BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| In the Matter of:<br><br>JACKSON & SON DISTRIBUTORS, INC., dba JACKSON AND SON OIL<br><br>Seaside, Oregon,<br><br>Respondent. | DOCKET NO. CWA-10-2025-0023<br><br>**COMPLAINANT'S INITIAL PREHEARING EXCHANGE** |

Pursuant to 40 C.F.R. § 22.19, the Presiding Officer's January 28, 2025, Prehearing Order, and the Presiding Officer's December 17, 2025, Order on Complainant's Motion to Amend and Motion for Stay, Complainant U.S. Environmental Protection Agency ("EPA" or "Complainant") submits its Initial Prehearing Exchange.

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## I. WITNESSES

Complainant respectfully submits the following list of expert and fact witnesses who will testify at hearing, together with a brief narrative summary of their expected testimony:

1. **Kate Spaulding**, EPA Region 10 Oil Program Enforcement Coordinator (fact/expert): Ms. Spaulding has over 17 years of experience working for EPA Region 10, including 16 years working as the Clean Water Act (CWA) Section 311 enforcement team lead for the Enforcement and Compliance Assurance Division. In this capacity, Ms. Spaulding works on enforcement cases involving the discharge of oil in violation of CWA Section 311(b)(3), and violations of the Spill Prevention, Control, and Countermeasure (SPCC) and Facility Response Plan (FRP) regulations issued pursuant to CWA Section 311(j), which are located at 40 C.F.R. Part 112 and are entitled "Oil Pollution Prevention" (hereinafter referred to as the "40 C.F.R. Part 112 regulations" or the "Oil Pollution Prevention regulations"). Ms. Spaulding investigates and develops enforcement cases and serves as the lead resource in the development, negotiation, and prosecution of enforcement cases within the CWA Section 311 program for EPA Region 10. Ms. Spaulding's résumé is listed below as Exhibit CX 16 (Spaulding Résumé).

Ms. Spaulding's responsibilities and expertise include calculating appropriate penalties for violations of the CWA Section 311 program, including violations of the SPCC regulations issued pursuant to CWA Section 311(j). Ms. Spaulding reviews all CWA Section 311 penalties for EPA Region 10. She has been conducting this review for approximately 10 years. Ms. Spaulding's responsibilities and expertise also include evaluating efforts made by respondents to return to compliance with the CWA Section 311 program. Ms. Spaulding will testify regarding the statutory factors and all relevant facts and guidance supporting an appropriate penalty in this case, including the seriousness of the violation, economic benefit resulting from the violation,

and degree of culpability involved. Ms. Spaulding will also testify to Respondent's compliance with the SPCC regulations.

2. **Kyle Masters**, EPA Region 10 Case Officer (fact): Mr. Masters has been a case officer for EPA Region 10's Enforcement and Compliance Assurance Division since May of 2022. He worked in the Surface Water Enforcement Section until August of 2023, when he transferred to the Land Enforcement Section. Before joining the EPA, Mr. Masters was a dangerous waste compliance inspector for the Washington Department of Ecology for over four years. Mr. Masters will testify to Respondent's compliance with the SPCC regulations.

3. **Richard Franklin**, EPA Region 10 Oil Program Coordinator (fact/expert): Mr. Franklin has over 31 years of experience across a wide variety of oil spill and hazardous material emergency responses and in CWA Section 311 SPCC and FRP policy and inspections. Mr. Franklin's current responsibilities include coordinating oil spill prevention regulatory programs across Alaska, Idaho, Oregon, and Washington, and supporting oil spill response. Mr. Franklin is also responsible for overseeing field inspections for the SPCC program to assure compliance with the Oil Pollution Prevention regulations. Mr. Franklin is authorized to conduct CWA Section 311 inspections, including for compliance and in response to releases. Mr. Franklin works nationally in developing and implementing oil regulatory policy and training staff throughout the EPA (as well as other federal, state, and local agencies), regarding hazardous materials and oil spill response and prevention. Mr. Franklin has also conducted trainings and workshops for industry. Mr. Franklin's résumé is listed below as Exhibit CX 13 (Franklin Résumé).

Mr. Franklin will testify about the purpose of the SPCC program to prevent discharges of oil. Mr. Franklin will also testify about applicability of the SPCC program, including who

determines whether a facility is subject to the SPCC program. Mr. Franklin will also testify about the impact of noncompliance on the Oil Pollution Prevention regulatory program and how noncompliance frustrates the purpose of the Oil Pollution Prevention regulatory program.

Mr. Franklin communicated with the Respondent in 2015 about potentially conducting a CWA inspection of the facility called Jackson & Son Distributors, Inc., with an assumed business name of Jackson and Son Oil, located at 84721 Happel Lane in Seaside, Oregon ("Facility"). This inspection did not occur. Mr. Franklin will testify about the contents of those communications, including a compliance assistance email that he sent to the Respondent, informing the Respondent of the 40 C.F.R. Part 112 regulations that implement CWA Section 311(j). That email is attached as Exhibit CX 03 (June 2015 Email).

Mr. Franklin inspected the Facility on September 21, 2021, to determine compliance with Section 311(j) of the CWA, and the requirements of 40 C.F.R. Part 112 (hereinafter referred to as "the Inspection" or the "September 21, 2021, Inspection"). Mr. Franklin's findings are summarized in Exhibit CX 01 (SPCC Inspection). Mr. Franklin will testify to the findings in his Inspection Report and to Respondent's compliance with the SPCC regulations.

Mr. Franklin will also testify to the regulatory requirements found in the 40 C.F.R. Part 112 regulations and Respondent's compliance efforts. Mr. Franklin will also testify that the aboveground storage tanks that Respondent contracted for integrity testing on April 5, 2023, were the same tanks that were present at the time of Mr. Franklin's September 21, 2021, Inspection. The reports that Powers Engineering and Inspection, Inc. generated, documenting its integrity testing are included as Exhibits CX 04 through CX 10 (Powers Engineering Inspection Reports).

4. **Charissa Bujak**, EPA Region 10 Senior Biologist (fact/expert): Ms. Bujak, who has a Master of Science in Plant Science from Montana State University, has worked for over a decade for EPA Region 10. She has over 10 years of experience as a wetland scientist and regulatory specialist, over one year of experience as a Professional GIS Specialist, and over two years of experience as a Senior Biologist. Her résumé is listed below as Exhibit CX 14 (Bujak Résumé).

In her role as Senior Biologist, Ms. Bujak is the most senior EPA Region 10 scientist that analyzes whether a waterbody qualifies as a "navigable water," defined as a "water of the United States" under the CWA. In her role as Senior Biologist at EPA Region 10 on "waters of the United States" matters, Ms. Bujak has conducted, assisted on, or reviewed hundreds of CWA jurisdictional analyses for a variety of EPA Region 10 offices, including the Enforcement and Compliance Assurance Division, as well as other EPA Regions and various United States Army Corps of Engineers ("Corps") Districts. In her role as a Professional GIS Specialist at the EPA, she has over one year of experience collecting, analyzing, and visualizing spatial data using specialized software to create maps and inform decisions in the environmental field. She has also produced reports such as an Overhead Imagery Interpretation and Geographic Information System Analysis report for use in litigation. Her more than one decade of experience as a wetland scientist and regulatory specialist for the EPA informs her expert opinion on CWA jurisdictional analyses.

Ms. Bujak will testify regarding the statutory definition of navigable waters, applicable regulatory definitions of "waters of the United States," and the various categories of "waters of the United States" that apply to this case. Ms. Bujak will also testify about her analysis that Circle Creek is a relatively permanent water, and that Circle Creek is connected to and

contributes flow to downstream traditional navigable waters, specifically Little Muddy Creek, the Necanicum River, and the Pacific Ocean. Ms. Bujak will also testify about the flow paths that oil could take from the Facility. Ms. Bujak's jurisdictional and flow path analysis can be found in Exhibit CX 11 (Jurisdictional Analysis Report).

5. **Dr. Daniel Marshalonis,** EPA Region 10 Section Manager, Surface Water Enforcement Section (fact/expert): Dr. Marshalonis, who has a Ph.D. from the University of South Carolina Department of Biological Sciences, has worked for the EPA since 2010. During his approximately 15 years at the EPA, Dr. Marshalonis has developed significant experience serving as a technical advisor to the EPA Region 10's Enforcement and Compliance Assurance Division and Criminal Investigation Division on issues related to modeling, including the fate and transport of petroleum contamination into "waters of the United States."

In this capacity, Dr. Marshalonis reviews complex hydrologic analyses of wetland and surface water connectivity. He also serves as the EPA Region 10's water enforcement modeling expert providing technical advice in aquatic modeling related to stormwater runoff and discharges of oil. He has provided written expert reports for civil and criminal trials. Dr. Marshalonis's résumé is listed below as Exhibit CX 15 (Marshalonis Résumé).

Dr. Marshalonis evaluated how oil would flow from the Facility and modeled the impacts of a worst-case discharge from the Facility. Dr. Marshalonis's findings are summarized in Exhibit CX 12 (Worse-Case Spill Report). Dr. Marshalonis will testify to the contents of his report. Specifically, Dr. Marshalonis will testify that a worst-case discharge from the Facility will impact Circle Creek to the north of the Facility based on the Facility and surrounding area's topography and drainage patterns; the distance between the Facility and Circle Creek (approximately 1,700 feet); and the physical properties of oil infiltration and inflow.

## II. DOCUMENTS AND EXHIBITS

Copies of the following documents and exhibits that Complainant may introduce into evidence accompany this Prehearing Exchange.

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| CX 22 | September 15, 2024, Stormwater Pollution Control Plan | 1-68 |
| CX 23 | December 16, 2024, Spill Prevention, Containment, and Countermeasure (SPCC) Plan for Jackson & Son Oil Bulk Fuel Facility | 1-53 |
| CX 24 | December 2024 Jackson & Son Oil Compliance Plan Schedule and Status | 1-2 |
| CX 25 | EPA, Spill, Prevention, Control and Countermeasure (SPCC) Regulation, 40 CFR Part 112, A Facility Owner/Operator's Guide to Oil Pollution Prevention | 1-10 |
| CX 26 | December 16, 2013, EPA SPCC Guidance for Regional Inspectors | 1-921 |
| CX 27 | National Marine Fisheries Service Endangered Species Act Critical Habitat Mapper Screenshot for Circle Creek | 1 |
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## III. ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT'S CASE

Subject to the length of cross-examination of witnesses, Complainant estimates that it will require approximately two days to present its case. Translation services are not necessary for the testimony of Complainant's witnesses.

## IV. DOCUMENTATION OF SERVICE

In accordance with the Presiding Officer's instructions, Complainant submits the following documentation that service of the original Complaint was completed in accordance with 40 C.F.R. § 22.5(b)(1). On December 18, 2024, Complainant filed the original Complaint, a copy of the Consolidated Rules of Practice under 40 C.F.R. Part 22 ("Consolidated Rules"), and a copy of the Standing Order on the Designation of EPA Region 10 Part 22 Electronic Filing System ("Standing Order") with the EPA Region 10 Regional Hearing Clerk via email in accordance with the Standing Order on the Designation of EPA Region 10 Part 22 Electronic Filing System. Complainant included Respondent and their counsel on this filing. On January 17, 2025, Complainant's process server "Guaranteed Subpoena Services, Inc." personally served a copy of the original Complaint, Consolidated Rules, and Standing Order on Casey Jackson.[1] Casey Jackson is the registered agent for Jackson & Son Distributors, Inc. per the Oregon Secretary of State business listing for Respondent.[2] On January 31, 2025, Complainant filed a Certificate of Service and accompanying affidavit with the Regional Hearing Clerk.

[1] *See* CX 17 (Documentation of Service).
[2] *See* CX 18 at 1 (Oregon Secretary of State Listings).

Complainant filed a motion to amend the original Complaint on August 15, 2025,[3] which this tribunal granted on October 7, 2025.[4] Because Complainant submitted a signed copy of the proposed Amended Complaint as an attachment to the Motion to Amend, the tribunal deemed the Amended Complaint to have been filed and served as of October 7, 2025.[5]

Complainant filed a motion for leave to amend the amended complaint on December 15, 2025,[6] which this tribunal granted on December 17, 2025.[7] Because Complainant submitted a signed copy of the proposed Second Amended Complaint as an attachment to its motion, the tribunal deemed the Second Amended Complaint to have been filed and served as of December 17, 2025.[8]

## V. FACTUAL AND LEGAL BASIS FOR ALLEGATIONS DENIED IN RESPONDENT'S ANSWER

In accordance with the Presiding Officer's instructions, Complainant offers the factual and legal bases for the allegations that Respondent denied in its Answer to the Second Amended Complaint.

CWA Section 311(j) provides for the regulation of onshore facilities to prevent and contain discharges of oil.[9] CWA Section 311(j)(l)(C) provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for

[3] Complainant's Motion for Leave to Amend the Complaint, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Aug. 15, 2025).
[4] Order on Complainant's Motion for Leave to Amend the Complaint at 7, *In re Jackson & Son Oil,* Dkt. No. CWA-10-2025-0023 (Oct. 7, 2025).
[5] *Id.* at 7-8.
[6] Complainant's Motion for Leave to Amend the Amended Complaint, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Dec. 15, 2025) (hereinafter "Complainant's Second Motion to Amend").
[7] Order on Complainant's Motion to Amend and Motion for Stay at 2, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Dec. 17, 2025).
[8] *Id.*
[9] 33 U.S.C. § 1321(j).

equipment to prevent discharges of oil ... from onshore facilities ... and to contain such discharges . . ..”[10]

Initially by Executive Order 11548 (July 20, 1970),[11] and most recently by Section 2(b)(l) of Executive Order 12777 (October 18, 1991),[12] the President delegated to the EPA the Section 311(j)(1)(C) authority to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

Pursuant to these delegated statutory authorities and pursuant to its authorities under the CWA,[13] to implement Section 31l(j), the EPA promulgated the Oil Pollution Prevention regulations in 40 C.F.R. Part 112, which set forth “procedures, methods, equipment, and other requirements to prevent the discharge of oil from non-transportation-related onshore . . . facilities into or upon the navigable waters of the United States or adjoining shorelines,” including requirements for preparation and implementation of a Spill Prevention, Control, and Countermeasures Plan (“SPCC Plan”).[14] CWA Section 311[15] uses the phrase “navigable waters of the United States,” which the EPA and the courts construe to have the same meaning as the phrase “navigable waters,” used elsewhere in CWA Section 311 and in other sections of the CWA.[16]

The requirements of 40 C.F.R. Part 112 apply to (1) owners and operators of onshore facilities that are (2) non-transportation-related and are “engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil

[10] *Id.* § 1321(j)(l)(C).
[11] 35 Fed. Reg. 11,677 (July 22, 1970).
[12] 56 Fed. Reg. 54,757 (October 22, 1991).
[13] CWA, 33 U.S.C. § 1251 *et seq.*
[14] 40 C.F.R. § 112.1(a)(1).
[15] 33 U.S.C. § 1321.
[16] *Rice v. Harken Exploration Co.,* 250 F.3d 264, 267-69 (5th Cir. 2001); *United States v. Texas Pipe Line Co.,* 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324–25 (6th Cir. 1974).

products" and (3) that have oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, (4) which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful (5) into or upon the navigable waters of the United States or adjoining shorelines.[17]

**A. Respondent is the Owner or Operator of an Onshore Facility**

The regulations define "owner or operator" to include "any person owning or operating an onshore facility."[18] The regulations define "person" to "include[] any individual, firm, corporation, association, or partnership."[19] The regulations define "onshore facility" to mean "any facility of any kind located in, on, or under, any land within the United States other than submerged lands."[20] The regulations define "facility" to include "any …fixed[] onshore …building, parcel, lease structure, installation, equipment, pipe, or pipeline (other than a vessel or a public vessel) used in …oil storage, … oil transfer, [or] oil distribution."[21]

In paragraph 3.1 of the Second Amended Complaint, the EPA alleges that "Respondent is a domestic business corporation conducting business in the state of Oregon, and is a 'person' under CWA Section 311(a)(7), 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2." Respondent admits the allegations in this paragraph[22] and therefore admits that it is a "person" under CWA Section 311(a)(7),[23] and 40 C.F.R. § 112.2.

[17] 40 C.F.R. § 112.1(b).
[18] *Id.* § 112.2.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Respondent's Answer to Second Amended Complaint, Affirmative Defenses, and Request for Hearing at ¶ 3.1, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Jan. 6, 2026) (hereinafter "Answer to Second Amended Complaint").
[23] 33 U.S.C. § 1321(a)(7).

In paragraphs 3.2 and 3.3 of the Second Amended Complaint, the EPA alleges that since 1984, Respondent has owned or operated a petroleum product distribution facility located at 84721 Happel Lane in Seaside, Oregon. Respondent admits only that it "owns the property located at 84721 Happel Lane, Seaside, Oregon."[24]

The EPA will support its allegations through the testimony of Mr. Franklin, who inspected the Facility on September 21, 2021, and observed that Respondent was storing and distributing petroleum products, including diesel and gasoline, at the time of the Inspection. Mr. Franklin will also testify that the Respondent told him that they had been operating since 1984.[25] The EPA will also support its allegations with filings that Respondent has made with the Oregon Secretary of State, which can be found at CX 18. According to the Oregon Secretary of State's website, Respondent submitted an amended annual report on June 23, 2025, that was signed by Casey Jackson who is the President and Registered Agent for Jackson & Son Distributors, Inc.[26] This report indicates that Jackson & Son Distributors, Inc. is in the business of "fuel distribution" with a "primary place of business" at 84721 Happel Lane in Seaside, Oregon, 97138.[27] Similarly, the most recent assumed business name filing for Jackson and Son Oil indicates that Respondent engages in "petroleum wholesale and distribution" with a "primary place of business" at 84721 Happel Lane in Seaside, Oregon, 97138.[28] Last, the EPA will support its allegations with the Facility's SPCC Plan, dated December 16, 2024, which states that "[f]acility operations are classified under Standard Industrial Classification (SIC) code 5171 – Petroleum Bulk Stations

[24] Answer to Second Amended Complaint *supra* note 22, ¶ 3.2.
[25] CX 01 at 4 (SPCC Inspection).
[26] CX 18 at 7-8 (Oregon Secretary of State Listings).
[27] *Id.*
[28] *Id.* at 30.

and Terminals," with bulk fuel available Monday through Friday and fueling operations available 24 hours a day, 7 days a week.[29]

Despite Respondent's general denial, Complainant does not believe that this allegation is in dispute. For example, in paragraph 3.8 of the Answer to the Second Amended Complaint, Respondent admits that it "operates a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil." The EPA therefore proffers its stipulation to the fact that Respondent owns and operates a facility that stores and distributes oil located at 84721 Happel Lane in Seaside, Oregon.

### B. Respondent's Onshore Facility Stores and Distributes Oil and is Non-Transportation Related

"Non-transportation-related," as applied to an onshore facility is defined to include "industrial, commercial, agricultural, or public facilities which use and store oil"; "oil storage facilities including all equipment and appurtenances related thereto"; and "[l]oading racks, transfer hoses, loading arms and other equipment which are appurtenant to a non-transportation-related facility."[30] In addition, the requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related facilities that are "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products."[31] The regulations define "oil" to mean oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, synthetic oils, oil refuse, and oil mixed with wastes other than dredged spoil.[32]

[29] CX 23 (December 2024 SPCC Plan) at 7.
[30] 40 C.F.R. Pt. 112, App. A
[31] 40 C.F.R. § 112.1(b).
[32] *Id*. § 112.2.

The EPA alleges in paragraph 3.2 of the Second Amended Complaint that Respondent is a petroleum product distributor. As discussed above, Respondent denies this allegation.[33] The EPA further alleges in paragraph 3.7 of the Second Amended Complaint that it, *inter alia*, stores oil, and in 3.8 and 3.9 of the Second Amended Complaint, Complainant lists the specific gasoline and diesel fuel above-ground storage tanks at the Facility. In response to Second Amended Complaint paragraph 3.8, Respondent admits "that it operates a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil."[34] In response to Second Amended Complaint paragraph 3.9, Respondent admits that Powers Engineering and Inspection, Inc. conducted certain work at Respondent's property in April 2023.[35] Respondent denies the remainder of the allegations.[36] In paragraph 3.4 of the Second Amended Complaint, Complainant alleges that the Facility is "non-transportation-related" within the meaning 40 C.F.R. § 112.2, 40 C.F.R. Pt. 112, App. A. In response, Respondent "denies that the entirety of its operations" are "non-transportation-related" within the meaning of 40 C.F.R. § 112.2, 40 C.F.R. Pt. 112, App. A.[37]

The EPA will support its allegations through the testimony of Mr. Franklin, who inspected the Facility on September 21, 2021, through integrity testing reports that were provided by Respondent to the EPA and that state the capacity and contents (either diesel or gasoline) of each aboveground storage tank at the Facility, and through the Facility's December 2024 SPCC Plan. Regarding integrity testing, Respondent contracted for this integrity testing, which was performed in the spring of 2023. In addition to identifying the results of the integrity

[33] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.2.
[34] *Id.* at ¶ 3.8.
[35] *Id.* at ¶ 3.9.
[36] *Id.* at ¶¶ 3.2, 3.7 – 3.9.
[37] *Id.* at ¶ 3.4.

testing, each report describes the aboveground storage tank inspected, including by identifying the capacity, and states that it is either "currently in gasoline service" or "currently in diesel service." Furthermore, the Facility's SPCC Plan, dated December 16, 2024, states that "[f]acility operations are classified under Standard Industrial Classification (SIC) code 5171 – Petroleum Bulk Stations and Terminals," and contains an inventory of oil stored at the Facility.[38] Mr. Franklin's inspection report can be found at CX 01 (SPCC Inspection). The integrity testing reports can be found at CX 04 through CX 10 (Powers Engineering Inspection Reports). The Facility's SPCC Plan can be found at CX 23 (December 2024 SPCC Plan).

Despite Respondent's denial that it is a petroleum product distributor and its denial that it stores any oil, including diesel and gasoline, at the Facility, Complainant does not believe this allegation is in dispute and hereby proffers its stipulation to the fact that Respondent is a petroleum product distributor that stores oil, including diesel and gasoline, at the Facility.

### C. Respondent's Aboveground Storage Capacity is Greater than 1,320 U.S. Gallons of Oil.

The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities that "have oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2.[39] The requirements of 40 C.F.R. Part 112 do not apply if the aggregate aboveground storage capacity of the facility is 1,320 U.S. gallons or less of oil.[40] The aggregate aboveground storage capacity excludes containers with a capacity of less than 55 U.S. gallons and the capacity of a container that is "permanently closed" as defined in 40 C.F.R. § 112.2. The regulations define "oil" to mean oil of

[38] CX 23 (December 2024 SPCC Plan) at 7.
[39] 40 C.F.R. § 112.1(b).
[40] 40 C.F.R. § 112.1(d).

any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, synthetic oils, oil refuse, and oil mixed with wastes other than dredged spoil.[41]

The EPA alleges in paragraph 3.8 of the Second Amended Complaint that at the time of the Inspection on September 21, 2021, and at all times relevant to the Second Amended Complaint, the Facility had an approximate above-ground storage capacity of 107,500 gallons of oil. The EPA further alleges in paragraph 3.8 of the Second Amended Complaint that at the time of the Inspection through November 30, 2024, the Facility had two 10,000-gallon diesel tanks that lacked secondary containment. The EPA further alleges in paragraph 3.9 of the Second Amended Complaint that on April 5, 2023, Powers Engineering and Inspection, Inc. conducted integrity testing of seven aboveground storage tanks that were present at the time of the Inspection: a 2,500-gallon diesel tank; a 3,000-gallon gasoline tank; a 2,000-gasoline tank; two 20,000-gallon gasoline tanks; and two 20,000-gallon diesel tanks. The total storage capacity of these tanks plus the two 10,000-gallon diesel tanks is 107,500 gallons. These aboveground storage tanks all hold either diesel or gasoline. Respondent denied these allegations except to admit that Powers Engineering and Inspection, Inc. "conducted certain work at Respondent's property on or about April 5, 2023"[42] and to admit that Respondent "operates a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil."[43]

The EPA will support its allegations through the testimony of Mr. Franklin, who inspected the Facility on September 21, 2021, and through integrity testing reports that were provided by Respondent to the EPA and that state the capacity and contents (either diesel or gasoline) of each aboveground storage tank at the Facility and provide photographs of the

[41] 40 C.F.R. § 112.2.
[42] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.9.
[43] *Id.* at ¶ 3.8.

aboveground storage tanks. Mr. Franklin's inspection report can be found at CX 01 (SPCC Inspection). The integrity testing reports can be found at CX 04 through CX 10 (Powers Engineering Inspection Reports). Mr. Franklin will testify that the aboveground storage tanks inspected by Powers Engineering and Inspection, Inc. were the same aboveground storage tanks that were present at Respondent's property at the time of the Inspection. Mr. Franklin will also testify that during the Inspection, Respondent indicated that the approximate aboveground storage capacity of the Facility was approximately 107,500 gallons,[44] and that the two aboveground storage tanks that lacked secondary containment had a capacity of 10,000 gallons each.[45]

The EPA will also support its allegations through the testimony of Ms. Spaulding, who will testify that Respondent provided a compliance schedule to the EPA in December of 2024, which indicates that Respondent replaced the single-walled aboveground storage tanks on November 30, 2024, with a double-walled 15,000-gallon split aboveground storage tank. This compliance schedule can be found at Exhibit CX 24 (Compliance Plan Schedule). Ms. Spaulding's testimony will also be supported by the Facility's December 16, 2024, SPCC Plan, which lists the aboveground storage tanks present at the Facility at that time, including the double-walled 15,000-gallon split aboveground storage tank.[46] The Facility's December 16, 2024, SPCC Plan can be found at Exhibit CX 23 (December 2024 SPCC Plan).

Respondent admits that it operates a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil.[47] Respondent therefore admits the threshold oil storage

[44] CX 01 (SPCC Inspection) at 2.
[45] *Id.* at 23, App. A at 33.
[46] CX 23 (December 2024 SPCC Plan) at 8.
[47] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.8.

capacity required for applicability of the 40 C.F.R. Part 112 regulations.[48] As discussed below in Section VI, the approximate oil storage capacity is further relevant for the penalty analysis. Despite Respondent's denials on this point, Complainant does not believe that the approximate oil storage capacity at the facility is in dispute and hereby proffers its stipulation to the fact that at the time of the Inspection through November 30, 2024, the aboveground storage capacity of the Facility was approximately 107,500 gallons of oil, and after November 30, 2024, the aboveground storage capacity of the Facility was approximately 102,500 gallons of oil.

**D. <u>The Facility could, due to its location, be reasonably expected to discharge harmful quantities of oil.</u>**

The SPCC Program applies to a facility "which, due to its location, could reasonably be expected to discharge oil in quantities that may be harmful … into or upon the navigable waters of the United States of adjoining shorelines."[49] A harmful discharge includes those that "...violate applicable water quality standards; or [c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."[50] The harmful quantity threshold is generally a low one. "Very small quantities of oil can cause a sheen on the surface of the water."[51] The Program is prophylactic in nature and designed to prevent oil spills before any such spill occurs.[52]

Pursuant to 40 C.F.R. § 112.1(d)(1)(i), whether a facility could reasonably be expected to discharge oil is "based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage,

[48] 40 C.F.R. § 112.1(d).
[49] 40 C.F.R. § 112.1(b).
[50] 40 C.F.R. § 110.3.
[51] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, *108 (Jan. 8, 2002).
[52] 40 C.F.R. § 112.1(a)(1) ("This part establishes procedures, methods, equipment, and other requirements to *prevent* the discharge of oil …") (emphasis added); *Pepperrell Assocs. v. EPA*, 246 F.3d. 15, 24 (1st Cir. 2001).

etc.).” The facility’s location and geography must be such that a discharge of oil into navigable waters is “reasonably foreseeable.”[53] However, “the exact path of the discharge does not have to be foreseeable.”[54] Because proximity and location alone may not be enough to establish a reasonable expectation of discharge,[55] the EPA may rely on a variety of geographical factors to establish reasonable expectation of discharge, including topography, slope, water runoff patterns, and surface runoff flows.[56]

Under 40 C.F.R. § 112.1(d)(1)(i), reasonable expectation of discharge “exclude[s] consideration of manmade features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge.” Excluding consideration of these features is necessary because they must be appropriately maintained to ensure that they retain oil—one of the very purposes of the SPCC Program.[57]

The reasonable expectation of a discharge standard is not, however, strictly limited to a “stark description of surrounding terrain.”[58] As discussed in *In re Crown Central Petroleum Corp.*, when evaluating reasonable expectation of discharge, the SPCC Program uses the worst-case spill scenario[59]—“the largest foreseeable discharge in adverse weather conditions.”[60] In *In*

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[53] *Pepperell*, 246 F.3d at 23; *see also In re Consumers Recycling, Inc*., 2002 EPA ALJ LEXIS 18, *45 (Apr. 12, 2002).
[54] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1 at *107 (finding that, because oil flows like water, reasonable expectation of discharge may be based on oil’s tendency to flow downgradient along natural contours of the land).
[55] *In re. Pepperrell Assocs*., 9 E.A.D. 83, 93-94 (EAB, May 10, 2000) citing *In re City of Akron*, 1 E.A.D. 442, 446 (1978)).
[56] *See In re Consumers Recycling*, 2002 EPA ALJ LEXIS 18 at *46-47 (finding no genuine issue of material fact regarding reasonable expectation of discharge when considering facility topography, surface water runoff flows, and drainage system connections). *See also Pepperrell*, 246 F.3d at 23 (stating that “features of a location that influence drainage patterns are highly relevant to any inquiry into the foreseeability of a harmful discharge”).
[57] *In re Marathon Oil Co*., 1 E.A.D. 150, 151-52 (EAB, Sept. 25, 1975) (stating that the EPA’s regulations excluding man-made structures that are designed to retain oil from the evaluation of whether is a reasonable expectation of a discharge are not unreasonable because “even where existing man-made features make a spill of oil into navigable waters highly unlikely, an SPCC plan will, at a minimum, assure proper maintenance and use of such features”); *see also In re Cent. Fla. Pipeline Corp*., 1 E.A.D. 264, 265 (EAB July 6, 1976).
[58] *Pepperrell*, 246 F.3d at 23
[59] *See In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, at *109-10.
[60] 40 C.F.R § 112.2.

*re Crown Central Petroleum Corp.*, the court calculated the worst-case discharge planning volume for determining whether there is a reasonable expectation of a discharge "using the worksheets in Appendix D to this part."[61] For multiple tank facilities, a worst-case discharge volume equals the "total aboveground oil storage capacity of tanks without secondary containment" plus the "capacity of the largest single aboveground oil storage tank within an adequate secondary containment area."[62] Mr. Franklin will also testify that as a conservative alternative and based on his professional experience, the EPA considers the volume of the largest aboveground storage tank at a facility when determining whether there is a reasonable expectation of a discharge.

The relevant volume must be considered in combination with "adverse weather conditions."[63] The weather patterns of a particular area, including rain and snowmelt, are therefore relevant in determining reasonable expectation of discharge because precipitation may carry oil to navigable waters.[64]

### *1. The Relevant Volume for Consideration of a Worst-Case Discharge is 40,000 gallons or 20,000 gallons.*

The EPA alleges in paragraph 3.11 of the Second Amended Complaint that the Facility's worst-case planning volume is 40,000 gallons or 20,000 gallons. Respondent denies this allegation.[65]

The EPA will support its allegation through the testimony of Mr. Franklin, who inspected the Facility on September 21, 2021, and through the use of integrity testing reports that were provided by Respondent to the EPA and that state the capacity and contents (either diesel or

[61] *See In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, at *109-10.
[62] 40 C.F.R. Part 112, App. D. A.2 (Secondary Containment – Multiple-Tank Facilities).
[63] *See In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1 at *109; 40 C.F.R. § 112.2; CX 26 at 84 (SPCC Guidance for Regional Inspectors).
[64] *See In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1 at *108-09.
[65] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.11.

gasoline) of each aboveground storage tank at the Facility. Mr. Franklin's inspection report can be found at CX 01 (SPCC Inspection). The integrity testing reports can be found at CX 04 through CX 10 (Powers Engineering Inspection Reports). The EPA will further support its allegation through the use of the Facility's SPCC Plan, which states the capacity and contents (either diesel or gasoline) of each aboveground storage tank at the Facility. The Facility's SPCC Plan can be found at CX 23 (December 2024 SPCC Plan). The EPA will also support its allegation through the testimony of Ms. Spaulding and through the use of the most recent compliance information that Respondent provided to the EPA. That compliance information can be found at CX 24 (Compliance Plan Schedule).

As outlined in *In re Crown Central Petroleum Corp.*,[66] for multiple tank facilities, a worst-case discharge volume equals the "total aboveground oil storage capacity of tanks without secondary containment" plus the "capacity of the largest single aboveground oil storage tank within an adequate secondary containment area."[67] Based on his inspection and the integrity testing reports, Mr. Franklin will testify that the capacity of the largest aboveground storage tank with adequate secondary containment at the time of the Inspection was 20,000 gallons of oil. In addition, Mr. Franklin will testify that at the time of the Inspection, there were two 10,000-gallon aboveground storage tanks that lacked secondary containment. As a result, at the time of the Inspection, the Facility's worst-case planning volume was 40,000 gallons.

Ms. Spaulding will testify that based on information provided by the Respondent to the EPA, the Respondent replaced the two 10,000-gallon aboveground storage tanks that lacked

[66] 2002 EPA ALJ LEXIS 1 at *109-10.
[67] 40 C.F.R. Part 112, App. D. A.2 (Secondary Containment – Multiple-Tank Facilities).

secondary containment on November 30, 2024, with a tank that has secondary containment.[68] As a result, after November 30, 2024, the worst-case planning volume is 20,000 gallons.

Mr. Franklin will also testify that as a conservative alternative and based on his professional expertise and experience, the EPA uses the capacity of the largest aboveground storage tank at a facility in determining whether a facility is reasonably expected to discharge harmful quantities of oil. Mr. Franklin will testify that in this case, as outlined above, the capacity of the largest aboveground storage tank at the Facility is 20,000 gallons based on his Inspection,[69] the integrity testing reports[70] and the Facility's SPCC Plan.[71]

**2. *The Facility Can Reasonably Be Expected to Discharge Oil in Harmful Quantities.***

As alleged in the Second Amended Complaint, there is a reasonable expectation that discharged oil would impact Circle Creek in harmful quantities, which is a "water of the United States."[72] If a worst-case spill scenario occurred, there is a reasonable expectation of discharge into Circle Creek located to the north of the Facility via multiple pathways.[73] As alleged in paragraphs 3.10 and 3.11 of the Second Amended Complaint, Circle Creek is located approximately 1,700 feet to the north of the Facility. Respondent denies these allegations.[74]

The EPA will support its allegations through the testimony of Ms. Bujak and Dr. Marshalonis. Both Ms. Bujak and Dr. Marshalonis will testify that a commercial lumberyard adjoins the Facility to the north, beyond which is a wetland area, beyond which is Circle Creek. Ms. Bujak evaluated flow paths from the Facility to Circle Creek, and will testify that there are

[68] CX 24 (Compliance Plan Schedule); CX 23 (December 2024 SPCC Plan) at 8.
[69] CX 01 (SPCC Inspection).
[70] CX 04 through CX 10 (Powers Engineering Inspection Reports).
[71] CX 23 (December 2024 SPCC Plan).
[72] Complainant's Second Amended Complaint at ¶¶ 3.10 – 3.11, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Dec. 15, 2025) (hereinafter "Second Amended Complaint").
[73] Second Amended Complaint at ¶ 3.10.
[74] Answer to Second Amended Complaint, *supra* note 22, at ¶¶ 3.10, 3.11.

multiple flow paths that oil could take from the Facility to Circle Creek. Ms. Bujak's flow path analysis, which Ms. Bujak will testify to, can be found in Exhibit CX 11 (Jurisdictional Analysis Report).

Dr. Marshalonis evaluated these flow paths as well, and also modeled a worst-case discharge from the Facility under adverse weather conditions. Dr. Marshalonis specifically modeled how oil would flow via the multiple flow paths to the wetland area, as well as flow through the wetland area to Circle Creek. Dr. Marshalonis used the EPA's Hydrocarbon Spill Screening Model (HSSM). Dr. Marshalonis's analysis, which he will testify to, can be found in Exhibit CX 12 (Worst-Case Scenario Spill Report). Dr. Marshalonis's modeling was externally peer reviewed for the EPA by ERG, and the results of that peer review can be found in Exhibit CX 12, Appendix C.

From the Facility to Circle Creek, Ms. Bujak and Dr. Marshalonis will testify that there are at least three possible pathways. As Dr. Marshalonis will testify, it is reasonably foreseeable that a worst-case discharge would overwhelm storm drains and flow across impervious surfaces at the Facility and then the impervious lot of the lumberyard to the north of the Facility and discharge directly to the wetlands. From there, oil would flow through the wetlands to Circle Creek. Dr. Marshalonis will also testify that based on his review of the EPA site visit photos from June of 2024, storm drains present on the lumberyard property were full of debris, making it even more reasonable that the storm drains could not handle a worst-case discharge.

Ms. Bujak and Dr. Marshalonis will testify that to the extent that oil does enter storm drains, the Facility's Storm Water Pollution Control Plan ("SWPCP") indicates that storm water is directed to a swale on the eastern side of the property, which discharges to a culvert that goes

under the lumberyard.[75] The Facility's SWPCP states that this drainage system "eventually discharges to Circle Creek."[76]

Last, Ms. Bujak and Dr. Marshalonis will testify that it is also reasonably foreseeable that oil will discharge south and west from the Facility to a ditch that would channel oil along the west side of the Facility and along the west side of the lumberyard and discharge to the same wetlands located to the north of the lumberyard. From there, oil will flow through the wetlands to Circle Creek.

Dr. Marshalonis will also testify that based on a worst-case planning volume of either 20,000 gallons or 40,000 gallons of gasoline; the Facility and surrounding area's topography and drainage patterns; the distance between the Facility and Circle Creek; and the physical properties of oil infiltration and inflow, it is reasonably foreseeable that oil will reach Circle Creek north of the facility. Dr. Marshalonis will testify that he used the HSSM model based on conservative assumptions to ensure that the results erred in favor of the Respondent. Dr. Marshalonis will testify that the total estimated gasoline discharge from the Site that is predicted to reach Circle Creek ranges from 243 to 3,232 U.S. gallons under the 20,000-gallon spill scenario and from 20,213 to 23,202 U.S. gallons under the 40,000-gallon spill scenario. Under either spill scenario, such an impact easily qualifies as a harmful impact to Circle Creek.

As explained in more detail below, Circle Creek is a "water of the United States."

[75] CX 22 (2024 SWPCP) at 30 - 31 (Fig. 1, Fig. 2).
[76] *Id.* at. 12.

### E. <u>There Is a Reasonable Expectation of Discharge Into Navigable Waters.</u>

#### *1. The EPA Determines Navigable Waters by Applying the Statutory, Regulatory, and Judicial Context.*

Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas." The EPA has construed "navigable waters" under Section 311 of the CWA to have the same meaning as "navigable waters" under other sections of the Act.[77] The EPA and the Corps define "waters of the United States" through a rule making process that relies on a best reading of the statute and promulgation of corresponding regulations, as informed by jurisprudence. The EPA and the Corps also issue publicly available guidance documents providing further information about the implementation of the definition of "waters of the United States."

In Oregon, where the Facility is located, the regulatory regimes defining "waters of the United States" have changed during the applicable five-year statute of limitations, which dates back to 2019 in this case. The EPA has considered three "waters of the United States" regulatory regimes that were at least ostensibly applicable in Oregon during the timeframe relevant to this action: 1) the pre-2015 Corps and EPA regulations,[78] as informed by applicable guidance

[77] *See supra* note 16, *Rice,* 250 F.3d at 267-69; *Texas Pipe Line Co.,* 611 F.2d at 34; *Ashland Oil & Transp. Co.*, 504 F.2d at 1324–25.

[78] The pre-2015 regulations refer to the Corps' and EPA's nearly identical definitions of "Waters of the United States" promulgated in 1986 and 1988, respectively [51 Fed. Reg. 41,206, 41217 (Nov. 13, 1986) and 53 Fed. Reg. 20,764, 20,774 (June 6, 1988)] and are inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. *See* 33 C.F.R. § 328.3 (2014) and 40 C.F.R. § 232.2 (2014). The pre-2015 regulations defining "waters of the United States" for Oil Spill Programs under 40 C.F.R. Part 112 utilize the 1973 definition of "navigable waters." *See* 40 C.F.R. § 112.2 (2014). In 2002, the EPA revised its regulations defining "waters of the United States" in 40 C.F.R. Part 112 to ensure that the rule's language was consistent with the regulatory language used in other CWA programs. Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 Fed. Reg. 47,042 (July 17, 2002). A district court vacated the rule for failure to comply with the Administrative Procedure Act and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008). However, the agencies implement the pre-2015 regulatory regime for 40 C.F.R. Part 112 consistent with their implementation for other CWA programs.

documents[79] and case law (pre-2015 Regulatory Regime), 2) the 2020 Navigable Waters Protection Rule,[80] and 3) the "Revised Definition of 'Waters of the United States'" rule, as amended by the conforming rule (Amended 2023 Rule).[81]

Any applicable regulation must be considered in light of case law, including *Sackett v. EPA,* which interpreted the scope of Clean Water Act jurisdiction.[82] Relevant to this case, the U.S. Supreme Court stated in *Sackett* that "the [CWA]'s use of waters encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[83]

Further, under any rule that applies within the statute of limitations, a traditional navigable water is one that is "[c]urrently used or [was] used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow

[79] This guidance includes but is not limited to the 2008 *Rapanos* Guidance and the March 2025 guidance concerning implementation of the "continuous surface connection" requirement for adjacent wetlands. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* U.S. EPA and U.S. Army Corps of Engineers (Dec. 2, 2008), available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (accessed Jan. 5, 2026) (CX 33); *Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act*, U.S. EPA and U.S. Army Corps of Engineers (Mar. 12, 2025), available at https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf (accessed Jan. 5, 2026).

[80] Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250 (Apr. 21, 2020), available at: https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definitionof-waters-of-the-united-states (accessed Jan. 5, 2026).

[81] *See* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023): https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-unitedstates; Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg 61,964 (Sept. 8, 2023): https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming.

[82] 598 U.S. 651 (2023).

[83] *Id.* at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)) (internal quotation marks omitted).

of the tide."[84] The EPA and the Corps have issued guidance for determining whether waters qualify as a traditional navigable water.[85]

Because the Navigable Waters Protection Rule was vacated by two U.S. District Courts,[86] solely for the purposes of this administrative litigation, Complainant seeks that the parties stipulate that the pre-2015 Regulatory Regime was the applicable regulatory definition until and including March 19, 2023. Complainant seeks that the parties stipulate that the Amended 2023 Rule, which was amended on September 8, 2023, to conform with *Sackett*, was the applicable regulatory definition on and after March 20, 2023.

***2. How the EPA Determines Whether Tributaries are Jurisdictional.***

Whether a tributary is relatively permanent is relevant under both the pre-2015 Regulatory Regime and the Amended 2023 Rule. Pursuant to the pre-2015 Regulatory Regime and consistent with *Sackett*, jurisdictional tributaries include natural, man-altered, or man-made water bodies that carry flow directly or indirectly to traditional navigable waters, territorial seas, interstate waters, or impoundments of any "waters of the United States" and that have relatively permanent flow.[87] Under the Amended 2023 Rule, tributaries must be relatively permanent waters connected to traditional navigable waters, the territorial seas, interstate waters, or jurisdictional impoundments of "waters of the United States."[88] Tributaries must also be

[84] 40 C.F.R. § 230.3(s)(1) (2014); 40 C.F.R. § 120.2(a)(1)(i).
[85] *Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations*, U.S. EPA, https://www.epa.gov/wotus/waters-qualify-traditional-navigable-waters-under-section-a1-agencies-regulations (last updated on Jan. 6, 2026) (.
[86] *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021) and *Navajo Nation v. Regan*, 563 F. Supp. 3d 116 (D. N.M. 2021).
[87] 40 C.F.R. § 230.3(s)(5) (2014); *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, U.S. EPA and U.S. Army Corps of Engineers at 6, n. 24 (Dec. 2, 2008), available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (accessed Jan. 5, 2026) (CX 33).
[88] 40 C.F.R. § 120.2(a)(3).

"relatively permanent, standing or continuously flowing bodies of water."[89] Regardless of how relative permanence is defined pursuant to either the pre-2015 regulatory regime or the Amended 2023 Rule, water bodies with standing and/or continuously flowing water year-round are routinely recognized as "waters of the United States."[90] Pursuant to the Navigable Waters Protection Rule, a tributary includes a river, stream, or similar naturally occurring surface water channel that contributes perennial surface water flow to a traditional navigable water or the territorial seas in a typical year either directly or through one or more jurisdictional waters.[91]

**i. Circle Creek.**

As alleged in paragraph 3.10 of the Second Amended Complaint, Circle Creek is a jurisdictional tributary with relatively permanent flow. Respondent generally denies this allegation.[92] Circle Creek is relatively permanent because it has perennial flow. Additionally, it is connected via Little Muddy Creek to traditional navigable waters, specifically the Necanicum River and the Pacific Ocean. Coho salmon—a threatened species under the Endangered Species Act—rear and migrate in Circle Creek.[93] The documented presence of anadromous fish (fish that are born in freshwater, spend most of their lives in saltwater, and return to freshwater to spawn[94]) is one of several indicators that Circle Creek is connected to the Pacific Ocean and that it

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[89] *Id.*
[90] *Sackett v. EPA*, 598 U.S. 651, 671-72 (2023).
[91] 33 C.F.R. § 328.3(c)(8) and (c)(12) (2020); 40 C.F.R. § 120.2(3)(vii) and (xii) (2020).
[92] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.10.
[93] *National NMFS ESA Critical Habitat Mapper*, Nat'l Oceanic & Atmospheric Admin., https://www.fisheries.noaa.gov/resource/map/national-esa-critical-habitat-mapper (last visited Jan. 14, 2026) (select "Application", navigate to the search bar and enter terms "Circle Creek, Oregon" and zoom in; click the arrow at the bottom of the map to access the results table, select the results tab titled "All_critical_habitat_line_20220404", and scroll down species list to view listing and habitat status for Salmon, coho.) (screenshot included as CX 27); *see also Oregon Coast Coho Salmon*, Nat'l Oceanic & Atmospheric Admin., https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/oregon-coast-coho-salmon (last updated Aug. 21, 2024).
[94] *Pacific Salmon and Steelhead Fisheries Management Glossary*, Nat'l Oceanic & Atmospheric Administration, https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/pacific-salmon-and-steelhead-fisheries-management-glossary (last updated Sep. 7, 2022).

contains sufficient flow to support observation of anadromous fish.[95] Circle Creek is therefore jurisdictional pursuant to any regulatory regime ostensibly applicable to this case.

Ms. Bujak will testify to features that support Circle Creek as a jurisdictional tributary under the CWA. The United States Geological Survey's ("USGS") NHD indicates the Circle Creek has perennial flow for the entire 3.1 mile relevant reach that flows past the Facility and outlets to the Necanicum River near river mile 5.[96] Ms. Bujak will also testify that the relevant reach of Circle Creek has a volume and duration of flow for development of geomorphic features that indicate it carries relatively permanent flow, such as an ordinary high-water mark and a valley bottom. Testimony from Ms. Bujak and Complainant's exhibits will demonstrate that Circle Creek is perennial in the relevant reach and is connected to traditional navigable waters.

Ms. Bujak will also testify that while the USGS topographic maps have mapped a connection between Circle Creek at the Necanicum at approximately River Mile 5.2 for decades,[97] a review of LiDAR[98] for this area reveals that this secondary connection between Circle Creek and the Necanicum River likely only occurs during high flows. It is possible that the construction of a power line through this area altered the connection. Ms. Bujak will testify that Circle Creek's primary connection to the Necanicum River occurs after it continues to flow downstream to the north and connects to the river via Little Muddy Creek, at River Mile 2.7.

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[95] *See* CX 11 (Jurisdictional Analysis Report).
[96] USGS. 2018. National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1710 (published 20181030), available at: https://prd-tnm.s3.amazonaws.com/StagedProducts/Hydrography/NHDPlusHR/VPU/Current/GDB/NHDPLUS_H_1710_HU4_GDB.zip (accessed on Jan. 14, 2026).
[97] USGS Topographic Maps (Cannon Beach, Oreg. 1955; Tillamook Head, OR. 2017 and 2020).
[98] LiDAR stands for Light Detection and Ranging and is a remote sensing method that is used to create high-resolution models of the ground elevation. *What is LiDAR Data and Where Can I Download It?*, USGS, https://www.usgs.gov/faqs/what-lidar-data-and-where-can-i-download-it (last updated May 13, 2025).

### ii. Little Muddy Creek.

The EPA alleges in paragraph 3.10 of the Second Amended Complaint that Circle Creek connects to the Necanicum River via Little Muddy Creek, which is a relatively permanent water. Little Muddy Creek is relatively permanent because it has perennial flow.

Ms. Bujak will testify to the connection between Circle Creek and Little Muddy Creek. Specifically, Ms. Bujak will testify that Circle Creek is connected to Little Muddy Creek before discharging to the Necanicum River. Ms. Bujak will testify to features that support Little Muddy Creek as a jurisdictional tributary under the CWA. The USGS's NHD indicates that Little Muddy Creek has perennial flow for the entire 0.5-mile reach that flows from the confluence with Circle Creek to the outlet to the Necanicum River near river mile 2.7.[99] Her testimony will also explain that Little Muddy Creek has a volume and duration of flow for development of continuous geomorphic features that indicate it carries relatively permanent flow, such as an ordinary high-water mark and a defined bed and banks. Testimony from Ms. Bujak and Complainant's exhibits will demonstrate that the relevant reach of Little Muddy Creek satisfies the relatively permanent standard and that the creek is connected to traditional navigable waters. Little Muddy Creek is therefore jurisdictional pursuant to any regulatory regime ostensibly applicable to this case.

### iii. The Necanicum River.

The EPA alleges in paragraph 3.10 of the Second Amended Complaint that Circle Creek connects to the Necanicum River via Little Muddy Creek near River Mile 2.7. The EPA alleges

[99] USGS. 2018. National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1710 (published 20181030), available at: https://prd-tnm.s3.amazonaws.com/StagedProducts/Hydrography/NHDPlusHR/VPU/Current/GDB/NHDPLUS_H_1710_HU4_GDB.zip (accessed on Jan. 14, 2026).

that the Necanicum River is relatively permanent and a traditional navigable water that discharges to the Pacific Ocean. Respondent generally denies these allegations.[100]

Complainant's exhibits and expert testimony from Ms. Bujak will demonstrate that the Necanicum River is a relatively permanent water because it has perennial flow (continuous flow year-round)[101] and that it is also a traditional navigable water up to at least river mile 3. The Corps has documented the Necanicum River as a "navigable water of the United States" for purposes of Section 10 of the Rivers and Harbors Act up to river mile 3;[102] traditional navigable waters include (but are not limited to) Section 10 waters.[103] The U.S. Coast Guard has documented that the Necanicum River is also subject to the ebb and flow of the tide in the lower 2 river miles[104] before it connects to the Pacific Ocean, indicating the lower 2 miles of the Necanicum River are tidal. Waters that are subject to the ebb and flow of the tide also qualify as traditional navigable waters under the Clean Water Act. The Pacific Ocean is also a traditional navigable water and part of the territorial seas. The Necanicum River and the Pacific Ocean are therefore jurisdictional pursuant to any regulatory regime ostensibly applicable to this case.

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[100] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.10.
[101] *The National Map: 3D Viewer*, USGS, https://apps.nationalmap.gov/viewer/; USGS. 2018. National Hydrography Dataset Plus High Resolution (NHDPlus HR) for 4-digit Hydrologic Unit - 1710 (published 20181030), available at: https://prd-tnm.s3.amazonaws.com/StagedProducts/Hydrography/NHDPlusHR/VPU/Current/GDB/NHDPLUS_H_1710_HU4_GDB.zip (accessed on Jan. 14, 2026).
[102] *Navigable Waters Lists*, U.S. Army Corps of Engineers Portland District, 3 (October 1993), available at https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable_US_Waters_Oregon_1993.pdf (accessed on Jan. 14, 2026) (CX 35).
[103] *Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations*, U.S. EPA and U.S. Army Corps of Engineers, available at: https://www.epa.gov/system/files/documents/2022-12/Water%20that%20Qualify%20as%20TNWs_Final_0.pdf (accessed on Jan. 14, 2026) (CX 38).
[104] *Navigability Determinations for the Thirteenth District*, U.S. Coast Guard, 10, available at https://www.oregon.gov/osmb/forms-library/Documents/Outfitter%20Guide/Navigability_Determination_for_the_13th_Coast_Guard_District.pdf (accessed on Jan. 14, 2026) (CX 34).

**iv. Summary.**

As established above, Circle Creek is jurisdictional because it is a perennial water connected to traditional navigable waters, specifically the Necanicum River and the Pacific Ocean, via Little Muddy Creek.

Despite Respondent's denials, Complainant does not believe that the jurisdictional status of Circle Creek, Little Muddy Creek, or the Necanicum River are in dispute and seeks a stipulation identifying that Circle Creek, Little Muddy Creek, and the Necanicum River are jurisdictional as "waters of the United States" pursuant to the CWA.

**F. <u>Respondent Violated the SPCC Regulations.</u>**

The EPA's regulations at 40 C.F.R. § 112.3 require that the owner or operator of an onshore facility subject to Part 112 prepare in writing and implement an SPCC Plan. As alleged in paragraph 3.16 of the Second Amended Complaint, at the time of the Inspection and at all times relevant to the Second Amended Complaint through December 16, 2024, Respondent failed to prepare and implement an SPCC Plan, in violation of 40 C.F.R. § 112.3. Respondent denies this allegation.[105]

If necessary, Complainant will use the testimony of Mr. Franklin and his EPA SPCC Field Inspection and Plan Review Checklist for Jackson and Son Oil[106] to show that at the time of the Inspection, Respondent did not have and therefore had not implemented an SPCC Plan. Respondent also stated to Mr. Franklin that it had never developed an SPCC Plan despite beginning operations in 1984.[107]

[105] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.16.
[106] CX 01 (SPCC Inspection).
[107] *Id.* at 4 (stating that the Facility began operations in 1984).

The EPA will also support its allegations an SPCC Plan that was signed on December 16, 2024, and is included as CX 23 (December 2024 SPCC Plan). Respondent includes reference to an October 2024 SPCC Plan in paragraph 9 of its affirmative defenses.[108] The SPCC Plan that is included at CX 23 (December 2024 SPCC Plan) has a header that states "November 2024," and unsigned PE certification, and a signature indicating management approval[109] for the SPCC Plan on December 16, 2024.[110] As a result, it is unclear where Respondent obtained the October 2024 date.

The December 16, 2024, SPCC Plan indicates it was the very first plan drafted for the Facility because it lacks review information required by the 40 C.F.R. Part 112 regulations. Pursuant to 40 C.F.R. § 112.5(b), owners or operators must complete a review and evaluation of the SPCC Plan "at least once every five years." Further, owners or operators are required to "document...completion of the review and evaluation, and must sign a statement as to whether [they] will amend the Plan, either at the beginning or end of the Plan or in a log or an appendix to the Plan."[111] Chapter 7 of Respondent's December 2024 SPCC Plan acknowledges the requirements outlined in 40 C.F.R. § 112.5 and notes that "SPCC Review & Amendment Logs are included in Appendix A" of the SPCC Plan.[112] Appendix A is entitled "SPCC Plan Review, Amendment, & Training Logs."[113] Appendix A of the December 2024 SPCC Plan is blank.[114]

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[108] Answer to Second Amended Complaint, *supra* note 22, at ¶ 3.16, pg. 10. Complainant addresses in its prehearing exchange factual statements made by Respondent in the affirmative defenses section of the Answer to the Second Amended Complaint to the extent they are relevant to Complainant's prehearing exchange. Complainant will address any arguments made by Respondent with regard to these affirmative defenses in its rebuttal prehearing exchange. *See* Presiding Officer's Prehearing Order, *In re Jackson & Son Oil*, Dkt. No. CWA-10-2025-0023 (Jan. 28, 2025). The EPA is also prepared to address its history of interactions with Respondent during negotiations that occurred prior to filing the original Complaint when and if it becomes relevant to the proceedings.
[109] 40 C.F.R. § 112.7 requires that an SPCC Plan "have the full approval of management at a level of authority to commit the necessary resources to fully implement the Plan."
[110] CX 23 (December 2024 SPCC Plan) at 5.
[111] 40 C.F.R. § 112.5(b).
[112] CX 23 (December 2024 SPCC Plan) at 23.
[113] *Id.*, at 29-32 (App. A).
[114] *Id.*

Furthermore, neither Chapter 7 nor Appendix A include any discussion of previously completed 5-year reviews or copies of completed Amendment Logs.[115] Taken together and read in light of the requirements of 40 C.F.R. § 112.5, these portions of the SPCC Plan indicate Respondent failed to have a Plan for the Facility prior to December 16, 2024.

Complainant will also use the testimony of Kyle Masters and Kate Spaulding to show that between the time of the Inspection and EPA's receipt of the December 16, 2024, SPCC Plan, Respondent was, at times, making the EPA aware of its compliance efforts and had not developed an SPCC Plan during the intervening timeframe.[116]

Despite Respondent's denial and its reference to an October 2024 SPCC Plan,[117] Complainant does not believe this fact is in dispute and accordingly seeks a stipulation that Respondent first finalized an SPCC Plan for the Facility on December 16, 2024.

## VI. FACTUAL INFORMATION AND SUPPORTING DOCUMENTATION RELEVANT TO ASSESSMENT OF A PENALTY

In accordance with the Presiding Officer's instructions, Complainant sets forth in this Section all factual information and supporting documentation relevant to the assessment of penalty.

The Presiding Officer also instructed Complainant to provide a copy of any policy or guidance that Complainant relied on in calculating a proposed penalty.[118] The EPA has never issued a penalty policy for use by the EPA in administrative litigation or by Presiding Officers in determining penalties under the CWA.[119] Consequently, Presiding Officers rely on the wording

[115] *Id.* at 23, 29-32.
[116] *See also* CX 24 (Compliance Plan Schedule).
[117] Answer to Second Amended Complaint, *supra* note 22, at 10.
[118] Relevant documents are provided in CX 20 (CWA Section 311 Civil Penalty Policy) and CX 21 (GM 21 and GM 22).
[119] While issued for settlement purposes, some courts have used the EPA's 311 settlement penalty policy "to the extent that its application is central to the parties' arguments or circumstances of this case." *In the Matter of: VSS*

of the statutory penalty factors set out in CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8), and Complainant's proposed penalty is based on these applicable penalty factors. CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8), requires consideration of the following factors: "[A] the seriousness of the violation or violations, [B] the economic benefit to the violator, if any, resulting from the violation, [C] the degree of culpability involved, [D] any other penalty for the same incident, [E] any history of prior violations, [F] the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, [G] the economic impact of the penalty on the violator, and [H] any other matters as justice may require." This proceeding is for the assessment of a penalty, and Complainant has not to this point specified a proposed penalty in this proceeding. Pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will provide the amount of the proposed penalty and a detailed explanation of the factors considered in its rebuttal prehearing exchange in accordance with the criteria set forth above. Complainant discusses all factual information it considers relevant to the assessment of the penalty below.

**A. <u>Seriousness of the Violation</u>**

Respondent's noncompliance is serious because Respondent's failure to prepare and implement an SPCC Plan presented significant environmental risk. As included in paragraph 2.1 of the Second Amended Complaint, the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[120] Consistent with these goals, CWA Section 311(j) provides for the regulation of onshore facilities to prevent and contain discharges of oil.[121] Pursuant to the President's delegation through several Executive

*Int'l, Inc*., 2020 EPA ALJ LEXIS 20, *1, *115-116 (Sep. 16, 2020). As a result, EPA has included a copy of EPA's 311 settlement penalty policy as an exhibit to this prehearing exchange. *See* CX-20 (Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act). In *In re Crown Cent. Petroleum Corp.*, the court did look to EPA's 311 settlement penalty policy in deciding an appropriate penalty to resolve the case while also noting that administrative law judges have "discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." 2002 EPA ALJ LEXIS 1 at *149.

[120] 33 U.S.C. § 1251(a).

[121] CWA Section 311(j), 33 U.S.C. § 1321(j)

Orders,[122] the EPA promulgated the regulations at 40 C.F.R. Part 112 to establish oil pollution prevention procedures and requirements, including preparation and implementation of SPCC Plans.[123]

The purpose of the SPCC Program is to provide a comprehensive spill prevention program that minimizes the potential for discharges.[124] The failure to prepare and implement an SPCC Plan frustrates that purpose. An SPCC Plan is not merely a piece of paper that sits on a shelf – it is a program specifically tailored to an individual facility that minimizes the risk of oil spills through its use and implementation. The SPCC regulations require countermeasures and spill prevention infrastructure because "an ounce of prevention is worth a pound of cure."[125] For example, a spill of only one gallon of oil can contaminate a million gallons of water.[126] Yet, Respondent operated for decades[127] – until December 16, 2024 – before complying with the 40 C.F.R. Part 112 requirement to develop and implement an SPCC Plan.[128] As discussed in more detail below, Respondent's failure to prepare and implement a SPCC Plan directly inhibited the Facility's ability to respond quickly in the event of a spill.[129]

The requirements for an SPCC Plan are outlined in 40 C.F.R. Part 112. These regulations require that SPCC plans "address all relevant spill prevention, control, and countermeasures necessary at the specific facility."[130] While Respondent asserts that it "at all time (sic) conducted

[122] Initially by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11,677 (July 22, 1970), and most recently by Section 2(b)(l) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54,757 (October 22, 1991), the President delegated to the EPA the Section 311(j)(1)(C) authority to issue regulations for non-transportation related onshore facilities.
[123] The EPA first issued the 40 C.F.R. Part 112 regulations, effective on January 10, 1974, 38 Fed. Reg. 34,164 (Dec. 11, 1973).
[124] 40 C.F.R § 112.1(e) ("The purpose of an SPCC Plan is to form a comprehensive Federal/State spill prevention program that minimizes the potential for discharges"); *In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at *127.
[125] *Spill Prevention, Control, and Countermeasure (SPCC) Regulation, A Facility Owner/Operator's Guide to Oil Pollution Prevention*, U.S. EPA Office of Solid Waste and Emergency Response, 2 (June 2010), https://www.epa.gov/sites/default/files/documents/spccbluebroch.pdf.
[126] *Id.* at 5.
[127] *See supra* Section V.F.
[128] *See supra* Section V.F.
[129] *See e.g., In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at *128 ("By coming up short in its various SPCC obligations, Respondent failed to meet a requirement that is central to the regulatory scheme...").
[130] 40 C.F.R. § 112.1(e).

its operations in substantial compliance with the SPCC Plan regulations,"[131] the report from the Inspection[132] shows that Respondent was actually in substantial violation of the 40 C.F.R. Part 112 regulations.

For example, SPCC Plans must address appropriate secondary containment to prevent discharges.[133] Secondary containment is central to the SPCC program and one of the primary ways that the rule sets out to prevent discharges of oil into "waters of the United States" and adjoining shorelines.[134] At the time of the Inspection until November 30, 2024, the two 10,000-gallon single-walled tanks that stored diesel oil at the Facility completely lacked secondary containment.[135]

Similarly, SPCC Plans must also ensure secondary containment for the largest compartment of a tank truck involved in fuel transfer at loading/unloading racks.[136] At the time of the Inspection, the Facility's loading/unloading racks drained to a single sump with a capacity of 100 gallons.[137] The Facility's December 16, 2024 SPCC Plan states that the maximum capacity of any single compartment of a tank truck loaded or unloaded at the Facility is 1,400 gallons,[138] meaning that the sump was undersized by 1,300 gallons.

If the Facility had developed and implemented an SPCC Plan, at the very least when the EPA put the Respondent on notice of the SPCC Program in 2015,[139] these example deficiencies related to secondary containment would have likely been addressed then. Instead, it took over a

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[131] Answer to Second Amended Complaint, *supra* note 22, at 10.
[132] CX 01 (SPCC Inspection).
[133] 40 C.F.R. §§ 112.7, 112.8(c). § 112.7 sets forth the general secondary containment requirements while § 112.8(c) sets forth sized secondary containment requirements for tanks and bulk storage.
[134] *See In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1 at *158-59 (lack of SPCC plan for the facility combined with insufficient secondary containment undermines the ability to prevent oil spills and is thus consistent with major noncompliance in the penalty policy); *see also* CX 26 at 148 (SPCC Guidance for Regional Inspectors).
[135] CX 01 at 23 (SPCC Inspection); CX 24 (Compliance Plan Schedule).
[136] 40 C.F.R. § 112.7(h)(1).
[137] CX 01 at 24 (SPCC Inspection).
[138] CX 23 (December 2024 SPCC Plan) at 11.
[139] CX 03 (June 2015 Email). The EPA notified the Respondent of the regulations at 40 C.F.R. Part 112 and stated that the SPCC regulations "commonly apply to oil storage and handling facilities such as yours, and are found in the federal regulations at 40 CFR Part 112."

decade for the single-walled tanks to be replaced with a double-walled tank[140] and for the size of the containment system for the truck loading/unloading rack to be upgraded from 100 gallons to 1,600 gallons.[141]

Consistent with the SPCC Program's preventative approach, SPCC Plans must also include a procedure for tank integrity testing.[142] Tank integrity testing allows facilities "to prevent, predict and detect potential integrity or structural issues with a tank before they cause a leak, spill or discharge of oil to navigable waters or adjoining shorelines. Regularly scheduled inspections, evaluations, and testing by qualified personnel are critical parts of oil discharge prevention."[143] Prior to 2023, Respondent had never tested any of its aboveground storage tanks to ensure that they were physically sound and could continue to be used to store oil.[144] Without a record of regular tank integrity testing, Respondent had no way of knowing the condition of the tanks, resulting in a critical loss of oil spill prevention.

As one final example, in areas where oil is loaded or unloaded, SPCC Plans require a system that prevents vehicles from departing before completely disconnecting oil transfer lines.[145] Respondent, at the time of the Inspection through November 30, 2024, did not have warning lights or a barrier system at the Facility's loading and unloading rack,[146] thereby increasing the risk of a spill.

The above examples illustrate why the failure to prepare an SPCC Plan is "one of the

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[140] CX 24 (Compliance Plan Schedule). Based on information from Respondent, the single-walled tanks were replaced on November 30, 2024.
[141] *Id.* Based on information from Respondent, the containment in the loading/unloading rack was "completed w SPCC Plan" on November 30, 2024.
[142] 40 C.F.R. § 112.8(c)(6).
[143] CX-26 at 268 (SPCC Guidance for Regional Inspectors).
[144] CX 04 – 10 (Powers Engineering Inspection Reports). Each report notes that the prior inspection date for the respective tank is "unknown" or "N/A".
[145] 40 C.F.R. § 112.7(h)(2) (Owners or operators are required to provide an interlocked warning light or physical barrier system, warning signs, wheel chocks or vehicle brake interlock system in the area adjacent to a loading/unloading rack, to prevent vehicles from departing before complete disconnection of flexible or fixed oil transfer lines).
[146] CX 01 (SPCC Inspection) at 9. Based on information from Respondent, spill prevention at the loading and unloading rack was completed on November 30, 2024. CX 24 (Compliance Plan Schedule).

most egregious violations of the SPCC regulations."[147] The absence of an SPCC Plan "completely thwarts the stated purpose of Section 311 of the Clean Water Act."[148] Respondent's failure to prepare and implement an SPCC Plan also harms the entire regulatory program because, for example, such failure may influence others to forego compliance.

In addition to Respondent's failure to prepare and implement an SPCC Plan, the volume of the oil stored at the Facility further contributes to the seriousness of the violations.[149] From the time of the Inspection through November 30, 2024, the aboveground storage capacity of the Facility was approximately 107,500 gallons of oil, and after November 30, 2024, the aboveground storage capacity of the Facility was approximately 102,500 gallons of oil.[150] Under either timeframe, the storage capacity is over 100,000 gallons above the threshold for applicability of the 40 C.F.R. Part 112 regulations.[151]

Beyond the volume of oil stored and the degree of noncompliance, the violation is also serious and presents significant environmental risk given the location of the Facility. There is a reasonable expectation that a discharge from the Facility would impact Circle Creek, which is critical habitat for Endangered Species Act listed Coho salmon.[152] The ramifications of an oil

[147] *In re Pepperell Assocs.*, 1999 EPA ALJ LEXIS 16, *75-76 (Feb. 26, 1999).
[148] *Id.*
[149] *See e.g., In re Crown Cent. Petroleum,* 2002 EPA ALJ LEXIS 1 at *153-55 (applying the oil storage capacity as the base penalty amount).
[150] *See supra* Section V.C for evidence and exhibits supporting the approximate aboveground storage capacity at the Facility.
[151] *See e.g., In re VSS Int'l, Inc*., 2020 EPA ALJ LEXIS 20 at *122 ("Within a given category of violations, it is possible to assess seriousness based on the amount of pollutant involved...").
[152] 50 C.F.R. § 226.212(s)(1) (critical habitat for Coho Salmon); *see also National NMFS ESA Critical Habitat Mapper*, Nat'l Oceanic & Atmospheric Admin., https://www.fisheries.noaa.gov/resource/map/national-esa-critical-habitat-mapper (last visited Jan. 14, 2026) (navigate to the search bar and enter terms "Circle Creek, Oregon"; select the results tab titled "All_critical_habitat_line_20220404", and scroll down species list to view listing and habitat status for Salmon, coho; screenshot included as CX 27); *Oregon Coast Coho Salmon*, Nat'l Oceanic & Atmospheric Admin., https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/oregon-coast-coho-salmon (last updated Aug. 21, 2024); *see also In re VSS Int'l, Inc.*, 2020 EPA ALJ LEXIS 20 at *122 (considering the "sensitivity of the environment" as a factor relevant to assessment of the seriousness of the violations under the Clean Water Act).

spill reaching Coho salmon and their habitat would vary depending on several factors including the salmons' life stage(s), the amount of oil to reach salmon or salmon habitat, and the toxins present in the product (in this case being gasoline or diesel fuel).[153] If an acute exposure did not immediately kill Coho salmon, it would prove to be detrimental by potentially impacting spawning beds, honing mechanisms salmon use to navigate for spawning, development in fish embryos and larvae, and the salmons' food sources.[154]

Finally, the failure to prepare and implement an SPCC Plan is a serious violation because a discharge from the Facility could impact human health. A lumberyard is located directly adjacent to the Facility to the north and as explained above, a spill could sheet flow over the parking lot of the lumberyard.[155] Considering scientific literature related to indoor inhalation exposure and the fact that gasoline is a highly volatile compound, exposure to Polycyclic Aromatic Hydrocarbons (PAHs) and Volatile Organic Compounds (VOCs) can lead to nausea, skin and eye irritation, headaches, fatigue, dizziness and respiratory difficulties.[156] Chronic exposure to PAHs can impair the immune system, lead to pregnancy complications, cause neurodegenerative diseases,[157] and may lead to lung, skin, or bladder cancers.[158] Thus, in light of

[153] Calik, D.M., et al., *Temperature matters: Acute and latent toxicity of diluted bitumen to developing salmon is potentiated by a modest increase in water temperature,* 283 AQUATIC TOXICOLOGY 107374 (2025), available at https://doi.org/10.1016/j.aquatox.2025.107347. While this study examined the effects of diluted bitumen, its analysis of detrimental effects on salmons is relevant to a spill from the Facility because Polycyclic Aromatic Hydrocarbons (PAHs) found in gasoline and diesel endure the refining process. For further discussion of the refining process's effects on PAHs, *see* Goto, Y., Nakamuta, K., and Nakata, H., *Parent and alkylated PAHs profiles in 11 petroleum fuels and lubricants: Application for oil spill accidents in the environment*, 224 ECOTOXICOLOGY AND ENVIRONMENTAL SAFETY 112644 (Nov. 2021), available at https://doi.org/10.1016/j.ecoenv.2021.112644.
[154] Calik, D.M., et al., *supra* note 141.
[155] *See supra* Section V.D.2 for evidence and exhibits supporting this flow path.
[156] *Volatile Organic Compounds Impact on Indoor Air Quality*, U.S. EPA, https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality (last updated July 24, 2025).
[157] Montano, L. et al., *Polycyclic Aromatic Hydrocarbons (PAHs) in the Environment: Occupational Exposure, Health Risks and Fertility Implications*, 13 TOXICS 151 (Feb. 23, 2025), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC11946043/.
[158] Mallah, M.A. et al., *Polycyclic aromatic hydrocarbon and its effects on human health: An overeview*, 296 CHEMOSPHERE 133948 (June 2022), available at https://doi.org/10.1016/j.chemosphere.2022.133948.

the scope of noncompliance, volume of oil stored at the Facility, and proximity to businesses and ecologically sensitive areas, the EPA considers Respondent's violation to be serious.

**B. Economic Benefit Resulting from the Violation**

The failure to develop and implement an SPCC Plan resulted in an economic benefit to Respondent.[159] Respondent delayed the costs of compliance, which should be considered an unlawful economic benefit that should be recovered through this penalty action. Complainant does not have specific information at this time regarding the amount of Respondent's economic benefit. If Respondent does not provide additional information in Respondent's Prehearing Exchange, Complainant reserves the right to seek such information through a motion for additional discovery pursuant to 40 C.F.R. § 22.19(e).

**C. Degree of Culpability Involved**

Respondent has a high degree of culpability because Respondent's business experience and previous EPA communications should have alerted it to the regulated nature of its oil storage activities.[160] Respondent has been in the business of distributing oil since 1984,[161] an industry that is regularly subject to the 40 C.F.R. Part 112 regulations.[162] It is incumbent upon the regulated facility owner/operator to determine whether the SPCC Program is applicable.[163] At the time of the Inspection, the Respondent did not have any substantive information to support whether the Facility was subject to the 40 C.F.R. Part 112 regulations nor has Respondent since

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[159] *In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at *116 ("Generally, economic benefit is calculated as a measure of the benefit from "delayed costs," "avoided costs," or "competitive advantage" gained through noncompliance) (first quoting *San Pedro Forklift*, 15 E.A.D. 838, 879 (EAB Apr. 22, 2013); then quoting *Britton Construction Co.*, 8 E.A.D. 261, 287 at *19 (EAB Mar 30, 1999)).

[160] *See In re VSS Int'l Inc.*, 2020 EPA ALJ LEXIS 20 at *144-45.

[161] The EPA first issued regulations requiring the development of SPCC Plans in 1973, which became effective on January 10, 1974, (38 Fed. Reg. 34,164 (Dec. 11, 1973)), over a decade before Respondent started its oil distribution facility.

[162] *In re VSS Int'l, Inc.* 2020 EPA ALJ LEXIS 20 at *144 (weighing the Respondent's operation of the Facility "for more than three decades" as a factor relevant to determining culpability under the Penalty Policy); *see also Spill Prevention, Control, and Countermeasure (SPCC) Regulation, A Facility Owner/Operator's Guide to Oil Pollution Prevention*, U.S. EPA Office of Solid Waste and Emergency Response, 2 (June 2010), https://www.epa.gov/sites/default/files/documents/spccbluebroch.pdf.

[163] CX 26 at 50 (SPCC Guidance for Regional Inspectors).

shared any such supporting information with the EPA.

Respondent was notified by the EPA, as early as 2015, about the 40 C.F.R. Part 112 regulations.[164] In 2015, the EPA corresponded with Respondent via email about the 40 C.F.R. Part 112 regulations.[165] The EPA stated that the SPCC regulations "commonly apply to oil storage and handling facilities such as yours, and are found in the federal regulations at 40 CFR Part 112."[166] The EPA further provided a hyperlink to an EPA website "[f]or help with understanding the requirements."[167] In addition, after conducting the Inspection in 2021, the EPA transmitted its inspection report to the Respondent, which outlined the EPA's findings.[168] Despite these communications, Respondent did not complete an SPCC Plan until December 16, 2024, three years after the Inspection and nearly a decade after the 2015 email providing notice of the regulations.[169] Accordingly, the violations observed at the Facility are the result of a culpable actor.

**D. Ability to Pay**

Complainant has discussed with Respondent the EPA's process for determining and considering a respondent's ability to pay a civil penalty and has no information indicating that Respondent is unable to pay the proposed penalty. The burden to prove an inability to pay falls on Respondent. Complainant will consider information submitted by Respondent related to its ability to pay a penalty.

**E. Other Statutory Factors**

Section 311(b)(8) of the CWA provides for consideration of other penalty factors not considered above, including other penalties paid for the same incident; history of prior

[164] CX 03 (June 2015 Email)
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] CX 02 (Letter Transmitting Inspection Report).
[169] *See In re Pepperrell Assocs.*, 9 E.A.D. at 109-110 ("[Respondent's] knowledge that its activities were subject to environmental regulation should have alerted it to the need to make further inquiries into what other regulations, such as EPA's SPCC regulations, might also apply to the Facility.").

violations; the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; and any other matters as justice may require. Complainant does not believe that any adjustment is warranted under these additional penalty factors.

Complainant is not aware of other penalties paid or previous violations by Respondent. Further, the nature, extent, and degree of efforts to minimize or mitigate noncompliance does not support any adjustment. In CWA Section 311(j) matters without an accompanying discharge of oil, mitigation of noncompliance may include consideration of how quickly the violator comes into compliance with the regulations at 40 C.F.R. Part 112.[170] Here, an adjustment does not apply because Respondent has repeatedly delayed steps to comply, since at least EPA's 2015 email and even after the EPA's 2021 inspection.

Similarly, Complainant is not aware of any facts suggesting that Respondent was self-auditing or correcting violations before the EPA notified Respondent of deficiencies at the Facility. Complainant is not aware of any additional facts supportive of further adjustments for matters as justice may require. Accordingly, Complainant proposes no further adjustments to the gravity component for penalty.

## VII. PROOF OF PUBLIC NOTICE

Pursuant to CWA Section 311(b)(6)(C), 33 U.S.C. § 1321(b)(6)(C), and 40 C.F.R. § 22.45(b), Complainant provided public notice of the Original Complaint via the internet and afforded the public thirty days to comment on the Complaint and proposed penalty.[171] Complainant initiated the public notice period on February 11, 2025,[172] within thirty days of

[170] *See In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1 at *167-68 (applying the CWA Section 311 Penalty Policy and noting that "[m]itigation calls for a consideration of how quickly the violator comes into compliance" with the SPCC regulation); *see also In re Loggins Oil Co.*, 2000 EPA ALJ LEXIS 59, *17, *26 (2000) (noting respondent's lack of mitigation where no attempts to comply were made and considering the Section 311 Penalty Policy as adequate consideration of the statutory factors set forth in Section 311(b)(8)).
[171] *See* CX 19 (Public Notices) at 1. The EPA maintains an active public notice website at the following link: https://www.epa.gov/publicnotices/notices-search. Because the comment period ended on March 13, 2025, the public notice is no longer be available on the EPA's public notice website.
[172] CX 19 (Public Notices) at 1.

service of the Complaint on Respondent. The public notice period expired on March 13, 2025.[173] The EPA did not receive any public comments.

Pursuant to CWA Section 311(b)(6)(C), 33 U.S.C. § 1321(b)(6)(C), and 40 C.F.R. § 22.45(b), Complainant provided public notice of the Amended Complaint via the internet and afforded the public thirty days to comment on the Amended Complaint and proposed penalty.[174] Complainant initiated the public notice period on November 5, 2025,[175] within thirty days of service of the Amended Complaint on Respondent. The public notice period expired on December 4, 2025. The EPA did not receive any public comments.

Pursuant to CWA Section 311(b)(6)(C), 33 U.S.C. § 1321(b)(6)(C), and 40 C.F.R. § 22.45(b), Complainant provided public notice of the Second Amended Complaint via the internet and afforded the public thirty days to comment on the Amended Complaint and proposed penalty.[176] Complainant initiated the public notice period on December 22, 2025,[177] within thirty days of service of the Second Amended Complaint on Respondent. The public notice period expires on January 21, 2026.[178]

## VIII. RESERVATIONS

Complainant reserves the right to call all witnesses named or called at hearing by Respondent and to introduce as evidence at hearing any exhibit identified in Respondent's prehearing information exchange. Complainant further reserves the right to submit the names of

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[173] *Id.*
[174] *Id.* at 2. The EPA maintains an active public notice website at the following link: https://www.epa.gov/publicnotices/notices-search. Because the comment period ended on December 4, 2025, the public notice is no longer be available on the EPA's public notice website.
[175] CX 19 (Public Notices) at 2.
[176] *Public Notice: Second Amended Administrative Complaint and Notice of Opportunity for Hearing against Jackson & Son Distributors, Inc.*, EPA, https://www.epa.gov/publicnotices/second-amended-administrative-complaint-and-notice-opportunity-hearing-against. A screenshot of this public notice is also included at CX 19 (Public Notices) on page 3 for future use as the public notice will no longer be available on the EPA's public notice website once the public comment period closes.
[177] *Id.*
[178] *Id.*

additional witnesses and to submit additional exhibits prior to the hearing of this matter upon timely notice to the Presiding Officer and to Respondent, in accordance with 40 C.F.R. § 22.22(a) and the Presiding Officer's Prehearing Order of January 28, 2025.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

Ashley Bruner Digitally signed by Ashley Bruner Date: 2026.01.16 16:37:28 -07'00'

DATE

Ashley Bruner
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Bruner.Ashley@epa.gov

Christine Allen
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Allen.Christine.J@epa.gov

In the Matter of *Jackson & Son Distributors, Inc., d/b/a Jackson and Son Oil*, Respondent.
Docket No. CWA-10-2025-0023

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Complainant's Prehearing Exchange**, dated January 16, 2026, was sent this day to the following parties in the manner indicated below.

**Complainant's Prehearing Exchange** was filed with the OALJ E-filing System to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

CX 36 to **Complainant's Prehearing Exchange** exceeds the OALJ E-Filing System file size limit and was therefore uploaded using a link to a OneDrive folder provided by the Headquarters Hearing Clerk.

Further, **Complainant's Prehearing Exchange** was served on Respondent via electronic mail to:

Allan Bakalian, WSBA# 14255
Bakalian & Associates P.S.
8201 164th Avenue NE, Suite 200
Redmond, WA 98052
Email: allan@bakalianlaw.com
*Counsel for Respondent*

The exhibits to **Complainant's Prehearing Exchange** were served on Respondent via GoAnywhere, which is a secure, online file-sharing service.

Dated: January 16, 2026

Ashley Bruner Digitally signed by Ashley Bruner Date: 2026.01.16 16:37:39 -07'00'

Ashley Bruner
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07

Seattle, WA 98101
Bruner.Ashley@epa.gov