially the same" as the investigation done by the EPA. *Id.* (finding "[It is] not disputed that the EPA and Louisiana–Pacific investigations were essentially the same.")

The case at bar is materially distinct from *Louisiana-Pacific Corp.* because FAWS's response actions were not "essentially the same" as those of the EPA. In fact, unlike in *Louisiana-Pacific Corp.*, FAWS's response actions were not even remotely similar to actions undertaken by the EPA. The EPA never tested Fartown wells. R. at 7 (stating "the final five wells were installed approximately half a mile north of Fartown."). The response costs at issue here were incurred when Fartown residents tested wells *in Fartown*. This—by definition—was not duplicative because the EPA had never conducted any tests in Fartown.

As the district court correctly pointed out, Fartown residents "use private drinking water wells in each of their homes that pump directly from the Sandstone Aquifer." R. at 5. Further, BELCO's hazardous release of NAS-T created a plume of hazardous NAS-T in the Sandstone Aquifer—the direct water source for all of Fartown's residents. *Id.*

It is undisputed that the RI/FS conducted by BELCO under EPA oversight never tested any wells in Fartown. Likewise, it is undisputed that the Consent Decree between the EPA and BELCO never tested any wells in Fartown. Further, the Consent Decree also explicitly required no remediation of the NAS-T plume in the Sandstone Aquifer. District court Order at 7. It was therefore necessary that Fartown conduct these tests on their own since neither the EPA nor

BELCO would do so. Further, the Sandstone Aquifer—Fartown's water source—was confirmed to contain a plume of the hazardous NAS-T released by BELCO.

Unlike the investigations conducted in *Louisiana-Pacific*, FAWS's investigations were not "essentially the same" as those of the EPA because the EPA only tested wells located in an entirely different town. FAWS's investigations were therefore not duplicative. FAWS's testing of Fartown wells did seek to uncover information different than that of the EPA because the EPA never tested any Fartown wells. The District court's reliance on *Louisiana-Pacific* was therefore misguided because the cases are materially distinct.

At the very least, summary judgment was improper and should be reversed because a reasonable juror could find FAWS's nonduplicative actions necessary. Therefore, this Court should find summary judgment was improper there is a reasonable dispute of material fact.

ii. FAWS's response costs were necessary because there was a clear nexus between the testing done and the actual effort to respond to BELCO's hazardous release.

The Tenth Circuit has held that the response costs are not necessary where there is no nexus between the actions taken by the plaintiff and the actual cleanup of the hazardous release. *Young*, at 863. In doing so, the *Young* court found that costs incurred by the plaintiffs such as "site investigation, soil sampling, and risk assessment" are "classic examples of preliminary steps taken in response to the discovery of the release or threatened release of hazardous substances." *Id.* at 864. On the other hand, the court found that costs such as surveying their property, "stretch the statutory language entirely too far." *Id.* Further, the 10th Circuit found response costs unnecessary where plaintiffs "[did] not intend to spend any money to clean up the contamination on their property" and "purchased the property [for considerably less than its appraised value] *after* they knew about the EPA's actions at the." *Id.* at 861, 164.

In *Walnut Creek Manor*, the court applied *Young* to determine the defendant's motion for summary judgment on the plaintiff's CERCLA response costs claim was denied because a genuine dispute of material fact existed over whether said response costs were "necessary." *Walnut Creek Manor, LLC v. Mayhew Ctr., LLC*, 622 F. Supp. 2d 918, 929 (N.D. Cal. 2009). The court found that since the plaintiff did "intend to spend any money to clean up the contamination on its property" and was requesting "response costs" to "assist with . . . remediation and cleanup efforts" that the costs were a necessary response cost within the meaning of CERCLA. *Id.* at 929.

Here, FAWS and its members are simply seeking reimbursement for those costs the 10th Circuit have deemed "classic examples of preliminary steps taken in response" to the release of hazardous materials." The facts at bar are analogous to *Walnut Creek Manor* than *Young*. FAWS had not testified that it did not intend to spend money to assist with the cleanup. FAWS merely seeks to recover response costs for work performed in order to assist with and help plan the eventual remediation and cleanup efforts.

Additionally, FAWS expressed no intention to abandon its property like the plaintiffs did in *Young*. FAWS members did not purchase their properties at a reduced rate because of the hazardous release and then seek further monetary relief. FAWS has not requested reimbursement for actions not typically deemed "response costs" under CERCLA. Nor have the members of FAWS abandoned their properties. Given these key distinctions from the *Young* case, it is clear the requested costs fall squarely within the "classic examples" the 10th Circuit acknowledged are reimbursable under CERCLA.

Other district courts have also recognized the importance of this nexus between the actions taken and response to the contamination. In *Iron Mountain Mines*, the court found that the plaintiff's response costs were not reimbursable under CERCLA because "no activity by the

[defendant] ha[d] generated the [hazardous] releases that [the Plaintiff's] costs respond to." *Iron Mountain Mines*, at 1269. In that case, the plaintiff sought CERCLA reimbursement for response costs associated with the release of a hazardous material from a mine *the plaintiff owned. Id.* at 1266. The plaintiff argued that the defendant's hazardous release upstream migrated with releases caused by the plaintiff. *Id.* at 1267. However, none of the response costs were incurred at the location where the waters from the defendant's hazardous release might have come into contact with the hazardous materials released by the plaintiff. *Id.* at 1269. The court rejected the plaintiff's argument because the defendant did not cause the release of the hazardous materials from the plaintiff's mines which its response costs responded to. *Id.* at 1270. In other words, the court found the plaintiff "failed to show a nexus between its response costs" and the actions of the defendant. *Id.* at 1271.

Unlike the defendant in *Iron Mountain Mines*, there is no dispute here that BELCO alone generated the release of hazardous substances. R. at 4 (indicating BELCO as the "company responsible for contamination"). There is, therefore, a clear nexus between the response costs incurred by FAWS and the actions of BELCO. That nexus is demonstrated by three key facts:

(1) That BELCO's hazardous release of NAS-T created a toxic plume in the Sandstone Aquifer. R. at 6.

(2) That the Sandstone Aquifer is the sole water source for the citizens of Fartown's private wells. R. at 5.

(3) That FAWS tested Fartown wells solely as a response to BELCO's hazardous release. R. at 8.

The release of NAS-T was not caused by FAWS. It was not caused by the EPA. This release was caused by BELCO alone. For that reason, there is a clear nexus between FAWS's testing of private wells connected to the Sandstone Aquifer and the actions of BELCO. At the very least, summary judgment should be overturned because a reasonable juror could find that such a nexus

existed between the testing done by FAWS and an actual effort to respond to BELCO's release of the hazardous NAS-T.

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

Additionally, this court should overrule the grant of summary judgment because whether FAWS's response actions substantially complied with the National Contingency Plan ("NCP") is an issue of fact that should be reserved for the jury. A private cleanup effort is "consistent with the NCP" when the action, "evaluated as a whole, is in substantial compliance with the applicable requirements in 40 C.F.R. § 300.700(c)(5)-(6) and results in a CERCLA-quality cleanup." *Walnut Creek Manor,* at 930 (quoting 40 C.F.R. § 300.700(c)(3)(i)). Since BELCO's investigation and compliance with the initial consent decree indicates that a CERCLA-quality cleanup is the necessary result, the only question before this Court is whether FAWS substantially complied with 40 C.F.R. § 300.700(c)(5)-(6).

Turning to that issue, the NCP's procedural requirements include, among other things, that the party seeking response costs conduct a remedial site investigation (40 C.F.R. § 300.700(c)(5)(vii)), prepare a remedial investigation and feasibility study ("RI/FS")(40 C.F.R. 300.700(c)(5)(viii)), and provide an opportunity for public comment (40 C.F.R. 300.700(c)(6)). *Id*. at 1152. However, FAWS's NCP consistency does not hinge on completing each of these factors. Rather, NCP consistency is "designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment." *Washington State Dep't. of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 802 (9th Cir.1995). Therefore, "immaterial or insubstantial deviations" from the NCP will not preclude a cost-recovery action.

Mayhew, 622 F. Supp. at 930 (quoting 40 C.F.R. § 300.700(c)(4)).[2] The question for the Court is simply whether there was "substantial compliance with the NCP," which ***is a question of fact***. *City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1236 (E.D. Wash. 2006) (emphasis added).

Here, Fartown appropriately chose the cost-effective option of having their water tested after determining the Sandstone Aquifer could be contaminated. R. at 8. Further, it was only after being ignored by BELCO and the EPA that Fartown residents formed FAWS and enlisted the help of a private lab to conduct the testing. *Id*. Additionally, FAWS is 100 residents of Fartown, a town of just 500 people. This 20% participation rate would be more than enough to persuade a reasonable juror that FAWS acted with meaningful public participation. Now, FAWS is simply requesting reimbursement for those tests which did, in fact, yield results of contamination. *Id.* Thus, summary judgment should be reversed because a reasonable juror could find FAWS substantially complied with the NCP.

II. THE DISTRICT COURT DID NOT ERR IN RULING THE EPA PROPERLY EXERCISED ITS AUTHORITY TO REOPEN THE CONSENT DECREE BASED ON THE EPA'S DETERMINATION THAT THE ENVIRONMENTAL RIGHTS AMENDMENT (ERA) WAS AN "APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENT" AND THUS A NEW, MORE STRINGENT REGULATORY STANDARD.

Section 121 of CERCLA requires all remediation efforts in which the EPA is involved to "attain a degree of cleanup at a minimum which assures protection of human health and the environment" and to meet all "applicable or relevant and appropriate requirements" ("ARARs").

[2] Prior to 1990, strict compliance with the NCP was required to recover costs under CERCLA. The EPA relaxed this standard in 1990 with the passage of 40 C.F.R. § 300.700(c)(3)(i). "EPA purposely shifted to this more flexible 'case-by-case' standard to avoid discouraging parties from cleaning up hazardous wastes for fear that recovery of their costs would later be precluded by less than perfect compliance with the NCP." *Waste Mgmt. of Alameda Cnty., Inc. v. E. Bay Reg'l Park Dist*., 135 F. Supp. 2d 1071, 1100 (N.D. Cal. 2001) (citing 55 Fed.Reg. at 8792-94); *see also* 55 Fed.Reg. 8666, 8794 ("minor procedural discrepancies [should not] defeat reimbursement ....").

42 U.S.C. § 9621(d). Although CERCLA does not itself define ARARs, the National Contingency Plan ("NCP") — codified in 40 C.F.R. § 300.5 — defines ARARs as "cleanup standards, standards of control and other substantive requirements, criteria or limitations promulgated under federal environmental or state environmental or facility siting laws." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001).

A site cleanup, under CERCLA, must comply with all ARARs, including any "state environmental" requirements that are "more stringent" than the governing federal requirements. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 671 (5th Cir. 1989). If a state environmental law qualifies as an ARAR, the federal government is obligated to ensure that a CERCLA cleanup site complies with that particular state environmental law. *Fort Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828, 831 (9th Cir. 1999). A state environmental standard constitutes an ARAR to which a cleanup remedy must comply if: (1) it was properly promulgated, (2) it is more stringent than federal standards, (3) it is legally applicable or relevant and appropriate, and (4) it was timely identified. *Akzo*, at 1440; *Pierson Sand & Gravel, Inc*, at 835.

A. The ERA was properly promulgated because it was a generally applicable environmental standard that was legally enforceable.

It has long been understood that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference. *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *United States v. Clark*, 454 U.S. 555, 565 (1982). CERCLA requires that a state standard be "promulgated…under a state environmental or facility citing law," in order to be considered an ARAR. 42 U.S.C. § 9621. The EPA has construed "promulgated," as it is used in 42 U.S.C. § 9621, to mean "laws imposed by state legislative bodies and regulations developed by state agencies that are of general applicability and are legally enforceable." *Akzo*, at 1440. State environmental standards are promulgated if they are "of general applicability and are legally

enforceable." *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520, 1527 (D.C. Cir. 1993) (citing 40 C.F.R. § 300.400(g)(4)).

In *Akzo*, the Sixth Circuit held that a Michigan state anti-degradation law was properly promulgated for purposes of designation as an ARAR because the law was both "generally applicable" and "legally enforceable." 949 F.2d 1409, 1440-41. The court determined that the Michigan law was "generally applicable" because it was imposed on all citizens of Michigan and "legally enforceable" because it was passed by the Michigan legislature, consistent with all other laws that were enforceable. *Id*. at 1443.

The ERA is a properly promulgated standard, for purposes of designation as an ARAR, because it is both generally applicable and legally enforceable on the citizens of New Union. The Sixth Circuit in *Akzo* held that the Michigan state antidegradation law was "generally applicable" and "legally enforceable" because it was passed by the Michigan legislature and was imposed on all citizens of Michigan. Similarly, the ERA is an amendment to the New Union Constitution, and as such, was intended to be imposed on "[e]ach and every person" of the state of New Union. Moreover, the ERA was not only passed by the New Union state legislature, but it was also signed by the governor and passed a ballot measure by an overwhelming margin of 71%. Because the ERA is both "generally applicable" and "legally enforceable", it is therefore properly promulgated for purposes of designation as an ARAR.

B. The ERA is more stringent than any other general or specific relevant federal environmental laws because it is broader in scope and grants a fundamental right.

A site cleanup, under CERCLA, must comply with all ARARs, including any "state environmental" requirements that are "more stringent" than the governing federal requirements. *Amoco Oil Co.*, at 671 (citing 42 U.S.C. § 9621(d)). The EPA must comply with state environmental laws that fall within the definition of "applicable or relevant and appropriate

requirements" if such requirements are "more stringent than federal law." *United States v. City & Cnty. of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996). "Where no Federal ARAR exists for a chemical, location, or action, but a State ARAR does exist, or where a state ARAR is broader in scope than the Federal ARAR, the State ARAR is considered more stringent." *See Akzo*, at 1443.

In *Akzo,* the Sixth Circuit compared a Michigan state antidegradation law with the federal Safe Drinking Water Act ("SWDA") for purposes of determining if the state law constituted an ARAR. *Id*. After a thorough analysis, the Sixth Circuit concluded that the Michigan state law was a more stringent environmental standard for three main reasons: First, the provisions of the SWDA applied to only a limited number of substances, whereas the state law regulated "any substance which is or may become injurious to the public health." *Id*. at 1443. Second, the SWDA only applied to public drinking water supply systems, whereas the state law applied to any waters of the state, including groundwater. *Id*. Third, no party identified a federal statute or rule that more broadly regulated the discharge of injurious or potentially injurious substances into groundwater. *Id*.

Here, BELCO contends that ERA cannot be more stringent than federal standards because its language is too similar to the language used in the NCP for selecting remedies that are "protective of human health and the environment." The ERA expressly establishes the fundamental right of New Union citizens "to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." This fundamental right is far beyond the general language of the NCP to assure "protection of human health and the environment," and there exists no other general or specific environmental standard that would more broadly regulate the human-caused discharge of NAS-T into the sandstone aquifer. Similar to the Michigan state

antidegradation law in *Akzo Coatings*, the ERA is not limited to any one hazardous substance caused by humans, and it applies to all waters of the state of New Union, including groundwater.

C. The ERA is a "relevant and appropriate" environmental standard because it sufficiently addresses the NAS-T problem and is well suited for Fartown remediation.

It is widely understood that CERCLA cleanup plans must comply with "legally applicable ***or*** relevant and appropriate" standards of state environmental law. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1356 (2020) (emphasis added); *see also Fort Ord Toxics Project, Inc. v. California E.P.A.*, 189 F.3d 828 (9th Cir. 1999) (holding that a CERCLA cleanup must comply with any state environmental requirement that is "legally applicable or relevant and appropriate."); *see also New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006) (holding remedial actions must result in a level of cleanup that meets the "legally applicable or otherwise relevant and appropriate" requirements.) In fact, the EPA, in issuing guidance on the definition of ARARs, clearly conveyed that a state environmental law may be either "applicable" or "relevant and appropriate" to a remedial action, but it cannot be both. *See Superfund Program; Interim Guidance on Compliance With Other Applicable or Relevant and Appropriate Requirements*, 52 Fed.Reg. 32496-01 (Aug. 27, 1987).

On appeal, FAWS concedes that the ERA is not "applicable" as the term is used in CERCLA; therefore, the relevant question on appeal is whether ERA is "relevant and appropriate." While CERCLA does not expressly define "relevant and appropriate requirements," the NCP defines them as "those substantive requirements that", while not applicable to a specific release, "nonetheless address problems or situations sufficiently similar to those encountered at the CERCLA site such that their use is well suited to the particular site." *State of Ohio v. U.S. E.P.A.*,

at 1526; *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001).

The NCP lists several factors to consider when evaluating both the relevance and appropriateness of an environmental standard, including in pertinent part: the substances involved, type of place that is affected, purpose of the requirement, the actions or activities regulated by the requirement and the remedial action contemplated, and any consideration of the potential use of the affected resource. 40 C.F.R. § 300.400(g)(2). The EPA, in promulgating revisions to the NCP to comply with the Superfund Amendments and Reauthorization Act of 1986 (SARA), clarified that the requirement and the site situation does not have to be similar with respect to each factor to be considered "relevant and appropriate," and while the factors are useful, the final decision on relevancy and appropriateness "is based on professional judgment about the situation at the site and the requirement as a whole." *See National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed.Reg. 8666-01; *see also State of Ohio v. U.S. E.P.A.*, at 1530 (holding that the EPA is given deference in determining whether or not an ARAR is "relevant and appropriate.").

Here, BELCO contends that the ERA is not "relevant and appropriate" because it provides no "measurable standard" for any specific situation, but BELCO erroneously confuses the difference between "applicable" and "relevant and appropriate." The EPA's determination that the ERA is "relevant and appropriate" was based on consideration of the relevancy and appropriateness factors listed in the NCP alongside its professional judgment. When reopening the consent decree with BELCO, the EPA included in its administrative record the NCP factors it considered in determining that the ERA is "relevant and appropriate." The EPA considered 2020 Central Labs result, the NAS-T odor in the water, the potential carcinogenic effect of ingesting

NAS-T, and the fact that Fartown is an environmental justice community — a fact that is not argued on appeal. The EPA also included the additional response actions demanded of BELCO to supply water bottles, sampling private wells, and continuing to monitor Fartown wells.

The legislative history of the ERA makes clear that it is intended to serve as a self-executing provision with the purpose of addressing unregulated contaminants caused by humans. NAS-T, an unregulated contaminant caused by humans, is the exact form of toxic substance that the ERA was intended to address; therefore, the right granted by the ERA to a clean environment "free from contaminants and pollutants caused by human" addresses the NAS-T problem plaguing the people of Fartown. When considering the purpose of the ERA alongside the relevant factors, the EPA used its professional judgment and concluded that the ERA is "relevant and appropriate," and this determination is entitled to deference. Whether the ERA was timely identified is not challenged on appeal.

In conclusion, the EPA properly exercised its authority to reopen the consent decree on the grounds that the ERA is a more stringent state environmental standard that constitutes an ARAR. Therefore, the district court did not err in granting summary judgment on this issue in favor of the EPA and FAWS, and FAWS's Action seeking additional remediation from BELCO than that ordered by the EPA's Unilateral Administrative Order ("UAO") should stand.

III. THE DISTRICT COURT DID NOT ERR IN RULING THAT THE EPA'S DECISION TO NOT REQUIRE BELCO TO INSTALL CLEANSTRIPPING FILTRATION SYSTEMS ON FARTOWN PRIVATE WELLS WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The Administrative Procedure Act ("APA") "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). The APA requires that federal administrative agencies engage in "reasoned decision making" before performing final actions. The *Dep't of Homeland*

Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1905 (2020). The Courts of Appeal must set aside a federal agency's decision made pursuant to the Administrative Procedure Act when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Minnesota Pub. Utilities Comm'n. v. F.C.C.*, 483 F.3d 570, 577 (8th Cir. 2007). Under the APA, a federal agency's action is "arbitrary and capricious" if the agency relied on factors that Congress did not intend for it to consider; failed to consider an important part of the problem; offered an explanation contradicted by the available evidence; or is so implausible that it could not be attributed to a difference in view or the product of agency expertise. *Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Env't Quality*, 990 F.3d 818, 826 (4th Cir. 2021).

An administrative agency must analyze the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 164 (1962). To sustain an agency's final action under the arbitrary and capricious standard of review, the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. *See Am. Petroleum Inst. v. E.P.A.*, 540 F.2d 1023, 1029 (10th Cir. 1976). "An agency's decision is entitled to a presumption of regularity, but that presumption is not to shield the agency's action from a thorough, probing, in-depth review." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994)."Judicial review must be based on something more than trust and faith in EPA's experience." *Am. Petroleum Institute*, at 349.

The Fifth Circuit in *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993) analyzed a case with similar facts to those in this case. In that case, one citizen of a small community in Odessa, Texas complained that the drinking water was discolored. *Id*. at 892. After

an investigation conducted by the Texas Water Commission and a remedial investigation conducted by the State, it was discovered that the Trinity Aquifer, the only source of groundwater in the area, contained elevated concentrations of chromium. *Id*. In response, the EPA furnished an alternative water supply for the people of Odessa without applying any evidence available. *Id*. at 893. On appeal, the Fifth Circuit concluded that the decision to furnish an alternative water supply for the people of Odessa, absent any evidence that the people were actually drinking the contaminated water was arbitrary and capricious. *Id*. at 905.

Similarly in this case, the EPA failed to use the evidence available to it in the administrative record as well as the Central Labs testing results before it made the decision to not require BELCO to install CleanStripping on Fartown wells testing positive for NAS-T. It was abundantly clear that the people of Fartown were actually drinking the contaminated water and NAS-T. In addition, NAS-T is an unregulated contaminant that should be met with additional caution. The EPA's decision flies directly in the face of the plain language of the ERA and its intended purpose. The legislative history of the ERA makes clear that its intended purpose was to entitle each and every person of New Union the right to clean water free from unregulated toxic chemicals, including "non-natural, human-caused pollutants and contaminants." The EPA's decision cannot be considered to be a rational connection between all facts available to it – including the administrative record, the fact that Fartown qualifies as an environmental justice community, and the Central Labs results showing a positive presence of NAS-T in Fartown – and the purpose of the ERA. Thus, like in *Matter of Bell Petroleum Servs., Inc.*, the EPA's decision was arbitrary and capricious. Therefore, the district court did not err in its determination that the EPA was arbitrary and capricious in not requiring BELCO to install CleanStripping and summary judgment in favor of FAWS was proper.

IV. The District court's decision to retain jurisdiction over the state law tort claims was an abuse of discretion because the claims are novel and the federal law claims had been settled.

An appellate court's review of whether a district court had supplemental jurisdiction is reviewed de novo, however, the decision to exercise jurisdiction over pendent state claims is reviewed for abuse of discretion. *Desert Valley Landscape & Maint., Inc.*, at 925; *Landefeld v. Marion Gen. Hosp. Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993).

Fartown contends the district court's decision to retain jurisdiction over the state law tort claims was an abuse of discretion because the novelty of the remaining state law claims and the federal law claims have all been settled.

Federal courts are granted original jurisdiction over all civil cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2022). When the original jurisdiction requirement is met, the federal courts are also granted jurisdiction on other claims coming out of the same case or controversy as the original claim. 28 U.S.C. § 1367(a) (2022). The court may decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of State law" or if "(3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c) (2022). In *Gibbs*, the Supreme Court established a federal court could exercise pendent jurisdiction when state and federal claims "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The Supreme Court emphasized the power to hear pendant cases "need not be exercised in every case in which it is found to exist." *Id* at 726. The Supreme Court went on to say, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Id*. The court weighs several factors to determine whether to exercise supplemental jurisdiction, such as, "judicial economy, convenience, fairness, and

comity." *Nowak v. Ironworkers Loc. 6 Pension*, 81 F.3d 1182, 1191 (2d Cir. 1996) (citing *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir.1994).

A. The case should be dismissed because the lower court lacked jurisdiction over these novel issues of state law.

The Court may decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of State law" 28 U.S.C. § 1367(c) (2022). A state law issue is considered novel when it: (1) is new; and (2) concerns a notable state matter. *Ganley*, at 1082. In *Seabrook*, the Court stated if pendent state claim turns on a novel or unresolved question of state law it should be left for decision by the state courts. *Seabrook*, at 72. The Court further emphasized this concept to be "particularly true if the federal claim on which the state claim hangs has been dismissed." *Id*.

In *Rounseville*, a 42 U.S. Code § 1983 action was brought in federal court under 28 U.S. Code § 1331 federal question jurisdiction. 13 F.3d 625, 628. A malicious prosecution complaint accompanied the action under 28 U.S.C. § 1367. *Id*. at 627. Though the Court stated the state law was not complex, they determined the application of the law to the facts of the case was potentially novel. *Id*. at 632. The Court said the retention of the state claim after the dismissal of the federal claim "would be an inappropriate exercise of pendent jurisdiction and a waste of judicial resources." *Id*. at 631.

Like in *Rounseville*, the current case is novel and should be heard by the state court. Both *Rounseville* and the present case include a state law claim before a federal court after the federal law claims have been dismissed. Also, like *Rounseville*, this state law claim involves a novel application of state law and should therefore be tried in the state court. The New Union Environmental Rights Amendment has not been examined in the state courts and the application of the law on the facts of this case provides a novel issue for the court. Like *Rounseville*, retention

of the state claim after the dismissal of the federal claims "would be an inappropriate exercise of pendent jurisdiction and a waste of judicial resources."

Ganley clarified that a state law issue is considered novel when it is new and concerns a notable state matter. Both of these qualifications are met in the present case. The New Union Environmental Rights Amendment is both new and a notable state matter. Further, NAS-T is a chemical that is only locally monitored and due to its scarcity, "there are no further state or federal regulations" outside of New Union. This rare local chemical is notable to only New Union and as such it should be examined by the state courts.

B. All Federal Claims have been Dismissed

The Court may decline to exercise supplemental jurisdiction if "(3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c) (2022). The Second Circuit has stated that if all federal claims in a case have been dismissed, then the state law claims should be dismissed as well. *Brzak,* at 113. The exception to this is for cases that are ready for trial and have completed discovery. *Raucci,* at 1055. In cases in which discovery has not been completed and the case is not ready for trial, the court has found pendant jurisdiction to be an abuse of discretion. *Valencia v. Sung M. Lee,* 316 F.3d 299, 306 (2d Cir. 2003).

In *Weathers v. Millbrook Cent. Sch. Dist.,* an action was brought in federal court under 28 U.S. Code § 1331 federal question jurisdiction. 486 F. Supp. 2d 273, 276 (D.N.Y. 2007). State law tort claims accompanied the action under 28 U.S.C. § 1367. *Id*. The federal claims were ultimately dismissed, and the only remaining claims were state law claims. *Id.* The Court dismissed the state law claims and provided a quote from *Gibbs,* "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties." *Id*. (quoting *Gibbs* at 715).

The discovery process had not yet been completed and the Court determined the case was not ready for trial. *Id*. at 276.

Like in *Weathers*, the current case is not ready for trial and therefore the remaining state law claims should be dismissed and tried by a state court. When both cases were initiated they contained a federal claim and a pendent state claim. In both instances the federal claims were dismissed, leaving only the state law claim. Like *Weathers*, the discovery process has not been completed in the present case, as expert discovery on the damages for the state law claims has not yet begun. For the federal court to hear this issue would be a needless decision of state law and, as the Supreme Court stated in *Gibbs*, that "should be avoided both as a matter of comity and to promote justice between the parties."

The District court erred in retaining jurisdiction over the remaining state law tort claims after the federal law claims were settled. The state law being examined in the case is a novel issue that has not been heard by the state and retention of the state claim "would be an inappropriate exercise of pendent jurisdiction and a waste of judicial resources." Further, since the federal law claims have been settled and the case is not yet trial ready, the most judicially efficient option would be to allow the state court to complete the discovery process and hear the case. The District court's decision to retain jurisdiction after all federal claims were dismissed over a novel state law issue in a case that is not ready for trial was an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting summary judgment against FAWS's CERCLA response costs claims. In the alternative, this Court should uphold the district court's finding that the ERA constitutes an ARAR, and, accordingly finding the EPA's reopening the Consent Decree based on that ARAR and ordering further

remedial action in the UAO was proper. Further, this Court should uphold the district court's decision to vacate the EPA's determination that BELCO is not required to install filtration systems as arbitrary, capricious or contrary to law in Fartown. Lastly, this Court should reverse the district court's retaining jurisdiction over FAWS's remaining state law tort claims since the federal claims had been resolved.