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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

IN THE MATTER OF)	
)	
)	DOCKET NO. UIC-09-2022-0058
)	
NSHE HI Narcissus, LLC)	MOTION TO WITHDRAW COMPLAINT
)	WITHOUT PREJUDICE AND RESPONSE
Respondent.)	TO MOTION TO DISMISS
_____)	

I. INTRODUCTION

On September 3, 2024, Complainant filed a motion to dismiss, arguing that this action for penalties under the Safe Drinking Water Act (SDWA) may be invalid under the Supreme Court’s recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), and that instead this penalty action should proceed “in a court of law.” While Complainant disagrees that *Jarkesy* precludes an action for penalties under the SDWA in the administrative forum, Complainant is nevertheless willing to proceed with this action in federal district court. Complainant therefore

respectfully requests that the Presiding Officer issue an order allowing Complainant to withdraw the Complaint without prejudice so that it may refer this case to the United States Department of Justice. If the motion to withdraw the Complaint without prejudice is granted, then Respondent's motion to dismiss is moot.

II. MOTION TO WITHDRAW THE COMPLAINT WITHOUT PREJUDICE

In its motion to dismiss, Respondent requested that this action proceed "in a court of law," on the grounds that an action for penalties may not be "valid" in this forum under the Supreme Court's recent decision in *Jarkesy*. See Respondent's Motion to Dismiss (Sept. 3, 2024).

After the respondent files an answer to the complaint, the complainant "may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(d). Further, Complainant here has the discretion to pursue penalties for violations of the SDWA in a civil action in federal court. 42 U.S.C. § 300h-2 (a)(2) ("Whenever the Administrator finds . . . that any person subject to any requirement of any applicable underground injection control program in such State is violating such requirement, the Administrator shall issue an order under subsection (c) requiring the person to comply with such requirement or the Administrator shall commence a civil action under subsection (b).") (emphasis added); see also 40 C.F.R. § 300h-2 (a)(2) (accord). While Complainant does not agree that *Jarkesy* renders an action for penalties under the SDWA invalid in the administrative forum, Complainant is willing to proceed in federal court by exercising its discretion under 42 U.S.C. § 300h-2 (a)(2) to prosecute violations of the SDWA through a civil action in federal court. Complainant therefore requests that the Presiding Officer allow it to withdraw the

Complaint without prejudice so that it may refer the case to the United States Department of Justice.

III. RESPONSE TO RESPONDENT'S MOTION TO DISMISS

If this motion to withdraw the Complaint without prejudice is granted, then Respondent's motion to dismiss is moot. If the motion to withdraw the Complaint without prejudice is denied, then Complainant requests a later opportunity to file a brief in opposition to Respondent's Motion to Dismiss.

IV. CONCLUSION

For the reasons laid out above, Complainant respectfully moves the Presiding Officer to GRANT its Motion to Withdraw Complaint Without Prejudice, and DENY Respondent's Motion to Dismiss as moot.

Respectfully submitted,

Erin Brewer
Assistant Regional Counsel
Office of Regional Counsel, EPA Region 9

Certificate of Service

The undersigned certifies that on the date indicated below this Motion to Withdraw Complaint Without Prejudice and Response to Motion to Dismiss was served upon Respondent's representative and managing member, who has consented in writing to electronic service pursuant to 40 C.F.R. § 22.5(b)(2).

One copy via electronic mail to:

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Dated: September 17, 2024

Erin Brewer
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