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 INITIAL PREHEARING EXCHANGE**

Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's October 24, 2024 Prehearing Order, 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. **Mark Jen**, EPA Region 10 Case Officer and Inspector (fact/expert witness): Mr. Jen has over 30 years of experience working for EPA Region 10, including 25 years of working as a Clean Water Act ("CWA") Section 404 credentialed inspector and enforcement case officer based in Anchorage, Alaska. His resume is listed below as Exhibit CX – 12 (Jen Resume).

Mr. Jen's responsibilities and expertise include conducting inspections of facilities that have discharged dredged and/or fill material to waters of the United States, including wetlands. Mr. Jen's responsibilities and expertise also include assessing the applicability of possible exemptions for discharges of dredged and/or fill material under CWA Section 404(f), 33 U.S.C. § 1344(f). Lastly, Mr. Jen has extensive experience calculating appropriate penalties for violations involving unauthorized discharges of dredged and/or fill material.

Mr. Jen inspected each of the locations in Table 1 of the Complaint on May 6, 2022, September 13, 2022, September 26, 2023, and May 20 – 23, 2024, documented the presence of dredged and/or fill material at each of those locations, and measured the dimensions and the extent of the dredged and/or fill material. Mr. Jen's findings are summarized in Complainant's Exhibit CX – 01 (Discharge Report).

Mr. Jen will testify to the findings in Exhibit CX – 01, including, as needed, his expert opinion on the inapplicability of exemptions to discharges of dredged and/or fill material under CWA Section 404(f), 33 U.S.C. § 1344(f). He will also testify regarding how Exhibit CX – 05 (Corps Notice of Violation), Exhibit CX – 06 (Respondent's Response to Corps NOV), Exhibit

CX – 07 (Complainant's CWA Section 308 Information Request), Exhibit CX – 08 (Respondent's Response to Complainant's Information Request), and Exhibit CX - 09 (Corps' Referral Letter to Complainant) each support a conclusion that Respondent should be found liable for the discharges of dredged and/or fill material to waters of the United States. Additionally, Mr. Jen will testify regarding the factors supporting a significant penalty, including reference to Exhibit CX – 10 (2010 Consent Decree) and reliance upon a variety of websites found at URL addresses contained in footnotes throughout Section VI of this filing.

2. **Amy Jensen**, EPA Region 10 Wetland Coordinator (fact/expert): Ms. Jensen has over 25 years of experience as a hydrologist for federal agencies and has over five years of experience as the Regional Wetland Coordinator for EPA Region 10 based in Seattle, Washington. Her résumé is listed below as Exhibit CX – 13 (Jensen Resume).

In her role as Regional Wetland Coordinator, Ms. Jensen is the lead scientist on behalf of EPA Region 10 analyzing whether a waterbody qualifies as a "navigable water," defined as a "water of the United States" under the CWA. In her role as EPA Region 10's lead on waters of the United States matters, Ms. Jensen 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. Her more than two decades of experience as a hydrologist for federal agencies informs her expert opinion on CWA jurisdictional analyses.

Ms. Jensen visited each of the locations in Table 1 of the Complaint on May 20 – 23, 2024, supporting her analysis of the jurisdictional status of the impacted wetlands.

Ms. Jensen will testify regarding the statutory definition of navigable waters, regulatory definition of waters of the United States, the various categories of waters of the United States,

her analysis of the presence of wetlands at each of the locations identified in Table 1 of the Complaint in accordance with Exhibit CX – 03 (1987 Corps Delineation Manual) and Exhibit CX – 04 (Alaska Regional Supplement), and her analysis of the CWA jurisdictional status of the wetlands impacted by Respondent's discharges of dredged and/or fill material. Specifically, Ms. Jensen will testify that the impacted wetlands are each adjacent to and have a continuous surface connection to unnamed relatively permanent tributaries that connect to Gastineau Channel, a traditional navigable water, and/or are adjacent to and have a continuous surface connection to Gastineau Channel. The content of her testimony can be found in Exhibit CX – 2 (Jurisdictional Analysis Report).

3. **Gwendolyn Jacobson**, Corps' Alaska District Regulatory Specialist (fact): Ms. Jacobson has 2 ½ years of experience as a Regulatory Specialist for the Corps' Alaska District and has approximately 7 ½ years of experience working on wetland matters. Ms. Jacobson is based in Fairbanks, Alaska.

In her role as a Regulatory Specialist for the Corps' Alaska District, Ms. Jacobson performs wetland delineations and jurisdictional determinations in the field, among other responsibilities.

Ms. Jacobson visited the locations identified in Table 1 of the Complaint on May 20 – 23, 2024 and collected data regarding the presence of hydrophytic vegetation to determine whether the locations contained wetlands.

If needed at hearing, Ms. Jacobson will testify regarding the data collected and what that data showed regarding the presence of hydrophytic vegetation at each of the locations. Ms. Jacobson will utilize Exhibit CX – 02 (Jurisdictional Analysis Report) in her testimony.

4. **Randal Vigil**, Corps' Alaska District Southeast Section Chief (fact): Mr. Vigil has approximately 29 years of experience working in a variety of positions for the Corps' Alaska District Regulatory Program. Mr. Vigil is based in Juneau, Alaska. He currently serves as the Chief of the Southeast Section for the Corps' Alaska District and has served in that role since 2023.

In his role with the Corps' Alaska District, Mr. Vigil's responsibilities have included making permitting decisions, including but not limited to determining the applicability of Nationwide Permits. Mr. Vigil's responsibilities also include issuing notices of violation and other enforcement and compliance correspondence. In that role, Mr. Vigil issued Respondent a Notice of Violation and received a written response from Respondent to that Notice of Violation. Mr. Vigil will utilize Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation) in his testimony.

Mr. Vigil also visited the locations identified in Table 1 of the Complaint on May 20 – 23, 2024 and will testify that Respondent's discharges of pollutants to waters of the United States were not authorized by any CWA Section 404 permit, including any Nationwide Permits. Mr. Vigil will utilize Exhibit CX – 11 (2017 Issuance of NWP 3) in his testimony.

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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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 three 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 Complaint was completed in accordance with 40 C.F.R. § 22.5(b)(1). On August 27, 2024, Complainant filed the original Complaint, a copy of the Consolidated Rules of Practice under 40 C.F.R. Part 22, and a copy of Standing Order on the Designation of EPA Region 10 Part 22 Electronic Filing System 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. On August 28, 2024, Complainant sent the Commissioner of the State of Alaska Department of Transportation and Public Facilities, the "chief executive officer" of the Department consistent with 40 C.F.R. § 22.5(b)(1)(ii)(C), via United States Postal Service certified mail, a true and correct copy of the Complaint, copy of the Consolidated Rules of Practice under 40 C.F.R. Part 22, and a copy of Standing Order on the Designation of EPA Region 10 Part 22 Electronic Filing System. That same day, Complainant sent counsel for Respondent the same package. On September 6, 2024, Respondent received and signed for the certified mailing of the package and on September 16, 2024, Respondent's counsel signed for the certified mailing of the package.[1]

[1] *See* Exhibit CX – 15 (Documentation of Service).

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. Under CWA Section 301(a), 33 U.S.C. § 1311(a), "the discharge of any pollutant by any person shall be unlawful" except as in compliance with, *inter alia*, CWA Section 404, 33 U.S.C. § 1344. In its Complaint, Complainant alleges that Respondent violated CWA Section 301(a), 33 U.S.C. § 1311(a), because 1) Respondent is a person; 2) that discharged; 3) pollutants (dredged and/or fill material); 4) from a point source (heavy mechanical equipment); 5) to waters of the United States (wetlands adjacent to unnamed relatively permanent tributaries and/or to a traditional navigable water); 6) without permit authorization issued pursuant to CWA Section 404, 33 U.S.C. § 1344. Complaint ¶¶ 3.1–3.14. Respondent generally denies these allegations in the Complaint. Answer ¶¶ 3.1-3.14.

The primary Exhibits relevant to the alleged CWA violations are: 1) Exhibit CX – 01 (Discharge Report) illustrating the presence of discharged dredged and/or fill material at each of the locations identified in Table 1 of the Complaint; and 2) Exhibit CX – 02 (Jurisdictional Analysis Report) illustrating that each of the locations contain wetlands that abut and have continuous surface connections to and thus are adjacent to unnamed relatively permanent tributaries to Gastineau Channel and/or directly to Gastineau Channel.

A. Respondent is a Person

Under CWA Section 502(5), 33 U.S.C. § 1362(5), the term person means, *inter alia*, a "State" or "political subdivision of a State." The Complaint alleges that Respondent is the State of Alaska and Respondent denies that allegation, stating that "Respondent is the State of Alaska Department of Transportation and Public Facilities." Answer ¶ 3.1. Despite Respondent's denial, Complainant does not believe this allegation is in dispute and hereby proffers its

stipulation to the fact that the State of Alaska, through its Department of Transportation and Public Facilities, is the Respondent in this matter.

B. Respondent Discharged Pollutants

The CWA defines "discharge" to include "discharge of a pollutant," 33 U.S.C. § 1362(16), and defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The CWA defines "pollutant" broadly to include an array of materials such as "dredged spoil," "sand," and "biological materials." 33 U.S.C. § 1362(6). "Pollutant" also includes "fill material," defined as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States," 33 C.F.R. § 323.2(e), and "dredged material" defined as "material that is excavated or dredged from waters of the United States," 33 C.F.R. § 323.2(c). The regulatory definition of "fill material" goes on to include, *inter alia*, "rock." 33 C.F.R. § 323.2(e). Additionally, Courts have consistently concluded that native organic soils, sediment, or "dirt,"[2] woody debris,[3] and gravel or rock[4] are each a pollutant, and that placement of such pollutants within waters of the United States constitute a "discharge of a pollutant."

As alleged in the Complaint and as can be seen throughout Exhibit CX – 01 (Discharge Report), Respondent discharged native organic soils, woody debris, gravel, rock, and sediments, each of which are pollutants under the CWA. Respondent admits that it "performed maintenance work" and its denials of Complainant's allegations of a discharge of dredged and/or fill material

[2] *See e.g. Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001) and *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000).
[3] *See e.g. United States v. Banks*, 873 F. Supp. 650, 653 (S.D. Fla. 1995) (finding that "organic debris" and "palm fronds" fit within the definition of "fill material).
[4] *See e.g. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).

argue that the locations "are not subject to federal jurisdiction pursuant to *Sackett*, and DOT&PF's maintenance activities are exempt under Section 404(f) of the CWA or was preauthorized under one or more nationwide permits." Answer ¶¶ 3.12, 3.13, and 3.14.

While Respondent's defenses are related to the determination of whether pollutants were added to "navigable waters," whether the discharge activities required CWA Section 404 permit authorization, and whether the activities were "preauthorized," they appear unrelated to the other portions of the definition of "discharge of a pollutant," including the "addition of any pollutant . . . from any point source." "Point source" is further addressed in Complainant's analysis below.

Given that the Answer does not explicitly dispute that there was an "addition" of a "pollutant," Complainant proffers its stipulation that there was a "discharge of a pollutant," associated with Respondent's activities as alleged in ¶¶ 3.12, 3.13, 3.14, and 3.26 of the Complaint. Through this proffer of stipulation, Complainant is not requesting that Respondent stipulate that the discharges of pollutants were to "navigable waters," that the discharge activities were not exempt from CWA Section 404 permitting requirements, nor that the discharge activities were not "preauthorized" by a CWA Section 404 permit.

If a hearing is necessary in this matter, Complainant's witness Mr. Jen will testify regarding his observations in the field of the presence of native organic soils, woody debris, gravel, rock, and sediments at the locations identified in Table 1 of the Complaint along with the approximate volumes of those materials and the area impacted by those materials. Additionally, Mr. Jen and Mr. Vigil will testify regarding the information provided by Respondent in writing

to Complainant[5] and the Corps[6] confirming the placement of these materials in the locations identified in Table 1 of the Complaint.

C. <u>The Discharges Were from Point Sources</u>

Pursuant to CWA Section 502(14), 33 U.S.C. § 1362(14), the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged." Further, courts have found that trucks, backhoes, and excavators can each qualify as "point sources" under this provision.[7] As alleged in the Complaint and identified in Exhibit CX – 01 (Discharge Report), Complainant alleges that Respondent's heavy mechanical equipment such as a truck, backhoe, excavator, and/or water-jet truck each constitute a "point source" pursuant to the CWA. Complaint ¶¶ 3.12, 3.13, 3.14, 3.24, and 3.26. Respondent generally denies this allegation "because its maintenance activities were exempt under Section 404(f) of the CWA or preauthorized under one or more nationwide permits. Moreover, no federal jurisdiction exists at the locations in question given the lack of a continuous surface water connection." E.g. Answer ¶ 3.24.

Given that the Answer does not explicitly deny that the heavy mechanical equipment identified in the Complaint is a "point source," and given the clear case law on this point, Complainant does not believe this allegation is in dispute. Complainant hereby proffers its stipulation that the heavy equipment referenced in Paragraphs 3.12, 3.13, 3.14, 3.24, and 3.26 of the Complaint are each a "point source," pursuant to CWA Section 502(14), 33 U.S.C.

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[5] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[6] *See* Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).
[7] *See e.g. United States v. Sweeney*, 483 F. Supp. 3d 871, 917 (E.D. Cal. 2020) ("[T]he term 'point source' includes bulldozers, dump trucks, and other equipment used to place dredged or fill material in waters of the United States."); *United States v. Pozsgai*, 999 F.2d 719, 726 n.6 (3d Cir. 1993) ("Courts have consistently held that dump trucks and bulldozers, such as those used for depositing and spreading fill . . ., qualify as 'point sources.'"). *See also e.g. United States v. Bayley*, No. 3:20-cv-05867, 2023 U.S. Dist. LEXIS 73018, at *14 – 15 (W.D. Wash. Apr. 26, 2023) and *United States v. Andrews*, 677 F. Supp. 3d 74 (D. Conn. 2023).

§ 1362(14). Through this proffer of stipulation, Complainant is not requesting that Respondent stipulate that the discharges from point sources were to "navigable waters," that the discharge from point sources were not exempt from CWA Section 404 permitting requirements, nor that the discharge from point sources were not "preauthorized" by a CWA Section 404 permit.

If a hearing is necessary in this matter, Complainant's witness Mr. Jen will testify regarding the information provided by Respondent to Complainant confirming the use of this equipment at the locations identified in Table 1 of the Complaint.[8]

D. The Point Sources Discharged to Navigable Waters

1. The EPA Determines Navigable Waters by Applying the Statutory and Regulatory 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." Solely for the purposes of this administrative litigation, Complainant seeks that the parties stipulate that the 1986/88 Corps and EPA regulations, 40 C.F.R. § 230.3(s) (2014), as informed by applicable guidance documents and case law, including but not limited to *Sackett*, was the applicable regulatory definition throughout the alleged violations. As will be discussed below, there were multiple regulatory definitions of waters of the United States ostensibly in effect during the period of violations: 1) the Navigable Waters Protection Rule from August 24, 2021 to August 30, 2021;[9] 2) the 1986/88 Corps and EPA regulations, 40 C.F.R. § 230.3(s) (2014), as informed by applicable guidance documents and case law, from August 31, 2021 to March 19, 2023 and from April 11, 2023 until

[8] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).

[9] Navigable Waters Protection Rule: Definition of "Waters of the United States", (April 21, 2020). https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states. The Navigable Waters Protection Rule was effective in Alaska on June 22, 2020 until August 30, 2021, when it was vacated by multiple decisions in *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).

August 27, 2024;[10] and 3) a rule published in the Federal Register on January 18, 2023 revising the definition of waters of the United States ("January 2023 Rule") from March 20, 2023 to April 10, 2023.[11]

The EPA and the Corps interpreted the term waters of the United States consistent with the 1986/88 Corps and EPA regulations, as amended, 40 C.F.R. § 230.3(s) (2014), and as informed by applicable guidance documents and case law for the vast majority of the period when unauthorized dredged and/or fill material remained in waters of the United States.[12] Additionally, vacatur of the Navigable Waters Protection Rule in the U.S. District Court for the District of Arizona[13] and District of New Mexico[14] should apply retroactively.[15]

On January 18, 2023, the EPA and the Corps published the January 2023 Rule.[16] That definition was later amended on August 29, 2023[17] to conform to the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*, 598 U.S. 651

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[10] For the period of applicability for this regulatory definition and the January 2023 Rule, the EPA alleges that each day that the unauthorized dredged and/or fill material remains in waters of the United States constitutes an additional day of CWA violations. *See Sasser v. Adm'r, EPA*, 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation" under the Clean Water Act*.); Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1275 (10th Cir. 2018) ("[W]e affirm the district court's conclusion that the roadway and filling of wetlands in Saline Creek constitute a continuing violation of the CWA."); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D. Mass.1986), aff'd, 826 F.2d 1151 (1st Cir.1987) (holding that the defendant violated the Act for each day it allowed the illegal fill material to remain there).

[11] *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-united-states. The January 2023 Rule was enjoined from implementation in Alaska on April 12, 2023, by *West Virginia v. EPA*, 2023 WL 2914389 (D. N.D. 2023).

[12] *See e.g.* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[13] *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

[14] *Navajo Nation v. Regan*, 563 F. Supp. 3d 116 (D. N.M. 2021).

[15] Under "the normal rule of retroactive application," *see, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).

[16] *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-united-states.

[17] *See* Revised Definition of "Waters of the United States; Conforming," 88 Fed. Reg. 61964 (Sept. 8, 2023): https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming.

(2023). The January 2023 Rule was only in effect for a few weeks in Alaska before it was enjoined.[18] However, because much of the discharged pollutants subject to this Complaint have not been removed, a continuous violation of the CWA was occurring during the limited applicability of the January 2023 Rule.[19]

Context for the 2023 rulemakings and the *Sackett* decision helps inform Complainant's jurisdictional analysis for the impacted waters at issue in this case. In 2006, the U.S. Supreme Court addressed the scope of waters of the United States in *Rapanos v. United States,* 547 U.S. 715 (2006). No position in *Rapanos* commanded a majority of the Court, but all nine members of the Court agreed that the term waters of the United States encompasses some waters that are not navigable in the traditional sense.[20]

A four-Justice plurality in *Rapanos* interpreted the term waters of the United States as covering "relatively permanent, standing or continuously flowing bodies of water,"[21] that are connected to traditional navigable waters as well as wetlands with a "continuous surface connection" to such waterbodies.[22] The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in

[18] *See West Virginia et al. v. EPA*, 669 F. Supp. 3d (D. N.D. 2023).
[19] *See Sasser v. Adm'r, EPA*, 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation" under the Clean Water Act*.); Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1275 (10th Cir. 2018) ("[W]e affirm the district court's conclusion that the roadway and filling of wetlands in Saline Creek constitute a continuing violation of the CWA."); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D.Mass.1986), aff'd, 826 F.2d 1151 (1st Cir.1987) (holding that the defendant violated the Act for each day it allowed the illegal fill material to remain there).
[20] *Rapanos,* 547 U.S. at 731 (Scalia, J., plurality opinion) ("We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001); *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 (1985)").
[21] *Id.* at 739.
[22] *Id.* at 742.

extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months."[23]

Justice Kennedy's concurring opinion took a different approach, concluding that "to constitute 'navigable waters' under the [CWA], a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[24] He concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[25]

The four dissenting Justices in *Rapanos* would have deferred to the agencies and also concluded that waters would be jurisdictional under "either the plurality's or Justice Kennedy's test."[26]

The January 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term waters of the United States.

First, under that rule, the "relatively permanent standard" referred to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such

[23] *Id.* at 732 n.5
[24] *Id.* at 759.
[25] *Id.* at 780.
[26] *Id.* at 810 & n.14 (Stevens, J., dissenting).

relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters.

Second, the "significant nexus standard" under the January 2023 Rule referred to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. Under the January 2023 Rule, waters were jurisdictional if they met either standard. The January 2023 Rule also defined the term "adjacent" with no changes from the agencies' longstanding regulatory definition. "Adjacent" was defined as "bordering, contiguous, or neighboring." Wetlands separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as "adjacent" wetlands.

On May 25, 2023, the Supreme Court decided *Sackett v. EPA.*[27] While the January 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The purpose of the January 2023 Rule—to define "waters of the United States"—was the same as the Supreme Court's purpose in *Sackett:* "to identify with greater clarity what the Act means by 'the waters of the United States.'"[28]

The Supreme Court recognized the agencies' definition and utilization of "adjacent" and "significant nexus" "as set out in [the agencies'] most recent rule," but concluded that the significant nexus standard was "inconsistent with the text and structure of the [CWA]."[29] Instead, the Court "conclude[d] that the *Rapanos* plurality was correct: the [CWA]'s use of waters encompasses only those relatively permanent, standing or continuously flowing bodies of

[27] 598 U.S. 651 (2023).
[28] *Id.*
[29] *Id*. at 679.

water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[30]

The Court also "agree[d] with [the plurality's] formulation of when wetlands are part of 'the waters of the United States,'"[31] "when wetlands have a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands. "[32] Thus, the Supreme Court concluded that "this interpretation"— *i.e.,* the interpretation of adjacent wetlands as "waters of the United States" set out in the January 2023 Rule—"is inconsistent with the text and structure of the CWA" insofar as it incorporated the "significant nexus" test and defined "adjacent" other than as the *Rapanos* plurality defined the term.[33]

In response, the EPA and the Corps revised the January 2023 Rule to remove the significant nexus standard and to amend its definition of "adjacent" as these provisions are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.*[34]

As a result of the January 2023 Rule only being in effect during a couple of weeks in Alaska, the conforming rule never being in effect in Alaska,[35] and the EPA's position that the Navigable Waters Protection Rule was retroactively vacated from implementation,[36] solely for the purposes of this administrative litigation, Complainant seeks that the parties stipulate that the 1986/88 Corps and EPA regulations, 40 C.F.R. § 230.3(s) (2014), as informed by applicable

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[30] *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739) (internal quotation marks omitted).
[31] *Id.* at 678.
[32] *Id.* at 678 (citing *Rapanos,* 547 U.S. at 742, 755) (internal quotation marks omitted).
[33] *Id.* at 679.
[34] *See* Revised Definition of "Waters of the United States; Conforming," 88 Fed. Reg. 61964 (Sept. 8, 2023): https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming.
[35] *See West Virginia et al. v. EPA*, 669 F. Supp. 3d (D. N.D. 2023).
[36] Under "the normal rule of retroactive application," *see, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).

guidance documents and case law, including but not limited to *Sackett*, was the applicable regulatory definition throughout the alleged violations.

2. How the EPA Determines Whether Wetlands are Adjacent After *Sackett*

Given that the waters at issue in this case are wetlands, further explanation of the EPA's interpretation of *Sackett* for purposes of determining whether a wetland is jurisdictional is required. As described above, *Sackett*: (1) adopted the "continuous surface connection" requirement from the *Rapanos* plurality; (2) held that adjacent wetlands must have a "continuous surface connection" to covered waters to qualify as "waters of the United States"; and (3) explained that wetlands are "as a practical matter indistinguishable from waters of the United States"—and therefore are themselves covered—"when" there is a "continuous surface connection" between wetlands and covered waters "so that there is no clear demarcation between 'waters' and wetlands."[37]

Under *Sackett*, the word "indistinguishable" is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are "waters of the United States;" rather, the term (among others the Supreme Court uses) informs the application of the "continuous surface connection" requirement. The *Rapanos* plurality (which *Sackett* followed) uses phrases like "continuous physical connection" to describe the continuous surface connection requirement.[38]

Sackett does not require the EPA and the Corps to prove that wetlands and covered waters are visually identical. Indeed, as *Sackett* notes, courts have long regarded wetlands that abut covered waters as meeting the continuous surface connection requirement. Further, as

[37] *Sackett,* 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755).
[38] *See Rapanos*, 547 U.S. at 747, 751 n.13, 755.

judicial decisions applying the continuous surface connection test since 2006 illustrate,[39] the demonstration that wetlands have a continuous surface connection and so are indistinguishable is fact specific. Precedent and the EPA's experience applying the continuous surface connection requirement demonstrate that the continuous surface connection requirement can be met by a wetland abutting a jurisdictional water. In addition, while the CWA does not require a continuous surface *water* connection between wetlands and covered waters, such evidence can suffice to meet the continuous surface connection requirement.[40]

Depending on the factual context, a sufficient continuous surface connection can be demonstrated when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) "serve[s] as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."[41] In other words, *Sackett* does not require that there be a continuous surface *water* connection between wetlands and otherwise covered waters for those wetlands to be jurisdictional. Such a requirement would wrongly limit the scope of "waters of the United States" to open waters, contrary to the CWA's plain language, "which shows that some wetlands"—a term with distinct scientific and regulatory meaning—"qualify as 'waters of the United States.'"[42]

These Agency interpretations of *Sackett* are also consistent with the relatively few post-

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[39] *See, e.g., United States v. Cundiff*, 555 F.3d 200, 212-13 (6th Cir. 2009).
[40] *See, e.g., United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008) (considering evidence of kayaking in relatively permanent tributaries and their connected wetlands).
[41] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3095 (January 18, 2023); *see, e.g., Cundiff*, 555 F.3d at 212-13 (considering evidence of a channel with surface water flow and surface connections between wetlands and relatively permanent water bodies "during storm events, bank full periods, and/or ordinary high flows" and also concluding that "it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally").
[42] *See Sackett*, 598 U.S. at 674-75 (citing 33 U.S.C. § 1344(g)(1)). Additionally, as *Sackett* described the *Riverside Bayview* holding: "the Corps could reasonably determine that wetlands 'adjoining bodies of water' were part of those waters." *Sackett*, 598 U.S. at 677 (quoting *Riverside Bayview*, 474 U.S. at 135 & n.9); *see also id.* at 676 (CWA jurisdiction includes wetlands "contiguous" with covered waters).

Sackett decisions on this subject. The most thorough analysis stems from a recent decision in *White v. EPA*, No. 2:24-CV-00013, 2024 U.S. Dist. LEXIS 108248, at *27, (E.D. N.C. June 18, 2024), where the Court stated that "[t]he relationship between 'practically indistinguishable' and 'continuous surface connection' in *Sackett* is clear: for a wetland to be 'as a practical matter indistinguishable from a water of the United States' . . . requires the party show 'first, that the adjacent body of water constitutes 'waters of the United States' and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and where the 'wetland' begins.' Put another way, a wetland with a continuous surface connection is a 'water[] of the United States' because that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected. The continuous surface connection powers the test."[43] The *White* Court goes on to point to multiple other lower court decisions articulating a consistent view, stating that "[n]o lower court has read *Sackett* to mandate a wetland have both a continuous surface connection to a jurisdictional water *and* practically indistinguishable in order to be 'adjacent.'"[44]

The EPA's longstanding position has also been that a single wetland may be divided by, for example, ditches, berms, and road crossings.[45] It is therefore often necessary to utilize multiple sources of evidence to assess whether divided wetland areas are separate, distinct wetlands or are functioning as one wetland. Where, after assessing certain factors, such as the presence of a hydrologic connection, the two or more wetland areas are found to be one wetland,

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[43] *See White*, 2024 U.S. Dist. LEXIS 108248 at *27.
[44] *Id. See also United States v. Valentine*, No. 5:22-CV-00512-M, U.S. Dist. LEXIS 182267, at *4 (E.D. N.C. Sept. 27, 2024) (holding that "a continuous surface connection is the quality that renders a wetland practically indistinguishable from a water of the United States.").
[45] *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf at p. 6 (last visited October 30, 2024). *See also* Exhibit CX – 02 (Jurisdictional Analysis Report).

the Agencies assess whether that wetland has a continuous surface connection to an otherwise covered water. The agencies consider the entire wetland to be "adjacent" if any part of the wetland is "adjacent." If two or more wetland areas are found to not be one wetland, then they are individually assessed for jurisdiction.

3. **The EPA Has Determined that Wetlands are Present**

As established above, wetlands that have a continuous surface connection to relatively permanent waters are considered "adjacent" and are therefore waters of the United States. The term "wetlands" means "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (2014). The protocol utilized by the EPA and the Corps to determine whether a water meets the regulatory definition of a wetland can be found in the 1987 Corps of Engineers Wetlands Delineation Manual[46] and, given the location of the waters at issue in this case, the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0).[47]

As can be seen in Exhibit CX – 02 (Jurisdictional Analysis Report) and the Complaint, Complaint ¶¶ 3.2 – 3.8, the Complainant alleges that each of the locations within Table 1 of the Complaint contain wetlands. While Respondent generally denies the allegations in each of these paragraphs of the Complaint, Answer ¶¶ 3.2 – 3.8, those denials are focused on the jurisdictional status of the wetlands and the possibility that any discharges to those waters were exempt from CWA Section 404 permitting requirements. As a result, Complainant hereby proffers its

[46] *See* Exhibit CX – 03 (1987 Corps Delineation Manual).
[47] *See* Exhibit CX – 04 (Alaska Regional Supplement).

stipulation that the locations referenced in Paragraphs 3.2 - 3.8 of the Complaint contain "wetlands" pursuant to 33 C.F.R. § 328.3(b) (2014). Through this proffer of stipulation, Complainant is not requesting that Respondent stipulate that the wetlands are "navigable waters," that any discharges to those wetlands were not exempt from CWA Section 404 permitting requirements, nor that any discharges to those wetlands were not "preauthorized" by a CWA Section 404 permit.

If a hearing is necessary in this matter, Complainant's witnesses Ms. Jensen and Ms. Jacobson will testify regarding the presence of wetlands at the locations as discussed in Exhibit CX – 02 (Jurisdictional Analysis Report). As can be seen throughout Exhibit CX – 02, Ms. Jensen intends to methodically testify regarding her conclusions that each of the locations contained each of the three required wetland environmental parameters. Specifically, Ms. Jensen will testify that at each location, hydrophytic vegetation met the dominance test, the soil met the definition of a hydric soil, and multiple wetland hydrology primary indicators were documented.[48] As needed, Ms. Jacobson will corroborate Ms. Jensen's testimony that hydrophytic vegetation met the dominance test.

4. The EPA Has Determined that the Impacted Wetlands are "Navigable Waters"

Complainant alleges first that Gastineau Channel is a traditional navigable water; and second, that each of the identified discharge locations contain wetlands with a continuous surface connection to Gastineau Channel.

[48] *See* Exhibit CX – 02 (Jurisdictional Analysis Report).

a. Gastineau Channel is a Traditional Navigable Water

In its Answer, Respondent does not dispute that Gastineau Channel is a traditional navigable water, an allegation that Complainant makes in multiple areas of the Complaint. Complaint ¶¶ 3.3 - 3.8. As a result, Complainant hereby proffers its stipulation that Gastineau Channel, as referenced in Complaint ¶¶ 3.3 - 3.8, is a traditional navigable water for purposes of CWA Section 502(7), 33 U.S.C. § 1362(7), and 40 C.F.R. § 230.3(s) (2014). If a hearing is necessary in this matter, Complainant's witness Ms. Jensen will testify in detail regarding the jurisdictional status of the Gastineau Channel in accordance with Exhibit CX – 02 (Jurisdictional Analysis Report).

b. The Discharge Locations Identified in the Complaint are All Within Wetlands that Connect to Gastineau Channel

Complainant alleges that each of the locations identified in Table 1 of the Complaint contain "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7). Complaint ¶¶ 3.3 - 3.8. Therefore, Complainant alleges that each of those locations contain waters of the United States.[49] Respondent's Answer denies that any of the locations are waters of the United States and are therefore not "navigable waters" and provides general rationale for its positions.

i. Wetlands at Location 1 are Waters of the United States

Complaint Paragraph 3.3 states that "Location 1 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that is subject to the ebb and the flow of the tide and connects to the Gastineau Channel." Respondent's Answer denies this allegation, generally referencing the

[49] *See supra* Section V.D.a.

distance between the location and the Gastineau Channel and the "surface water connections between Glacier Highway, the array of culverts, highway medians, Egan Drive and its roadside ditches, private lands and possibly intermittent streams flowing towards Gastineau Channel are not continuous or permanent and this area frequently lacks standing water." Answer ¶ 3.3.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Location 1. Additionally, the EPA has documented that these wetlands are waters of the United States under at least two bases.

First, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that, at the time of the unauthorized discharges, flowed 0.3 miles from Location 1 to the regulatory high tide line of Gastineau Channel, a traditional navigable water.[50] Ms. Jensen will testify that the relatively permanent tributary, named "Tributary Y" in Exhibit CX – 02, was a natural channel that flows to the Gastineau Channel at least seasonally based on a review of aerial imagery. As a result, the wetlands at Location 1 of the Complaint are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel, a traditional navigable water.

Second, Ms. Jensen will testify that the wetlands at Location 1 are waters of the United States because they are part of a single wetland that is divided by Egan Drive that historically was one wetland and continues to function as one wetland, and that this one wetland directly abuts, has a continuous surface connection, and is adjacent to Gastineau Channel, a traditional navigable water.

[50] Exhibit CX – 02 (Jurisdictional Analysis Report).

The wetlands at Location 1 are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

ii. Wetlands at Location 2 are Waters of the United States

Complaint Paragraph 3.4 states that "Location 2 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that is subject to the ebb and the flow of the tide and connects to the Gastineau Channel." Respondent's Answer denies this allegation, generally referencing the distance between the location and the Gastineau Channel and the "surface water connections between the Glacier Highway culvert and its associated Egan Drive culvert and roadway median, and ultimately the Gastineau Channel are not continuous or permanent and this area frequently lacks standing water." Answer ¶ 3.4.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Location 2. Additionally, the EPA has documented that these wetlands are waters of the United States under at least three bases.

First, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that flows approximately 85 feet to the inlet of a culvert under Egan Drive, through that culvert, and then 45 feet past that culvert to the regulatory high-tide line of Gastineau Channel, a traditional navigable water.[51] Ms. Jensen will testify that the relatively permanent tributary, named "Tributary I" in Exhibit CX – 02, is a natural channel that flows to the Gastineau Channel at least seasonally based on a review of aerial imagery and data collected in the field. As a result, the wetlands at Location 2 of the Complaint are adjacent

[51] *Id.*

to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel.

Second, Ms. Jensen will testify that the wetlands at Location 2 are waters of the United States because they are part of a single wetland that is divided by Egan Drive that historically was one wetland and continues to function as one wetland, and that this one wetland directly abuts, has a continuous surface connection, and is adjacent to Gastineau Channel.[52]

Third, Ms. Jensen will testify that the wetlands at Location 2 are also part of a single wetland that abuts, has a continuous surface connection, and is adjacent to multiple jurisdictional tributaries that flow at least seasonally and therefore meet the relatively permanent standard, including anadromous fish-bearing streams that have been documented to provide habitat for juvenile coho salmon; and the Pacific Ocean at Gastineau Channel, particularly where the ebb and flow of the tide at the regulatory high tide line of Gastineau Channel inundates to the north side of Egan Drive and creates a tidal pool at the inlets of three culvert locations.[53]

The wetlands at Location 2 are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

iii. Wetlands at Location 3 are Waters of the United States

Complaint Paragraph 3.5 states that "Location 3 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that is subject to the ebb and the flow of the tide and connects to the Gastineau Channel." Respondent's Answer denies this allegation, generally referencing the distance between the location and the Gastineau Channel and the "surface water connections

[52] *Id.*
[53] *Id.*

between the Glacier Highway culvert, the highway median, the Egan Drive culverts, the ditch of the roadway prism, and intermittent streams and the Gastineau Channel located nearly a mile from Location 3 are not continuous or permanent." Answer ¶ 3.5.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Location 3. Additionally, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that flows approximately 700 feet to the inlet of a culvert under Egan Drive, through that culvert, and then 190 feet past that culvert to the regulatory high-tide line of Gastineau Channel, a traditional navigable water.[54] Ms. Jensen will testify that the relatively permanent tributary, named "Tributary J" in Exhibit CX – 02, is a natural channel that flows to the Gastineau Channel at least seasonally based on a review of aerial imagery and data collected in the field.

As a result, the wetlands at Location 3 of the Complaint are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel. They are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

iv. Wetlands at Location 4 are Waters of the United States

Complaint Paragraph 3.6 states that Location 4 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that is subject to the ebb and the flow of the tide and connects to the Gastineau Channel." Respondent's Answer denies this allegation, generally referencing the distance between the location and the Gastineau Channel and the "surface water connections

[54] *Id.*

between the Egan Drive culvert and the Gastineau Channel are not continuous or permanent and this area frequently lacks standing water." Answer ¶ 3.6.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Location 4. Additionally, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that flows approximately 0.3 miles to the regulatory high tide line of Gastineau Channel, a traditional navigable water.[55]

Ms. Jensen will testify that the relatively permanent tributary, named "Tributary S" in Exhibit CX – 02, is a natural channel that contributes flow to the Gastineau Channel at least seasonally based on a review of aerial imagery and data collected in the field.

As a result, the wetlands at Location 4 of the Complaint are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel. The wetlands at Location 4 are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

v. Wetlands at Locations 5, 6, 7, and 8 are Waters of the United States

Complaint Paragraph 3.7 states that "Locations 5 through 8 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that is subject to the ebb and the flow of the tide and connects to the Gastineau Channel." Respondent's Answer denies this allegation, generally referencing the distance between the location and the Gastineau Channel and the "surface water

[55] *Id.*

connections between Glacier Highway, Egan Drive, and the Gastineau Channel are not continuous or permanent and this area frequently lacks standing water." Answer ¶ 3.7.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Locations 5 through 8. Additionally, the EPA has documented that these wetlands are waters of the United States relying upon at least three bases.

First, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that flows approximately 320 feet to the regulatory high-tide line of Gastineau Channel, a traditional navigable water.[56] Ms. Jensen will testify that the relatively permanent tributary, named "Tributary F" in Exhibit CX – 02, is a natural channel that contributes flow to the Gastineau Channel at least seasonally based on a review of aerial imagery and data collected in the field. As a result, the wetlands at Locations 5 – 8 of the Complaint are adjacent to and have a continuous surface connection to the Gastineau Channel and are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel.

Second, Ms. Jensen will testify that the wetlands at Locations 5 through 8 are waters of the United States because they are part of a single wetland that is divided by Egan Drive that historically was one wetland and continues to function as one wetland, and that this one wetland directly abuts, has a continuous surface connection, and is adjacent to Gastineau Channel.[57]

Lastly, Ms. Jensen will testify that the wetlands at Locations 5 through 8 are also part of a single wetland that abuts, has a continuous surface connection, and are adjacent to multiple

[56] *Id.*
[57] *Id.*

jurisdictional tributaries that flow at least seasonally and therefore meet the relatively permanent standard, including anadromous fish-bearing streams that have been documented to provide habitat for juvenile coho salmon. Further, the wetlands at Locations 5 through 8 are also part of a single wetland that has a continuous surface connection, and are adjacent to the Pacific Ocean at Gastineau Channel, particularly where the ebb and flow of the tide at the regulatory high tide line of Gastineau Channel, inundates these wetlands up to the north side of Egan Drive and creates tidal pools at the inlets of three culvert locations.[58]

The wetlands at Locations 5 through 8 are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

vi. Wetlands at Location 9 are Waters of the United States

Complaint Paragraph 3.8 states that "Location 9 within Table 1 of this Complaint contains wetlands that are adjacent to and have a continuous surface connection to the Gastineau Channel. The Gastineau Channel is subject to the ebb and flow of the tide and is a traditional navigable water." Respondent's Answer denies this allegation, generally referencing the distance between the location and the Gastineau Channel and the "surface water connections between Glacier Highway, Egan Drive, and the Gastineau Channel are not continuous or permanent and this area frequently lacks standing water." Answer ¶ 3.8.

As Ms. Jensen will testify consistent with Exhibit CX – 02 (Jurisdictional Analysis Report), the EPA has documented clear evidence of the presence of the three required wetland environmental parameters at Location 9. Additionally, the EPA has documented that these wetlands are waters of the United States relying at least three bases.

[58] *Id.*

First, the EPA has documented that these wetlands abut and have a continuous surface connection to a relatively permanent tributary that flows a few hundred feet to the regulatory high-tide line of Gastineau Channel, a traditional navigable water.[59] Ms. Jensen will testify that the relatively permanent tributary is a natural channel that contributes flow to the Gastineau Channel at least seasonally based on a review of aerial imagery and data collected in the field. As a result, the wetlands at Location 9 of the Complaint are adjacent to and have a continuous surface connection to the Gastineau Channel and are adjacent to and have a continuous surface connection to a relatively permanent unnamed tributary that connects to the Gastineau Channel.

Second, Ms. Jensen will testify that the wetlands at Location 9 are waters of the United States because they are part of a single wetland that is divided by Egan Drive that historically was one wetland and continues to function as one wetland, and that one wetland directly abuts, has a continuous surface connection, and is adjacent to Gastineau Channel.[60]

Lastly, Ms. Jensen will testify that the wetlands at Locations 9 are also part of a single wetland that abuts, has a continuous surface connection, and are adjacent to multiple jurisdictional tributaries that flow at least seasonally and therefore meet the relatively permanent standard, including anadromous fish-bearing streams that have been documented to provide habitat for juvenile coho salmon. Further, the wetlands at Location 9 are also part of a single wetland that has a continuous surface connection and are adjacent to the Pacific Ocean at Gastineau Channel, particularly where the ebb and flow of the tide at the regulatory high tide line of Gastineau Channel, inundates these wetlands up to the north side of Egan Drive and creates tidal pools at the inlets of three culvert locations.[61]

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[59] *Id.*
[60] *Id.*
[61] *Id.*

The wetlands at Location 9 are therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

E. Respondent's Discharges Were Not Authorized by a CWA Section 404 Permit

As stated in the Complaint, Complaint ¶ 2.2, CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to navigable waters by any person, except, *inter alia*, as authorized by a Department of Army permit issued by the Corps pursuant to CWA Section 404, 33 U.S.C. § 1344. There are multiple types of CWA Section 404 permits that applicants can seek from the Corps, including individual permits and general permits. Complainant alleges that Respondent failed to receive any authorization pursuant to a CWA Section 404 permit prior to discharging pollutants to waters of the United States. Complaint ¶ 3.27.

In its denials of that allegation, Respondent does not state that it actively applied for CWA Section 404 permit authorization prior to discharging pollutants into waters of the United States. Rather, it states that the "activities were exempt under Section 404(f) of the CWA or preauthorized under one or more nationwide permits." E.g. Answer ¶ 3.27. As a result, Complainant hereby proffers its stipulation that Respondent failed to actively apply for CWA Section 404 permit authorization prior to discharging pollutants to waters of the United States.

1. Respondent's Discharges did not Qualify for CWA Section 404(f) Exemptions

Throughout its Answer, Respondent repeatedly, but without any detail supporting its position, claims that the activities alleged in the Complaint were "exempt under Section 404(f) of the CWA." E.g. Answer ¶ 3.27. However, based on previous engagement with Respondent in pre-filing discussions, Complainant anticipates that Respondent's defenses will primarily depend upon CWA Section 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B), which exempts certain maintenance

activities. This exemption is inapplicable to Respondent's activities, as concluded by the Corps in Exhibit CX – 09 (Corps Referral Letter Complainant).

a. Respondent Cannot Carry Its Burden to Demonstrate that Its Discharges Were Exempt

Prior to discussing the details of the inapplicability of the exemption, it is important to note that Respondent bears the burden to prove that the discharges of dredged and/or fill material are exempt under CWA Section 404(f), 33 U.S.C. § 1344(f).[62] Additionally, "any claims of exemption, from the jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be *narrowly construed* to achieve the purposes of the CWA."[63] As a result, were this matter to go to hearing, Respondent would have the burden of establishing that its activities were exempt, with a narrow construal of the scope of the exemption's applicability.

b. Respondent's Discharges are Not Exempt under CWA Section 404(f)(1)(B).

CWA Section 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B), exempts some discharges to waters of the United States "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."

Complainant anticipates that Respondent's defense will rely upon a conclusion that the discharges were associated with "maintenance" of a "transportation structure" under the statute. While the activities that resulted in the discharges to waters of the United States were apparently at least partially associated with Respondent's efforts to clean out culverts that run beneath a

[62] *See United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).
[63] *Id.* (emphasis added).

highway, this exemption is intended to ensure that *existing* fill in waters of the United States associated with transportation structures can be maintained through additional discharges without the need for additional CWA Section 404 permitting authorization. The implementing regulations at 33 C.F.R. § 323.4(a)(2) reflect this approach, providing, in relevant part, that "[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design."

As can be seen in Exhibit CX – 01 (Discharge Report) and as articulated in writing by the Respondent previously,[64] Respondent's activities involve discharging dredged and/or fill material outside of the original footprint of the highway; precisely the type of activity that the CWA implementing regulations are intended to prevent. The original fill design associated with the highway did not incorporate the dredged and/or fill material that Respondent recently placed into wetlands.[65] As a result, the discharges, by definition, changed the character, scope, and/or size of the original fill design. A contrary interpretation of the exemption would potentially allow entities, in the name of "maintenance," to take any material associated with any "transportation structure" and place it in any waters of the United States without consequence, regardless of how much those discharges expand the footprint of the original fill design. This would clearly exceed the original Congressional intent of the exemption. As a result, Respondent will not be able to meet its burden that the activities are exempt pursuant to CWA Section 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B).

[64] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[65] *See* Exhibit CX – 01 (Discharge Report).

c. Respondent Also Does Not Qualify for CWA Section 404(f)(1)(B) Exemptions Because It Brought Waters of the United States into New Use

Even if Respondent could satisfy its burden of illustrating that certain discharges could be exempt pursuant to CWA Section 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B), which it cannot, it must also prove that the discharges were not for the purpose of bringing an area of waters of the United States "into a use to which it was not previously subject" or the discharge neither impaired the "flow or circulation" of waters of the United States nor reduced their reach pursuant to CWA Section 404(f)(2), 33 U.S.C. § 1344(f)(2). In this case, Respondent has converted certain waters of the United States, most notably wetlands, into uplands through the discharge of dredged and/or fill material. This conversion has clearly impaired the flow and circulation of waters of the United States and reduced their reach. The activities within jurisdictional wetlands at Locations 2 and 7, as described in Exhibit CX – 01, provide illustrative examples of how the wetlands have been converted into uplands and have impaired flow and circulation of those wetlands.

If a hearing is necessary in this matter, Complainant's witness Mr. Jen will testify regarding the circumstances observed in the field and why those activities would not qualify for an exemption pursuant to CWA Section 404(f), 33 U.S.C. § 1344(f), consistent with his written testimony in Exhibit CX – 01 (Discharge Report).

2. Respondent did not Apply for any Nationwide Permits

Throughout its Answer, Respondent repeatedly, but without any detail supporting its position, claims that the activities alleged in the Complaint were "preauthorized under one or more nationwide permits." E.g. Answer ¶ 3.27. Once again, Respondent does not apparently dispute Complainant's allegation that it failed to actively submit a permit application for CWA

Section 404 permit authorization prior to discharging pollutants into waters of the United States. Rather, it appears that Respondent is arguing that the activities were authorized by a CWA Section 404 permit that did not require pre-construction notification. Yet Respondent does not articulate which of the over 50 Nationwide Permits applied to its activities. Similar to arguments raised by Respondents regarding the possible applicability of CWA Section 404(f), 33 U.S.C. § 1344(f), Respondents have the burden to illustrate that the discharges of pollutants into waters of the United States were authorized by a nationwide permit that did not require pre-construction notification.

Respondent previously explained to the Corps, in writing, that it failed to obtain CWA Section 404 permit coverage prior to discharging pollutants into waters of the United States because Respondent's environmental staff "was unaware of the project" and that had those staff "been made aware . . . [it] would have submitted a pre-construction notification to the Corps under NWP 3(b) – *Maintenance* to obtain authorization for the work."[66] Additionally, in response to questions from Complainant about why Respondent failed to obtain CWA Section 404 permit coverage prior to discharging pollutants into waters of the United States, Respondent stated that it was due to a "fail[ure] to communicate the nature of the work at the sites internally," "confusion regarding the federal permitting requirements associated with the sites," and that Respondent would "work to avoid internal communication failures on future projects."[67]

Notably, Respondent makes no mention of the lack of need for pre-construction notification in these responses, suggesting that any *ex post facto* defense that the discharges were authorized by a nationwide permit that did not require pre-construction notification should be

[66] *See* Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).
[67] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).

met with some skepticism. Regardless, given Respondent's reference to Nationwide Permit 3 in its communication with the Corps, Complainant will address the applicability of that permit to the discharges at issue in this case.[68]

As acknowledged by Respondent previously,[69] the discharges, had they been authorized under Nationwide Permit 3, would have been covered under paragraph (b) of the Permit, which "authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.)."[70] However, that Permit states that "[a]ll dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the District Engineer under separate authorization."[71] This permit language precisely describes the nature of the activities here, and even mentions culverted road crossings explicitly. The Permit also clearly states that "for activities authorized by paragraph (b) of this NWP, the permittee *must submit a pre-construction notification* to the district engineer prior to commencing the activity (see general condition 32. Pre-Construction Notification)."[72] This requirement for pre-construction notification within the Permit is clear and unambiguous. There are no other available Nationwide Permits that are even remotely applicable to the discharges at issue here. As a result, there is no legitimate basis to conclude that the discharges of pollutants into waters of the United States were "preauthorized" by a "nationwide permit" as raised by Respondent.

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[68] Department of Defense, Department of Army, Corps of Engineers (January 6, 2017) Issuance and Reissuance of Nationwide Permits. Final Rule (82 FR 1860). 33 CFR Chapter II. Nationwide Permit No. 3. Maintenance. Accessible at: https://www.govinfo.gov/content/pkg/FR-2017-01-06/pdf/2016-31355.pdf.
[69] *See* Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).
[70] *See* Exhibit CX – 11 (2017 Issuance of NWP 3).
[71] *Id.*
[72] *Id.*

If a hearing is necessary in this matter, Complainant's witness Mr. Vigil will testify regarding the Corps' implementation of any Nationwide Permits and interpretation of the pre-construction notification requirements that are consistent with the above description.

F. Summary of Proposed Stipulations of Fact and Remaining Issues in Dispute

From Respondent's Answer, it is clear that there are three primary defenses that Respondent intends to raise through this litigation: 1) the wetlands impacted by the alleged activities are not waters of the United States and are therefore not subject to CWA regulation; 2) even if the wetlands are waters of the United States, the activities that resulted in the discharges into those wetlands were exempt pursuant to CWA Section 404(f), 33 U.S.C. § 1344(f); and 3) even if the wetlands are waters of the United States and the activities that resulted in the discharges into those wetlands activities were not exempt, the discharges were "preauthorized" by a Nationwide Permit that did not require pre-construction notification.

To promote judicial efficiency and to focus the Parties' resources on the issues of dispute, Complainant proposes that Respondent stipulate to the following allegations: Respondent, the State of Alaska Department of Transportation and Public Facilities,

1) is a "person" (pursuant to CWA Section 502(5), 33 U.S.C. § 1362(5));
2) that "discharged" "pollutants" (pursuant to CWA Sections 502(16) and (6), 33 U.S.C. § 1362(16) and (6), respectively);
3) from a "point source" (pursuant to CWA Section 502(14), 33 U.S.C. § 1362(14));
4) into "wetlands" (pursuant to 33 C.F.R. § 328.3(b) (2014));
5) without actively submitting a permit application (pursuant to CWA Section 404, 33 U.S.C. § 1344) prior to discharging those pollutants.

Additionally, Complainant proposes that Respondent stipulate that the Gastineau Channel is a "traditional navigable water" for purposes of CWA Section 502(7), 33 U.S.C. § 1362(7), and 40 C.F.R. § 230.3(s) (2014).

Lastly, Complainant seeks that solely for purposes of this administrative litigation that the parties stipulate that the 1986/88 Corps and EPA regulations, 40 C.F.R. § 230.3(s) (2014), as informed by applicable guidance documents and case law, including but not limited to *Sackett*, were the applicable regulatory definition throughout the alleged violations.

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. 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.[73] Consequently, Presiding Officers rely on the wording of the statutory penalty factors set out in CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), and Complainant's proposed penalty is based on these applicable penalty factors. CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), provides that "in determining the amount of any penalty assessed under this subsection, the Administrator … shall take into account" [A] "the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to"

[73] Because the EPA has no CWA penalty pleading policy, *In re Pepperell Associates*, 9 E.A.D. 83 n.22 (May 10, 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001), the Agency does not argue the application of penalty policy calculations at hearing. *See* EPA, "Issuance of Revised CWA Section 404 Settlement Penalty Policy," https://www.epa.gov/sites/default/files/documents/404pen.pdf (December 21, 2001) at 4 ("This Policy is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at a hearing or trial."); *see also* EPA, "Clean Water Act Distinctions Among Pleading, Negotiating and Litigating Civil Penalties For Enforcement Cases," https://www.epa.gov/sites/default/files/documents/distnc-reich-rpt011989.pdf (January 19, 1989) at 1 ("[EPA] Counsel should support its arguments for the 'litigation amount' based on upon reasoned application of the statutory penalty assessment criteria and citation of precedent, not through arithmetic calculations derived according to the CWA penalty settlement policy.")

Respondent, [B] "ability to pay," [C] any prior history of such violations," [D] "the degree of culpability," [E] "economic benefit or savings (if any) resulting from the violations, and" [F] "such other matters as justice may require." 33 U.S.C. § 1319(g)(3).

This proceeding is for the assessment of a penalty and Complainant has not to this point specified a proposed penalty. 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. The Nature, Circumstances, Extent, and Gravity of the Violations

As described in the Complaint, Respondent's unauthorized discharge of pollutants to waters of the United States resulted in significant violations that undermine the CWA's regulatory scheme and caused harm to the chemical, physical, and/or biological integrity to waters of the United States. When considering the nature, circumstances, extent, and gravity of the violations, the Presiding Officer should consider the location and nature of the wetlands that were impacted by Respondent's illegal activities.[74]

[74] *See In re: Phoenix Constr. Servs.*, 11 E.A.D. 379, 405 (EAB 2004) ("[i]n an illegally-filled wetlands case, a 'sensitivity of the environment' analysis would almost always necessarily include a consideration of the quality of the wetlands impacted. Consistent with this, numerous courts assessing penalties for section 404 wetlands violations have mentioned the quality of the wetland in the remedy phase of their decisions. *E.g., Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *20, 21 (E.D. Cal. Nov. 8, 1999) (finding the wetlands to be important for supporting endangered species and referring to them as 'rare federal wetlands' in considering an appropriate penalty), aff'd in part & rev'd in part on other grounds, 261 F.3d 810 (9th Cir. 2001), aff'd by an equally divided Court, 537 U.S. 99 (2002) (mem.); *United States v. Banks*, 873 F. Supp. 650, 656, 659 (S.D. Fla. 1995) (considering the importance and scarcity of the type of wetland impacted), aff'd, 115 F.3d 916 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1999); *United States v. Van Leuzen*, 816 F. Supp. 1171, 1179 (S.D. Tex. 1993) (determining that the filled wetland was 'ecologically of great value' and of a 'unique quality'); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965 (S.D. Fla. 1989) (considering the importance to the ecosystem of the illegally-filled water and wetlands in its analysis of the seriousness of the violation); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 280 (EAB 1999) (noting that the presiding officer found the filled area to be a relatively small, low-value wetland)."

As described in Exhibit CX – 02 (Jurisdictional Analysis Report), Respondent's unauthorized activities impacted wetlands adjacent to multiple unnamed relatively permanent tributaries that are mapped by the State of Alaska Department of Fish and Game's Anadromous Waters Catalog.[75] In order for a waterbody to be mapped within the Catalog, "[a]nadromous fish must have been seen or collected and identified by a qualified observer," most frequently a fisheries biologist employed by the State of Alaska Department of Fish and Game.[76] Once a waterbody is mapped as containing anadromous fish, the State of Alaska has identified that it should be afforded special protections pursuant to State law.[77] One of the most iconic anadromous fish, salmon are a critical ecological, commercial, recreational, and subsistence resource to the State of Alaska and its residents.[78] The multiple unnamed relatively permanent tributaries that are mapped by the State of Alaska Department of Fish and Game as containing anadromous fish are likely the first freshwater streams that some salmon enter as they continue their spawning migration; maintaining high water quality in those waterbodies is of utmost importance.

As stated by the State of Alaska Department of Environmental Conservation, "[w]etlands help maintain water quality by slowly filtering excess nutrients, sediments, and pollutants before water seeps into rivers, streams, and underground aquifers."[79] By discharging dredged and/or fill material to wetlands and thereby limiting their ability to provide the functions and services that

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[75] *See* Anadromous Waters Catalog Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/sf/SARR/AWC/ (last visited October 30, 2024).
[76] *Id.*
[77] *See* Alaska Stat. § 16.05.871.
[78] *See* Salmon Research in Alaska, NOAA Fisheries, https://www.fisheries.noaa.gov/alaska/science-data/salmon-research-alaska (last visited October 30, 2024).
[79] *See* Alaska's Wetlands, Alaska Dep't of Envtl. Conservation, https://dec.alaska.gov/water/wastewater/stormwater/permits-approvals/wetlands/ak-wetlands/ (last visited October 30, 2024).

the State of Alaska acknowledges that these wetlands provide, Respondent's activities very likely decreased water quality in those waterbodies that support anadromous fish. The wetlands impacted by Respondent's unauthorized activities help to maintain water quality for waterbodies that support a critical ecological, commercial, recreational, and subsistence resource for the State of Alaska and its residents.

In addition to impacting wetlands that provide important water quality benefits to anadromous fish, all of the wetlands that were impacted by Respondent's unauthorized activities are either located within the Mendenhall Wetlands State Game Refuge or are connected to wetlands that make up the Refuge.[80] The Refuge is approximately 4,000 acres and provides "a vital feeding and resting area for both resident birds and migrants traveling to and from their Arctic breeding grounds" and "is enjoyed year-round by residents and visitors alike. Waterfowl hunting, hiking, wildlife viewing and photography, boating, fishing, scientific and educational studies, and sightseeing are popular activities supporting approximately 20,000 user days annually."[81] Respondent's unauthorized discharges of dredged and/or fill material have likely decreased the functions and services that the wetlands within the Refuge provide.

B. Information and Documentation Regarding Respondent's Ability to Pay

Complainant has no information indicating that Respondent is unable to pay a penalty up to the statutory maximum penalty. Complainant will consider any information submitted by Respondent in its prehearing exchange related to its ability to pay a penalty.

[80] *See* Mendenhall Wetlands – State Game Refuge, Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/index.cfm?adfg=mendenhallwetlands.main (last visited October 30, 2024).
[81] *Id.*

C. Respondent's History of Prior Violations

The most significant and relevant prior violations by Respondent involved, among other things, unauthorized discharges of dredged and/or fill material to waters of the United States at ten locations on the Kenai Peninsula following two large floods.[82] Those violations resulted in a Consent Decree that was entered between the United States and Respondent on September 21, 2010, in the U.S. District Court for the District of Alaska that resulted in total costs to Respondent of nearly $1 million.[83]

D. Respondent's Degree of Culpability

Respondent has a high degree of culpability, as it is experienced in obtaining permitting under CWA Section 404, 33 U.S.C. § 1344, and was therefore on notice of the potential consequences associated with discharging dredged and/or fill material prior to obtaining that necessary permitting. Given the volume of work that Respondent performs involving earthwork throughout the State of Alaska and given that according to the State of Alaska Department of Natural Resources, the State of Alaska "has the greatest surface water resources of any state in the United States,"[84] Respondent frequently works within or near waters of the United States. As a result, it has experience obtaining permits under CWA Section 404, 33 U.S.C. § 1344, even explicitly identifying the program in its "Alaska Storm Water Pollution Prevention Plan Guide."[85] Respondent also acknowledged its extensive experience working with the Corps on

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[82] *See* Alaska Department of Transportation and Public Facilities to Pay Nearly $1 Million for Alleged Clean Water Act Violations, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/alaska-department-transportation-and-public-facilities-pay-nearly-1-million-alleged-clean#:~:text=WASHINGTON%E2%80%94The%20Alaska%20Department%20of,Environmental%20Protection%20Agency%20announced%20today (last visited October 30, 2024).
[83] *Id. See also* Exhibit CX – 10 (2010 Consent Decree).
[84] *See* Alaska Hydrologic Survey, Alaska Dep't of Natural Resources, https://dnr.alaska.gov/mlw/water/hydro/ (last visited October 30, 2024).
[85] *See* Alaska Storm Water Pollution Prevention Plan Guide, Alaska Dep't of Transp. and Public Facilities, https://dot.alaska.gov/stwddes/desenviron/assets/pdf/swppp/english/2021/swppp_guide_2021.pdf at page 1-1.

permitting in written correspondence to Complainant.[86] In that same written correspondence to Complainant, Respondent also acknowledged that it "failed to secure proper permitting at some of the sites," "did not obtain any federal permits for the work," that Respondent would "work to avoid internal communication failures on future projects," and that this was an "error."[87]

Respondent has access to sophisticated legal counsel, environmental consultants, and contractors and other resources to ensure adherence to the CWA. Furthermore, Respondent has a large number of staff state-wide, with almost 100 personnel employed alone by the Southcoast Region, the area covered by the locations identified within this Complaint.[88] Respondent has sufficient expertise and resources to meet the letter and spirit of the CWA's requirements.

Respondent was previously subject to a judicial CWA enforcement action involving facts similar to the ones alleged in this Complaint that resulted in Respondent paying nearly $1 million in civil penalties and injunctive relief,[89] so Respondent is aware its responsibilities under the CWA.

Respondent's acknowledgment of its error in failing to obtain the necessary CWA authorizations for the work,[90] internal communication failures, past violations of a similar nature that resulted in a Consent Decree, and significant staffing capable of appropriately identifying and applying for the necessary federal permits, illustrate a high degree of culpability for Respondent's failure to obtain authorization pursuant to CWA Section 404, 33 U.S.C. § 1344,

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[86] *See* Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[87] *Id.*
[88] *See* Southcoast Region, Alaska Dep't of Transp., https://dot.alaska.gov/stwdmno/mno_sr.shtml (last visited October 30, 2024).
[89] *See* Alaska Department of Transportation and Public Facilities to Pay Nearly $1 Million for Alleged Clean Water Act Violations, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/alaska-department-transportation-and-public-facilities-pay-nearly-1-million-alleged-clean#:~:text=WASHINGTON%E2%80%94The%20Alaska%20Department%20of,Environmental%20Protection%20Agency%20announced%20today (last visited October 30, 2024).
[90] Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).

prior to performing the work. This high degree of culpability warrants a substantial penalty to serve as deterrence.

E. Information and Documentation Regarding Respondent's Economic Benefit or Savings

The discharge activities very likely resulted in avoided costs associated with obtaining a CWA Section 404 permit from the Corps. This 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).

F. Such Other Matters as Justice May Require

In addition to the specific environmental impacts associated with the Respondent's activities, its actions have undermined the permitting structure under CWA Section 404, 33 U.S.C. § 1344. Compliance with a permit's conditions and restrictions are vital to the CWA Section 404, 33 U.S.C. § 1344, regulatory scheme, and Respondent's failure to obtain a permit prior to the discharge activity undermines the statutory and regulatory purposes of the CWA. It is particularly important that a governmental entity such as Respondent comply with permitting requirements, as its noncompliance could send a message to residents of the State of Alaska that compliance with CWA Section 404 is discretionary.

VII. PROOF OF PUBLIC NOTICE

In accordance with CWA Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), Complainant provided public notice of the Compliant via the internet and

afforded the public thirty days to comment on the Complaint and proposed penalty.[91] At the expiration of the notice period, the EPA did not receive any comments from the public that met the requirements of 40 C.F.R. § 22.45(c)(1)(i).

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 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 October 24, 2024.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

PATRICK JOHNSON Digitally signed by PATRICK JOHNSON Date: 2024.12.06 02:45:46 -09'00'

December 6, 2024
DATE

Patrick B. Johnson
Senior Water Law Attorney
U.S. Environmental Protection Agency, Region 10
Alaska Operations Office
222 West 7th Avenue, No. 19
Anchorage, Alaska 99513
Johnson.patrick@epa.gov

[91] *See* Exhibit CX – 14 (Public Notice Screenshot). The EPA maintains an active public notice website at the following link: https://www.epa.gov/publicnotices/notices-search. The public comment period for this matter commenced on September 11, 2024 and ended on October 10, 2024. Because the comment period ended on October 10, 2024, the public notice is no longer available on the EPA's public notice website.

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	DOCKET NO.
	)	CWA-10-2024-0154
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)	**CERTIFICATE OF SERVICE**
Juneau, Alaska	)	
Respondent.	)	

The undersigned certifies that the original COMPLAINANT'S INITIAL PREHEARING EXCHANGE in the above-captioned action was filed with 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 certain original exhibits to the original COMPLAINANT'S INITIAL PREHEARING EXCHANGE in the above-captioned action filed with the OALJ E-Filing System were uploaded using a link to a OneDrive folder provided by the Headquarters Hearing Clerk.

Further the undersigned certifies that a true and correct copy of the original COMPLAINANT'S INITIAL PREHEARING EXCHANGE was served on Respondent State of Alaska Department of Transportation and Public Facilities via email to:

Brian E. Gregg, Assistant Attorney General
State of Alaska Department of Law
brian.gregg@alaska.gov
ayla.lisenbee@alaska.gov

Further the undersigned certifies that true and correct copies of the original exhibits to the original COMPLAINANT'S INITIAL PREHEARING EXCHANGE in the above-captioned

action served on Respondent via email were uploaded to an online file-sharing service accessible to Respondent following advance coordination with Respondent.

Dated this 6th day of December, 2024.

PATRICK JOHNSON Digitally signed by PATRICK JOHNSON
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