BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | |
|---|---|
| In the Matter of:<br><br>JACKSON & SON DISTRIBUTORS, INC., dba JACKSON AND SON OIL,<br><br>Seaside, Oregon<br><br>Respondent. | DOCKET NO. CWA-10-2025-0023<br><br>**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 Jackson & Son Distributors, Inc., with an assumed business name of Jackson and Son Oil ("Respondent") is subject to the 40 C.F.R. Part 112 requirements that the EPA issued pursuant to Clean Water Act Section 311(j), 33 U.S.C. § 1321(j), because it meets the following requirements of 40 C.F.R. § 112.1(b):

1) Respondent is an owner and/or an operator of an onshore facility that is non-transportation-related and is "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products" and
2) has, subject to the limits of 40 C.F.R. § 112.1(d), oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, and
3) due to its location, could reasonably be expected to discharge oil in quantities that may be harmful,
4) into or upon the navigable waters of the United States or adjoining shorelines.

The EPA further moves for an accelerated decision that Respondent violated the requirement in 40 C.F.R. § 112.3 to develop and implement a Spill, Prevention, Control and Countermeasure Plan.

In support of this Motion, the EPA relies on applicable procedural rules in the Part 22 Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion and its attachments. Prior to filing this Motion, the undersigned contacted Respondent's counsel on April 1, 2026, and twice on April 6, 2026, to determine whether Respondent would object to granting the relief sought in this motion. Respondent's counsel did not respond.

Dated this 6th day of April 2026.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

Ashley Bruner Digitally signed by Ashley Bruner Date: 2026.04.06 17:48:40 -07'00'

DATE

Ashley Bruner
Assistant Regional Counsel
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Bruner.Ashley@epa.gov

Christine Allen
Attorney-Advisor
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Allen.Christine.J@epa.gov

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | |
|---|---|
| In the Matter of:<br><br>JACKSON & SON DISTRIBUTORS, INC., dba JACKSON AND SON OIL,<br><br>Seaside, Oregon<br><br>Respondent. | DOCKET NO. CWA-10-2025-0023<br><br>**COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ACCELERATED DECISION** |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Administrative Cases**

**Federal Statutes**



**Regulations**

**Federal Register**

**Executive Orders**

## 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 the liability elements alleged in the Second Amended Complaint against Jackson & Son Distributors, Inc., with an assumed business name of Jackson and Son Oil ("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.

CWA Section 311(j), 33 U.S.C. § 1321(j), provides for the regulation of onshore facilities to prevent and contain discharges of oil. Pursuant to CWA Section 311(j)(1)(C), the EPA promulgated the Oil Pollution Prevention regulations in 40 C.F.R. Part 112. These regulations set forth procedures and other requirements to prevent the discharge of oil from non-transportation-related onshore facilities into the navigable waters of the United States or adjoining shorelines, including requirements for preparation and implementation of a Spill Prevention Control and Countermeasure ("SPCC") Plan.[1]

In its Second Amended Complaint, the EPA alleges that the Respondent is subject to the 40 C.F.R. Part 112 requirements that the EPA issued pursuant to CWA Section 311(j), 33 U.S.C.

[1] 40 C.F.R. § 112.1(a)(1); *id.* § 112.3.

§ 1321(j). The EPA further alleges that Respondent failed to develop and implement an SPCC Plan before December of 2024.

While Respondent's Answer substantially denies the majority of the above allegations, the EPA's Initial Prehearing Exchange sought Respondent's stipulation to certain facts to further judicial efficiency and to focus resources on genuinely disputed issues.[2] Respondent's Prehearing Exchange and Supplemental Prehearing Exchange failed to acknowledge the EPA's request.[3] Respondent's Prehearing Exchange and Supplemental Prehearing Exchange also failed to provide any substantive information disputing liability or the fact that it had not developed an SPCC Plan prior to December of 2024.

This Motion focuses on all elements of liability. The argument below will establish that the Respondent is subject to the 40 C.F.R. Part 112 regulations that the EPA issued pursuant to CWA Section 311(j), 33 U.S.C. § 1321(j), because it meets the requirements of 40 C.F.R. § 112.1(b):

1) Respondent is an owner and/or an operator of an onshore facility that is non-transportation-related and is "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products" and
2) has, subject to the limits of 40 C.F.R. § 112.1(d), oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, and
3) due to its location, could reasonably be expected to discharge oil in quantities that may be harmful,
4) into or upon the navigable waters of the United States or adjoining shorelines.

This Motion also argues that Respondent violated 40 C.F.R. § 112.3's requirement to develop and implement an SPCC Plan.

[2] *See, e.g.,* Complainant's Initial Prehearing Exchange at 13, 15, 18, 32, 34.
[3] *See generally* Respondent's Prehearing Exchange.

This Court should enter an accelerated decision finding that Respondent is subject to the 40 C.F.R. Part 112 requirements and failed to develop and implement an SPCC Plan.

## STATUTORY AND REGULATORY BACKGROUND

CWA Section 311(j) provides for the regulation of onshore facilities to prevent and contain discharges of oil.[4] CWA Section 311(j)(l)(C) provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from onshore facilities ... and to contain such discharges . . .."[5]

Initially by Executive Order 11,548 (July 20, 1970),[6] and most recently by Section 2(b)(l) of Executive Order 12,777 (Oct. 18, 1991),[7] the President delegated to the EPA the CWA Section 311(j)(1)(C) authority to issue the regulations referenced in the preceding paragraph for non-transportation-related onshore facilities.

Pursuant to these delegated statutory authorities and pursuant to its authorities under the CWA,[8] to implement CWA Section 311(j), the EPA promulgated the Oil Pollution Prevention regulations in 40 C.F.R. Part 112, which set forth "procedures, methods, equipment, and other requirements to prevent the discharge of oil from non-transportation-related onshore . . . facilities into or upon the navigable waters of the United States or adjoining shorelines," including requirements for preparation and implementation of an SPCC Plan.[9] CWA Section 311[10] uses the phrase "navigable waters of the United States," which the EPA and the courts construe to have

[4] 33 U.S.C. § 1321(j).
[5] *Id.* § 1321(j)(l)(C).
[6] 35 Fed. Reg. 11,677 (July 22, 1970).
[7] 56 Fed. Reg. 54,757 (Oct. 22, 1991).
[8] CWA, 33 U.S.C. § 1251 *et seq.*
[9] 40 C.F.R. § 112.1(a)(1).
[10] 33 U.S.C. § 1321.

the same meaning as the phrase "navigable waters," used elsewhere in CWA Section 311 and in other sections of the CWA.[11]

The requirements of 40 C.F.R. Part 112 apply to (1) owners and operators of onshore facilities that are non-transportation-related and are "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products" and (2) that have oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, (3) which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful (4) into or upon the navigable waters of the United States or adjoining shorelines.[12]

The requirements of 40 C.F.R. Part 112 do not apply if the aggregate aboveground storage capacity of the facility is 1,320 U.S. gallons or less of oil.[13] The aggregate aboveground storage capacity excludes containers with a capacity of less than 55 U.S. gallons[14] and the capacity of a container that is "permanently closed" as defined in 40 C.F.R. § 112.2.[15]

**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.

[11] *See infra* discussion at note 168.
[12] 40 C.F.R. § 112.1(b).
[13] *Id.* § 112.1(d)(2)(ii).
[14] *Id.*
[15] *Id.* § 112.1(b).

This standard is analogous to the summary judgment standard established under Rule 56 of the Federal Rules of Civil Procedure.[16]

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.[17] The evidentiary basis for the moving party's motion must be viewed in the light most favorable to the opposing party.[18]

To satisfy this burden, the moving party must present evidence "such that no reasonable decisionmaker could find for the nonmoving party."[19] 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.[20] 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.[21]

## FACTUAL BACKGROUND

Since 1984, Respondent has owned and/or operated a petroleum product distribution facility located at 84721 Happel Lane in Seaside, Oregon ("Facility").[22] The Facility has an

[16] *See In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999).
[17] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[18] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[19] *See Clarksburg Casket Co*, 8 E.A.D. at 502; *see also Anderson*, 477 U.S. at 252.
[20] *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).
[21] *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).
[22] CX 01 (SPCC Inspection) at 2.

aboveground oil storage capacity that exceeds 100,000 gallons.[23] The EPA inspected the Facility on September 21, 2021,[24] to evaluate compliance with the 40 C.F.R. Part 112 requirements ("Inspection"). During this Inspection, the EPA determined that the Facility did not have an SPCC Plan,[25] among other violations that increase the risk of an oil spill from the Facility, including the failure to have secondary containment for two 10,000-gallon aboveground storage tanks,[26] secondary containment in fuel transfer areas that was undersized by over 1,000 gallons,[27] and the failure to conduct integrity testing of its aboveground storage tanks,[28] among others.[29] Respondent first developed an SPCC Plan for the Facility in December of 2024.[30] The Facility is located approximately 1,700 feet from Circle Creek,[31] which is perennial.[32]

## ARGUMENT

### I. 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 is subject to the 40 C.F.R. Part 112 requirements because it meets the following requirements of 40 C.F.R. § 112.1(b):

---

[23] *Id.*
[24] Respondent admits that the EPA and/or its representatives performed an inspection on or about September 21, 2021. Respondent's Answer to Second Amended Complaint, Affirmative Defenses, and Request for Hearing, ¶ 3.6 (hereinafter "Answer to Second Amended Complaint").
[25] CX 01 (SPCC Inspection) at 3.
[26] *Id.* at 23.
[27] SPCC Plans must ensure secondary containment for the largest compartment of a tank truck involved in fuel transfer at loading/unloading racks. 40 C.F.R. § 112.7(h)(1). At the time of the Inspection, the Facility's loading/unloading racks drained to a single sump with a capacity of 100 gallons. CX 01 (SPCC Inspection) at 24. The Facility's December 2024 SPCC Plan states that the maximum capacity of any single compartment of a tank truck loaded or unloaded at the Facility is 1,400 gallons. CX 23 (December 2024 SPCC Plan) at 11. The sump was therefore undersized by 1,300 gallons.
[28] *Id.* at 24; CX 04 – 10 (Powers Engineering Inspection Reports). Each report notes that the prior inspection date for the respective tank is "unknown" or "N/A".
[29] *See e.g.*, CX 01 (SPCC Inspection) at 23-24; Complainant's Prehearing Exchange at 35-39; Complainant's Corrected Rebuttal Prehearing Exchange at 15, 21-22.
[30] CX 23 (December 2024 SPCC Plan) at 5 (dated December 16, 2024).
[31] CX 12 (Worst-Case Spill Report) at 49 (listing distance of north pathway from the Facility to wetlands via the lumberyard as 768 feet), 52 (listing length of wetlands from the lumberyard to Circle Creek as 925 feet). 768 plus 925 is 1,693 feet, or approximately 1,700 feet.
[32] CX 11 (Jurisdictional Analysis Report) at 22.

1) Respondent is an owner and/or an operator of an onshore facility that is non-transportation-related and is "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products" and
2) has, subject to the limits of 40 C.F.R. § 112.1(d), oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, and
3) due to its location, could reasonably be expected to discharge oil in quantities that may be harmful,
4) into or upon the navigable waters of the United States or adjoining shorelines.

There is also no question of material fact that Respondent violated 40 C.F.R. § 112.3's requirement to develop and implement an SPCC Plan prior to December 16, 2024. These are issues of law suitable for accelerated decision.

The EPA's argument below relies on the applicable regulations, caselaw, and exhibits that either the EPA or the Respondent attached to their prehearing exchanges, including reports that the EPA included as exhibits to its Initial Prehearing Exchange that contain the findings of Ms. Bujak[33] and Dr. Marshalonis[34] related to whether there is a reasonable expectation of a discharge from the Facility and whether Circle Creek and downstream waters are navigable waters pursuant to the CWA. The EPA has also included declarations from Ms. Bujak and Mr. Franklin, who is the EPA Region 10[35] Oil Program Coordinator and who conducted the 2021 Inspection at the Facility.[36] All three EPA employees are briefly introduced below.

Mr. Franklin has over 30 years of experience with the CWA Section 311 Program, including the SPCC Program.[37] Mr. Franklin conducted the 2021 Inspection of the Facility that is

[33] CX 11 (Jurisdictional Analysis Report).
[34] CX 12 (Worst-Case Spill Report).
[35] The EPA has 10 regional offices. EPA, *Regional and Geographic Offices*, https://www.epa.gov/aboutepa/regional-and-geographic-offices (last updated Mar. 2, 2026). The EPA Region 10 oversees programs in Alaska, Washington, Oregon, and Idaho. *Id.*
[36] *See* Franklin Declaration and Bujak Declaration, submitted as Attachment 1 and 2, respectively.
[37] CX 13 (Franklin Résumé); Franklin Declaration, ¶ 1.

at issue here and prepared an inspection report[38] that the EPA transmitted to the Respondent.[39] In total, Mr. Franklin has conducted approximately 350 CWA Section 311 inspections.[40] Mr. Franklin also works nationally to develop and implement oil regulatory policy and conducts trainings regarding hazardous materials and oil spill response and prevention.[41]

Ms. Bujak is a Senior Biologist for EPA Region 10.[42] Ms. Bujak evaluated the flow paths that oil could take from the Facility and determined that Circle Creek and its downstream waters are navigable waters pursuant to the CWA.[43] As a Professional Geographic Information Sciences ("GIS") Specialist at the EPA, Ms. Bujak has experience collecting, analyzing, and visualizing spatial data using specialized software to create maps and inform decisions in the environmental field.[44] She has also produced reports involving overhead imagery interpretation and GIS analysis use in litigation.[45] Ms. Bujak is qualified to perform and explain flow path analysis through a combination of advanced certification, specialized training, and mentorship.[46] She holds Professional Certifications in GIS and Geospatial Data Analytics & Visualization (GDAV), which provide her with a firm grasp of remote sensing, spatial statistics, and automated geoprocessing.[47] These credentials ensure her mapping and data analysis are technically sound and reproducible.

Ms. Bujak is also the most senior EPA Region 10 scientist that analyzes whether a waterbody qualifies as a "navigable water" pursuant to the CWA.[48] Ms. Bujak has conducted,

---

[38] CX 01 (SPCC Inspection).
[39] CX 02 (Letter Transmitting Inspection Report).
[40] Franklin Declaration, ¶ 2.
[41] *Id.*
[42] CX 14 (Bujak Résumé); Bujak Declaration, ¶ 4.
[43] CX 11 (Jurisdictional Analysis Report) at 3; Bujak Declaration, ¶ 7.
[44] Bujak Declaration, ¶ 6.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* ¶ 4.

assisted on, or reviewed hundreds of CWA jurisdictional analyses for a variety of EPA Region 10 offices, including the Enforcement and Compliance Assurance Division, as well as other EPA Regions and various U.S. Army Corps of Engineers ("Corps") Districts.[49] Ms. Bujak's résumé can be found at CX 14.

Dr. Marshalonis is the manager of the Surface Water Enforcement Section in the EPA Region 10 Enforcement and Compliance Assurance Division.[50] Dr. Marshalonis evaluated the flow paths that oil could take from the Facility, and modeled a worst-case discharge scenario from the Facility using the Hydrocarbon Spill Screening Model (HSSM).[51] Dr. Marshalonis, who has a Doctor of Philosophy degree in Biology from the University of South Carolina, is a recognized national expert in hydrologic modeling.[52] He has written and developed, reviewed, and interpreted environmental models and their results for over 25 years.[53] Since 2009, Dr. Marshalonis has written or contributed to expert witness testimony reports for over 48 enforcement matters.[54]

### A. Respondent is the Owner and/or Operator of an Onshore Facility that is Non-Transportation Related

Relevant here, the 40 C.F.R. Part 112 regulations apply to owners or operators of non-transportation-related onshore facilities.[55] Both 33 U.S.C. § 1321(a) and the 40 C.F.R. Part 112 regulations define "owner or operator" to include "any person owning or operating an onshore facility."[56] Both 33 U.S.C. § 1321(a) and the 40 C.F.R. Part 112 regulations define "person" to

[49] *Id.*
[50] CX 12 (Worst-Case Spill Report) at 11-12; CX 15 (Marshalonis Résumé).
[51] CX 12 (Worst-Case Spill Report) at 12.
[52] CX 12 (Worst-Case Spill Report) at 11-12; CX 15 (Marshalonis Résumé).
[53] CX 12 (Worst-Case Spill Report) at 11.
[54] *Id.* at 12.
[55] 40 C.F.R. § 112.1(b).
[56] *Id.* § 112.2.

"include[] any individual, firm, corporation, association, or partnership."[57] In paragraph 3.1 of the Second Amended Complaint, the EPA alleges that "Respondent is a domestic business corporation conducting business in the state of Oregon, and is a 'person' under CWA Section 311(a)(7), 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2." Respondent admits the allegations in this paragraph[58] and therefore admits that it is a "person" under CWA Section 311(a)(7),[59] and 40 C.F.R. § 112.2.

Both 33 U.S.C. § 1321(a) and the regulations define "onshore facility" to mean "any facility of any kind located in, on, or under, any land within the United States other than submerged lands."[60] The regulations define "facility" to include "any …fixed[] onshore …building, parcel, lease structure, installation, equipment, pipe, or pipeline (other than a vessel or a public vessel) used in …oil storage, … oil transfer, [or] oil distribution."[61]

"Non-transportation-related," as applied to an onshore facility, is defined to include "industrial, commercial, agricultural, or public facilities which use and store oil"; "oil storage facilities including all equipment and appurtenances related thereto"; and "[l]oading racks, transfer hoses, loading arms and other equipment which are appurtenant to a non-transportation-related facility."[62] In addition, the requirements of 40 C.F.R. Part 112 apply to owners or operators of non-transportation-related facilities that are "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products."[63] Both 33 U.S.C. § 1321(a) and the regulations define "oil" to mean oil of any kind or

[57] *Id.*
[58] Answer to Second Amended Complaint, *supra* note 24, ¶ 3.1.
[59] 33 U.S.C. § 1321(a)(7).
[60] *Id.*
[61] *Id.*
[62] 40 C.F.R. Pt. 112, App. A
[63] 40 C.F.R. § 112.1(b).

in any form, including, but not limited to, petroleum, fuel oil, sludge, synthetic oils, oil refuse, and oil mixed with wastes other than dredged spoil.[64]

In paragraph 3.2 of the Second Amended Complaint, the EPA alleges that since 1984, Respondent has owned or operated a petroleum product distribution facility located at 84721 Happel Lane in Seaside, Oregon. The EPA further alleges in paragraph 3.7 of the Second Amended Complaint that Respondent, *inter alia*, stores oil, and in paragraphs 3.8 and 3.9 of the Second Amended Complaint, Complainant lists the specific gasoline and diesel fuel aboveground storage tanks at the Facility. In response to paragraph 3.2 of the Second Amended Complaint, Respondent admits only that it "*owns* the property located at 84721 Happel Lane, Seaside, Oregon," and denies that it operates the Facility and that it is a petroleum product distributor.[65] Despite Respondent's limited admission in response to paragraph 3.2 of the Second Amended Complaint, Respondent admits in paragraph 3.8 of its Answer to the Second Amended Complaint that it "*operates* a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil." Respondent does not define the term "facility" in its Answer to the Second Amended Complaint. To the extent that Respondent's admissions could be read to mean that Respondent operates a facility but not the Facility at 84721 Happel Lane in Seaside, Oregon, Respondent also "denies that the entirety of its operations at 84721 Happel Lane, Seaside, Oregon are 'non-transportation-related' within the meaning of 40 CFR 112.2, 40 CRR (sic) Pt. 112, App. A."[66] By denying that *all* of its operations on Happel Lane are non-transportation-related, Respondent is conceding that it does indeed have some operations at 84721 Happel

[64] *Id.* § 112.2.
[65] Answer to Second Amended Complaint *supra* note 24, ¶ 3.2.
[66] *Id.* ¶ 3.4.

Lane. In addition, Respondent has not indicated in its Prehearing Exchange, Supplemental Prehearing Exchange, or otherwise that it operates at a different facility.

In paragraph 3.4 of the Second Amended Complaint, Complainant alleges that the Facility is "non-transportation-related" within the meaning 40 C.F.R. § 112.2, 40 C.F.R. Pt. 112, App. A. As stated above, in response, Respondent "denies that the entirety of its operations" are "non-transportation-related" within the meaning of 40 C.F.R. § 112.2, 40 C.F.R. Pt. 112, App. A.[67] Respondent is therefore admitting that some of its operations are non-transportation-related within the meaning of 40 C.F.R. § 112.2, 40 C.F.R. Pt. 112, App. A, which is all that the regulations require.

The EPA's Initial Prehearing Exchange sought Respondent's stipulation that Respondent owns and operates a facility that stores and distributes oil located at 84721 Happel Lane in Seaside, Oregon.[68] The EPA's Initial Prehearing Exchange also sought Respondent's stipulation that it is a petroleum product distributor that stores oil, including diesel and gasoline, at the Facility.[69] Respondent failed to substantively respond to either request in its Prehearing Exchange or Supplemental Prehearing Exchange.[70]

The combination of the admissions in Respondent's Answer, however, is sufficient for establishing that Respondent owns and/or operates an onshore facility that is non-transportation-related because Respondent has admitted that it is a person, and that it owns and/or operates property that stores oil at 84721 Happel Lane, Seaside, Oregon. Indeed, in *In re Consumers Recycling, Inc.*, the court found that there was "no question" that the respondent in that case was the owner or operator of an onshore facility that is non-transportation-related based on a similar

[67] *Id.* ¶ 3.4.
[68] *See* Complainant's Initial Prehearing Exchange at 13.
[69] *See id.* at 15.
[70] *See generally* Respondent's Prehearing Exchange and Supplemental Prehearing Exchange.

admission.[71] Additionally, Respondent's lack of substantive engagement on this issue within its Prehearing Exchange and Supplemental Prehearing Exchange illustrates that there is no question of material fact that Respondent owns and/or operates an onshore facility that stores oil and is therefore non-transportation related. The EPA is entitled to judgment as a matter of law on this element of Respondent's liability.

To the extent Respondent's admissions are insufficient to establish this element, the EPA has also provided numerous exhibits to its Initial Prehearing Exchange that establish this element. For example, the EPA included filings that Respondent has made with the Oregon Secretary of State, which can be found at CX 18. Respondent submitted an amended annual report on June 23, 2025, that was signed by Casey Jackson who is the President and Registered Agent for Jackson & Son Distributors, Inc.[72] This report indicates that Respondent, Jackson & Son Distributors, Inc., is in the business of "fuel distribution" with a "primary place of business" at 84721 Happel Lane in Seaside, Oregon, 97138.[73] Similarly, the most recent assumed business name filing for Jackson and Son Oil indicates that Respondent engages in "petroleum wholesale and distribution" with a "primary place of business" at 84721 Happel Lane in Seaside, Oregon, 97138.[74] The EPA also included the Facility's SPCC Plan, dated December 16, 2024, as an exhibit to its Initial Prehearing Exchange, which states that "[f]acility operations are classified under Standard Industrial Classification (SIC) code 5171 – Petroleum Bulk Stations and Terminals," with bulk fuel available Monday through Friday and fueling operations available 24

[71] 2002 EPA ALJ LEXIS 18, 44 (finding Respondent's admission that it "had above ground storage tanks (ASTs) with a storage capacity of greater than 660 gallons of oil and a total above ground storage capacity of more than 1,320 gallons of oil" sufficient to establish that the Respondent in that case was the owner or operator of an onshore facility that is non-transportation-related).
[72] CX 18 at 7-8 (Oregon Secretary of State Listings).
[73] *Id.*
[74] *Id.* at 30.

hours a day, 7 days a week.[75] This SPCC Plan also states that Respondent "is located at 84721 Happel Lane in Seaside, Oregon, west of U.S. 101."[76]

Next, the Inspection Report submitted as CX 01 lists Casey Jackson as "Owner and Manager" of the Jackson & Son facility, located at 84721 Happel Lane in Seaside, Oregon.[77] The Facility operator's name and address are denoted as "same," indicating that they are not different from the owner's name and address.[78] The Inspection Report states that the Facility has an oil terminal and a cardlock,[79] meaning that it allows businesses to obtain a card and then provides automated access to the fueling station by using the card.[80] The Inspection Report also states that the Facility stores over 100,000 gallons of oil, including diesel, gasoline, gear oil, lube oil, and heating oil.[81] The Inspection Report also includes pictures of the Facility's oil storage tanks.[82]

As additional evidence that the Facility stores oil, the Facility's December 2024 SPCC Plan, which can be found at CX 23, contains an inventory of oil stored at the Facility, Table 2 and Table 3 from which are reproduced as Figure 1 below:[83]

[75] CX 23 (December 2024 SPCC Plan) at 7; *see In re Spring Crest Fuel Co.*, 2000 EPA ALJ LEXIS 55, at *2-3 (considering Respondent's statements about its operations in its SPCC Plan when determining that Respondent is the owner or operator of a non-transportation-related, onshore facility, which is involved in the gathering, storing, transferring, distributing or consuming of oil or oil products).
[76] CX 23 (December 2024 SPCC Plan) at 7.
[77] CX 01 (SPCC Inspection) at 2.
[78] *Id.*
[79] *Id.*
[80] *See Cardlock Fueling Stations and EPCRA 311/312*, EPA, https://www.epa.gov/epcra/cardlock-fueling-stations-and-epcra-311-312 (last updated July 15, 2025).
[81] CX 01 (SPCC Inspection) at 2.
[82] *See, e.g.*, CX 01 (SPCC Inspection) at 33-39, 43-49.
[83] CX 23 (December 2024 SPCC Plan) at 8.

*Figure 1 - December 2024 SPCC Plan, Table 2 and 3*

**Table 2.** Petroleum-based AST product inventory.

| ID | Contents | Capacity (gal) | Location | Tank/Container Type |
|---|---|---|---|---|
| **Bulk Fuel Facility** | | | | |
| 1 | Highway Diesel | 20,000 | Bulk Tank Area | Vertical Steel AST with concrete dike containment |
| 2 | Off-Road Diesel | 20,000 | Bulk Tank Area | Vertical Steel AST with concrete dike containment |
| 3 | Super Gasoline | 20,000 | Bulk Tank Area | Vertical Steel AST with concrete dike containment |
| 4 | Gasoline | 20,000 | Bulk Tank Area | Vertical Steel AST with concrete dike containment |
| **Retail Cardlock Facility** | | | | |
| 5 | Super Gasoline | 2,000 | Retail Cardlock | Single-walled Steel AST with steel dike containment |
| 6 | Diesel | 2,500 | Retail Cardlock | Single-walled Steel AST with concrete dike containment |
| 7 | Gasoline | 3,000 | Retail Cardlock | Double-walled Steel AST |
| 8 | Diesel | 15,000 | Retail Cardlock | Double-walled Steel AST* |

*15,000-gallon double-walled tank has two compartments – 9,000 gallons and 6,000 gallons.

**Table 3.** Petroleum-based container storage product inventory.

| Location^ | Contents | Container | Capacity (gal) | Approximate Total Stored (gal)* |
|---|---|---|---|---|
| **Warehouse (Shop)** | DEF | Poly | 275 | 1000 |
| **Warehouse (Shop)** | DEF | Poly | 2.5 | 200 |
| **Warehouse (Shop)** | DEF | Poly Drum | 55 | 500 |
| **Warehouse (Shop)** | Hydraulic Oil 46 | Poly | 275 | 500 |
| **Warehouse (Shop)** | Hydraulic Oil 46 | Plastic Bucket | 5 | 100 |
| **Warehouse (Shop)** | Hydraulic Oil 46 | Steel Drum | 55 | 100 |
| **Warehouse (Shop)** | Diesel Engine Oil (SAE15W-40) | Poly | 275 | 500 |
| **Warehouse (Shop)** | 15/40 | Steel Drum | 55 | 200 |
| **Warehouse (Shop)** | 15/40 | Plastic Bucket | 5 | 60 |
| **Warehouse (Shop)** | Gear Oil | Plastic Bucket | 5 | 25 |
| **Warehouse (Shop)** | Bar Oil | Poly Tank | 275 | 275 |
| **Warehouse (Shop)** | Bar Oil | Steel Drum | 55 | 55 |
| **Warehouse (Shop)** | Bar Oil | Plastic Bucket | 5 | 75 |

^Active containmnet is deployed in the Warehouse.
*Total quantities may vary.

Taken together, the EPA's exhibits easily establish that Respondent is the owner and/or operator of a non-transportation-related onshore facility located at 84721 Happel Lane in Seaside, Oregon. The EPA has met its burden that this element cannot be genuinely disputed through citations to exhibits.[84] Respondent has not presented any evidence in its Prehearing Exchange to the contrary. The "mere allegation of a factual dispute" is insufficient to defeat a motion for accelerated decision.[85] As a result, the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

[84] *In re Polo Dev., Inc*., 2015 EPA ALJ LEXIS 4, at *14 (quoting Fed. R. Civ. P. 56(c)(1)).
[85] *In re Mayes*, 2003 EPA ALJ LEXIS 41, at *8; *see also In re Troy Chem. Corp*., 1999 EPA ALJ LEXIS 71, at *9 (stating that unsupported assertions are insufficient to create issues of material fact that would preclude summary judgment) (citing *SEC v. Bonastia*, 614 F.2d 908, 914 (3rd Cir. 1980)).

### B. Respondent's Aboveground Storage Capacity is Greater than 1,320 U.S. Gallons of Oil.

The requirements of 40 C.F.R. Part 112 apply to owners or operators of non-transportation-related onshore facilities that "have oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2.[86] The requirements of 40 C.F.R. Part 112 do not apply if the aggregate aboveground storage capacity of the facility is 1,320 U.S. gallons or less of oil.[87] The aggregate aboveground storage capacity excludes containers with a capacity of less than 55 U.S. gallons and the capacity of a container that is "permanently closed" as defined in 40 C.F.R. § 112.2.[88] As stated above, the regulations define "oil" to mean oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, synthetic oils, oil refuse, and oil mixed with wastes other than dredged spoil.[89]

The EPA alleges in paragraph 3.8 of the Second Amended Complaint that at the time of the Inspection, and at all times relevant to the Second Amended Complaint, the Facility had an approximate aboveground storage capacity of 107,500 gallons of oil. The EPA further alleges in paragraph 3.8 of the Second Amended Complaint that at the time of the Inspection through November 30, 2024, the Facility had two 10,000-gallon tanks that lacked secondary containment. The EPA further alleges in paragraph 3.9 of the Second Amended Complaint that on April 5, 2023, Powers Engineering and Inspection, Inc. conducted integrity testing of seven aboveground storage tanks that were present at the time of the Inspection: a 2,500-gallon diesel tank; a 3,000-

[86] 40 C.F.R. § 112.1(b).
[87] *Id.* § 112.1(d)(2)(ii).
[88] *Id.* In order for an aboveground storage tank to be permanently closed, all liquid and sludge must be removed from the container, all connecting lines and pipes must be disconnected, all valves must be closed and locked, and signs must be posted stating that the aboveground storage tank is closed, together with the closure date. 40 C.F.R. § 112.2.
[89] *Id.* § 112.2.

gallon gasoline tank; a 2,000-gallon gasoline tank; two 20,000-gallon gasoline tanks; and two 20,000-gallon diesel tanks. The total storage capacity of these tanks plus the two 10,000-gallon diesel tanks is 107,500 gallons. Respondent denied these allegations except to admit that Powers Engineering and Inspection, Inc. "conducted certain work at Respondent's property on or about April 5, 2023"[90] and to admit that Respondent "operates a facility with an aggregate above-ground oil storage capacity greater than 1,320 gallons of oil."[91]

Respondent's admission in its Answer that it operates a facility with an aggregate aboveground oil storage capacity greater than 1,320 gallons of oil is sufficient to establish this element of liability. The EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

To the extent Respondent's admissions are insufficient to establish this element, the EPA has also provided numerous exhibits to its Initial Prehearing Exchange that establish this element. The Inspection Report states that the capacity at the Facility is 107,500 gallons, including two 10,000-gallon diesel aboveground storage tanks that lacked secondary containment.[92] Just the capacity of the two 10,000-gallon aboveground storage tanks alone is sufficient for the 1,320-gallon threshold. The EPA has, however, provided numerous other documents that confirm that the Facility's total aboveground storage tank capacity in containers greater than 55 gallons is over 100,000 gallons. While a list of aboveground storage tanks was not available at the time of the Inspection,[93] the EPA included reports of integrity testing that Powers Engineering and Inspection, Inc. conducted at the Facility on April 5, 2023.[94] Powers

[90] Answer to Second Amended Complaint, *supra* note 24, ¶ 3.9.
[91] *Id.* ¶ 3.8.
[92] CX 01 (SPCC Inspection) at 2, 33. The fact that these aboveground storage tanks stored diesel means they were not permanently closed. *Cf.* 40 C.F.R. § 112.2. *Cf.* CX 01 (SPCC Inspection) at 32 (noting where tanks were empty and out of service but had not been permanently closed pursuant to 40 C.F.R. § 112.2).
[93] CX 01 (SPCC Inspection) at 15.
[94] CX 04 through CX 10 (Powers Engineering Inspection Reports).

Engineering and Inspection, Inc. conducted integrity testing on a 2,500-gallon diesel tank[95]; a 3,000-gallon gasoline tank[96]; a 2,000-gallon gasoline tank[97]; two 20,000-gallon gasoline tanks[98]; and two 20,000-gallon diesel tanks[99]. The total storage capacity of these tanks plus the two 10,000-gallon diesel tanks is 107,500 gallons.[100] In December of 2024, Respondent replaced the two 10,000-gallon aboveground storage tanks that lacked secondary containment with a double-walled 15,000-gallon split aboveground storage tank.[101] This change is also reflected in the Facility's December 2024 SPCC Plan, the tank list for which is reproduced in Figure 1 above.[102] The tank list also matches the volumes listed in the Powers Engineering and Inspection, Inc. reports.[103]

Taken together, the EPA's exhibits easily establish that Respondent has an aggregate aboveground storage capacity of at least 1,320 U.S. gallons of oil in containers that are in-service, the capacity of which is each greater than 55 U.S. gallons. The EPA has met its burden that this element cannot be genuinely disputed through citations to exhibits.[104] Respondent has not presented any evidence in its Prehearing Exchange to the contrary. The "mere allegation of a

[95] CX 08 (Powers Engineering Inspection Report) at 2 ("The tank has a nominal capacity of 2,500 gallons. The tank is currently in Diesel service.").
[96] CX 09 (Powers Engineering Inspection Report) at 2 ("The tank has a nominal capacity of 3,000 gallons. The tank is currently in Gasoline service.").
[97] CX 10 (Powers Engineering Inspection Report) at 2 ("The tank has a nominal capacity of 2,000 gallons. The tank is currently in Gasoline service.").
[98] CX 04 (Powers Engineering Inspection Report) at 2; CX 05 (Powers Engineering Inspection Report) at 2. Both CX 04 and CX 05 note a nominal storage capacity of 20,000 gallons and gasoline service.
[99] CX 06 (Powers Engineering Inspection Report) at 2; CX 07 (Powers Engineering Inspection Report) at 2. Both CX 06 and CX 07 note a nominal storage capacity of 20,000 gallons and diesel service.
[100] *See also* Franklin Declaration, ¶¶ 7, 8 (stating that the four 20,000-gallon aboveground storage tanks that Powers Engineering and Inspection, Inc., conducted integrity testing on were also present at the time of the Inspection).
[101] CX 24 (Compliance Plan Schedule) at 1.
[102] CX 23 (December 2024 SPCC Plan) at 8.
[103] *Compare* CX 23 (December 2024 SPCC Plan) at 8, *with* page 2 of CX 04 through CX 10 (Powers Engineering Inspection Reports). Page 2 of CX 04 through CX 10 (Powers Engineering Inspection Reports) also states that the aboveground storage tank is "in service" and includes the type of fuel that the aboveground storage tank contains.
[104] *In re Polo Dev., Inc.,* 2015 EPA ALJ LEXIS 4, at *14 (quoting Fed. R. Civ. P. 56(c)(1)).

factual dispute" is insufficient to defeat a motion for accelerated decision.[105] As a result, the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

### C. The Facility could, due to its location, be reasonably expected to discharge harmful quantities of oil.

The SPCC requirements in 40 C.F.R. Part 112 apply to facilities that could, due to their location, be reasonably expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.[106] In paragraphs 3.10 and 3.11 of the Second Amended Complaint, Complainant alleges that there is a reasonable expectation that a discharge of oil from the Facility would flow north via multiple pathways to Circle Creek in quantities that may be harmful.

Respondent denies these allegations.[107] Given Respondent's lack of substantive engagement on this issue within its Prehearing Exchange and Supplemental Prehearing Exchange, however, there is no question of material fact that there is a reasonable expectation of a discharge to Circle Creek. The EPA is entitled to judgment as a matter of law on this element of Respondent's liability.

As described below it is clear that 1) Respondent's Facility could, due to its location and oil storage, be reasonably expected to discharge 2) quantities of oil that may be harmful.

#### *1. There is a Reasonable Expectation of a Discharge Based on the Facility's Location and Oil Storage.*

Pursuant to 40 C.F.R. § 112.1(d)(1)(i), determining a reasonable expectation of a discharge "must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour,

---

[105] *In re Mayes*, 2003 EPA ALJ LEXIS 41, at *8; *see also In re Troy Chem. Corp*., 1999 EPA ALJ LEXIS 71, at *9 (stating that unsupported assertions are insufficient to create issues of material fact that would preclude summary judgment) (citing *SEC v. Bonastia*, 614 F.2d 908, 914 (3rd Cir. 1980)).
[106] 40 C.F.R. § 112.1(b).
[107] Answer to Second Amended Complaint, *supra* note 24, ¶¶ 3.10, 3.11.

drainage, etc.) and must exclude consideration of manmade features such as dikes, equipment or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge as described in paragraph (b) of this section." The reasonable expectation of a discharge standard, however, is not limited to a "stark description of surrounding terrain."[108] "Oil, just like water, follows natural pathways."[109] Thus, reasonable expectation of a discharge may be determined by evaluating a variety of geographical features in addition to proximity and location, including topography, slope, water runoff patterns, and surface runoff flows.[110]

As discussed in *In re Crown Central Petroleum Corp.*, whether there is a reasonable expectation of a discharge for purposes of the SPCC Program is evaluated in the context of a worst-case spill scenario,[111] defined by the regulations as "the largest foreseeable discharge in adverse weather conditions."[112] Accordingly, the relevant worst-case discharge volume must be considered alongside weather patterns of a particular area, including rain and snowmelt because of precipitation's propensity to carry oil to navigable waters.[113] In *In re Crown Central Petroleum Corp.*, the court calculated the worst-case discharge planning volume for determining whether there is a reasonable expectation of a discharge "using the worksheets in Appendix D to this part."[114] For facilities with multiple tanks, the worst-case spill scenario pursuant to 40 C.F.R. Part 112, Appendix D, considers the "total aboveground oil storage capacity of tanks without secondary containment" plus "the capacity of the largest single aboveground oil storage tank

[108] *Pepperell Assocs. v. EPA*, 246 F.3d 15, 23 (1st Cir. 2001).
[109] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, at *107.
[110] *See In re Consumers Recycling*, 2002 EPA ALJ LEXIS 18, at *45-47 (finding no genuine issue of material fact regarding reasonable expectation of discharge when considering facility topography, surface water runoff flows, and drainage system connections)
[111] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, at *109-10.
[112] 40 C.F.R. § 112.2.
[113] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, at *108-09.
[114] *Id.* at *109-10.

within an adequate secondary containment area."[115] As a conservative alternative, the EPA considers the volume of the largest aboveground storage tank at a facility when determining whether there is a reasonable expectation of a discharge.[116]

Complainant alleges in paragraph 3.11 of the Second Amended Complaint that the Facility could discharge oil in harmful quantities based on "several factors, including the worst-case planning volume of 40,000 gallons or 20,000 gallons, 40 C.F.R. Pt. 112, App. D; the Facility and surrounding area's topography and drainage patterns; the distance between the Facility and navigable waters (approximately 1,700 feet); and the physical properties of oil infiltration and flow." Respondent denies these allegations in paragraph 3.11 of its Answer to the Second Amended Complaint. Despite Respondent's denial, Respondent did not provide any evidence in its Prehearing Exchange or Supplemental Prehearing Exchange to counter the EPA's allegations.

As to the relevant volume for the analysis, there is no question of material fact regarding Complainant's assertion that 20,000 gallons and 40,000 gallons are the relevant volumes to evaluate a worst-case discharge scenario. The EPA established this element through numerous exhibits to its Initial Prehearing Exchange as well as the declaration of Mr. Franklin.

The largest aboveground storage tank at the time of the Inspection had a capacity of 20,000 gallons of oil.[117] In fact, there were four aboveground storage tanks with a 20,000-gallon capacity at the time of the Inspection.[118] These aboveground storage tanks were still present at the Facility when Powers Engineering and Inspection, Inc. conducted integrity testing of these aboveground storage tanks on April 5, 2023.[119] These aboveground storage tanks are also listed

[115] 40 C.F.R. Part 112, App. D. A.2 (Secondary Containment – Multiple-Tank Facilities).
[116] Franklin Declaration, ¶ 3.
[117] *Id*. at ¶ 7.
[118] *Id.*
[119] CX 04 – CX 07 (Powers Engineering Inspection Reports); *see also* Franklin Declaration, ¶¶ 8-13.

as Tanks 1-4 in the Facility's December 2024 SPCC Plan, the tank list for which is reproduced in Figure 1 above.[120] Therefore, the EPA has clearly established that the capacity of the largest aboveground storage tank at the Facility is 20,000 gallons. As stated above, as a conservative estimate, the EPA uses the capacity of the largest aboveground storage tank at a facility to determine whether there is a reasonable expectation of a discharge.[121] The EPA has established that this conservative estimate is 20,000 gallons for Respondent's Facility.

Also, as stated above, in *In re Crown Central Petroleum Corp.*, the court calculated the worst-case discharge planning volume for determining whether there is a reasonable expectation of a discharge "using the worksheets in Appendix D to this part."[122] For facilities with multiple tanks, the worst-case spill scenario considers the "total aboveground oil storage capacity of tanks without secondary containment" plus "the capacity of the largest single aboveground oil storage tank within an adequate secondary containment area," defined as secondary containment "sufficiently large to contain the capacity of the aboveground storage tank plus sufficient freeboard to allow for precipitation."[123]

Using Appendix D, the relevant volume at the time of the Inspection through November 30, 2024, was 40,000 gallons. At the time of the Inspection, two 10,000-gallon aboveground storage tanks lacked secondary containment.[124] These aboveground storage tanks did not have adequate secondary containment because they were located on unlined vegetated soil that was nearly at grade with the adjacent parking lot.[125] The total capacity of aboveground storage tanks without secondary containment was therefore 20,000 gallons. Next, Appendix D requires

[120] CX 23 (December 2024 SPCC Plan) at 8.
[121] Franklin Declaration, ¶ 3
[122] *See In re Crown Cent. Petroleum*, 2002 EPA ALJ LEXIS 1, at *109-10.
[123] 40 C.F.R. Part 112, App. D. A.2 (Secondary Containment – Multiple-Tank Facilities), A.1 (for definition of adequate secondary containment); *see also* 40 C.F.R. § 112.8(c)(2).
[124] CX 01 (SPCC Inspection) at 23, 33-37; Franklin Declaration, ¶ 6.
[125] Franklin Declaration, ¶ 6.

consideration of the largest aboveground storage tank within secondary containment. As discussed above, the largest aboveground storage tanks at the Facility are four 20,000-gallon aboveground storage tanks.[126] These aboveground storage tanks are located within secondary containment.[127] Thus, at the time of the Inspection, the relevant volume was 40,000 gallons.

This volume remained relevant through November 30, 2024, when the Facility's documents show that it replaced the two 10,000-gallon single-walled aboveground storage tanks with a double-walled aboveground storage tank.[128] The relevant volume after November 30, 2024, is therefore 20,000 gallons.

Using either 20,000 gallons or 40,000 gallons as the relevant volume, there is a reasonable expectation of a discharge to Circle Creek. As alleged in paragraph 3.10 and 3.11 of the Second Amended Complaint, based on geographical features, including "topography and drainage patterns," distance, and the physical properties of oil infiltration and flow, there is a reasonable expectation that a worst-case discharge would convey oil from the Facility to the north to Circle Creek. Respondent generally denies these allegations in paragraphs 3.10 and 3.11 of its Answer.

Despite these general denials, Respondent did not provide any evidence in its Prehearing Exchange or Supplemental Prehearing Exchange on this point and there is no genuine issue of material fact as to this element. To the contrary, Respondent's documents state that a stormwater discharge from the Facility would reach Circle Creek. The Facility has a CWA permit for stormwater discharges from the Oregon Department of Environmental Quality.[129] Pursuant to this permit, the Facility developed a Stormwater Pollution Control Plan, which states that

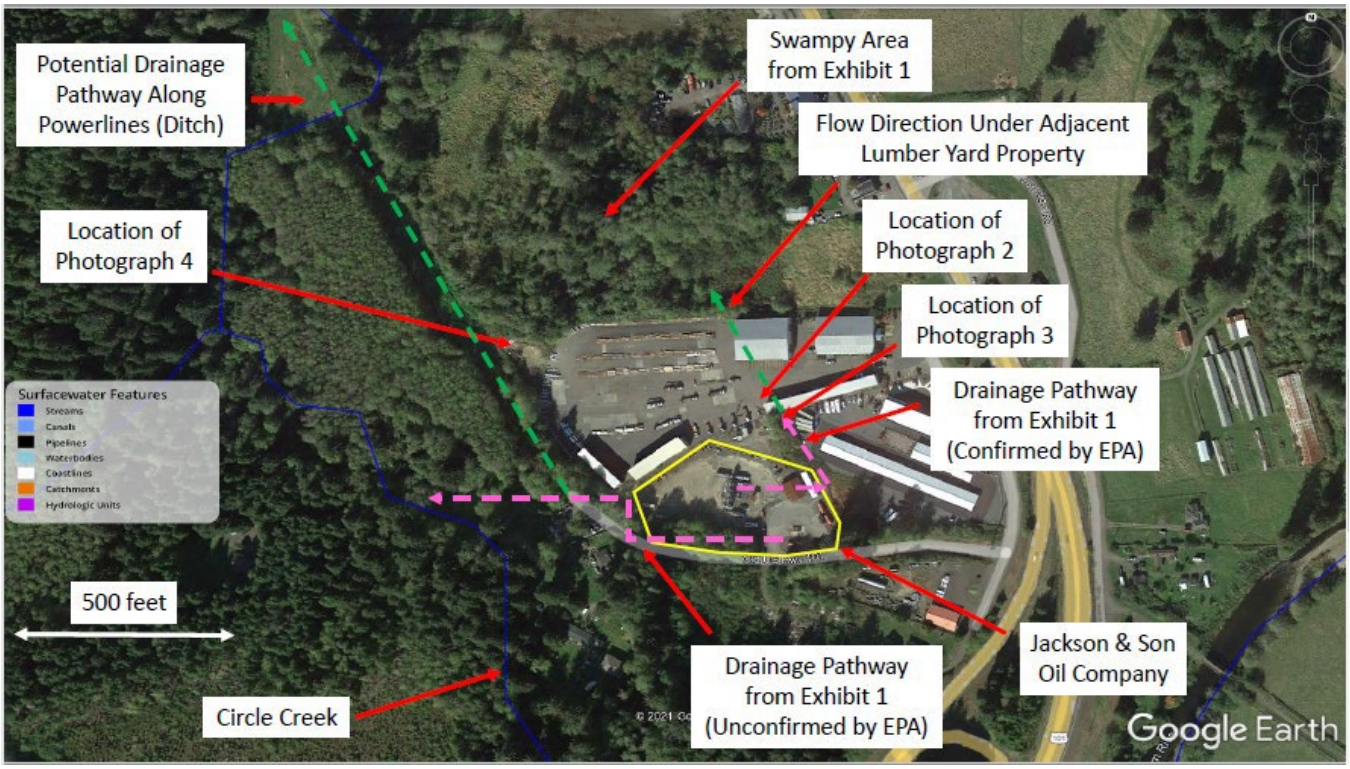
[126] CX 23 (December 2024 SPCC Plan) at 8.
[127] Franklin Declaration, ¶ 7; CX 01 (SPCC Inspection) at 43; CX 23 (December 2024 SPCC Plan) at 8-9.
[128] CX 24 (Compliance Plan Schedule) at 1.
[129] CX 22 (2024 SWPCP) at 6; RX 08.

"[s]tormwater drainage that does not infiltrate from the site is discharged from a swale onsite to a series of ditches and eventually discharges to the Circle Creek."[130] There is no reason to think that oil would not follow the same flow paths as stormwater. Indeed, courts have used surface runoff flows to determine whether there is a reasonable expectation of a discharge.[131] In addition, during the Inspection, the Facility provided the EPA with a map that shows two flow paths from the Facility, both of which drain to Circle Creek.[132]

Circle Creek is located approximately 1,700 feet north of the Facility.[133] Happel Lane borders the Facility to the south and a lumberyard is located to the north.[134] Beyond the lumberyard is a wetland area (also referred to as a swampy area),[135] beyond which is Circle Creek.[136] All of these areas are included in a figure to the EPA's Inspection Report,[137] which was transmitted to the Respondent on January 20, 2022,[138] and is reproduced in Figure 2 below.

[130] CX 22 (2024 SWPCP) at 6, 12.
[131] *See In re Consumers Recycling*, 2002 EPA ALJ LEXIS 18, at *45-47 (finding no genuine issue of material fact regarding reasonable expectation of discharge when considering facility topography, surface water runoff flows, and drainage system connections); *see also In re Pepperell Assocs.*, 9 E.A.D. 83, 95 (EAB 2000) (stating that "man-made features such as sewer pipes that could facilitate rather than inhibit drainage to a navigable waterway are … highly relevant" to whether there is a reasonable expectation of a discharge).
[132] CX 11 (Jurisdictional Analysis Report) at 16, 28; CX 01 (SPCC Inspection) at 54.
[133] CX 12 (Worst-Case Spill Report) at 49 (listing distance of north pathway from the Facility to wetlands via the lumberyard as 768 feet), 52 (listing length of wetlands from the lumberyard to Circle Creek as 925 feet). 768 plus 925 is 1,693 feet, or approximately 1,700 feet.
[134] CX 11 (Jurisdictional Analysis Report) at 6; CX 12 (Worst-Case Spill Report) at 55; CX 01 (SPCC Inspection) at 54 (note rotation of figure provided by the Facility with north pointing to the right, but stating that lumber yard is adjacent property to the north).
[135] CX 11 (Jurisdictional Analysis Report) at 29; CX 01 (SPCC Inspection) at 54 (note rotation of figure provided by the Facility with north pointing to the right, but noting "swampy area" to the north).
[136] CX 11 (Jurisdictional Analysis Report) at 25 (Figure 7) (showing drainage point to Circle Creek).
[137] CX 01 (SPCC Inspection) at 59.
[138] CX 02 (Letter Transmitting Inspection Report) at 1.

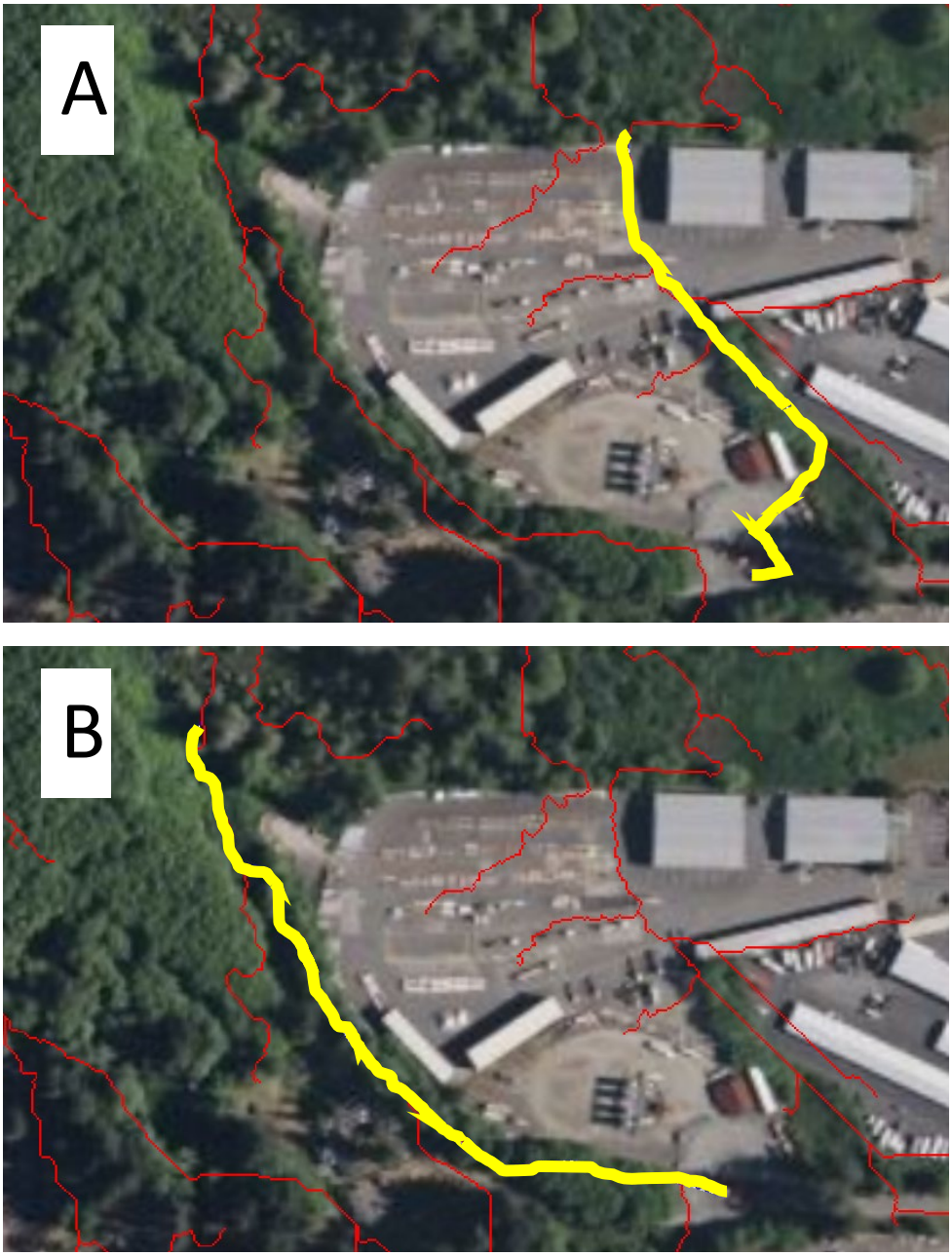
*Figure 2 - Facility Orientation from Inspection Report*




Based on a review of the Facility's documents, drainage patterns, and elevation data,[139] Ms. Bujak and Dr. Marshalonis confirmed that oil could reasonably take multiple pathways from the Facility to the wetlands located to the north. Those pathways, which depict how runoff drains based on elevation data,[140] are shown with dashed blue lines in Figure 4 of CX 12.[141] This figure is reproduced as Figure 3 below with the dashed blue lines highlighted yellow.

[139] *In re Consumers Recycling, Inc.* 2002 EPA ALJ LEXIS 18, 45-47 (identifying a reasonable expectation of a discharge based on topography, surface water flows, and location of storm water drains that directed water to either the Detroit River via a wastewater treatment plant or Baby Creek and the Rogue River).
[140] CX 11 (Jurisdictional Analysis Report) at 18.
[141] CX 12 (Worst-Case Spill Report) at 58.

*Figure 3 - Flow Paths from Facility*




Pathway A is the discharge point to the east of the Facility, which is piped under the lumberyard and discharges to the north of the lumberyard.[142] This is the pathway described in the Facility's Stormwater Pollution Control Plan.[143] Pathway B exits the Facility to the south and follows a

[142] CX 11 (Jurisdictional Analysis Report) at 16-17.
[143] CX 22 (2024 SWPCP) at 6, 12.

ditch located to the west of the Facility before discharging to the wetlands located to the north.[144] These pathways are also shown in Figure 4 to CX 11. In addition to Pathway A and B, Dr. Marshalonis determined that a spill of either 20,000 gallons or 40,000 gallons "could even generate a wave of overland flow that could directly reach the wetlands by traveling over the Site and neighboring lumberyard's surface."[145] Under any pathway, once oil enters the wetlands, it will flow to Circle Creek.[146] Ms. Bujak's analysis includes a flow path analysis that shows the likely flow paths through the wetlands to Circle Creek to the north.[147] Similar to the above analysis of flow paths, CX 11 Figure 6 shows the flow paths through the wetlands based on elevation.[148] Water naturally drains toward the lowest points in the landscape, and through the wetlands to the north of the Facility, Circle Creek is the lowest point in the landscape.[149]

While the EPA has evaluated flow paths based on the Facility's documents, topography, slope, water runoff patterns, and surface runoff flows, "the exact path of the discharge does not have to be foreseeable."[150] Rather, the question is whether, based on the information available, it is "reasonably foreseeable" that a discharge of oil would enter navigable waters.[151] The EPA has indeed determined that it is reasonably foreseeable that a discharge of oil would flow to Circle Creek, which as established in Section D below, is a navigable water.

---

[144] CX 11 (Jurisdictional Analysis Report) at 17-18.
[145] CX 12 (Worst-Case Spill Report) at 16.
[146] *Id.*
[147] CX 11 (Jurisdictional Analysis Report) at 24-25; CX 12 (Worst-Case Spill Report) at 37-38.
[148] CX 11 (Jurisdictional Analysis Report) at 18, 24.
[149] *Id.* at 24.
[150] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, at *107 (finding that, because oil flows like water, reasonable expectation of discharge may be based on oil's tendency to flow downgradient along natural contours of the land).
[151] *Pepperell Assocs. v. EPA*, 246 F.3d at 23; *see also In re Consumers Recycling, Inc.*, 2002 EPA ALJ LEXIS 18, at *45.

Based on these pathways, Dr. Marshalonis modeled a discharge of both 20,000 gallons and 40,000 gallons from the Facility.[152] Dr. Marshalonis' modelling shows that under either scenario, based on the Facility and surrounding area's topography and drainage patterns; the distance between the Facility and Circle Creek; and the physical properties of oil infiltration and inflow, it is reasonably foreseeable that oil will reach Circle Creek north of the facility. Dr. Marshalonis' model evaluated a discharge during the 2-year, 24-hour storm event – the total amount of precipitation during a 24-hour period that is predicted to occur every two years.[153] Doing so is consistent with *In re Crown Central Petroleum*, which counsels that facilities should consider the weather patterns of an area, including heavy rains.[154] Dr. Marshalonis' report is based on several conservative assumptions to ensure that the results erred in favor of the Respondent.[155]

Respondent asserts that Mr. Casey Jackson will testify that the "EPA agreed with Respondent that it was not required to prepare a written SPCC Plan because a discharge of petroleum from the facility would not impact waters of the U.S."[156] As previously stated in Complainant's Rebuttal Prehearing Exchange, the EPA has maintained that there is a reasonable expectation of a discharge from the Facility throughout its discussions with Respondent.[157] Regardless, this assertion is only relevant for penalty, not liability. The relevant question for a liability determination is whether there is a reasonable expectation of a discharge from the Facility to navigable waters.

---

[152] CX 12 (Worst-Case Spill Report) at 7, 10.
[153] *Id.* at 14.
[154] 2002 EPA ALJ LEXIS 1, at *108-09.
[155] CX 12 (Worst-Case Spill Report) at 32-35.
[156] Respondent's Prehearing Exchange at 2.
[157] Complainant's Corrected Prehearing Exchange at 7.

2. *A Discharge Would Result in the Release of Oil in Quantities that May be Harmful.*

In paragraphs 3.10 and 3.11 of the Second Amended Complaint, the EPA alleges that the Facility could reasonably be expected to discharge oil in quantities that may be harmful to Circle Creek. Respondent generally denies these allegations.[158] There is no genuine factual dispute that a worst-case discharge from the Facility would release oil in quantities that may be harmful to Circle Creek.

40 C.F.R. § 112.1(b) states that the Part 112 regulations apply to facilities that "could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this chapter." Pursuant to 40 C.F.R. § 110.3, discharges in quantities that may be harmful include discharges of oil that "cause a film or sheen upon or discoloration of the surface of the water…". A sheen is the "iridescent appearance [of oil] on the surface of water.[159] Thus, the harmful quantity threshold is a low one. Just one gallon of oil can contaminate a million gallons of water.[160] As noted by this Tribunal, "[v]ery small quantities of oil can cause a sheen on the surface of the water."[161] Indeed, even a drop of oil can cause a sheen on the surface of the water.[162]

Based on either a 20,000-gallon or a 40,000-gallon spill, it is reasonably foreseeable that oil would reach Circle Creek in harmful quantities. In *In re Crown Central Petroleum*, the Court concluded that a discharge would result in harmful quantities based on the storage capacity at the Facility.[163] The Court does not need to infer based on Respondent's storage capacity here

[158] Answer to Second Amended Complaint, *supra* note 24, at ¶¶ 3.11, 3.12.
[159] 40 C.F.R. § 110.1.
[160] CX 25 (Facility Owner/Operator's Guide) at 5.
[161] *In re Crown Cent. Petroleum Corp.*, 2002 EPA ALJ LEXIS 1, at *108.
[162] Franklin Declaration, ¶ 4.
[163] 2002 EPA ALJ LEXIS 1, at *107-08.

because Complainant provided a worst-case discharge analysis report prepared by Dr. Marshalonis.[164] As described in Dr. Marshalonis' report, the estimated total gallons of gasoline predicted to reach Circle Creek ranges from 243 to 3,232 gallons under the 20,000-gallon spill scenario and 20,213 to 23,202 gallons under the 40,000-gallon spill scenario.[165] According to Dr. Marshalonis' report, a spill from the Facility easily qualifies as a harmful impact to Circle Creek.

Respondent has not provided any evidence to rebut whether there is a reasonable expectation of a discharge to Circle Creek in harmful quantities. The EPA is entitled to an accelerated decision on this element.

*3. Conclusion*

Taken together, the EPA's exhibits establish that there is a reasonable expectation of a discharge from the Facility to Circle Creek in harmful quantities (the EPA will establish in Section D below that Circle Creek is a navigable water pursuant to the CWA). The EPA has met its burden that this element cannot be genuinely disputed through citations to exhibits.[166] Respondent has not presented any evidence in its Prehearing Exchange to the contrary. The "mere allegation of a factual dispute" is insufficient to defeat a motion for accelerated decision.[167] As a result, the EPA is therefore entitled to judgment as a matter of law on this element of Respondent's liability.

[164] CX 12 (Worst-Case Spill Report).
[165] *Id.* at 38.
[166] *In re Polo Dev., Inc.,* 2015 EPA ALJ LEXIS 4, at *14 (quoting Fed. R. Civ. P. 56(c)(1)).
[167] *In re Mayes*, 2003 EPA ALJ LEXIS 41, at *8; *see also In re Troy Chem. Corp*., 1999 EPA ALJ LEXIS 71, at *9 (stating that unsupported assertions are insufficient to create issues of material fact that would preclude summary judgment) (citing *SEC v. Bonastia*, 614 F.2d 908, 914 (3rd Cir. 1980)).

### D. There Is a Reasonable Expectation That a Discharge Would Reach Navigable Waters.

Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas." The EPA has construed "navigable waters" under Section 311 of the CWA to have the same meaning as "navigable waters" under other sections of the Act.[168] The EPA and the Corps define "waters of the United States" by regulation, consistent with the CWA and applicable case law. As described in Complainant's Initial Prehearing exchange, the alleged violation spans December 2019 to December of 2024, when Respondent first finalized an SPCC Plan for the Facility. During this time-period, three "waters of United States" regulatory definitions were at least ostensibly applicable in Oregon: 1) the pre-2015 Corps and EPA regulations, as informed by applicable guidance documents ("pre-2015 Regulatory Regime"),[169] 2) the 2020 Navigable Waters Protection Rule,[170] and 3) the "Revised Definition of 'Waters of the United States'" Rule, as amended by the conforming rule ("Amended 2023 Rule").[171]

Complainant's Initial Prehearing Exchange sought a stipulation, solely for the purposes of this administrative proceeding, that because the Navigable Waters Protection Rule was vacated

---

[168] *Rice v. Harken Exploration Co*., 250 F.3d 264, 267-69 (5th Cir. 2001); *U. S. v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *U. S. v. Ashland Oil & Transp. Co*., 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, the EPA revised its regulations defining "waters of the United States" in 40 C.F.R. Part 112 to ensure that the rule's language was consistent with the regulatory language used in other CWA programs. Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 Fed. Reg. 47,042 (July 17, 2002). A district court vacated the rule for failure to comply with the Administrative Procedure Act and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008). However, the EPA interprets ''navigable waters of the United States'' in CWA Section 311(b), in both the pre-2002 regulations and the 2002 rule, to have the same breadth as ''navigable waters'' in CWA Section 502(7).

[169] The pre-2015 regulations refer to the Corps' and the EPA's nearly identical definitions of "Waters of the United States" promulgated in 1986 and 1988, respectively [51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) and 53 Fed. Reg. 20,764, 20,774 (June 6,1988)] and are inclusive of the exclusion for prior converted cropland, which both agencies added in 1993, implemented in light of relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. *See* 33 C.F.R. § 328.3 (2014) and 40 C.F.R. § 232.2 (2014). As noted in *supra* note 168, the pre-2015 regulations defining "waters of the United States" for Oil Spill Programs under 40 C.F.R. Part 112 utilize the 1973 definition of "navigable waters." *See* 40 C.F.R. § 112.2 (2014). However, the agencies implement the pre-2015 regulatory regime for 40 C.F.R. Part 112 consistent with their implementation for other CWA programs.

by two U.S District Courts,[172] the pre-2015 Regulatory Regime was the applicable regulatory definition until and including March 19, 2023. Complainant also sought a stipulation for the purposes of this proceeding that the Amended 2023 Rule, which was amended on September 8, 2023, to conform with *Sackett*, was the applicable regulatory definition on and after March 20, 2023. Respondent's Prehearing Exchange and Supplemental Prehearing Exchange did not acknowledge the EPA's request.[173] As a result, the EPA has conservatively explained jurisdiction under all three regulatory regimes that were ostensibly operative during the relevant timeframe.[174]

As described in Section C above, there is a reasonable expectation of a discharge to Circle Creek. Circle Creek connects through Little Muddy Creek to the Necanicum River, which flows into the Pacific Ocean.[175] The entire flow path is shown in Figure 5 of CX 11[176] and is reproduced as Figure 4 below.

---

[170] The Navigable Waters Protection Rule was ostensibly effective in Oregon from June 22, 2020, until August 30, 2021, when it was vacated by proceedings in district courts including *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021) and *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D. N.M. 2021). *See also* Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250 (Apr. 21, 2020), available at: https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-ruledefinitionof-waters-of-the-united-states (accessed on Jan. 5, 2026).

[171] On December 30, 2022, the EPA and the U.S. Department of the Army announced the final "Revised Definition of 'Waters of the United States'" rule (2023 Rule), which was published in the *Federal Register* on January 18, 2023, and took effect on March 20, 2023 (88 Fed. Reg. 3,004, 3,142, Jan. 18, 2023). On September 8, 2023, the agencies published a final rule to amend the 2023 Rule in light of the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651, 671 (2023). Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023): https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-watersof-the-united-states-conforming.

[172] *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021) and *Navajo Nation v. Regan*, 563 F. Supp. 3d 116 (D. N.M. 2021).

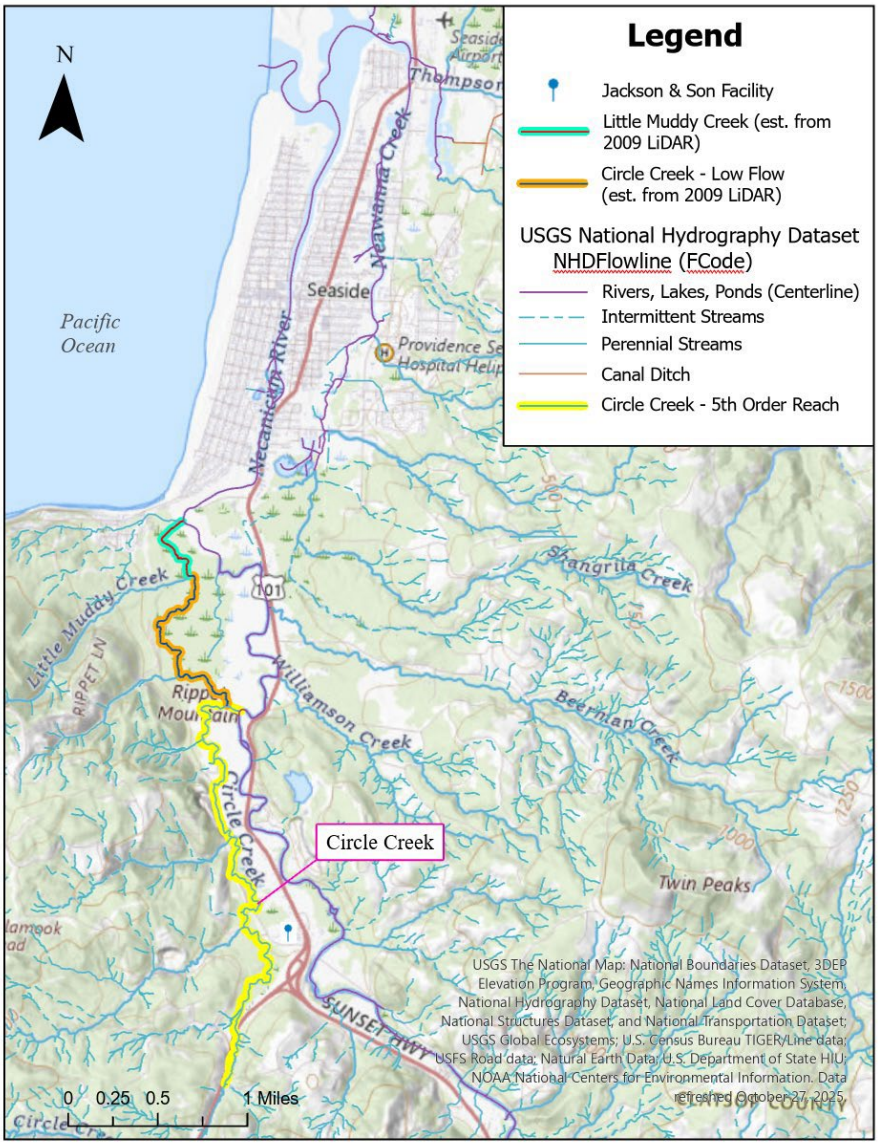
[173] *See generally* Respondent's Prehearing Exchange.

[174] *See supra* note 170. The pre-2015 regulatory regime was applicable before June 22, 2020, and after August 30, 2021, until the 2023 Rule took effect on March 20, 2023. The Amended 2023 Rule is currently operative in the state of Oregon. *Definition of "Waters of the United States": Rule Status and Litigation Update,* EPA (last updated Nov. 17, 2025), https://www.epa.gov/wotus/definition-waters-united-states-rule-status-andlitigation-update.

[175] CX 11 (Jurisdictional Analysis Report) at 23.

[176] *Id.* at 23.

*Figure 4 - Jurisdictional Flow Path*




Relevant to CWA jurisdiction, the EPA's review shows that Circle Creek is a *tributary* of Little Muddy Creek, which is a *tributary* of the Necanicum River, which flows into the Pacific Ocean. The Necanicum River is both a *tributary* to the Pacific Ocean and a *traditional navigable water*. The Pacific Ocean is a *traditional navigable water* and is part of the *territorial seas*. There are therefore three threshold terms that are relevant: tributary, traditional navigable water, and territorial seas.

First, the territorial seas are codified as jurisdictional pursuant to the CWA because "navigable waters" means "waters of the United States, *including the territorial seas*."[177] The territorial seas are further defined in the CWA as the three nautical miles seaward from the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[178]

Second, moving to traditional navigable waters, the definition is the same regardless of which regulatory regime applies. A traditional navigable water is one that is "[c]urrently used or [was] used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[179] Pursuant to guidance, traditional navigable waters include, but are not limited to, waters that are subject to the ebb and flow of the tide, waters that are presently used in interstate or foreign commerce, and waters that have been designated by the Corps as navigable pursuant to Section 10 of the Rivers and Harbors Act.[180]

Third, regarding tributaries, the definition differs depending upon the applicable regulatory regime. Any definition must be considered in light of case law, including *Sackett v. EPA*, which relevant to this case, held that "the [CWA]'s use of waters encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[181] Pursuant to the pre-2015 Regulatory Regime and consistent with *Sackett*, jurisdictional tributaries include natural, man-altered, or man-made water bodies that carry flow directly or indirectly to traditional navigable waters, territorial seas, interstate waters, or impoundments of any "waters

[177] 33 U.S.C. § 1362(7) (emphasis added).
[178] *Id.* § 1362(8).
[179] 40 C.F.R. § 230.3(s)(1) (2014); *id.* § 120.2(3)(xii) (2020); *id.* § 120.2(a)(1)(i).
[180] CX 38 (Traditional Navigable Waters Guidance) at 1; CX 33 (*Rapanos* Guidance) at 5, note 20.
[181] 598 U.S. 651, 653 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)) (internal quotation marks omitted).

of the United States" and that have relatively permanent flow.[182] Under the Amended 2023 Rule, tributaries must be relatively permanent waters connected to traditional navigable waters, the territorial seas, interstate waters, or jurisdictional impoundments of "waters of the United States."[183] Tributaries must also be "relatively permanent, standing or continuously flowing bodies of water."[184] Water bodies that contain standing and/or flowing water year-round are routinely recognized as "waters of the United States" because they meet the relatively permanent standard.[185] In contrast to the pre-2015 Regulatory Regime and the Amended 2023 Rule, the Navigable Waters Protection Rule did not use the term relatively permanent. Pursuant to the Navigable Waters Protection Rule, a tributary is a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent surface water flow in a typical year to a traditional navigable water or the territorial seas either directly or through one or more jurisdictional waters.[186] To summarize, under all of the relevant regimes and as applicable to this case, naturally-occurring surface water channels that flow year round and contribute surface water to downstream jurisdictional waters are themselves jurisdictional.

As described below, under any ostensibly applicable regulatory regime, each of the water bodies relevant to this proceeding are jurisdictional pursuant to the CWA.

*1. Circle Creek is a navigable water.*

As alleged in paragraph 3.10 of the Second Amended Complaint, Circle Creek is a jurisdictional tributary with relatively permanent flow.[187] Respondent generally denies this allegation in paragraph 3.10 of its Answer to the Second Amended Complaint. Despite its general

[182] 40 C.F.R. § 230.3(s)(5) (2014); CX 33 (*Rapanos* Guidance) at 6-7.
[183] *Id.* § 120.2(a)(3).
[184] *Id.*
[185] *Sackett v. EPA*, 598 U.S. at 671.
[186] 40 C.F.R. § 120.2(3)(xii) (2020).
[187] Complainant's Initial Prehearing Exchange at 28.

denial, Respondent has not provided any information to create a genuine issue of material fact with respect to Circle Creek's status as a jurisdictional tributary.

As outlined in Ms. Bujak's jurisdictional analysis report, Circle Creek is jurisdictional pursuant to all three regulatory regimes.[188] As shown in the above figure, Circle Creek flows approximately 1.9 miles from the location where there is a reasonable expectation of a discharge from the Facility to the mapped connection with the Necanicum River on United States Geological Survey's ("USGS") topographic maps (yellow line).[189] The entire relevant reach has been mapped on USGS topographic maps as perennial since 1940.[190] Based on a review of aerial photographs and high-resolution digital terrain modeling, Circle Creek likely only discharges to the Necanicum River at this juncture during high flow events.[191] Rather than discharging to the Necanicum River at this point, Circle Creek then continues another 1.3 miles before connecting with Little Muddy Creek (low flow path depicted with orange line on above figure).[192] Ms. Bujak reviewed aerial imagery and photographs taken by EPA staff in 2024, which indicate that the entire reach of Circle Creek has a volume and duration of flow for development of geomorphic features, including an ordinary-high water mark and a valley bottom.[193] Circle Creek is jurisdictional under all three regulatory definitions because it has continuous flow year-found and contributes flow to downstream traditional navigable waters—the Necanicum River and the Pacific Ocean—via Little Muddy Creek. Accordingly, Circle Creek is jurisdictional under CWA

[188] CX 11 (Jurisdictional Analysis Report) at 22-23.
[189] *Id* at 22.
[190] *Id.*
[191] *Id* at 22-23.
[192] This reach of Circle Creek is present in high-resolution digital terrain modelling derived from LiDAR (i.e., bare earth elevation), and high-resolution aerial imagery where water and channels can be observed through overstory vegetation. *Id.*
[193] *Id* at 22.

Section 502(7). Based on the information provided, Complainant is entitled to accelerated decision on this point.

*2. Little Muddy Creek is a navigable water.*

As alleged in paragraph 3.10 of the Second Amended Complaint, Circle Creek connects to the Necanicum River via Little Muddy Creek—a relatively permanent tributary. Respondent generally denies this allegation in paragraph 3.10 of its Answer to the Second Amended Complaint. Despite Respondent's denial, Respondent has not provided any evidence to directly refute Little Muddy Creek's status as a jurisdictional tributary. There is no genuine dispute of material fact regarding Little Muddy Creek's jurisdictional status.

As outlined in Ms. Bujak's jurisdictional analysis report, Circle Creek is jurisdictional pursuant to all three regulatory regimes. The USGS's National Hydrography Dataset and PROSPER model indicate that Little Muddy Creek has perennial flow for the entire 0.5-mile reach that flows from the confluence with Circle Creek to the outlet of the Necanicum River near river mile 2.7 (green line in figure above).[194] The PROPSER model is an empirical model developed by USGS to make predictions of the annual probability of year-round flow at 30-meter resolution for every stream in the Pacific Northwest for 2004-2016.[195] USGS topographic maps have similarly illustrated Little Muddy Creek as perennial since 1955.[196] Little Muddy Creek is thus a relatively permanent tributary with continuous flow year-round that is connected to downstream traditional navigable waters—the Necanicum River and the Pacific Ocean.[197] Under any of the ostensibly applicable regulatory regimes, Little Muddy Creek satisfies the

[194] CX 11 (Jurisdictional Analysis Report) at 21, 23.
[195] *Model Catalog, PROSPER – PRObability of Streamflow PERmanence*, USGS, https://data.usgs.gov/modelcatalog/model/c72285f9-5c78-4123-9beb-393cfc68d19c (last visited Apr. 5, 2026).
[196] CX 11 (Jurisdictional Analysis Report) at 21-22.
[197] *Id*. at 21.

definition of a water of the United States. Accordingly, Little Muddy Creek is jurisdictional under CWA Section 502(7). Based on the information provided, Complainant is entitled to accelerated decision on this point.

*3. The Necanicum River is a navigable water.*

As alleged in paragraph 3.10 of its Second Amended Complaint, Circle Creek connects to the Necanicum River via Little Muddy Creek near river mile 2.7. Complainant further alleges in paragraph 3.10 that the Necanicum River is relatively permanent and a traditional navigable water that discharges to the Pacific Ocean. Respondent generally denies these allegations in paragraph 3.10 of its Answer to the Second Amended Complaint.

The Necanicum River is a jurisdictional tributary. The Necanicum River is mapped by the USGS as a large perennial river.[198]

The Necanicum River is also a traditional navigable water. Traditional navigable waters include, but are not limited to, waters that are subject to the ebb and flow of the tide and waters that have been designated by the Corps as navigable pursuant to Section 10 of the Rivers and Harbors Act.[199] The Necanicum River is a traditional navigable water because the U.S. Coast Guard has documented the lower two miles as subject to the ebb and flow of the tide.[200] The Necanicum River is also a traditional navigable water because the Corps' Portland District has designated the Necanicum River as navigable pursuant to Section 10 of the Rivers and Harbors Act up to at least river mile 3.[201] River Mile 3 is upstream of where Little Muddy Creek connects

[198] CX 11 (Jurisdictional Analysis Report) at 21.
[199] CX 38 (Traditional Navigable Waters Guidance) at 1; CX 33 (*Rapanos* Guidance) at 5, note 20.
[200] CX 11 (Jurisdictional Analysis Report) at 20; CX 34 (U.S. Coast Guard Navigability Determinations) at 10.
[201] CX 35 (Navigable Waters List) at 4.

to the Necanicum River at River Mile 2.7.[202] In *In re Polo Dev., Inc.*, a Section 10 listing was sufficient for a finding that a waterbody is a navigable water pursuant to the CWA.[203]

Under any of the ostensibly applicable regulatory regimes, the Necanicum River satisfies the definition of a water of the United States. Accordingly, the Necanicum River is jurisdictional under CWA Section 502(7). Based on the information provided, Complainant is entitled to accelerated decision on this point.

*4. The Pacific Ocean is a navigable water.*

The EPA alleges in paragraph 3.10 of its Second Amended Complaint that the Necanicum River flows into the Pacific Ocean, which is a traditional navigable water and part of the territorial seas. Respondent generally denies these allegations in paragraph 3.10 of its Answer to the Second Amended Complaint.

The Pacific Ocean is a traditional navigable water pursuant to any of the three ostensibly applicable regulatory regimes. Traditional navigable waters include, but are not limited to, waters that are subject to the ebb and flow of the tide, waters that are presently used in interstate or foreign commerce, and waters that have been designated by the Corps as navigable pursuant to Section 10 of the Rivers and Harbors Act.[204] The Pacific Ocean is a traditional navigable water because it is subject to the ebb and flow of the tide and used for interstate or foreign commerce.[205] The Pacific Ocean is also a traditional navigable water because the Corps' Portland District has also designated the Pacific Ocean as navigable pursuant to Section 10 of the Rivers

[202] CX 11 (Jurisdictional Analysis Report) at 21.
[203] 2015 EPA ALJ LEXIS 4, at *25, 29.
[204] CX 38 (Traditional Navigable Waters Guidance) at 1; CX 33 (*Rapanos* Guidance) at 5, note 5.
[205] CX 11 (Jurisdictional Analysis Report) at 20.

and Harbors Act.[206] As stated above, in *In re Polo Dev., Inc.*, a Section 10 listing was sufficient for a finding that a waterbody is a navigable water pursuant to the CWA.[207]

In addition, as stated above, the term "navigable waters" means the waters of the United States, *including the territorial seas*.[208] The Pacific Ocean is part of the territorial seas, which is the three-nautical-mile wide band extending off the Oregon coast.[209] Last, courts have previously found the Pacific Ocean to be a navigable water pursuant to the CWA.[210]

Under any of the ostensibly applicable regulatory regimes, the Pacific Ocean satisfies the definition of a water of the United States. Accordingly, the Pacific Ocean is jurisdictional under CWA Section 502(7). Based on the information provided, Complainant is entitled to accelerated decision on this point.

*5. Respondent has not presented a genuine issue of material fact with respect to the jurisdictional status of these waters.*

As described above, each of the waters relevant to this case are jurisdictional under the CWA. The EPA has met its burden that this element cannot be genuinely disputed through citations to exhibits.[211] Complainant's Initial Prehearing Exchange sought a stipulation with respect to jurisdiction for Circle Creek, Little Muddy Creek, the Necanicum River, and the Pacific Ocean.[212] Respondent failed to offer any response to Complainant's request or to provide any evidence in its Prehearing Exchange or Supplemental Prehearing Exchange on this point.[213] Respondent includes, without explanation as to why, a copy of the March 2025 EPA/Corps

[206] CX 35 (Navigable Waters List) at 4.
[207] 2015 EPA ALJ LEXIS 4, at *25, 29.
[208] 33 U.S.C. § 1362(7).
[209] *Id.* § 1362(8); CX 11 (Jurisdictional Analysis Report) at 20.
[210] *See, e.g.*, *Hawai'i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 760 (9th Cir. 2018).
[211] *In re Polo Dev., Inc.,* 2015 EPA ALJ LEXIS 4, at *14 (quoting Fed. R. Civ. P. 56(c)(1)).
[212] Complainant's Initial Prehearing Exchange at 32.
[213] *See generally* Respondent's Prehearing Exchange and Supplemental Prehearing Exchange.

Continuous Surface Connection Joint Guidance Memo[214] and the November 2025 Notice of Proposed Rulemaking.[215] The inclusion of documents without explanation is insufficient to defeat a motion for accelerated decision. Respondent's failure to provide evidence on this issue illustrates that there is no genuine issue of material fact concerning jurisdiction of each of these waterways. The "mere allegation of a factual dispute" is insufficient to defeat a motion for accelerated decision.[216] There is no genuine dispute of material fact regarding the jurisdictional status of Circle Creek, Little Muddy Creek, the Necanicum River, or the Pacific Ocean. Accordingly, this Tribunal should determine that the EPA is entitled to judgment as a matter of law that Circle Creek, Little Muddy Creek, the Necanicum River, and the Pacific Ocean are each a "navigable water" for purposes of CWA Section 502(7).[217]

### E. Respondent Failed to Prepare and Therefore Implement an SPCC Plan Until December of 2024.

The EPA's regulations at 40 C.F.R. § 112.3 require that the owner or operator of an onshore facility subject to Part 112 prepare in writing and implement an SPCC Plan. The EPA has established in Section A above that the Facility is an onshore facility. As alleged in paragraph 3.16 of the Second Amended Complaint, at the time of the Inspection and at all times relevant to the Second Amended Complaint through December 16, 2024, Respondent failed to prepare and implement an SPCC Plan, in violation of 40 C.F.R. § 112.3. Respondent denies this allegation.[218]

The Facility began operations in the 1980s, and the EPA inspected the Facility on September 21, 2021.[219] According to the Inspection Report, at the time of the Inspection, the

---

[214] RX 09.
[215] RX 10.
[216] *In re Mayes*, 2003 EPA ALJ LEXIS 41, at *8; *see also In re Troy Chem. Corp*., 1999 EPA ALJ LEXIS 71, at *9 (stating that unsupported assertions are insufficient to create issues of material fact that would preclude summary judgment) (citing *SEC v. Bonastia*, 614 F.2d 908, 914 (3rd Cir. 1980)).
[217] 33 U.S.C. § 1362(7).
[218] Answer to Second Amended Complaint, *supra* note 24, at ¶ 3.16.
[219] CX 01 (SPCC Inspection) at 2, 4.

Facility had not developed an SPCC Plan.[220] At the time of the Inspection, the Facility informed the EPA that it had never developed an SPCC Plan.[221]

The December 16, 2024, SPCC Plan that the EPA attached as CX 23 to its Initial Prehearing Exchange also indicates it was the very first plan drafted for the Facility because it lacks review information required by the 40 C.F.R. Part 112 regulations. Pursuant to 40 C.F.R. § 112.5(b), owners or operators must complete a review and evaluation of the SPCC Plan "at least once every five years." Further, owners or operators are required to "document . . . completion of the review and evaluation, and must sign a statement as to whether [they] will amend the Plan, either at the beginning or end of the Plan or in a log or an appendix to the Plan."[222] Chapter 7 of Respondent's December 2024 SPCC Plan acknowledges the requirements outlined in 40 C.F.R. § 112.5 and notes that "SPCC Review & Amendment Logs are included in Appendix A" of the SPCC Plan.[223] Appendix A is entitled "SPCC Plan Review, Amendment, & Training Logs."[224] Appendix A of the December 2024 SPCC Plan is blank.[225] Furthermore, neither Chapter 7 nor Appendix A include any discussion of previously completed 5-year reviews or copies of completed Amendment Logs.[226] Taken together and read in light of the requirements of 40 C.F.R. § 112.5, these portions of the SPCC Plan indicate Respondent failed to have a Plan for the Facility prior to December 16, 2024.

The EPA's Initial Prehearing Exchange sought Respondent's stipulation that it first finalized an SPCC Plan for the Facility on December 16, 2024.[227] While Respondent failed to

[220] *Id.* at 3.
[221] Franklin Declaration, ¶ 5.
[222] 40 C.F.R. § 112.5(b).
[223] CX 23 (December 2024 SPCC Plan) at 23.
[224] *Id.* at 29-32 (App. A).
[225] *Id.*
[226] *Id.* at 23, 29-32 (App. A).
[227] *See* Complainant's Initial Prehearing Exchange at 34.

substantively respond to that request in its Prehearing Exchange or Supplemental Prehearing Exchange,[228] Respondent's lack of substantive engagement on this issue within its Prehearing Exchange and Supplemental Prehearing Exchange illustrates that there is no question of material fact as to this element. While Respondent asserts in its Prehearing Exchange that the "EPA's communications (including Complainants' exhibits), actions, inactions and related correspondence… did not request, require or otherwise communicate that an SPCC Plan was required for the facility,"[229] this assertion, which as the EPA explained in its Rebuttal Prehearing Exchange is contradicted by the very documents that Respondent attached to its Prehearing Exchange,[230] is only relevant for penalty, not liability. The relevant question for a liability determination is whether Respondent developed an SPCC Plan before December of 2024. Respondent has not substantively disputed this allegation, and the EPA is therefore entitled to judgment as a matter of law on this element.

## CONCLUSION

Complainant's Motion for Accelerated Decision should be granted because the EPA has adequately established that there are no questions of material fact that Respondent is subject to the requirements of 40 C.F.R. Part 112, which, relevant here, apply to (1) owners and operators of onshore facilities that are non-transportation-related and are "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil and oil products" and (2) that have oil in any aboveground container or any container that is used for standby storage, for seasonal storage, or for temporary storage, or not otherwise "permanently closed" as defined in 40 C.F.R. § 112.2, (3) which due to their location, could reasonably be

[228] *See generally* Respondent's Prehearing Exchange and Supplemental Prehearing Exchange.
[229] Respondent's Prehearing Exchange at 5.
[230] Complainant's Corrected Rebuttal Prehearing Exchange & Supplemental Prehearing Exchange at 5.

expected to discharge oil in quantities that may be harmful (4) into or upon the navigable waters of the United States or adjoining shorelines.[231] There is also no question of material fact that Respondent violated 40 C.F.R. § 112.3's requirement to develop and implement an SPCC Plan prior to December 16, 2024. This Tribunal should therefore determine that the EPA is entitled to judgment as a matter of law on each of these elements.

Dated this 6th day of April 2026.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

Ashley Bruner Digitally signed by Ashley Bruner Date: 2026.04.06 17:48:55 -07'00'

DATE

Ashley Bruner
Assistant Regional Counsel
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Bruner.Ashley@epa.gov

Christine Allen
Attorney-Advisor
Water Law Attorney
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
Allen.Christine.J@epa.gov

[231] 40 C.F.R. § 112.1(b).

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 **Complainant's Motion for Accelerated Decision**, dated April 6, 2026, was sent this day to the following parties in the manner indicated below.

Ashley Bruner Digitally signed by Ashley Bruner Date: 2026.04.06 17:49:02 -07'00'

Ashley Bruner
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue
Suite 155, M/S 11-C07
Seattle, WA 98101

Copy by OALJ E-Filing System to:

U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Electronic Mail to:

Allan Bakalian, WSBA# 14255
Bakalian & Associates P.S.
8201 164th Avenue NE, Suite 200
Redmond, WA 98052
Email: allan@bakalianlaw.com
*Counsel for Respondent*

Dated: April 6, 2026