

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

STATE OF ALASKA DEPARTMENT OF
TRANSPORTATION AND PUBLIC
FACILITIES,

Juneau, Alaska

Respondent.

DOCKET NO. CWA-10-2024-0154

**COMPLAINANT’S MOTION FOR LEAVE
TO WITHDRAW COMPLAINT WITHOUT
PREJUDICE**

Pursuant to Section 22.14(d) of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“Part 22 Rules”), the United States Environmental Protection Agency, Region 10 (“EPA”) hereby respectfully moves for leave to withdraw the complaint without prejudice. In support of this Motion, the EPA relies on applicable procedural rules in the Part 22 Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion. Prior to filing this Motion, the undersigned contacted Respondent’s counsel to determine whether the State of Alaska Department of Transportation and Public Facilities (“Respondent”) would object to the relief sought in this Motion. Respondent’s counsel stated that they will oppose this Motion.

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Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 10:

DATE

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**COMPLAINANT’S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR LEAVE
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I. INTRODUCTION

The U.S. Environmental Protection Agency (“EPA” or “Agency”) respectfully seeks leave to withdraw the complaint filed against the State of Alaska Department of Transportation and Public Facilities (“Respondent”) without prejudice. Leave to withdraw the complaint without prejudice is appropriate because there is no evidence that Respondent has expended significant effort and expense in preparation for hearing, there is no evidence of excessive delay, lack of diligence in prosecuting this action, or undue vexatiousness by the EPA, the EPA has provided an adequate explanation for the request for leave, there is minimal risk of duplicative expense of relitigating this case, and the equities weigh in favor of allowing the EPA to preserve its ability to enforce the CWA. Granting leave for the EPA to withdraw the complaint without prejudice is appropriate for the Agency to allow the ongoing rulemaking process regarding the definition of “waters of the United States” to proceed prior to submitting additional briefing materials in this litigation. As described in more detail below, the EPA and the Department of the Army (“Agencies”) have sent a proposed rule defining the jurisdictional scope of “waters of the United States” to the Office of Management and Budget for interagency review. Following that interagency review, the Agencies intend to publish a proposed rule in the *Federal Register*

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for public notice and comment. Following consideration of comments received on the proposed rule, the Agencies intend to take final action on the proposed rule. In the interest of judicial efficiency, the EPA seeks to withdraw the complaint without prejudice to allow the EPA to assess the impact, if any at all, of the rulemaking process on the Agency's decisions regarding the appropriate trajectory for this enforcement action. The EPA is unaware of any legal prejudice to Respondent that would occur from the withdrawal of the complaint without prejudice. Therefore, the EPA respectfully requests that this Tribunal grant the EPA's motion to withdraw the complaint without prejudice. In the alternative, the EPA seeks a stay of any further proceedings until the Agencies take final action on the proposed rule.

II. STANDARD OF REVIEW FOR WITHDRAWAL OF COMPLAINT WITHOUT PREJUDICE

The Rules of Practice governing this proceeding, 40 C.F.R. Part 22, provide that after an answer to the complaint has been filed, "[t]he complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer."¹ The Rules do not provide any standard for granting leave to withdraw a complaint without prejudice, but the Federal Rules of Civil Procedure ("FRCP") and federal court decisions interpreting the FRCP provide guidance. The determination of whether to grant or deny a plaintiff's motion to dismiss a complaint under Fed. R. Civ. P. 41(a)(2) is within the discretion of the court.² The U.S. Supreme Court stated that "a plaintiff possesses the unqualified right to dismiss his complaint . . . unless some plain legal prejudice will result to the defendant other than the mere prospect of a

¹ 40 C.F.R. § 22.14(d).

² See *Westlands Water Dist. v. U.S. Dep't of Interior*, 100 F.3d 94, 96 (9th Cir. 1996); *Roberts v. Smithkline Beecham Corp.*, 2010 U.S. Dist. LEXIS 20040, at *9 (W.D. La. Jan. 29, 2010).

second litigation upon the subject matter.”³ Federal courts have maintained this standard over the years.⁴

In evaluating whether legal prejudice will result, federal courts have considered: (1) the Defendant’s effort and expense of preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) the adequacy of plaintiff’s explanation for the need to take a dismissal; and (4) whether a motion for summary judgment has been filed by the defendant.⁵ Courts have also considered the plaintiff’s diligence in bringing the motion, any undue vexatiousness on plaintiff’s part, the extent to which the suit has progressed, and the duplicative expense of relitigating the case.⁶ The factors are not exclusive but are merely guidelines for the court.⁷

In the administrative forum, motions to withdraw complaints without prejudice have been granted in multiple contexts where new information was identified warranting a change in the Agency’s proposed trajectory of an enforcement matter.⁸ They have also been granted for

³ See *Jones v. Securities & Exchange Comm’n*, 298 U.S. 1, 19 (1936).

⁴ See e.g., *Wimber v. Dep’t of Soc. & Rehab. Servs.*, 1994 U.S. Dist. LEXIS 9628 (D. Kan. 1994)(“Courts generally allow dismissal without prejudice unless the defendant will suffer some plain legal prejudice”); *Westlands Water Dist. v. U.S. Dep’t of Interior*, 100 F.3d at 96; *SEC v. Chakrapani*, 2010 U.S. Dist LEXIS 65337, at *6 (S.D.N.Y., June 28, 2010)(there is a presumption in favor of dismissing without prejudice unless defendants show they “will suffer substantial prejudice as a result.”)(quoting *A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, 2009 U.S. Dist. LEXIS 55128 (S.D.N.Y. 2009)).

⁵ See *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992)(citing *U.S. v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir.), cert denied, 479 U.S. 961 (1986)).

⁶ See *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990); *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs. Inc.*, 903 F.2d 352, 360 (5th Cir. 1990)(“Important in assessing prejudice is the stage at which the motion to dismiss is made. Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal.”).

⁷ See *Zagano*, 900 F.2d at 14.

⁸ See e.g. *In re: Richmond American Homes of Colorado, Inc.*, 2004 EPA ALJ LEXIS 4 (EPA, Feb. 9, 2004)(order Granting Motion to Withdraw Penalty Complaint)(additional violations discovered during settlement negotiations raised the proposed penalty above the statutory maximum allowable for adjudication in an administrative forum); *In re: Virgin Islands Water & Power Auth.*, 1997 EPA ALJ LEXIS 118 (EPA, June 10, 1997)(order Denying

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purposes of promoting judicial economy.⁹ By contrast, in one administrative enforcement action, the EPA’s motion for leave to withdraw a complaint without prejudice was denied because the EPA did not provide an adequate explanation for its desire to withdraw the complaint at that time, as it did not point to any new information or changed circumstances, and that the EPA was subject to a potential default order for failure to file timely its prehearing exchange.¹⁰ Therefore, “a balancing of the relevant equities between the parties” led the Administrative Law Judge to deny the motion.¹¹

III. PROCEDURAL BACKGROUND

The EPA filed a Complaint on August 27, 2024, against Respondent alleging that the Respondent, a person, violated Clean Water Act (“CWA”) Section 301(a)¹² by 1) discharging; 2) pollutants; 3) from a point source; 4) to waters of the United States; 5) without authorization under a CWA Section 404¹³ permit. Specifically, the Complaint alleged that Respondent discharged dredged or fill material from heavy machinery, such as trucks, backhoes, excavators, and water-jet trucks to wetlands that are either adjacent to the Pacific Ocean within Gastineau Channel or adjacent to relatively permanent tributaries that connect to the Pacific Ocean within Gastineau Channel.¹⁴

Respondent’s Motion for Reconsideration) (upon newly discovered violations, EPA sought injunctive relief); *In re: ESSROC Materials, Inc.*, 1995 EPA ALJ LEXIS 80 (EPA, Oct. 18, 1995)(order Dismissing Complaint Without Prejudice)(same).

⁹ See e.g. *In re: Dependable Towing & Recovery, Inc.*, 2012 EPA ALJ LEXIS 47 (EPA, June 6, 2012)(order Granting Motion to Withdraw Complaint Without Prejudice because “it is more efficient and appropriate to allow the issues to be presented in a single forum”).

¹⁰ *In re: City of Mandeville*, 1998 EPA ALJ LEXIS 57 (EPA, July 14, 1998)(order Denying Respondent’s Motion for a Default Order and Order Denying Complainant’s Motion to Withdraw the Complaint).

¹¹ *Id.*

¹² 33 U.S.C. § 1311(a).

¹³ 33 U.S.C. § 1344.

¹⁴ See Complaint.

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On March 3, 2025, the EPA and Respondent filed cross Motions for Accelerated Decision. On March 4, 2025, the parties conferred and jointly moved for the deadline for the Parties to respond to the cross motions for accelerated decision to be extended to April 2, 2025, and for the deadline for the parties to file replies to the responses to the cross motions for accelerated decision be extended to April 22, 2025. On March 5, 2025, this Tribunal granted that joint motion.

The parties conferred and jointly moved on March 27, 2025, for the deadline for the parties to respond to the cross motions for accelerated decision to be further extended to June 2, 2025, and for the deadline for the Parties to file replies to the responses to the cross motions for accelerated decision be extended to June 23, 2025. On March 31, 2025, this Tribunal granted that joint motion.

On May 22, 2025, the EPA filed an unopposed motion seeking an additional 90-day extension of the response and reply brief deadlines for the cross motions for accelerated decision. On May 23, 2025, this Tribunal denied that Motion, stating that “[g]iven the several prior extensions provided in this case, and EPA’s simple repetition in the pending Motion of its broadly asserted need to brief new administration officials, I do not find that EPA has at this time presented good cause for extending until late September briefing deadlines that would originally have expired in March and April.” This Tribunal then stated that “[i]f EPA still desires more time to file its briefs, it may resubmit its request and state with greater specificity why more time is needed and why the previous 60-day extension was insufficient to accomplish the task of briefing new administration officials.”

On May 27, 2025, the EPA filed a second unopposed motion renewing the request for an additional 90-day extension of the response and reply brief deadlines for the cross motions for accelerated decision. In that second unopposed motion, the EPA provided greater specificity justifying the need for an additional deadline extension. On May 28, 2025, this Tribunal granted the motion, extending the deadline for the Parties to respond to the cross motions for accelerated decision to September 2, 2025, and extending the deadline for the Parties to file replies to the responses to the cross motions for accelerated decision to September 23, 2025.

On August 27, 2025, the EPA filed a motion seeking additional extensions to the response and reply brief deadlines for the cross motions for accelerated decision. On August 28, 2025, this Tribunal provided Respondent until September 5, 2025, to file a response to the EPA's motion. On September 8, 2025, this Tribunal extended the deadline for the Parties to respond to the cross motions for accelerated decision to October 2, 2025, and extended the deadline for the Parties to file replies to the responses to the cross motions for accelerated decision to October 23, 2025.

IV. ARGUMENT

As articulated by the U.S. Supreme Court, the EPA should be granted an “unqualified right” to withdraw the complaint in this matter without prejudice “unless some plain legal prejudice will result to the [Respondent] other than the mere prospect of a second litigation upon the subject matter.”¹⁵ There would be no such “plain legal prejudice” to Respondent in this matter were this Tribunal to grant the EPA's request. Therefore, the EPA respectfully requests

¹⁵ See *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 19 (1936).

that this Tribunal grant the EPA's motion seeking leave to withdraw the complaint without prejudice.

A. There is no evidence that Respondent has expended significant effort and expense in preparation for hearing, particularly considering that the case is at the early stages of the litigation.

Federal courts consider whether Defendants have expended significant effort and expense in preparation for trial, including consideration of the stage of the litigation, when determining whether to grant a motion to withdraw the complaint without prejudice.¹⁶ In this case, there is no evidence that Respondent has expended significant effort and expense in preparation for hearing. Contrary to the EPA's Initial Prehearing Exchange¹⁷ where the EPA filed hundreds of pages of exhibits, including a nearly 700-page Jurisdictional Analysis developed specifically for this matter,¹⁸ Respondent's short Prehearing Exchange¹⁹ and associated exhibits failed to demonstrate a significant investment of resources and expense to generate independent scientific reports or technical analyses specific to this matter.

This motion for leave to withdraw the complaint without prejudice also comes early in the litigation timeline. Dispositive motions have not been fully briefed, and no hearing has been scheduled. As a result, Respondent has not likely invested significant resources towards preparing for any future hearing. By contrast, in a previous administrative matter where the EPA sought leave to withdraw a complaint without prejudice, the hearing was scheduled to occur a

¹⁶ See e.g. *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992)(citing *U.S. v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir.), cert denied, 479 U.S. 961 (1986)); *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990); and *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs. Inc.*, 903 F.2d 352, 360 (5th Cir. 1990).

¹⁷ See generally Complainant's Initial Prehearing Exchange.

¹⁸ See Exhibit CX – 02 (Jurisdictional Analysis Report).

¹⁹ See generally Respondent's Prehearing Exchange.

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mere three weeks prior to the date of the Administrative Law Judge's decision.²⁰ Despite that imminent hearing date and the resources that had been invested by both parties in advance of that hearing, the Administrative Law Judge granted the EPA's motion.²¹ In this case, the timing of the EPA's motion to withdraw the complaint without prejudice is at a stage of the litigation such that any effort and expense incurred by Respondent is relatively minimal, especially when considering the relatively low volume of independently generated reports in support of Respondent's Prehearing Exchange.²²

B. There is no evidence of excessive delay, lack of diligence in prosecuting the action, or any undue vexatiousness by the EPA in this matter.

Other factors relevant to determining whether to grant a motion to withdraw a complaint without prejudice include whether there is evidence of excessive delay, a lack of diligence in prosecuting the action, or any undue vexatiousness by the moving party.²³ None of these factors apply to the EPA's actions in this case. As described below, the timeline for the EPA's actions in this matter can be clearly justified.

The EPA filed a complaint in this matter in August 2024 and its Motion for Accelerated Decision on March 3, 2025, both prior to the issuance of a March 12, 2025, memorandum where the Agencies stated their intent to publish a public notice in the *Federal Register* establishing a docket and gathering recommendations to assist the Agencies in further clarifying the definition

²⁰ See *In re: Dependable Towing & Recovery, Inc.*, 2012 EPA ALJ LEXIS 47 (EPA, June 6, 2012).

²¹ *Id.*

²² See generally Respondent's Prehearing Exchange.

²³ See e.g. *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992)(citing *U.S. v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir.), cert denied, 479 U.S. 961 (1986)); *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990); and *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs. Inc.*, 903 F.2d 352, 360 (5th Cir. 1990).

of “waters of the United States.”²⁴ Over the course of the six months since the issuance of the March 12 memorandum, the Agencies published the *Federal Register* notice,²⁵ held a series of listening sessions,²⁶ considered the recommendations in response to the public notice published in the *Federal Register*,²⁷ had new political leadership appointed within the Office of Enforcement and Compliance Assurance,²⁸ and sent a proposed rule revising the definition of “waters of the United States” to the Office of Management and Budget. All these activities are directly related to, or at least influence, the Agency’s position regarding the primary issue raised in the EPA’s Initial Prehearing Exchange,²⁹ Respondent’s Prehearing Exchange,³⁰ and Respondent’s Motion for Accelerated Decision.³¹ As a result, the series of requests made by the EPA for additional time to internally brief leadership was reasonable and not evidence of excessive delay, a lack of diligence in prosecuting the action, or any undue vexatiousness.

C. The EPA should be able to use discretion to determine its position in this litigation as informed, in part, by the “waters of the United States” rulemaking proceedings.

As stated above, on March 12, 2025, the Agencies issued a memorandum providing new guidance concerning implementation of the “continuous surface connection” requirement for

²⁴ *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*, <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

²⁵ See 90 Fed. Reg. 13,428 (Mar. 24, 2025).

²⁶ <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities#wotusnotice>

²⁷ The Agencies received over 45,000 recommendations: <https://www.regulations.gov/docket/EPA-HQ-OW-2025-0093>.

²⁸ E.g. Craig Pritzlaff started as the Principal Deputy Assistant Administrator and acting OECA Assistant Administrator on August 18, 2025.

²⁹ See Complainant’s Initial Prehearing Exchange at Section V.D.

³⁰ See generally Respondent’s Prehearing Exchange.

³¹ See generally Respondent’s Motion for Accelerated Decision.

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adjacent wetlands under the definition of “waters of the United States.”³² In the same memorandum, the Agencies announced a public notice to be published in the *Federal Register* establishing a docket and gathering recommendations to assist the Agencies in further clarifying the definition of “waters of the United States.”³³

On March 24, 2025, that public notice appeared in the *Federal Register*.³⁴ The public notice stated that the Agencies would hold a series of at least six listening sessions seeking input on the scope of “relatively permanent” waters, “continuous surface connection,” and “jurisdictional ditches.”³⁵ The Agencies accepted written recommendations from the public through April 23, 2025.³⁶ In doing so, the Agencies stated that they “will seek to provide clear and transparent direction regarding the definition [of ‘waters of the United States’] and will prioritize practical implementation approaches, provide for durability and stability, as well as for more effective and efficient jurisdictional determinations, permitting actions, and other actions consistent with relevant decisions of the Supreme Court.”³⁷

The Agencies held nine listening sessions for various stakeholders and the public³⁸ and received more than 45,000 recommendations.³⁹ On June 17, 2025, the EPA stated in a press

³² *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*, <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

³³ *Id.*

³⁴ See 90 Fed. Reg. 13,428 (Mar. 24, 2025).

³⁵ *Id.* at 13,430-31.

³⁶ *Id.* at 13,430.

³⁷ *Id.*

³⁸ <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities#wotusnotice>

³⁹ <https://www.regulations.gov/docket/EPA-HQ-OW-2025-0093>

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release that the Agencies intend to issue a proposed rule defining “waters of the United States” “in the coming months.”⁴⁰

In mid-August 2025, the Agencies submitted a proposed rule to the Office of Management and Budget for interagency review revising the definition of “waters of the United States.” The Agencies plan to issue the proposed rule for public comment following the completion of that interagency review, which has not yet concluded at the time of this filing.

The complaint in this matter was filed in August 2024, almost seven months prior to the issuance of the March 12, 2025, memorandum where the Agencies stated their plans to publish a public notice in the *Federal Register* establishing a docket and gathering recommendations to assist the Agencies in efforts to further clarifying the definition of “waters of the United States.”⁴¹ Additionally, after the Agencies gathered and considered the recommendations in response to the public notice published in the *Federal Register*, they determined that it was appropriate to send a proposed rule to the Office of Management and Budget nearly a year after the complaint in this matter was filed. As a result, at the time of the filing of the complaint in this matter and at the time of the EPA’s filing of its Motion for Accelerated Decision,⁴² the Agency had not yet publicly initiated the process to consider revising the definition of “waters of the United States.”

⁴⁰ <https://www.epa.gov/newsreleases/epa-and-army-wrap-initial-listening-sessions-move-toward-proposal-revise-2023>.

⁴¹ *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*, <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

⁴² See Complainant’s Motion for Accelerated Decision.

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In the EPA’s Initial Prehearing Exchange,⁴³ Respondent’s Prehearing Exchange,⁴⁴ and Respondent’s Motion for Accelerated Decision,⁴⁵ the issue of whether the impacted wetlands at issue in this matter are “waters of the United States” was identified as a complex technical, legal, and policy issue. As described in the EPA’s August 27, 2025, motion seeking additional extensions to the response and reply brief deadlines for the cross motions for accelerated decision, the ongoing administrative processes related to the rulemaking process revising the definition of “waters of the United States” may or may not be relevant to the Agency’s positions taken in this litigation. The EPA seeks leave to withdraw the complaint without prejudice to allow the rulemaking process to move forward and allow the Agency to fully assess this case in the context of that rulemaking process. This would further judicial economy, conserve the parties’ resources, and promote the efficient and orderly disposition of this case.

If this Tribunal were to deny the EPA’s motion to withdraw the complaint without prejudice, the remaining available paths for the litigation each have significant inequities. If the EPA were to file its response to Respondent’s Motion for Accelerated Decision, the substance of that response could not take into account the Agency’s rulemaking process. The first issue raised in Respondent’s March 3, 2025 Motion for Accelerated Decision involves the interpretation of the definition of “waters of the United States,” including the scope of “continuous surface connection.”⁴⁶ As described above, the EPA actively gathered written recommendations and conducted listening sessions on, among other things, the scope of “continuous surface

⁴³ See Complainant’s Initial Prehearing Exchange at Section V.D.

⁴⁴ See generally Respondent’s Prehearing Exchange.

⁴⁵ See generally Respondent’s Motion for Accelerated Decision.

⁴⁶ See Respondent’s Motion for Accelerated Decision at pages 9 – 14.

connection.” As a result, it is reasonable to conclude that a rulemaking process revising the definition of “waters of the United States” is likely to include the Agency’s perspectives on the scope of “continuous surface connection.” Therefore, it would be in the best interest of the Respondent and this Tribunal for the Agency’s response to Respondent’s Motion for Accelerated Decision to be informed, at least in part, by that rulemaking.

Another alternative to granting the EPA with leave to withdraw the complaint without prejudice would be for the Agency to withdraw the complaint with prejudice. This would be a particularly inequitable result, as it would preclude the EPA, after full consideration of the rulemaking process, from further pursuing claims against Respondent for the alleged CWA violations. As stated more fully in the EPA’s Initial Prehearing Exchange,⁴⁷ the alleged violations at issue impacted important waterbodies and appropriate resolution of this action is in the public interest. The EPA should have the opportunity to fully assess any outcome of the rulemaking process and determine the manner in which those alleged violations should be resolved without being precluded from filing a new complaint. Therefore, the EPA has adequately explained the need for leave to withdraw the complaint without prejudice.

D. The EPA’s motion for leave to withdraw the complaint without prejudice is unrelated to Respondent’s filing of a motion for accelerated decision.

Some federal courts have considered whether a Defendant has filed a motion for summary judgment in their assessment of whether to grant a motion for leave to withdraw a complaint without prejudice.⁴⁸ Courts have found this relevant when cases have been pending

⁴⁷ See Section VI of Complainant’s Initial Prehearing Exchange.

⁴⁸ See e.g. *Pace v. S. Express Co.*, 409 F.2d 331 (7th Cir. 1969).

for a long time, when substantial costs and resources have been invested by Defendants, the motion for summary judgment has been fully briefed, and when there is evidence that the plaintiff “was attempting to deprive the Defendant of a ruling on the summary judgment motion by its dismissal tactic.”⁴⁹

In this case, as described in detail above, the EPA’s impetus for the requests for deadline extensions and its request for leave to withdraw the complaint without prejudice is related to a separate administrative process that may or may not influence the Agency’s positions in this litigation. These requests would have been made irrespective of whether Respondent filed their Motion for Accelerated Decision in this matter.⁵⁰ In fact, the United States has made requests for abeyances and stays of litigation in U.S. District Court litigation involving CWA matters where no such motion by Defendants has been filed.⁵¹ This motion is not an attempt by the EPA to deprive the Respondent of a ruling on the motion for accelerated decision by its dismissal tactic. Additionally, Respondent’s motion has not been fully briefed, and this filing comes relatively early in the litigation. As a result, the mere fact that Respondent has filed a motion for accelerated decision should not weigh in favor of denying the EPA’s motion.

E. There is minimal risk of duplicative expense of relitigating this case, were the EPA to file a new complaint.

When determining whether to grant leave to withdraw a complaint without prejudice, federal courts have considered the risk associated with duplicative expense of relitigating the

⁴⁹ See *Pace v. S. Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969).

⁵⁰ The motion for accelerated decision is analogous to a motion for summary judgment in federal court practice. See *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999).

⁵¹ E.g. *U.S. v. White*, No. 2:23-cv-0001-BO-RN, Status Report and Unopposed Motion to Extend Stay (E.D.N.C. Aug. 12, 2025).

case, were it to be reinitiated with a new complaint.⁵² In this case, Respondent has incurred minimal expense related to this litigation, as their short Prehearing Exchange⁵³ and associated exhibits failed to demonstrate a significant investment of resources and expense to generate scientific reports or technical analyses specific to this matter. Additionally, there presumably has been little to no expense related to preparation for hearing, given that no hearing date has been established. Regardless of the total costs incurred to this point by Respondent, any reports, briefs, and other written materials that have required investment of resources would likely be useful in any future litigation were the EPA to file a new complaint, minimizing costs associated with a possible future action. As a result, the risk of duplicative expenses in possible future litigation is very minimal.

F. The equities weigh in favor of allowing the EPA to preserve its ability to enforce the CWA.

The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵⁴ CWA Section 301(a)⁵⁵ provides that, except as in compliance with a permit under CWA Section 404,⁵⁶ certain other permits, and limitations not applicable in this case, “the discharge of any pollutant by any person shall be unlawful.” As stated more fully in the EPA’s Initial Prehearing Exchange,⁵⁷ the alleged violations at issue impacted important waterbodies and appropriate resolution of this action is in the public interest. The EPA should have the opportunity to fully assess any outcome of the rulemaking process that

⁵² See *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990)

⁵³ See generally Respondent’s Prehearing Exchange.

⁵⁴ 33 U.S.C. § 1251(a).

⁵⁵ 33 U.S.C. § 1311(a).

⁵⁶ 33 U.S.C. § 1344.

⁵⁷ See Section VI of Complainant’s Initial Prehearing Exchange.

may directly address a central issue in the case and make an informed decision about the manner in which those alleged violations are resolved without being precluded from filing a new complaint. Preserving the EPA’s authority to utilize its authorities to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” is particularly important when the applicable state has not assumed implementation of the relevant CWA program. In this case, the State of Alaska has not sought approval of, or been approved to implement, the CWA Section 404 regulatory and enforcement program. As a result, the United States is the only governmental authority that can address unauthorized discharges of dredged and/or fill material, like those alleged here, through CWA authorities. While weighing the equities to determine whether to grant the EPA’s motion for leave to withdraw the complaint without prejudice, this Tribunal should place particular weight on the EPA’s unique role to address the alleged discharges at issue in this case.

Respondents’ September 5, 2025, opposition to the EPA’s motion for extension of deadlines states that the EPA’s action has prevented “permanent repairs to Glacier Highway’s stormwater management system that were damaged in a Winter 2020 storm event.”⁵⁸ This is similar to an argument that Respondent put forth in its Prehearing Exchange, stating that the “EPA largely caused the problem that it now complains of . . . [because the] Notice of Violation ordered [Respondent] to cease and desist all ongoing work along the Glacier Highway.”⁵⁹ Respondent is incorrect; the Corps, not the EPA, issued the Notice of Violation.⁶⁰ Additionally,

⁵⁸ See State of Alaska’s Opposition to EPA’s Third Motion for Extension of Deadlines to File Responses and Replies to Motions for Accelerated Decision at page 3.

⁵⁹ See Respondent’s Prehearing Exchange at page 9.

⁶⁰ See Exhibit CX – 05 (Corps Notice of Violation).

the Notice of Violation did not function as an “order,” much less contain language ordering Respondent to “cease and desist all ongoing work along the Glacier Highway.”⁶¹ The reason the unauthorized dredged and/or fill material remains in place is solely the result of Respondent’s unwillingness to agree to remove the material as part of an enforceable agreement on consent.

Respondent’s September 5, 2025, opposition goes on to say that the EPA’s “delays in this proceeding also have widespread impacts on [Respondent’s] operations throughout Alaska,” citing a specific example of delays to “traffic safety improvements” in Juneau.⁶² There is nothing precluding Respondent from working with the U.S. Army Corps of Engineers, as the entity with CWA Section 404⁶³ permitting authority, to seek clarity on whether permit coverage is required for those proposed projects. If such coverage is required, Respondent can take the same action required of every other regulated entity and apply for the permit, comply with its conditions, and implement these projects. The EPA’s enforcement action, and this Tribunal’s granting of the EPA’s motion for leave to withdraw the complaint without prejudice, should have no bearing on Respondent’s ability to perform work in compliance with the CWA. Therefore, the equities clearly weigh in favor of granting the EPA’s motion.

G. In the alternative, the EPA seeks a stay of the litigation pending a final action on the proposed rule.

As an alternative to granting the EPA leave to withdraw the complaint without prejudice, the EPA would request that this Tribunal consider staying all deadlines in this matter until the Agencies take final action on the proposed “waters of the United States” rule. The EPA’s June

⁶¹ See Exhibit CX – 05 (Corps Notice of Violation).

⁶² *Id.*

⁶³ 33 U.S.C. § 1344.

17, 2025, press release stated that following public comment on the proposal, the Agencies would review input and work to issue a final rule. Additionally, as stated above, in mid-August 2025, the Agencies submitted a proposed rule to the Office of Management and Budget for interagency review revising the definition of “waters of the United States.” The Agencies plan to issue the proposed rule for public comment following the completion of that interagency review, which has not yet concluded at the time of this filing. As an alternative to granting the EPA leave to withdraw the complaint without prejudice, the EPA proposes that this Tribunal consider staying all deadlines in this matter while requiring the EPA to file monthly status reports regarding the status of the rulemaking along with proposals for future proceedings. The monthly status reports would provide this Tribunal and Respondent with frequent updates on the rulemaking process with the understanding that new litigation deadlines would be established after the Agencies take final action on the proposed rule.

V. CONCLUSION

The EPA has demonstrated that the equities clearly weigh in favor of this Tribunal granting the motion for leave to withdraw the complaint without prejudice. In order to effectuate the expressed statutory goals of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” the EPA should have the opportunity to fully assess any outcome of the “waters of the United States” rulemaking process and make a decision about the manner in which the alleged violations in this matter should be addressed without being precluded from filing a new complaint. Additionally, the EPA is unaware of any legal prejudice to Respondent should this Tribunal grant the EPA’s motion. Therefore, the EPA respectfully requests that this Tribunal grant the motion for leave to withdraw the complaint without

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**U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 155, 11-C07
Seattle, Washington 98101**

prejudice. In the alternative, the EPA seeks a stay of any further proceedings in this litigation until the Agencies take final action on the proposed “waters of the United States” rule.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 10:

DATE

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

STATE OF ALASKA DEPARTMENT OF
TRANSPORTATION AND PUBLIC
FACILITIES,

Juneau, Alaska,

Respondent.

DOCKET NO. CWA-10-2024-0154

CERTIFICATE OF SERVICE

The undersigned certifies that the original COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW COMPLAINT WITHOUT PREJUDICE in the above-captioned action was filed within the OALJ E-Filing System to:

Mary Angeles, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Further the undersigned certifies that a true and correct copy of the original COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW COMPLAINT WITHOUT PREJUDICE was served on Respondent State of Alaska Department of Transportation and Public Facilities via email to:

Sarah E. Angell, Assistant Attorney General
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