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**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:	)	
	)	
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)	Case No.: CWA-10-2024-0154
	)	
Juneau, Alaska	)	STATE OF ALASKA’S OPPOSITION TO EPA’S MOTION FOR LEAVE TO WITHDRAW COMPLAINT WITHOUT PREJUDICE
Respondent.	)	
	)	

INTRODUCTION

The State of Alaska, Department of Transportation & Public Facilities (“DOT&PF”) hereby files its Opposition to the Motion for Leave to Withdraw Complaint Without Prejudice filed by the U.S. Environmental Protection Agency (“EPA”) on October 1, 2025.

DOT&PF agrees with EPA that this case should be disposed of, however; due to EPA’s failure to prosecute, bad faith actions, and the plain lack of legal merit in EPA’s arguments, this matter should be dispensed of with prejudice. EPA supports its request for a non-prejudicial dismissal upon an argument that there is “no evidence of excessive delay,

lack of diligence in prosecuting this action, or undue vexatiousness by the EPA.” DOT&PF disagrees with this characterization and submits to this Tribunal that EPA has intentionally caused excessive delay in this action, has displayed a stunning lack of diligence in prosecuting this action, has acted vexatiously and in bad faith, and should therefore not be allowed the opportunity to refile this action in the future or stay the case indefinitely.

ARGUMENT

A. EPA’S case against DOT&PF has lacked a legal foundation since its initiation, and new regulations won’t change that.

EPA initiated this action after the U.S. Supreme Court’s landmark decision in *Sackett v. Environmental Protection Agency* which significantly impacted jurisdiction under the Clean Water Act (CWA).¹ *Sackett* made clear that wetlands are only jurisdictional if they bear a continuous surface connection to a traditional Water of the United States (WOTUS).² Although EPA claims it cannot address jurisdiction until new regulations regarding WOTUS are finalized,³ new regulations will not change the fundamental concepts of jurisdiction as described in *Sackett*. Additionally, EPA and USACE have issued interim guidance regarding jurisdiction and its proper implementation post-*Sackett*, which continued to vindicate DOT&PF’s position by rescinding prior statements that indicated culverts and ditches were sufficient to form a surface connection.⁴ There is little reason to

¹ *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 651 (2023).

² *Id.* at 678-79.

³ Complainant’s Motion for Leave to Withdraw Complaint Without Prejudice, at 12.

⁴ See Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the *ITMO: State of Alaska DOT&PF* Case No. CWA-10-2024-0154
State of Alaska’s Opposition to EPA’s Motion for Leave to
Withdraw Complaint Without Prejudice

believe that any upcoming regulations would create a broader standard for jurisdiction than that which currently applies, and under which, EPA has essentially conceded to having no viable argument for jurisdiction.

This brings to light another example of EPA's bad faith actions during this proceeding: EPA alleges that DOT&PF violated the CWA, despite being unable to provide any explanation under the law for why the CWA applies to the highway culverts and roadside ditches at issue. *Sackett* altered the definition of WOTUS and the reach of federal jurisdiction significantly—it was clear in its wake that new regulations would be necessary. If EPA is unable to prosecute this case and assert a threshold issue in the absence of these hypothetical regulations, EPA should not have initiated this proceeding. Failing to address such a fundamental and preliminary issue as its own jurisdiction demonstrates just one example of EPA's lack of diligence and good judgment in bringing this proceeding. Because EPA initiated this action with the knowledge that federal jurisdiction was clearly limited and failed to meaningfully develop an argument that it had jurisdiction, allowing EPA to continue to cloud jurisdiction over the site by withdrawal without prejudice would be unjust.

Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act (March 12, 2025), available online at: <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

B. EPA's lack of diligence in prosecuting this action has caused undue delay and prejudice to DOT&PF.

By initiating this proceeding, EPA has an obligation to do so in good faith and to meaningfully prosecute it. Rather than responding to DOT&PF's arguments and repeated assertions that EPA lacks jurisdiction; EPA has avoided them while holding DOT&PF in suspense by continually requesting more time to file responses and replies to the parties' crossing Motions for Accelerated Decision.⁵ EPA has previously promised that additional time would not be necessary;⁶ nevertheless, it is now doubtful that EPA has ever intended to file a response to DOT&PF's pending motion.

EPA jeopardizes its own credibility and authority by initiating this action against DOT&PF without a legal claim of jurisdiction over the sites. DOT&PF faces substantial prejudice if this proceeding is allowed to conclude without finality. Without the finality of a dismissal with prejudice, EPA can continue to claim faulty jurisdiction and demand mitigation measures in-lieu of enforcement for DOT&PF's highway maintenance projects. DOT&PF cannot assume that EPA will act in accordance with the law, as is shown in this

⁵ Parties filed crossing Motions for Accelerated Decision on March 3 and since then, no progress has been made towards the resolution of this case. Rather, EPA has requested continual extensions of time for the filing of responses and replies to the crossing Motions for Accelerated Decision.

⁶ Petitioners Second Unopposed Motion for Additional Extensions to Deadlines to File Responses and Replies to Motions for Accelerated Decision, "[b]arring unforeseen circumstances, the EPA anticipates that this will be the last request for an extension to the deadline to file the EPA's response to Respondent's motion for accelerated decision."

post-*Sackett* enforcement action of highway maintenance activities, which creates uncertainty regarding DOT&PF's statewide projects.

Given that EPA has not and cannot demonstrate its jurisdiction over the roadside ditches and culverts at issue, EPA's case lacks merit. Without proper jurisdiction, there is nothing here to be decided—this is not a technicality, but a foundational mandate which EPA cannot ignore or wish away. EPA's lack of jurisdiction over these culverts and roadside ditches is dispositive.

By delaying this proceeding indefinitely without providing an explanation for its jurisdiction, EPA continues to prejudice DOT&PF by preventing Respondent from obtaining a favorable decision from this Tribunal and resolving the matter. Now, in its most recent motion, EPA seeks in the alternative for this Tribunal to stay this case pending finalization of the relevant regulations which EPA claims to be forthcoming.⁷ A decision to stay this case under these circumstances would maximize the prejudice faced by DOT&PF as there is no way of knowing how many months or years it could take for the regulations and ensuing litigation to be completed. Holding this case on pause indefinitely would increase the prejudice faced by DOT&PF on a daily basis; only to eventually resume the matter and win on the merits of the same arguments being made by DOT&PF currently, would be grossly unjust.

⁷ Complainant's Motion for Leave to Withdraw Complaint Without Prejudice, at 17-8.

Furthermore, due to the uncertainty of how long it may take for EPA to obtain the hypothetical regulations it relies on, it is likely that the statute of limitations will have run before new regulations are implemented.⁸ Keeping the resolution of this case in a state of perpetual limbo accomplishes little except creating significant uncertainty for DOT&PF's statewide maintenance and operations work, and hindering ongoing permitting efforts.

C. EPA has acted vexatiously throughout this proceeding.

Throughout this proceeding, EPA has displayed a stunning lack of judgement. In addition to initiating this case without a jurisdictional basis, then delaying its resolution indefinitely; EPA has weaponized a prior settlement agreement between the parties against DOT&PF and now seeks to circumvent this Tribunal's directive by requesting leave to withdraw the complaint without prejudice.

Throughout the present case, EPA has pointed to a 2010 Consent Decree between DOT&PF and EPA as evidence of DOT&PF's history of non-compliance. This reliance upon the prior agreement is patently against its own terms: "The parties to this Consent Decree agree that this Decree is not intended to be used in subsequent litigation to establish

⁸ Violations of Section 404 of the CWA are subject to a five-year statute of limitations (28 U.S.C. § 2642). Under federal law, when a case is dismissed without prejudice, the statute of limitations is deemed to have continued running from when the cause of action first accrued, ("if the suit is dismissed without prejudice, meaning that it can be refiled, then the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing.... In other words, a suit dismissed without prejudice is treated for statute of limitations purposes as if it had never been filed..") *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000). EPA's complaint identified dates between August and September of 2021 as the dates of violation, and thus, the Statute of Limitations will expire in less than a year from this filing's date.

either a point of law or fact.” Nonetheless, EPA weaponized the prior agreement against DOT&PF in its complaint and pre-hearing exchange—pointing to the agreement as evidence of DOT&PF’s history of non-compliance.⁹ Apparently, EPA believes that mere allegations and voluntary agreements are sufficient for establishing non-compliance. As EPA will not honor its prior commitments, DOT&PF has refused to settle this matter.

DOT&PF has no incentive to admit fault for actions it is not liable for, particularly in light of EPA’s reliance on the 2010 Consent Decree. However, EPA has now trapped DOT&PF in this proceeding by bringing meritless claims and then requesting continual extensions of time, so the matter is never resolved; and EPA never admits that it has plainly lacked jurisdiction all along. In response to the extreme delays caused by EPA, this Tribunal has previously directed EPA to finalize its positions and proceed onward with the case.¹⁰ EPA has provided a variety of excuses for needing more time: first, because of the new

⁹ Complaint at 13, “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.” This is a mischaracterization that fails to mention the fact that the prior action was settled. *See also*, Complainant’s Initial Prehearing Exchange at 42. (Using the prior action and agreement as the only example of DOT&PF’s history of prior violations.)

¹⁰ September 8, 2025, Order on Extension of Briefing Deadlines at 2. (Stating that EPA needs to finalize its litigation position sooner rather than later and that uncertainty in the Complainant’s case is not fault of the Respondent and Respondent’s prejudice should be minimized.) May 23, 2025, Order on EPA Motion for Additional Extension of Time at 2. (Noting the several prior extensions granted in the case, and EPA’s repetitive justifications for the delay).

administration;¹¹ then, because unnamed political leadership needed to be briefed for months on end;¹² and now, EPA finally admits that it cannot make an argument for jurisdiction in this case and asks this Tribunal for additional time to finalize regulations which are likely to only further vindicate DOT&PF's position in this matter. DOT&PF asserts to this Tribunal that enough accommodations have been extended to EPA in this matter; EPA brought forward a case that was without merit from the start, has failed to meaningfully pursue this case, and has accomplished nothing but causing continuing prejudice to DOT&PF and consuming this Tribunal's time.

CONCLUSION

For all the reasons described above, DOT&PF opposes EPA's pending Motion for Leave to Withdraw its Complaint Without Prejudice because this case should be disposed of with prejudice. DOT&PF also strongly opposes EPA's alternative request to stay this litigation pending final action on the proposed rule. Such a stay would continue for an indefinite amount of time, months to years, only for us to eventually reconvene and determine on the merits that EPA has lacked jurisdiction all along. DOT&PF has faced significant prejudice as a result of this action, DOT&PF should neither be held in limbo

¹¹ May 22, 2025, Complainant's Motion for Additional Extensions to the Deadlines to File Responses and Replies to Motions for Accelerated Decision at 1-2. (Requesting an additional 90 days because of the new presidential administration).

¹² August 27, 2025, Complainant's motion for Additional Extensions to Deadline to File Responses and Replies to Motions for Accelerated Decision at 5. (Requesting 60 additional days to brief new administration officials and to finalize and file EPA's response to DOT&PF's Motion).

indefinitely awaiting a hypothetical regulation, nor forced to await future litigation from EPA on this matter. If this matter is not dismissed with prejudice, DOT&PF asks this Tribunal to set updated deadlines for responses and replies to the Parties' crossing Motions for Accelerated Decision.

DATED: October 16, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies that the original **State of Alaska's Opposition to EPA'S Motion for Leave to Withdraw Complaint Without Prejudice** 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 **State of Alaska's Opposition to EPA'S Motion for Leave to Withdraw Complaint Without Prejudice** was served on Complainant United States Environmental Protection Agency via email to:

Patrick Johnson
johnson.patrick@epa.gov

DATED: October 16, 2025.

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