BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: JACKSON & SON DISTRIBUTORS, INC., dba JACKSON AND SON OIL, Seaside, Oregon, Respondent.	DOCKET NO. CWA-10-2025-0023 **REPLY IN SUPPORT OF COMPLAINANT'S MOTION FOR LEAVE TO AMEND THE COMPLAINT**

Respondent has not demonstrated that granting the United States Environmental Protection Agency's (EPA's or Complainant's) Motion for Leave to Amend the Complaint (Motion) will result in prejudice that constitutes a serious disadvantage or is the result of undue delay. As a result, Complainant's motion should be granted.

ARGUMENT

Complainant filed a Motion for Leave to Amend the Complaint for four reasons: (1) to include additional compliance information; (2) to update the volume of oil relevant for the reasonable expectation of a discharge analysis; (3) to update the receiving water and pathway for the reasonable expectation of a discharge analysis; and (4) to adjust the statutory penalty to account for the most recent inflation adjustment. Respondent's arguments – or lack thereof – in response to each category addressed in Complainant's Motion are addressed in turn.[1]

[1] Complainant notes that under the guise of procedural history, Respondent includes its characterization of settlement negotiations that occurred prior to filing the original Complaint. Respondent's Response in Opposition to Complainant's Motion to Amend Complaint at 1-2, Dkt. No. CWA-10-2025-0023 (Sept. 2, 2025) (hereinafter "Opposition"). Complainant substantially disagrees with Respondent's characterizations, including the extent to which Respondent was working cooperatively with the EPA to resolve the alleged violations. These allegations are outside the scope of the EPA's motion and as a result, the EPA does not address them here. *In re Bug Bam Prod., LLC*, 2010 EPA ALJ LEXIS 2, at *18-19 (finding that reasons Complainant decided to file a complaint in the first place are irrelevant to whether a motion to amend the complaint should be granted). The EPA is, however, prepared to address its history of interactions with Respondent when and if it becomes relevant to the proceedings.

1. **Respondent's Compliance Efforts.**

With respect to the first reason – to include additional compliance information made available to the EPA after it filed its original Complaint – Respondent argues that it will be prejudiced by this amendment because it needs to file an additional answer.[2] Simply put, if the requirement to file an answer constituted undue prejudice, courts would never grant motions to substantively amend a complaint.

2. **Reasonable Expectation of a Discharge**

In response to Respondent's compliance efforts, Complainant seeks to add an allegation that a reasonable expectation of a discharge remains after Respondent's recent compliance efforts. The relevant spill volume is different depending upon whether the aboveground storage tanks at a facility have secondary containment or not.[3] Complainant originally pled 40,000 gallons as the relevant volume because all of the aboveground storage tanks at the property lacked secondary containment.[4] Now that Respondent has replaced the two 10,000-gallon aboveground storage tanks that lacked secondary containment with a double-walled tank, Complainant asserts that 20,000 gallons is the relevant volume for the time period after the single-walled tanks were replaced. As a more conservative number, the EPA also typically considers the capacity of the largest aboveground storage tank at a facility – in this case, 20,000 gallons.

Respondent only addresses this reason for amending the Complaint in passing. When discussing its arguments related to the wetlands, Respondent states that amendment to add 20,000 gallons as a relevant volume is prejudicial because Respondent will need to change its

[2] Opposition, at 3.
[3] *In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, at *109-10; 40 C.F.R. Part 112, App. D.
[4] Complaint ¶ 3.11.

defense.[5] It is unclear how adding a volume that is half the volume originally pled is prejudicial rather than beneficial to Respondent, who has not explained exactly how it will need to change its defense on this point.[6] As stated in its Motion, the EPA used a model to analyze how oil would flow from Respondent's property to jurisdictional waters. The EPA has run the model using both 40,000 gallons and 20,000 gallons as a relevant spill volume. Complainant is prepared to present this modeling as part of its prehearing exchange and given the early stage of this litigation, Respondent can present any contrary modeling or evidence in its rebuttal prehearing exchange.[7]

3. Receiving Water and Downstream Waters

While Respondent does not address Complainant's amendments to the flowpath for the waters downstream of Circle Creek, it does claim that adjustment to the receiving water will result in several types of harm, none of which warrant denial of the EPA's Motion for Leave to Amend the Complaint.

a. "Waters of the United States" Rulemaking

Respondent argues that the Motion is prejudicial given the future rulemaking to revise the definition of "waters of the United States" because the EPA may need to change its complaint or the case schedule again in response to this rulemaking.[8] This is a red herring. In *Sackett*, the United States Supreme Court considered the statutory scope of "navigable waters," which are defined in the Clean Water Act as "the waters of the United States, including the territorial

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[5] Opposition, at 4-5.
[6] *In re San Antonio Shoe, Inc*., 1992 EPA ALJ LEXIS 525, at *10 (finding that Respondent had failed to meet its burden when it had "not shown that the amendment will interfere with its ability to present facts or evidence, to advance a legal theory, or to otherwise support its legal position").
[7] *In re Adamas Constr. & Dev. Servs., PLLC*, 2020 EPA ALJ LEXIS 10, at *7 (granting motion to amend the complaint and stating that Respondents have ample time to address the proposed amendments as Complainant filed its motion to amend in the early stages of the litigation process and a hearing has not yet been scheduled in the matter).
[8] Opposition, at 6; *EPA and Army Wrap Up Initial Listening Sessions, Move Toward Proposal to Revise 2023 Definition of WOTUS*, EPA (June 17, 2025), https://www.epa.gov/newsreleases/epa-and-army-wrap-initial-listening-sessions-move-toward-proposal-revise-2023 (announcing intent to issue a proposed rule to revise the regulatory definition of "waters of the United States" within the coming months).

seas."[9] *Sackett* "conclude[s]" that "the [Clean Water Act's] use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes" and wetlands with 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."[10]

Sackett expressly states that "continuously flowing bodies of water" are jurisdictional waters. Granting amendment of the EPA's original Complaint means that the receiving water at issue in the case, Circle Creek, and the downstream waters are all "continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams . . . [and] rivers."[11] These waters are clearly jurisdictional under *Sackett*. Therefore, allegations in the Amended Complaint follow the applicable U.S. Supreme Court precedent. If Respondent really wanted to avoid delays, it would not oppose Complainant's Motion on this point because simplifying the receiving waters at issue in this case decreases the likelihood that any future rulemaking would impact the jurisdictional status of those waters.[12]

Respondent also claims that by dropping the allegation that there is a reasonable expectation of a discharge to the wetlands, "[p]resumably, EPA no longer believes there is a continuous surface connection in the wetland between the Jackson facility and a navigable water

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[9] *Sackett v. EPA*, 598 U.S. 651, 661 (2023) ("[T]he [Clean Water Act] prohibits the discharge of pollutants into only 'navigable waters,' which it defines as 'the waters of the United States, including the territorial seas,' 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018 ed.). The meaning of this definition is the persistent problem that we must address.").

[10] *Id*. at 671, 678 (internal quotation marks and brackets omitted) (quoting *Rapanos v. U.S.*, 547 U.S. 715, 739, 742 (2006)).

[11] *Id.* at 671.

[12] In March 2025, the EPA and the Department of the Army sought initial feedback on the "waters of the United States" definition. The Agencies sought feedback on the scope of other terms – "relatively permanent" waters, "jurisdictional ditches," and the definition of "continuous surface connection," which is relevant to wetlands. *See* 90 Fed. Reg. 13,428, 13,430 (Mar. 24, 2025).

body sufficient for jurisdiction."[13] Not true. Complainant does not concede that it lacks jurisdiction over these wetlands. Rather, as stated in its Motion and above, evaluating whether there is a reasonable expectation of a discharge to Circle Creek reduces the number of contested issues in this case and minimizes the risk of possible future delays associated with the need to assess the jurisdictional status of certain waterbodies consistent with the future rulemaking.

b. Respondent's Defense

Respondent also argues that the Motion for Leave to Amend the Complaint is prejudicial because it will need to change its defense in this case.[14] Undue prejudice – that which is "more than appropriate or justified" – is required to justify denying a motion to amend a complaint because "almost every amendment of a complaint results in *some* prejudice" to a Respondent.[15] Here, Respondent has not shown the proposed amendments will substantially interfere with its ability to litigate the merits.[16]

Respondent states that it "has expended considerable time and effort, including retaining two wetlands consultant [sic] to evaluate the wetlands and potential continuous surface water connection." Respondent does not provide this Tribunal with enough information to determine whether this constitutes undue prejudice.[17] Respondent states that its time and effort has been in "retain[ing]" consultants to evaluate the wetlands. While it can take time and effort to find a

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[13] Opposition, at 4. Respondent also states in this paragraph that Complainant now asserts jurisdiction based on the surrounding area's topography and drainage patterns and the physical properties of oil infiltration and flow, as well as the quantity of oil stored at Respondent's facility. These are relevant factors for determining whether there is a reasonable expectation of a discharge *to* jurisdictional waters – not whether the waters are jurisdictional – and despite Respondent's statement, these factors have not changed. *Compare* Complaint ¶ 3.11 *with* Amended Complaint ¶ 3.11.

[14] Opposition, at 4-5. In this section, Respondent also states that Complainant's Motion is "circular" because it argues for dropping the reasonable expectation of a discharge to wetlands while also saying that there are multiple pathways to the wetlands. For this proposition, Respondent cites and quotes to page 6 of the Motion for Leave to Amend the Complaint, which summarizes the wetland allegations from Complainant's original Complaint as a backdrop for its rationale for amending it. Respondent thus misses the point.

[15] *In re Univ. of Kansas Med. Ctr*., 2007 EPA ALJ LEXIS 15, at *17-18.

[16] *In re San Antonio Shoe, Inc*., 1992 EPA ALJ LEXIS 525, at *10.

[17] *In re Bug Bam Prod., LLC*, 2010 EPA ALJ LEXIS 2, at *19 (stating the Respondent must demonstrate "cognizable harm as a result of the amendment").

reputable consultant, Respondent's opposition is unclear as to whether the consultants have actually conducted an evaluation. And if they have, how much effort have they expended? How much money has Respondent spent? And when was it spent?[18]

And even if Respondent has spent money beyond retaining consultants, it is likely that the consultants' work remains useful in Respondent's defense to the Amended Complaint. As Respondent is aware, Paragraph 3.10 of the original Complaint explained Complainant's basis for exerting Clean Water Act jurisdiction over Circle Creek as a downstream water. Surely as part of Respondent's analysis of the waters relevant to this matter, Respondent's consultants considered whether Circle Creek and the waters that are downstream of it are jurisdictional, and this information remains relevant.

In addition, the wetlands are still relevant because they are still part of the pathway for the reasonable expectation of a discharge analysis. Before, the question was whether there was a reasonable expectation of a discharge to the wetlands. Now, the question is whether there is a reasonable expectation of a discharge to Circle Creek. In order to get to Circle Creek to the north, oil would need to flow through the wetlands. The EPA states in its original and Amended Complaints that there are several factors relevant to its analysis: topography and drainage patterns; distance; and the physical properties of oil infiltration and flow.[19] A typical jurisdictional analysis would have gathered information that is pertinent for this type of analysis. In sum, assuming Respondent has collected information, it has failed to explain with any specificity why it can no longer use this information.

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[18] Given that Respondent blurs settlement discussions that occurred prior to filing the original Complaint with events that have occurred after, it is unclear whether the costs that Respondent asserts it has spent occurred before or after the original Complaint was filed. While the timing of Respondent's costs is unclear, the purpose of a complaint is to provide the Respondent with notice of the allegations so that Respondent can prepare a defense. *See e.g. In re Yaffe Iron & Metal Co.*, 1982 EPA App. LEXIS 1, at *721-22. In evaluating whether a motion to amend a complaint should be granted, courts consider whether the changes from the original Complaint constitute undue prejudice. *Id.* As a result, this Tribunal should only consider costs expended after the original Complaint was filed.

[19] Amended Complaint ¶ 3.11.

c. "Multiple Pathways"

Respondent also states that it is prejudiced because "it has no idea where or how EPA believes a discharge will actually flow and where the 'multiple pathways' it now asserts exist are."[20] While Complainant questions whether Respondent really has "no idea" given the history of the interactions between the parties, this "multiple pathways" language was included in the original Complaint and therefore should not be a basis to deny the EPA's Motion. The only difference between the original and Amended Complaint is whether oil would flow via these multiple pathways through the wetlands and into Circle Creek. Complainant is prepared to follow this Tribunal's instructions regarding its prehearing exchange and provide a "brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer."[21] Last, a motion to amend a complaint is not the appropriate place to adjudicate factual issues.[22]

d. Complainant's History of Assessing Jurisdiction

Respondent also makes inaccurate statements on pages 3-4 of its Opposition about the history of evaluating jurisdiction related to this case. While Respondent does not make specific arguments that this history is prejudicial, Complainant is concerned about the impression these statements make and addresses them here. Respondent states, "The Complaint itself was based on an inspection of the facility in 2021 that alleged a sill [sic] would flow south and

[20] Opposition, at 5.
[21] Prehearing Order, Dkt. No. CWA-10-2025-0023, at 3 (Jan. 28, 2025). *See also In re City of Urbana Wastewater Treatment Plant,* 1998 EPA ALJ LEXIS 2, at *6 (stating that while Respondent asserted that the amended complaint contained "cryptic references," this issue could be resolved through prehearing exchanges or discovery).
[22] *In re Bug Bam Prod., LLC*, 2010 EPA ALJ LEXIS 2, at *17-18 (stating that the standard for amending a complaint is "not concerned with the adjudication of factual issues").

west to the wetlands."[23] It is correct that the original Complaint includes allegations that are based on a September 21, 2021 inspection.[24] It is incorrect, however, that the inspection alleged that a spill would flow south and west to the wetlands. Rather, the inspection report, which was transmitted to the Respondent on January 20, 2022,[25] included the below figure,[26] which reflects the EPA's initial consideration of this issue and depicts multiple potential pathways for a spill.

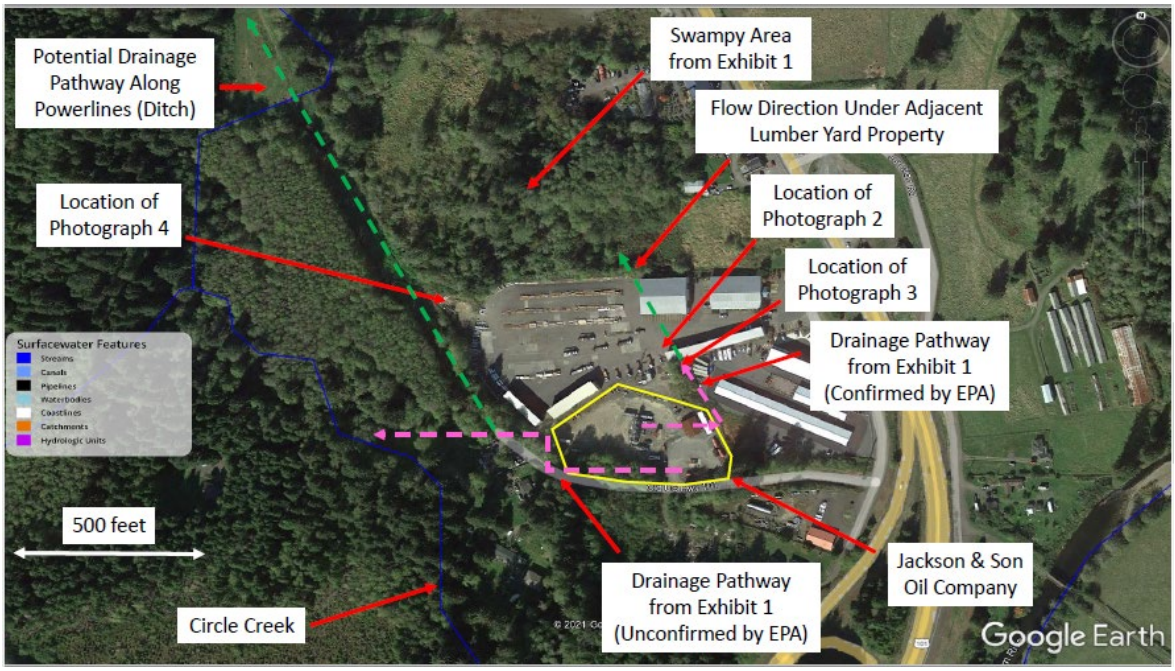

Figure 1. Potential Drainage Pathways Identified in Inspection Report.

The "Swampy Area" is the wetlands, which are and have always been located to the north[27] of Respondent's property. Circle Creek is depicted with a blue line and relevant here, connects to the wetlands to the north, at the top of the figure. Following the *Sackett* decision, while Complainant disagrees with the date Respondent provided, Complainant conducted additional fieldwork to verify the presence of wetlands and presented this information to Respondent.

[23] Opposition, at 3.
[24] Complaint ¶ 3.6.
[25] Attachment 1, at 1.
[26] *Id.* at 60.
[27] Respondent also states that the original Complaint and inspection report alleged that the wetlands are located to the west of Respondent's facility. Opposition, at 2. Complainant assumes this is a typo as the original Complaint alleges that the wetlands are located north of Respondent's property. Complaint ¶ 3.10.

Complainant then filed the original Complaint alleging that there was a reasonable expectation that a discharge would flow north via multiple pathways to these wetlands based on the information available at that time.[28] Now, the EPA alleges that there is a reasonable expectation that a discharge would flow north via multiple pathways all the way to Circle Creek, which is located on the other side of the wetlands. This does not represent Complainant's third attempt to assert jurisdiction[29] or an "extraordinary effort[] to assert jurisdiction"[30] or a "180 degree change."[31] This is one more step in the same direction. Complainant is simply stating that oil would flow through the wetlands and into Circle Creek, reducing the number of issues in this case. In addition, as explained in footnote 18 above, events that occurred prior to the filing of the original Complaint are not relevant to whether the original Complaint should be amended.

e. Delay

Last, Respondent makes reference to prejudice via delay. For example, Respondent asserts that Complainant filed the Motion for Leave to Amend the Complaint on the "eve of the prehearing exchange."[32] While it is unclear to what extent Respondent is really arguing undue delay, none exists here. Motions to stay cases[33] or extend deadlines[34] after a change in administration are common, and Respondent has never opposed any of Complainant's motions to extend the prehearing exchange schedule, the first of which was filed to allow settlement

[28] The original Complaint also alleged (as depicted with the pink line on the figure) that oil may flow south and west directly to Circle Creek. Complaint ¶ 3.10. The Amended Complaint drops this allegation. *See* Amended Complaint ¶ 3.10; Complainant's Motion for Leave to Amend the Complaint at 7 n.22, Dkt. No. CWA-10-2025-0023 (Aug. 15, 2025).
[29] Opposition, at 2.
[30] *Id.*
[31] Opposition, at 5.
[32] *Id.*
[33] *See, e.g.,* Order (Dkt. Entry No. 20), *American Free Enterprise Chamber of Commerce v. EPA*, No. 25-89 (9th Cir. Feb. 19, 2025) (staying challenge to agency action following change in administration); Order (Docket Entry No. 13), *Alaska Community Action on Toxics v. EPA*, No. 21-70168 (9th Cir. Apr. 6, 2021) (same).
[34] *See, e.g., In re GEO Grp., Inc.*, 2025 EPA ALJ LEXIS 13 (granting extension of time following change in administration); *see also In re State DOT & Pub. Facilities*, 2025 EPA ALJ LEXIS 16 (same).

discussions to continue.[35] In its June 2025 Unopposed Motion for an Additional Extension of Time, Complainant stated that it was considering jurisdiction related to this case in light of the listening sessions that had occurred on the scope of the "waters of the United States" definition with the goal of filing its prehearing exchange.[36] After that consideration, in the span of approximately two months, Complainant conducted the additional work necessary to evaluate a reasonable expectation of a discharge to Circle Creek and then conducted the necessary briefings and received approval to file the Motion for Leave to Amend the Complaint. This does not constitute undue delay. In addition, as has been stated numerous times, Complainant is filing its Motion for Leave to Amend the Complaint early in the administrative litigation. Motions to amend complaints are frequently granted during this phase of the litigation, where prehearing exchanges have not been filed and a hearing has not been scheduled.[37]

4. Inflation Adjustment

Respondent does not address this reason for amendment.

CONCLUSION

While the decision to grant or deny a motion to amend a complaint is "within the discretion of the [court]," leave should be "freely given" consistent with Fed. R. Civ. P. 15(a) unless there is "undue delay, bad faith or dilatory motive on the part of the movant . . . [or] undue

[35] Joint Motion for an Extension of Time, Dkt. No. CWA-10-2025-0023 (Feb. 26, 2025) (requesting extension to allow settlement discussions to continue); Joint Motion for Additional Extension of Time, Dkt. No. CWA-10-2025-0023 (Apr. 7, 2025) (requesting extension to brief new administration officials about the issues raised in this case); Complainant's Unopposed Motion for Additional Extension of Time, Dkt. No. CWA-10-2025-0023 (June 2, 2025) (requesting extension to allow consideration of recent "waters of the United States" listening sessions and conduct further briefings); Motion for Stay of Prehearing Exchange Schedule, Dkt. No. CWA-10-2025-0023 (Aug. 25, 2025) (requesting stay of prehearing exchange schedule pending resolution of Complainant's Motion to Amend the Complaint).

[36] Complainant's Unopposed Motion for Additional Extension of Time, at 3 (June 2, 2025).

[37] *In re Univ. of Kansas Med. Ctr*., 2007 EPA ALJ LEXIS 15 (granting motion to amend a complaint filed two days before prehearing exchanges were due); *In re Adamas Constr. & Dev. Servs., PLLC*, 2020 EPA ALJ LEXIS 10, at *7 (granting motion to amend the complaint and stating that Respondents have ample time to address the proposed amendments as Complainant filed its motion to amend in the early stages of the litigation process and a hearing has not yet been scheduled in the matter). *Cf., In re Carroll Oil Co.,* 2002 EPA App. LEXIS 14, at *5-6 (affirming denial of motion to amend complaint that was filed shortly before trial).

prejudice to the opposing party."[38] Respondent's arguments focus on Complainant's adjustment of the receiving water, which actually furthers judicial efficiency because it aims to narrow the issues in the litigation and to reduce the likelihood for future delays. Respondent's arguments in opposition fall short for lack of specificity and confusion of the issues. Especially given the early stages of litigation, allowing Complainant to substitute the reasonable expectation of a discharge to Circle Creek is in the interest of justice. If there is a reasonable expectation of a discharge to "waters of the United States," Respondent's facility should be required to comply with the 40 C.F.R. Part 112 regulations, and Complainant should be afforded an opportunity to test this claim on the merits.[39] As a result, Complainant respectfully requests that this Tribunal grant its Motion for Leave to Amend the Complaint.[40]

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

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[38] *Foman v. Davis*, 371 U.S. 178, 182 (1962).
[39] *Id*.
[40] If this Tribunal does not grant Complainant's Motion, the Motion should be denied. Respondent is incorrect that dismissal of the original Complaint is appropriate relief. *See* Opposition, at 6. Indeed, courts consider the fact that Complainant may need to file a new complaint as a reason to grant a motion to amend a complaint because it is more efficient and furthers judicial solicitude. *See, e.g., In re San Antonio Shoe, Inc.*, 1992 EPA ALJ LEXIS 525, at *9 ("The interests of judicial economy would not be served by requiring Complainant to bring the new violations against the Respondent in a separate legal proceeding."); *see also In re Univ. of Kansas Med. Ctr*, 2007 EPA ALJ LEXIS 15, at *20 (finding that it was in the interest of justice for claims to be added to "not leave open the possibility for an additional or subsequent action.").

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Reply in Support of Complainant's Motion for Leave to Amend the Complaint**, dated September 12, 2025, was sent this day to the following parties in the manner indicated below.

Ashley Bruner Digitally signed by Ashley Bruner Date: 2025.09.12 15:30:15 -07'00'

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Dated: September 12, 2025