BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES Juneau, Alaska Respondent.	DOCKET NO. CWA-10-2024-0154 **COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

Pursuant to Sections 22.16(a) and 22.20 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby moves for an accelerated decision concluding that the State of Alaska Department of Transportation and Public Facilities ("Respondent"):

1) is a "person;"[1]
2) that "discharged" "pollutants;"[2]
3) from a "point source;"[3]
4) to "wetlands;"[4]
5) without permit authorization prior to discharging those pollutants;[5]
6) that those activities that resulted in the "discharge" of "pollutants" were not "exempt" from the Clean Water Act;[6] and that
7) the Pacific Ocean within the Gastineau Channel is a "navigable water."[7]

In support of this Motion, the EPA relies on applicable procedural rules in the Part 22 Rules, the pleadings and documents in the record, and the facts and law set forth in the attached

[1] Pursuant to CWA Section 502(5), 33 U.S.C. § 1362(5)
[2] Pursuant to CWA Sections 502(16) and (6), 33 U.S.C. § 1362(16) and (6), respectively
[3] Pursuant to CWA Section 502(14), 33 U.S.C. § 1362(14)
[4] Pursuant to 33 C.F.R. § 328.3(b) (2014)
[5] Pursuant to CWA Section 404, 33 U.S.C. § 1344
[6] Pursuant to CWA Section 404(f), 33 U.S.C. § 1344(f)
[7] Pursuant to CWA Section 502(7), 33 U.S.C. § 1362(7)

Memorandum in Support of this Motion. Prior to filing this Motion, the undersigned contacted Respondent's counsel to determine whether Respondent would object to granting the relief sought in this motion. Respondent's counsel stated that they will oppose this Motion.

Dated this 3rd day of March 2025.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

PATRICK JOHNSON

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, Juneau, Alaska, Respondent.	DOCKET NO. CWA-10-2024-0154 **COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ACCELERATED DECISION**

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I. INTRODUCTION

The United States Environmental Protection Agency Region 10 ("Complainant" or "EPA") hereby moves for an accelerated decision as detailed below. The EPA so moves pursuant to Sections 22.16(a) and 22.20 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"). The EPA's motion requests an accelerated decision for certain elements alleged in the Complaint against the State of Alaska Department of Transportation and Public Facilities' ("Respondent") for violations of the Clean Water Act ("CWA" or "Act"). Because there are no genuine issues of material fact regarding these elements, the EPA is entitled to a determination of each of these elements as a matter of law. The EPA respectfully requests an order granting this motion.

In its Complaint, the EPA alleges that the Respondent, a person, violated CWA Section 301(a)[8] by 1) discharging; 2) pollutants; 3) from a point source; 4) to waters of the United States; 5) without authorization under a CWA Section 404[9] permit. Specifically, Respondent discharged dredged or fill material from heavy machinery, such as trucks, backhoes, excavators, and water-jet trucks to wetlands that are either adjacent to the Pacific Ocean within Gastineau Channel or adjacent to relatively permanent tributaries that connect to the Pacific Ocean within Gastineau Channel.

While Respondent's Answer denies all of the above allegations, the EPA's Initial Prehearing Exchange sought Respondent's stipulation to certain facts to further judicial efficiency and to focus the Parties' resources on genuinely disputed issues.[10] Respondent's

[8] 33 U.S.C. § 1311(a).
[9] 33 U.S.C. § 1344.
[10] *See* Complainant's Initial Prehearing Exchange at page 37.

Prehearing Exchange failed to acknowledge the EPA's request.[11] The EPA nevertheless interprets Respondent as only disputing discrete elements of the EPA's *prima facie* case in its Prehearing Exchange, where Respondent argues primarily that the affected wetlands are not jurisdictional, that CWA Section 404(f)[12] exempted the discharges, and that a Nationwide Permit did not require pre-construction notification to "preauthorize" the discharges.

This motion focuses on all the elements of liability other than the discrete issue of whether the wetlands are waters of the United States subject to CWA regulation.[13] The argument below will establish that the Respondent:

1) is a "person;"[14]
2) that "discharged" "pollutants;"[15]
3) from a "point source;"[16]
4) to "wetlands;"[17]
5) without permit authorization prior to discharging those pollutants;[18]
6) that those activities that resulted in the "discharge" of "pollutants" were not "exempt" from the CWA[19]; and that
7) the Pacific Ocean within Gastineau Channel is a "navigable water."[20]

As such, this court should enter an accelerated decision on each of these elements.

[11] *See generally* Respondent's Initial Prehearing Exchange.
[12] 33 U.S.C. § 1344(f).
[13] Given the complexities surrounding the regulatory definition of "waters of the United States" as explained in Section V.D. of Complainant's Initial Prehearing Exchange and Respondent's primary focus on that issue in its Prehearing Exchange, Complainant has chosen to leave that element of liability out of this motion for accelerated decision. This will allow the parties and this Tribunal to address the largely undisputed issues before focusing on the one primarily in dispute.
[14] Pursuant to CWA Section 502(5), 33 U.S.C. § 1362(5).
[15] Pursuant to CWA Sections 502(16) and (6), 33 U.S.C. § 1362(16) and (6), respectively.
[16] Pursuant to CWA Section 502(14), 33 U.S.C. § 1362(14).
[17] Pursuant to 33 C.F.R. § 328.3(b) (2014).
[18] Pursuant to CWA Section 404, 33 U.S.C. § 1344.
[19] Pursuant to CWA Section 404(f), 33 U.S.C. § 1344(f).
[20] Pursuant to CWA Section 502(7), 33 U.S.C. § 1362(7).

II. STATUTORY AND REGULATORY BACKGROUND

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[21] CWA Section 301(a)[22] provides that, except as in compliance with a permit under CWA Section 404,[23] certain other permits, and limitations not applicable in this case, "the discharge of any pollutant by any person shall be unlawful."

The relevant terms and elements in CWA Section 301(a)[24] are defined in CWA Section 502[25] and by applicable regulations. CWA Section 502(5)[26] defines "person" to include "State" or "political subdivision of a State." The CWA Section 502(16)[27] defines "discharge" to include "discharge of a pollutant," and CWA Section 502(12)[28] defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." CWA Section 502(6)[29] defines "pollutant" broadly to include an array of materials such as "dredged spoil," "sand," and "biological materials." "Pollutant" also includes "fill material," defined by regulation[30] 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," and "dredged material" defined by regulation[31] as "material that is excavated or dredged from waters of the United States." The regulatory definition of "fill material" goes on to include, inter alia, "rock."[32] CWA Section

[21] 33 U.S.C. § 1251(a).
[22] 33 U.S.C. § 1311(a).
[23] 33 U.S.C. § 1344.
[24] 33 U.S.C. § 1311(a).
[25] 33 U.S.C. § 1362.
[26] 33 U.S.C. § 1362(5).
[27] 33 U.S.C. § 1362(16).
[28] 33 U.S.C. § 1362(12).
[29] 33 U.S.C. § 1362(6).
[30] 33 C.F.R. § 323.2(e).
[31] 33 C.F.R. § 323.2(c).
[32] 33 C.F.R. § 323.2(e).

502(7)[33], defines "navigable waters" as "the waters of the United States, including the territorial seas." Lastly, CWA Section 502(14)[34] defines the term "point source" to include "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." These elements, plead together, form a *prima facie* case for the purpose of a CWA enforcement action.

III. STANDARD OF REVIEW FOR ACCELERATED DECISION

The standard of review for a motion for accelerated decision is set forth in 40 C.F.R. § 22.20(a), which provides:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

This standard is analogous to the summary judgment standard established under Rule 56 of the Federal Rules of Civil Procedure.[35]

The Supreme Court has held that a party moving for summary judgment bears the burden of "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate that no genuine issues of material fact exist.[36] The evidentiary basis for the moving party's motion must be viewed in the light most favorable to the opposing party.[37]

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[33] 33 U.S.C. § 1362(7).
[34] 33 U.S.C. § 1362(14).
[35] *See In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999).
[36] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Pepperell Associates*, 1999 EPA ALJ LEXIS 16 (EPA, Feb. 26, 1999).
[37] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To satisfy this burden, the moving party must present evidence "such that no reasonable decisionmaker could find for the nonmoving party."[38] On the other hand, to survive such a motion, the non-moving party must demonstrate to the court that the evidence presents "sufficient disagreement" such that a reasonable fact finder could decide in favor of either party.[39] However, to do so, the non-moving party cannot rely on the allegations or denials of its pleading, but rather must establish with affirmative evidence specific facts showing that there is a genuine issue for trial.[40]

In this case, no question of material fact exists as to whether Respondent:

1) is a "person" (pursuant to CWA Section 502(5)[41]);
2) that "discharged" "pollutants" (pursuant to CWA Sections 502(16) and (6),[42] respectively);
3) from a "point source" (pursuant to CWA Section 502(14)[43]);
4) to "wetlands" (pursuant to 33 C.F.R. § 328.3(b) (2014));
5) without permit authorization (pursuant to CWA Section 404[44]) prior to discharging those pollutants;
6) that those activities that resulted in the "discharge" of "pollutants" were not "exempt" from the CWA (pursuant to CWA Section 404(f)[45]); and
7) that the Pacific Ocean within Gastineau Channel is a "navigable water" for purposes of CWA Section 502(7).[46]

These are issues of law suitable for a motion for accelerated decision.

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[38] *See Clarksburg Casket Co*, 8 E.A.D. at 502; *see also Anderson*, 477 U.S. at 252.
[39] *See Anderson,* 477 U.S. at 251–52; *see also Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom*. *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).
[40] *Anderson*, 477 U.S. at 256; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (non-moving party must present specific, significant probative evidence, not simply "some metaphysical doubt"); *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).
[41] 33 U.S.C. § 1362(5).
[42] 33 U.S.C. § 1362(16) and (6).
[43] 33 U.S.C. § 1362(14).
[44] 33 U.S.C. § 1344.
[45] 33 U.S.C. § 1344(f).
[46] 33 U.S.C. § 1362(7).

IV. FACTUAL BACKGROUND

In August and September 2021, Respondent used heavy mechanical equipment such as a truck, backhoe, excavator, and/or water-jet truck to discharge dredged and/or fill material to wetlands over the course of several days. Those discharges occurred without prior authorization pursuant to CWA Section 404[47] and the material was placed outside the original fill design associated with the Glacier Highway. These discharges violate CWA Section 301(a).[48] The EPA enumerates the allegations against Respondent in full in paragraphs 3.1–3.27 of the Complaint.

V. ARGUMENT

A. The EPA is Entitled to Accelerated Decision Because No Genuine Issue of Material Fact Exists for Any of the Elements Identified in the Motion

No question of material fact exists as to whether Respondent: 1) is a person 2) that discharged pollutants 3) from a point source 4) to wetlands 5) without permit authorization prior to discharging those pollutants, 6) that those activities that resulted in the discharge of those pollutants were not exempt from the CWA, and (7) that the Pacific Ocean within Gastineau Channel is a navigable water.[49] These are issues of law suitable for a motion for accelerated decision.

1. Respondent is a "person."

Under CWA Section 502(5)[50] the term "person" means, *inter alia*, a "State" or "political subdivision of a State." The EPA alleges that Respondent is the State of Alaska and Respondent denies that allegation in its Answer, stating that "Respondent is the State of Alaska Department

[47] 33 U.S.C. § 1344.
[48] 33 U.S.C. § 1311(a).
[49] 33 U.S.C. § 1362(7).
[50] 33 U.S.C. § 1362(5).

of Transportation and Public Facilities."[51] Regardless of whether the Respondent should be considered the State of Alaska, as a "State," or the State of Alaska Department of Transportation and Public Facilities, as a "political subdivision of a State," Respondent is a "person" pursuant to CWA Section 502(5).[52]

The EPA's Initial Prehearing Exchange[53] sought Respondent's stipulation that Respondent is a person, but Respondent failed to substantively respond to that request in its Prehearing Exchange.[54] This Tribunal has concluded that other state departments of transportation are a person for purposes of the CWA.[55] Additionally, Respondent's lack of substantive engagement on this issue within its Prehearing Exchange illustrates that there is no question of material fact that Respondent is a person pursuant to CWA Section 502(5)[56] and the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's CWA liability.

2. Respondent's placement of native organic soils, woody debris, gravel, rock, and sediments constitutes the "discharge" of "pollutants."

The CWA defines "discharge" to include "discharge of a pollutant,"[57] and defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."[58] The CWA defines pollutant broadly to include an array of materials such as

[51] *See* Answer ¶ 3.1.
[52] 33 U.S.C. § 1362(5).
[53] *See* Complainant's Initial Prehearing Exchange at pages 7 – 8.
[54] *See generally* Respondent's Prehearing Exchange.
[55] *See e.g. In re: New York Dep't of Transp.*, 2018 EPA ALJ LEXIS 4, at *28. Even in the context of an administrative enforcement proceeding involving a statute that does not so clearly include a "State" and "political subdivision of a State" as a "person" subject to the statute (contrary to the CWA), this Tribunal has determined that a State agency can be a "person," articulating that "[t]here is no discernible difference in the impact on the environment whether the misuse is by a state agency or a private person." *See In re: Wyoming Dep't of Agriculture*, 1977 EPA ALJ LEXIS 8, at *17. Federal courts have similarly determined that other departments within a state government are "persons" under the CWA. *See e.g. W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 165 (4th Cir. 2010).
[56] 33 U.S.C. § 1362(5).
[57] 33 U.S.C. § 1362(16).
[58] 33 U.S.C. § 1362(12).

"dredged spoil," "sand," and "biological materials."[59] 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,"[60] and "dredged material" defined as "material that is excavated or dredged from waters of the United States."[61] The regulatory definition of fill material goes on to include, *inter alia*, "rock."[62] Additionally, courts have consistently concluded that native organic soils, sediment, or dirt,[63] woody debris,[64] and gravel or rock[65] are each a pollutant, and that placement of such pollutants constitutes a discharge of a pollutant.

As alleged in the Complaint, and as can be seen throughout Exhibit CX – 01 (Discharge Report), the EPA has explicitly illustrated that Respondent discharged native organic soils, woody debris, gravel, rock, and sediments (each of which are pollutants under the CWA) at each of the nine Locations identified in Table 1 of the Complaint. Respondent admits that it "performed maintenance work" and, in its denials in its Answer of the EPA's allegations of a discharge of dredged and/or fill material, argues that the Locations "are not subject to federal jurisdiction pursuant to *Sackett*, and [Respondent's] maintenance activities are exempt under Section 404(f) of the CWA or was preauthorized under one or more nationwide permits."[66]

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[59] 33 U.S.C. § 1362(6).
[60] 33 C.F.R. § 323.2(e)
[61] 33 C.F.R. § 323.2(c).
[62] 33 C.F.R. § 323.2(e).
[63] *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).
[64] *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).
[65] *See e.g. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).
[66] Answer ¶¶ 3.12, 3.13, and 3.14.

Respondent's Prehearing Exchange similarly fails to dispute the EPA's conclusion that Respondent's activities resulted in the discharge of pollutants; Respondent even explicitly acknowledges that there was the "[p]lacement of native soils atop [] wetlands" at the Locations.[67] At Table 1 within Exhibit RX – 01, Respondent also acknowledges the dredging and discharge activities for each of the nine Locations identified in Table 1 of the Complaint.[68] As a result, there is no question of material fact that Respondent discharged dredged and/or fill material, in the form of native organic soils, woody debris, gravel, rock, and sediments.

Respondent's Prehearing Exchange may implicitly argue that this Tribunal should consider as relevant that Respondent needed to remove and redeposit the pollutants at issue – native organic soils, woody debris, gravel, rock, and sediments – "due to natural events."[69] It is not clear whether Respondent was intending to suggest that redeposition of dredged material is not a discharge of pollutant, but if so that argument would be legally futile, as the case law is abundantly clear that redeposition of dredged material is considered a "discharge."[70] Therefore, there is no question of material fact that Respondent's activities involved the discharge of pollutants pursuant to CWA Sections 502(16) and (6)[71] and the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

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[67] *See* Respondent's Prehearing Exchange at page 14.
[68] *See* Exhibit RX – 01 (DOT&PF Background Summary) at pages 4 – 5.
[69] *See* Respondent's Prehearing Exchange at page 3.
[70] *See Borden Ranch P'ship v. U.S. Army Corps of Eng'r*, 261 F.3d 810, 814 (9th Cir. 2001) (holding that "once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.") (quoting *U.S. v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000) (emphasis in original)); *Deaton*, 209 F.3d at 335–36 (4th Cir. 2000) (determining that in the context of sidecasting, redeposit of native material is a discharge of a pollutant); and *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'").
[71] 33 U.S.C. § 1362(16) and (6).

3. The trucks, backhoes, excavators, and water jet trucks operated by or at the direction of Respondent are each "point sources."

Pursuant to CWA Section 502(14)[72] 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.[73] As alleged in the Complaint and identified in Exhibit CX – 01 (Discharge Report), Respondent's use of heavy mechanical equipment such as a truck, backhoe, excavator, or water-jet truck at each of the nine Locations identified in Table 1 of the Complaint each constitute a point source pursuant to the CWA.[74] Respondent acknowledged the use of this equipment in pre-filing correspondence with the EPA.[75] Additionally, courts have held that the "definition of a point source is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States,"[76] and have specifically found that bulldozers, dump trucks, and similar heavy machinery are point sources under the Act.[77]

While Respondent generally denies this allegation in the Answer, Respondent does not provide any substance to its denial and fails to specifically explain why it denies this fact.[78] Additionally, Respondent's Prehearing Exchange does not dispute this fact, Respondent

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[72] 33 U.S.C. § 1362(14).
[73] *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-DGE, 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).
[74] Complaint ¶¶ 3.12, 3.13, 3.14, 3.24, and 3.26.
[75] *See* Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[76] *See Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188 (2nd Cir. 2010).
[77] *See* note 73, *supra.*
[78] E.g. Answer ¶ 3.24.

previously acknowledged the use of this heavy mechanical equipment, and the case law is clear. Therefore, the EPA does not believe this allegation is in dispute. The EPA should be entitled to judgment as a matter of law on this element of Respondent's CWA liability in this matter.

4. Respondent's discharges were to "wetlands."

Separate and distinct from the analysis of whether a particular waterbody is a "navigable water" pursuant to CWA Section 502(7)[79] is the determination that a particular waterbody is a wetland. Before evaluating a wetland for CWA jurisdiction, a site would first need to satisfy the regulatory definition of a wetland. While many areas contain wetlands, only a subset of those wetlands meet the regulatory requirements to be "adjacent" wetlands that are "waters of the United States." Respondent's Prehearing Exchange admits the Locations contain wetlands and only argues over the jurisdictional status of those wetlands. This Motion for Accelerated Decision does not address whether the wetlands are waters of the United States subject to CWA regulation.

Under the EPA's implementing regulations, 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."[80] The protocol utilized by the EPA and the United States Army Corps of Engineers ("Corps") to identify and delineate whether an aquatic resource meets the regulatory definition of a wetland can be found in the 1987 Corps Wetlands Delineation Manual[81] and, given the location of the waters at issue in this case, the Regional Supplement to the Corps Wetland Delineation Manual: Alaska Region (Version 2.0).[82]

[79] 33 U.S.C. § 1362(7).
[80] 33 C.F.R. § 328.3(b) (2014); 33 C.F.R. § 328.3(c)(1) (2024) (same).
[81] *See* Exhibit CX – 03 (1987 Corps Delineation Manual).
[82] *See* Exhibit CX – 04 (Alaska Regional Supplement).

As can be seen in Exhibit CX – 02 (Jurisdictional Analysis Report) and the Complaint,[83] the EPA 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,[84] those denials are focused on the jurisdictional status of the wetlands and the possibility that any activities associated with discharges of dredged and/or fill material to those waters were exempt from CWA Section 404 permitting requirements. Respondent did not deny that the areas themselves were wetlands.

Additionally, Respondent's Prehearing Exchange acknowledges the presence of wetlands at the Locations identified in Table 1 of the Complaint. For example, when attempting to argue that the discharges of pollutants had limited effect on flow, Respondent explicitly admits that the discharges of "native soils" were "atop . . . *wetlands*."[85] This is consistent with the extensive evidence provided in Exhibit CX – 02 (Jurisdictional Analysis Report) and its associated Appendices, most notably Appendix B which contains the wetland determination sheets completed by federal scientists in the field at each of the nine Locations identified in Table 1 to the Complaint.[86] For each Location discussed within Exhibit CX – 02, detailed explanations are provided regarding the data collected and analysis conducted to draw conclusions that each Location is a wetland in accordance with federal regulation.[87] Respondent's Answer, Prehearing Exchange, and the exhibits associated with its Prehearing Exchange failed to meaningfully dispute the EPA's expert witness's conclusions that are based on rigorous and objective analysis. Therefore, there is no question of material fact that each of the nine Locations identified in Table

[83] Complaint ¶¶ 3.2 – 3.8.
[84] Answer ¶¶ 3.2 – 3.8.
[85] *See* Respondent's Prehearing Exchange at page 14.
[86] As described in Exhibit CX – 02 (Jurisdictional Analysis Report), this field work was performed from May 20 – 23, 2024.
[87] 33 C.F.R. § 328.3(b) (2014); 33 C.F.R. § 328.3(c)(1) (2024) (same).

1 of the Complaint contain "wetlands" as defined by federal regulation;[88] the EPA is consequently entitled to judgment as a matter of law that Respondent's discharges of dredged and/or fill material were to wetlands.

5. Respondent failed to obtain CWA Section 404 permit authorization prior to discharging pollutants.

CWA Section 301(a)[89] 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.[90] There are multiple types of CWA Section 404 permits that applicants can seek from the Corps, including individual permits, general permits, and nationwide permits. The EPA alleges that Respondent failed to apply for and receive any authorization pursuant to a CWA Section 404 permit from the Corps prior to discharging pollutants.[91]

a. *Respondent did not apply for a CWA Section 404 permit*

While Respondent generally denies that it failed to apply for a CWA Section 404 permit in the Answer and Prehearing Exchange, Respondent does not state that it actively applied for CWA Section 404 permit authorization prior to discharging pollutants. Rather, it states in relevant part that the "activities were . . . preauthorized under one or more nationwide permits."[92] Thus, there is no question that Respondent did not apply for a CWA Section 404 permit prior to performing the subject activities.

Respondent previously acknowledged to the Corps, in writing, that it did not obtain CWA Section 404 permit coverage prior to discharging pollutants because Respondent's environmental

[88] *Id.*
[89] 33 U.S.C. § 1311(a).
[90] 33 U.S.C. § 1344.
[91] Complaint ¶ 3.27.
[92] *See e.g.* Answer ¶ 3.27.

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."[93] Additionally, in response to questions from the EPA about why Respondent failed to obtain CWA Section 404 permit coverage prior to discharging pollutants, 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."[94] Notably, in its responses to the EPA's questions, Respondent did not assert that pre-construction notification was not required.

b. *Nationwide Permit 3 did not authorize the subject activities*

Nationwide Permits are issued by the Corps and authorize certain activities under CWA Section 404 and Section 10 of the Rivers and Harbors Act of 1899[95] that have no more than minimal individual and cumulative adverse environmental effects. There are currently 59 Nationwide Permits authorizing a variety of different activities.[96] Nationwide Permit 3 was issued to authorized the "repair, rehabilitation, or replacement of any currently serviceable structure or fill."[97] Even though Respondent, in its initial responses to the EPA, did not assert that pre-construction notification was not required, in its Prehearing Exchange, Respondent references Nationwide Permit 3 and asserts that the "activities were . . . preauthorized under one

[93] *See* Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).
[94] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[95] 33 U.S.C. § 403.
[96] *See* U.S. Army Corps of Engineers, 2021 Nationwide Permit Information; https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/.
[97] *See* Exhibit CX – 11 (2017 Issuance of NWP 3).

or more nationwide permits."[98] Nationwide Permit 3, however, is not applicable to the discharges at issue in this case.[99]

i. Paragraph (b) of Nationwide Permit 3 does not authorize the subject activities

As acknowledged by Respondent previously,[100] 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.)."[101]

However, that section of the 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."[102] This 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."[103] This requirement for pre-construction notification for the Nationwide Permit 3(b) is clear and unambiguous, as acknowledged by Respondent in its Prehearing Exchange.[104] As stated above, there is no question that Respondent failed to provide the Corps with pre-construction notification. As a result, there is no legitimate basis to conclude that the discharges of pollutants were "preauthorized" by paragraph (b) of Nationwide Permit 3.

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[98] *See e.g.* Answer ¶ 3.27.
[99] Department of Defense, Department of Army, Corps of Engineers (January 6, 2017) Issuance and Reissuance of Nationwide Permits. Final Rule (82 Fed. Reg. 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.
[100] *See* Exhibit CX – 05 (Corps NOV) and Exhibit CX – 06 (Respondent's Response to Corps Notice of Violation).
[101] *See* Exhibit CX – 11 (2017 Issuance of NWP 3).
[102] *Id.*
[103] *Id.*
[104] *See* Respondent's Prehearing Exchange at page 13.

ii. No other provision in Nationwide Permit 3 authorizes the subject activities

Respondent's Prehearing Exchange suggests, without any detailed explanation or analysis, that paragraphs 3(a) and 3(c) of Nationwide Permit 3, instead of paragraph 3(b), authorized the discharges. This assertion is neither supported nor consistent with Respondent's prior statements that paragraph 3(b) authorized the discharges.[105]

Nationwide Permit 3(a) specifically authorizes the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill."[106] Respondent's Prehearing Exchange explicitly states that the culverts being maintained did not need "to be repaired or replaced,"[107] and there is no argument that the existing fill was being "rehabilitated" through the subject activities. As a result, Respondent has no viable argument that Nationwide Permit 3(a) authorized the discharges. Similarly, Respondent provides no meaningful justification, other than a vague reference in a footnote in its Prehearing Exchange, that Nationwide Permit 3(c) "may be applicable" to the subject activities.[108]

Given the lack of meaningful justification for its positions, Respondent is unable to justify a conclusion that Nationwide Permit 3 authorized the discharges. Respondent cannot argue that much, if any, of the dredged or fill material that was discharged to wetlands was "necessary to conduct the maintenance activity" as required by the Permit.[109] Even if Respondent met its burden and was able to establish that some small percentage of the overall discharges were "necessary to conduct the maintenance activity," Respondent cannot identify that those discharges were "temporary" given that much of the dredged and/or fill material

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[105] *Id.* at pages 12 – 13.
[106] *See* https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/2021%20NWP/NWP-03.pdf?ver=2CyucbT2PpcN3NCYzKtlkw%3D%3D.
[107] *See* Respondent's Prehearing Exchange at page 9.
[108] *Id.* at fn. 26.
[109] *See* https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/2021%20NWP/NWP-03.pdf?ver=2CyucbT2PpcN3NCYzKtlkw%3D%3D.

remains in wetlands as of the filing of the Complaint, almost three years after the original activities occurred. As explained in the EPA's Rebuttal Prehearing Exchange, the reason the unauthorized dredged and/or fill material remains in place is solely the result of Respondent's unwillingness to agree to remove the material as part of an enforceable agreement on consent, and not because of an order by the Corps or the EPA.[110]

It is also worth noting that the Corps, as the permitting agency in the State of Alaska tasked with issuing and determining compliance with CWA Section 404 Nationwide Permits, explicitly determined that the activities subject to this action were not authorized by any CWA Section 404 permit, including Nationwide Permit 3.[111]

c. *No other Nationwide Permit could have authorized the subject activities*

There are no Nationwide Permits that would have authorized the discharges without an affirmative permit application. There is no question that Respondent failed to apply for a CWA Section 404 permit prior to performing the subject activities and the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

6. Respondent's activities do not fall within the scope of the CWA Section 404(f)(1)(B) and (C) exemptions.

Other than disputing the jurisdictional status of the wetlands impacted by Respondent's illegal discharges of dredged and/or fill material, Respondent's primary defense raised in its Answer and in its Prehearing Exchange is that the activities were exempt under CWA Section 404(f).[112] As the EPA has pointed out in its Initial Prehearing Exchange, Respondent bears the burden to prove that the discharges of dredged and/or fill material are exempt under CWA

[110] *See* Complainant's Rebuttal Prehearing Exchange at page 23.
[111] *See* Exhibit CX – 09 (Corps Referral Letter to Complainant).
[112] 33 U.S.C. § 1344(f).

Section 404(f).[113] 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."[114] As a result, Respondent has the burden of establishing that its activities were exempt, with a narrow construal of the scope of the exemption's applicability. Respondent's Prehearing Exchange did not provide additional material facts to support its claim that the activities were exempt under the CWA Section 404(f).

a. Respondent's discharges are not exempt under CWA Section 404(f)(1)(B).

Respondent primarily argues the applicability of CWA Section 404(f)(1)(B),[115] which exempts some discharges "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."

Respondent argues in its Prehearing Exchange that the discharges were associated with "maintenance" of a "transportation structure."[116] Solely for the purpose of this motion, the EPA will concede that the activities that resulted in the discharges of dredged and fill material to wetlands were at least partially associated with Respondent's efforts to clean out culverts that run beneath a highway, which could be considered a "transportation structure" pursuant to the exemption. However, this exemption does not permit the removal of fill material so that it can be discharged elsewhere beyond the scope of the original structure, instead, it is intended to allow dischargers to maintain or replace *existing* fill material associated with transportation

[113] *See United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).
[114] *Id.* (emphasis added). It is worth noting that one of the three cases cited by Respondent in its Prehearing Exchange further emphasized this point. *See United States v. Huebner,* 752 F.2d 1235, 1240-41 (7th Cir. 1985).
[115] 33 U.S.C. § 1344(f)(1)(B).
[116] *See* Respondent's Prehearing Exchange at page 8.

structures without the need for additional CWA Section 404 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." Courts have concluded that the "original fill design" in those regulations "refers to the manmade structures that are the subject of the exemption (e.g. dikes, dams, levees) rather than a natural watercourse."[117]

Adopting the definition of "original fill design" as articulated by the 7th Circuit Court of Appeals,[118] the "manmade structure" that is "the subject of the [CWA Section 404(f)(1)(B)] exemption" is the lateral extent of the fill originally discharged for the construction of the Glacier Highway. Respondent apparently agrees, arguing in its Prehearing Exchange that the Glacier Highway and its culverts were the "infrastructure" upon which "work was performed."[119] It is therefore irrelevant that Respondent argues that the placement of dredged and/or fill material was not performed with the goal of widening Glacier Highway as part of a "roadway realignment."[120] Instead, the focus of the analysis should be whether or not Respondent's activities resulted in discharges of dredged and/or fill material outside of the footprint of the lateral extent of the fill originally discharged for the construction of the Glacier Highway. Respondent's discharges to wetlands occurred outside of that footprint, making the exemption inapplicable. This can be seen throughout Exhibit CX – 01 (Discharge Report) and was articulated in writing by the Respondent previously.[121] As a result, the discharges of fill

[117] *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 953 (7th Cir. 2004).
[118] *Id.*
[119] *See* Respondent's Prehearing Exchange at page 10.
[120] *Id.*
[121] *See* Exhibit CX – 07 (Complainant's CWA Section 308 Information Request) and Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).

material, by definition, were not part of the character, scope, or size of the original fill design of Glacier Highway.

A contrary interpretation of the exemption would contradict any plain reading of the implementing regulations, as the "character, scope, [and] size" of the "original fill design" clearly articulates that any exempt discharges must occur within the footprint of that original fill design. If the exemption intended to cover discharges outside of the "original fill design," like Respondent's discharges here, the regulations could have articulated that intent explicitly. By contrast, the regulations are explicit that the analysis must first determine the original footprint of the manmade structure and, if fill material was placed outside of that original footprint, the exemption cannot apply to those discharges.

Contrary to Respondent's argument in its Prehearing Exchange, Exhibit RX – 06 (Whiskeytown Bureau of Reclamation document) does nothing to contradict the plain language of the exemption and its implementing regulations. As part of the Bureau of Reclamation's proposed activities within that Exhibit, the Bureau explicitly stated that apart from some vegetation removal, "the work area will be confined to the original excavation for the road and culvert and associated disturbance."[122] Congress likely had this type of activity in mind when it codified the exemption. In contrast, Respondent placed dredged and material outside of original footprint of the Glacier Highway, making its activities distinguishable from those contemplated in Exhibit RX – 06.

Furthermore, Respondent could have performed lawful dredging had it hauled away material without discharging that material to wetlands, as it apparently did with approximately 820 cubic yards of soil, rocks, and vegetation dredged from the waterbody identified in Exhibit

[122] *See* Exhibit RX – 06 (Whiskeytown Bureau of Reclamation document) at page 2.

CX – 02 (Jurisdictional Analysis Report) as Tributary S, on September 8 and 9, 2021. For that work, Respondent indicates the dredged material was placed in a dump truck and hauled to Honsinger Pond for permanent disposal.[123]

Respondent will not be able to meet its burden to show that the activities are exempt pursuant to CWA Section 404(f)(1)(B).[124] There is no question of material fact that Respondent placed dredged and/or fill material outside of the original footprint of Glacier Highway. Therefore, this Tribunal should determine that the EPA is entitled to judgment as a matter of law that Respondent's activities are not exempt under CWA Section 404(f)(1)(B).[125]

b. Respondent's discharges are not exempt under CWA Section 404(f)(1)(C).

Respondent's Prehearing Exchange argues that the activities that occurred at a "few of the subject culverts" should be considered exempt pursuant to CWA Section 404(f)(1)(C).[126] This exemption applies to discharges "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."[127] Respondent's Prehearing Exchange provides inadequate detail to understand which of the activities within the "few of the subject culverts" it argues are covered by this exemption. Respondent has the burden to demonstrate that an exemption is applicable,[128] but Respondent provided no information regarding the specific Locations or any substantive justification for its position within the Prehearing Exchange.

The portions of this exemption related to the "construction or maintenance of farm or stock ponds or irrigation ditches" are irrelevant to the subject activities. Therefore, the EPA

[123] *See* CX - 08 (Respondent's Response to Complainant's Information Request).
[124] 33 U.S.C. § 1344(f)(1)(B).
[125] *Id.*
[126] 33 U.S.C. § 1344(f)(1)(C).
[127] *Id.*
[128] *See Akers*, 785 F.2d at 819.

assumes that Respondent intends to argue that its activities at a "few of the subject culverts" should be considered pursuant to the "maintenance of drainage ditches" portion of the exemption.

The waterbodies from which Respondent dredged some of the materials before it placed the dredged material in wetlands are "streams," as identified by Respondent's own witness's exhibit,[129] or unnamed relatively permanent tributaries, as identified by the EPA's witness's exhibit.[130] The EPA is unaware of a scenario where an entity has successfully argued that drainage ditch maintenance activities exempted by CWA Section 404(f)(1)(C)[131] should apply to activities performed within natural streams.

The two U.S. District Court cases cited in Respondent's Prehearing Exchange are easily distinguishable from the facts at issue in this matter. The first, *Peconic Baykeeper, Inc. v. Suffolk County*,[132] involved an entity sidecasting material from a "mosquito grid ditch system," a series of ditches that had been constructed by local authorities in an apparent effort to manage mosquitos in the 1930s. The other U.S. District Court case cited by Respondent, *United States v. Sargent Cnty. Water Res. Dist.*,[133] similarly involved work performed within a ditch constructed by a local government nearly 100 years prior to the court's decision. A mosquito grid ditch system or a nearly 100-year-old drainage ditch can hardly be compared, for purposes of the CWA Section 404(f)(1)(C) exemptions, to the anadromous fish-bearing streams at issue in this matter.

[129] *See* Exhibit RX – 03 (ADFG Fish Habitat Report).
[130] *See* Exhibit CX – 02 (Jurisdictional Analysis Report).
[131] 33 U.S.C. § 1344(f)(1)(C).
[132] 585 F. Supp. 2d 377 (E.D. N.Y. 2008).
[133] 876 F. Supp. 1090 (D. N.D. 1994).

Though it is Respondent's burden to do so, it cannot prove that the activities are exempt under CWA Section 404(f)(1)(C).[134] There is no question of material fact that Respondent discharged dredged and/or fill material to wetlands, some of which was dredged from natural, anadromous fish-bearing streams rather than ditches. Therefore, this Tribunal should determine that the EPA is entitled to judgment as a matter of law that Respondent's activities are not exempt under CWA Section 404(f)(1)(C).[135]

7. CWA Section 404(f)(2) establishes that the CWA Section 404(f)(1) exemptions cannot apply to Respondent's discharges.

To establish that its discharges are exempt from the CWA Section 404 permit requirements, Respondent would have to demonstrate that the subject activities both *satisfy* the requirements of CWA Section 404(f)(1) and *avoid* the exception to the exemptions of CWA Section 404(f)(2).[136] Even if Respondent could satisfy the exemption pursuant to CWA Section 404(f)(1)(B) or (C),[137] which it cannot, it must also meet the requirements established by CWA Section 404(f)(2).[138] Pursuant to CWA Section 404(f)(2), otherwise exempted activities that (a) bring an area of waters of the United States "into a use to which it was not previously subject" and (b) impair the "flow or circulation" of waters of the United States or reduce their reach are required to have a CWA Section 404 permit.

Respondent has converted certain wetlands into uplands through the discharge of dredged and/or fill material. This conversion and change in use of the wetlands has clearly impaired the flow and circulation of those wetlands and reduced their reach. Conversion of a wetland to a non-wetland is a change in use according to the exemption's implementing regulations.[139] The

[134] 33 U.S.C. § 1344(f)(1)(C).
[135] *Id.*
[136] *See Akers*, 785 F.2d 814, 819 (9th Cir 1986).
[137] 33 U.S.C. § 1344(f)(1)(B) or (C).
[138] 33 U.S.C. § 1344(f)(2).
[139] 33 C.F.R. § 323.4(c).

activities within wetlands at Locations 2 and 7, as described in Exhibit CX – 01, provide illustrative examples of how the wetlands have been converted into uplands resulting in the impairment of flow and circulation of the adjacent surface waters and wetlands and reduced the reach of such waters.

In its Prehearing Exchange, Respondent asks how it can be "accused of impairing the 'flow and circulation'" of the streams when its maintenance work was seeking to clear the culverts to allow those streams to have unimpaired flow.[140] The answer is fairly simple: the focus of the recapture provision is on the original pre-existing waters *to which* the discharges were made, not the waters *from which* that dredged material was removed. Courts have affirmed this position, concluding that when entities sidecast dredged material from a ditch to wetlands surrounding those ditches, the impacts on the wetlands, not the ditches themselves, trigger the recapture provision.[141] In this case, the impairment of flow and circulation is associated with the wetlands that were covered with fill, not the streams from which the dredge material was removed. As a result, it is irrelevant whether Respondent's activities "restored" the flow of those streams. Respondent's conversion of wetlands to uplands is precisely the type of harm the statute seeks to prevent, as affirmed in the implementing regulations.[142] Therefore, even in the unlikely scenario where Respondent can meet its burden to illustrate that CWA Section 404(f)(1)(B) or (C)[143] could be relevant to some of the activities that resulted in discharges, those discharges would still not be exempt under CWA Section 404(f)(2).[144]

[140] *See* Respondent's Prehearing Exchange at page 12.
[141] *See e.g. Huebner*, 752 F.2d at 1242.
[142] 33 C.F.R. § 323.4(c).
[143] 33 U.S.C. § 1344(f)(1)(B) or (C).
[144] 33 U.S.C. § 1344(f)(2).

As illustrated above, there is no question of material fact regarding the nature of the activities that resulted in discharges in the context of CWA Section 404(f)(1)[145] exemptions. Respondent has not provided any material information to demonstrate that the activities in wetlands both *satisfy* the requirements of CWA Section 404(f)(1)[146] and avoid the recapture provision of CWA Section 404(f)(2).[147] Therefore, this Tribunal should determine that the EPA is entitled to judgment as a matter of law that Respondent's activities are not subject to any exemptions pursuant to CWA Section 404(f)(1).[148]

8. The Pacific Ocean within Gastineau Channel is a "navigable water."

While the Complaint does not allege that Respondent discharged pollutants directly to the Pacific Ocean within Gastineau Channel, the connection between the wetlands impacted by Respondent's illegal activities and the Pacific Ocean within Gastineau Channel is referenced throughout the filing,[149] both within the EPA's Initial Prehearing Exchange[150] and within Exhibit CX – 02.[151] In its Answer, Respondent does not dispute that the Pacific Ocean within Gastineau Channel is a traditional navigable water.[152] Additionally, Respondent explicitly acknowledges that the Pacific Ocean within Gastineau Channel is a "navigable water" in its Prehearing Exchange.[153] Therefore, there is no question of material fact that the Pacific Ocean within Gastineau Channel is a traditional navigable water. This Tribunal should determine that the EPA

[145] 33 U.S.C. § 1344(f)(1).
[146] *Id.*
[147] 33 U.S.C. § 1344(f)(2).
[148] 33 U.S.C. § 1344(f)(1).
[149] *See e.g.* Complaint ¶ 3.3.
[150] *See* Complainant's Initial Prehearing Exchange at page 22.
[151] *See e.g.* Exhibit CX – 02 (Jurisdictional Analysis Report) at page 18.
[152] *See generally* Answer.
[153] *See* Respondent's Prehearing Exchange at page 5.

is entitled to judgment as a matter of law that the Pacific Ocean within Gastineau Channel is a "navigable water" for purposes of CWA Section 502(7).[154]

VI. CONCLUSION

The Motion for Accelerated Decision should be granted because the EPA has adequately established that there are no questions of material fact that Respondent: 1) is a person 2) that discharged pollutants 3) from a point source 4) to wetlands 5) without permit authorization prior to discharging those pollutants; 6) that those activities that resulted in the discharge of pollutants were not exempt from the CWA and (7) that the Pacific Ocean within Gastineau Channel is a navigable water. This Tribunal should therefore determine that the EPA is entitled to judgment as a matter of law on each of these elements.

Dated this 3rd day of March 2025.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

PATRICK JOHNSON
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[154] 33 U.S.C. § 1362(7).

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 MOTION FOR ACCELERATED DECISION 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 a true and correct copy of the original COMPLAINANT'S MOTION FOR ACCELERATED DECISION 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
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Dated this 3rd day of March, 2025.

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