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**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:)	
)	
STATE OF ALASKA DEPARTMENT)	Case No.: CWA-10-2024-0154
OF TRANSPORTATION AND PUBLIC)	
FACILITIES,)	
)	RESPONDENT’S MOTION FOR
Juneau, Alaska)	ACCELERATED DECISION
)	
Respondent.)	
)	

Respondent State of Alaska, Department of Transportation & Public Facilities (“DOT&PF”) moves for an accelerated decision pursuant to 40 CFR 22.20(a). Pursuant to the October 24, 2024, Prehearing Order, DOT&PF conferred with Complainant U.S. Environmental Protection Agency (“EPA”) and EPA opposes this motion. For the reasons discussed in the attached memorandum, DOT&PF is entitled to an accelerated decision because: (1) EPA lacks jurisdiction under the U.S. Supreme Court’s ruling in *Sackett v. EPA*; (2) DOT&PF’s work was exempt from permitting requirements under Section

404(f) of the Clean Water Act; and (3) alternatively, DOT&PF's maintenance work was preauthorized under a Nationwide Permit.

DATED: March 3, 2025.

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(“DOT&PF”) moves for an accelerated decision pursuant to 40 CFR 22.20(a). As discussed below, DOT&PF is entitled to an accelerated decision because Complainant U.S. Environmental Protection Agency lacks jurisdiction over the highway medians in question and because DOT&PF’s maintenance work on the culverts and roadside ditches within those medians was exempt from permitting requirements under Section 404(f) of the Clean Water Act or, alternatively, was preauthorized under a Nationwide Permit.

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BACKGROUND

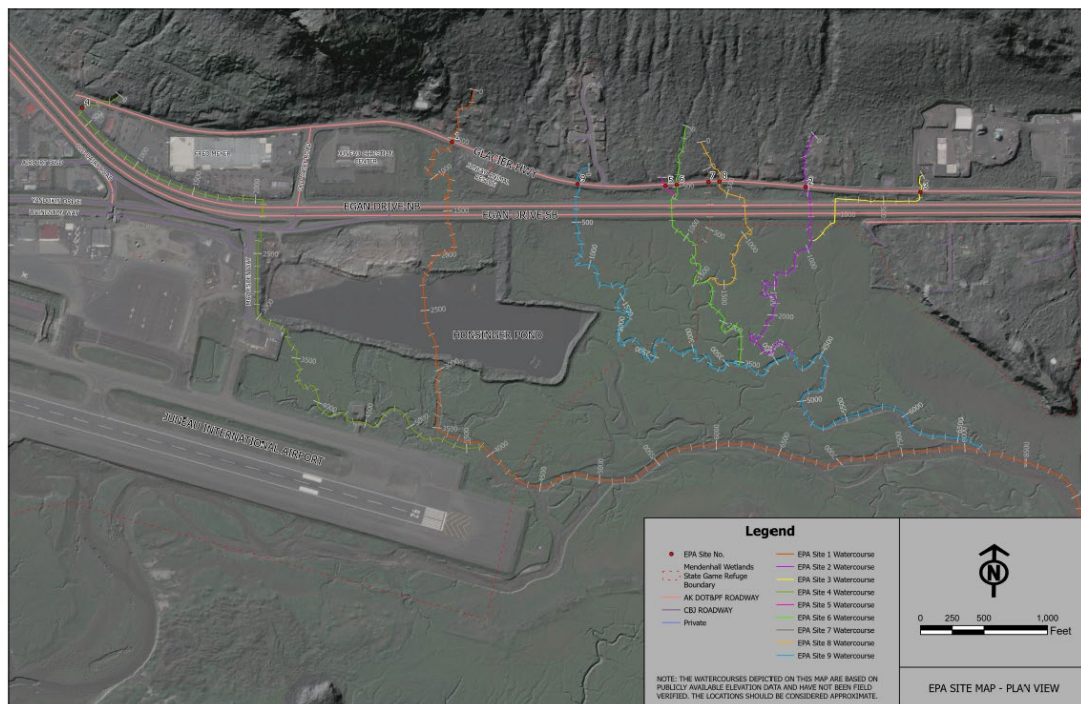
While the factual background for this motion is primarily set forth in RX 01 (DOT&PF Background Summary), RX 02 (DOT&PF Hydraulics Report), and RX 03 (ADFG Fish Habitat Report) as well as in DOT&PF's Prehearing Exchange brief, a summary of the factual background is provided below as well.¹

This case concerns maintenance work performed by DOT&PF in the summer of 2021 along Glacier Highway in Juneau, Alaska. The U.S. Army Corps of Engineers ("USACE") sent DOT&PF a Notice of Violation in October 2021 and the case was transferred to the U.S. Environmental Protection Agency ("EPA") for enforcement proceedings. Ultimately, EPA filed an administrative complaint against DOT&PF in August 2024 claiming violations of Section 404 of the Clean Water Act at nine sites, all located in the highway median separating Egan Expressway from Glacier Highway, for the alleged failure to obtain dredge and fill permits for DOT&PF's maintenance work to clear culverts and re-establish hydrological connections by cleaning roadside ditches.

Glacier Highway was constructed a century ago as a two-lane "pioneer road" build along the toe of the steep mountains that rise abruptly from the coastline as is common in the fjords of Southeast Alaska. Egan Drive, a divided four-lane highway and the primary arterial roadway between Juneau and the Mendenhall Valley, was built as a controlled access expressway in the 1970s to alleviate commuter traffic congestion and address

¹ EPA's Rebuttal Exchange does not dispute DOT&PF's Prehearing Exchange materials. At best, there is disagreement between the parties about the exact amount of material involved in DOT&PF's maintenance work (*see* CX 01 (Discharge Report) at 9, Table 1).

safety concerns along Glacier Highway. Glacier Highway remains the local access frontage road that runs parallel to and uphill of the Egan Drive expressway. Glacier Highway's mountainside curvature creates an irregular highway median several hundred wide between it and the Egan Drive expressway at most all locations in EPA's enforcement action. The farthest east and west site locations in EPA's enforcement action are at culverts that discharge stormwater into roadside ditches in a narrow highway median that eventually reach culverts that allow the stormwater to pass through the road prisms of Egan Drive expressway. The general layout is depicted below as excerpted from DOT&PF's Hydraulics Report:²



² See RX 02 (DOT&PF Hydraulics Report) at 12. Note that the lines on the map represent distances and are not intended depict existing surface water connections.

ITMO: SOA, DOT&PF

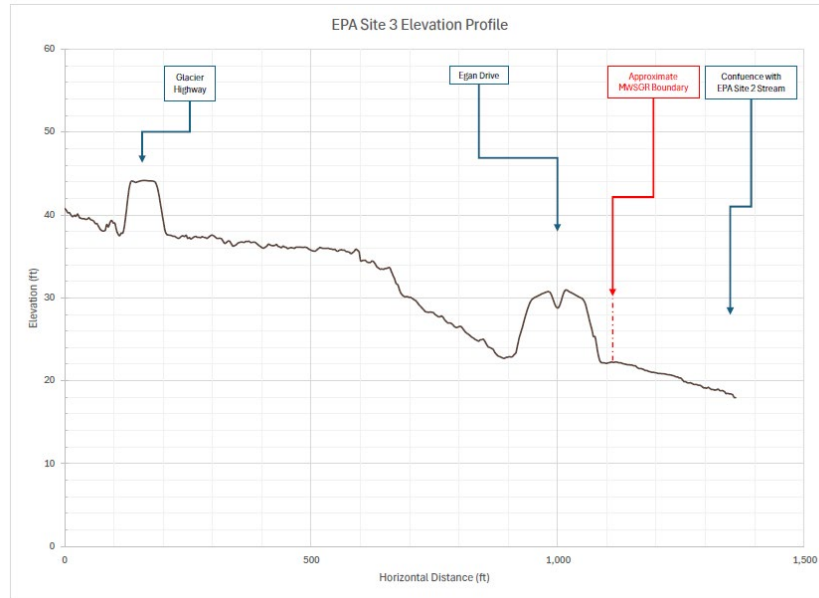
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The Egan Drive culvert system aligns with the Glacier Highway culverts so that stormwater from the mountainside travels through the transportation structures and into the Mendenhall Wetlands State Game Refuge (“Mendenhall Wetlands”). The Mendenhall Wetlands are connected to Gastineau Channel, which the parties agree is the traditional navigable water in this case, and at high tides these wetlands are saturated by and indistinguishable from Gastineau Channel.

However, the road prism of Egan Drive creates a clearly distinguishable boundary from the Mendenhall Wetlands as the road prism is elevated roughly eight to ten feet in elevation above the wetlands located outside the highway right-of-way. Glacier Highway is uphill of Egan Drive expressway and its road prism is similarly elevated at least seven feet above the highway median, and in excess of twenty feet in elevation above the outside limits of the Mendenhall Wetlands, such as depicted in the Site 3 diagram³ from DOT&PF’s Hydraulics Report below:

³ See RX 02 (DOT&PF Hydraulics Report) at 15.



Both Glacier Highway and Egan Drive feature a series of culverts and drainage ditches to manage storm runoff.⁴ Due to the natural deposition of sediment from the adjacent mountains to the north, the surface hydrology of the highway median changes with relative frequency. Streams may sometimes exist between the Glacier Highway culverts and the Egan Drive culverts, but as noted by the Alaska Department of Fish and Game (“ADFG”), “[m]ost streams in this area, upstream of Egan Drive are ephemeral and are occasionally dry.”⁵ Among other things, this situation renders anadromous fish habitat marginal to nonexistent in the median between the two road prisms, particularly since a number of the culverts are sliplined and perched (precluding fish passage) and any standing water is liable to freeze during the winter. As such, surface water connections

⁴ See RX 02 (DOT&PF Hydraulics Report) at 2-3 (individual site descriptions).

⁵ RX 03 (ADFG Fish Habitat Report) at 1.

between Glacier Highway, Egan Drive, and the Mendenhall Wetlands to the south are impermanent and frequently changing.

In December 2020, a major winter storm event occurred that caused landslides throughout the region, including at the sites subject to this enforcement action and resulted in two fatalities. These landslides caused significant runoff of soil, rocks, and organic debris to clog several culverts underneath Glacier Highway. DOT&PF crews performed emergency repairs at that time to restore minimum hydrological connections through the culverts (i.e., to bring the facility into full operation with the hillside creeks flowing through culverts rather than overtopping Glacier Highway) and continued to address other infrastructure damaged by the storm. In the following summer DOT&PF returned to this and other transportation structures facilities to provide more complete maintenance. Although the highway was fully operable at the time (i.e., open to vehicle traffic) and no parts of the transportation facility needed to be replaced, the blocked culverts needed to be cleaned out and restored to functionality before the next winter arrived; otherwise, without properly functioning culverts in place, the road prism would likely be damaged or destroyed.⁶

⁶ See RX 01 (DOT&PF Background Summary) at 1:

The increase in material deposition causing such obstructions rendered the culverts inoperable for them to provide the appropriate levels of flow. As a result, if maintenance actions were not performed soon, then the Glacier Highway would be flooded with water which would not only create hazardous driving conditions and/or cause a shut-down of the roadway, but also such over saturation of the road prism could cause extensive damage to entire sections of roadway that would require proportionately higher repair costs instead of such costs incurred at focused culvert locations.

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DOT&PF's maintenance activities generally consisted of jetting the debris from the blocked culverts and reestablishing plunge pools and drainage ditches in the immediate vicinity of the culverts.⁷ As described by DOT&PF's environmental manager:

All work occurred within DOT&PF's right-of-way. None of the culverts were retrofitted or replaced, and no new infrastructure was installed. In addition, the work is very focused at select locations along a much larger road prism, and none of the work performed is in such a connected linear fashion that would result in expanding the roadway's overall size, nor substantially change the character of the embankment's original fill design. The completed culvert maintenance activities are a commensurate effort to maintain the roadway's existing condition and functionality as part of best practices that ensure that the road prism would not be compromised. Furthermore, the work performed did not alter the existing road prism and did not bring any areas into any new type of use. The overall purpose of this maintenance work was to restore the functionality of the existing transportation structure.⁸

At Site 2, DOT&PF constructed a small temporary pad from dredged material to extend the reach of the heavy machinery performing maintenance activities in the highway median; the dredge material would normally be removed and hauled away upon completion of the project.⁹ Significantly, however, DOT&PF's maintenance work at this location was never completed because the agency was ordered to cease and desist all work when the USACE issued its Notice of Violation in October 2021.¹⁰ As a result, the

See also RX 02 (DOT&PF Hydraulics Report) at 9-10 (describing importance of culvert systems and need for regular maintenance).

⁷ RX 01 (DOT&PF Background Summary) at 4-5 (site specific description of maintenance activities).

⁸ RX 01 (DOT&PF Background Summary) at 6.

⁹ *Id.* at 4.

¹⁰ RX 01 (DOT&PF Background Summary) at 3-4.

ITMO: SOA, DOT&PF

work pad created from dredged material is still in place within the Glacier Highway median, and is now beginning to become grown over.¹¹

DOT&PF commenced its maintenance work as soon as was practical under the circumstances. The debris that clogged the culverts was frozen in place following the 2020 winter storm event, so DOT&PF had to wait until the ground had thawed in order to remove it. Moreover, DOT&PF had to arrange for specialized equipment to be brought up from the lower 48, a process which took several months to complete.¹² Additionally, the 2020 major storm event caused landslides throughout the region and DOT&PF had to prioritize its critical infrastructure maintenance projects.

LEGAL STANDARD

EPA's regulations provide for accelerated decisions under certain circumstances:

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. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.¹³

While the Federal Rules of Civil Procedure ("FRCP") are not strictly binding on administrative adjudications, the EAB and OALJ nonetheless look to the FRCPs for

¹¹ RX 01 (DOT&PF Background Summary) at 3-4.

¹² *Id.* at 3.

¹³ 40 CFR 22.20(a).

guidance.¹⁴ Therefore, in practice, accelerated decisions under Section 22.20 function as a motion for summary judgment under FRCP 56.

In a summary judgment context, an accelerated decision is appropriate where a movant shows that no genuine issue of material fact exists in the matter and that it is entitled to judgment as a matter of law. A factual dispute is material if “under the governing law, it might affect the outcome of the proceeding,” and an issue concerning a material fact is genuine if a “factfinder could reasonably find for the nonmoving party.”¹⁵ In addition, “neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence.”¹⁶

ARGUMENT

An accelerated decision in DOT&PF’s favor is appropriate here because EPA lacks jurisdiction over the worksites in question and because DOT&PF’s maintenance work was exempt from permitting requirements under Section 404(f) of the Clean Water Act or, alternatively, was preauthorized under a Nationwide Permit.

¹⁴ *Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 (E.D.N.Y. 1982) (“The federal rules in terms only “govern the procedure in the United States district courts in all suits of a civil nature.” Rule 1. The administrative agencies enjoy “wide latitude” to fashion their own rules of procedure for the discharge of their duties.”).

¹⁵ *In re BWX Technologies*, 9 E.A.D. 61, 2000 WL 365958, at *11.

¹⁶ *Id.* (citing 11 James W. Moore et al., *Moore's Federal Practice* § 56.13 (3d ed. 1999)).

I. EPA lacks jurisdiction over DOT&PF's highway medians.

EPA does not have jurisdiction over the Glacier Highway worksites because federal jurisdiction in this case ends at the outer reaches of the Mendenhall Wetlands, which are all on the southern side of Egan Drive. DOT&PF's Prehearing Exchange already described the new standard established by the U.S. Supreme Court in *Sackett v. EPA*.¹⁷ Under *Sackett*, federal jurisdiction only exists if a particular location is "adjacent" to traditionally navigable waters, and if there is a "continuous surface connection" between the two.¹⁸ Neither element is met here, as discussed below.

First, the locations of the Glacier Highway worksites are not adjacent to the Gastineau Channel because the worksites are clearly distinguishable from federal jurisdictional wetlands. Citing *Rapanos*, the *Sackett* Court held that waters of the United States must be "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."¹⁹ In this case, the physical setting of the highway median at issue here is clearly distinguishable from the Mendenhall Wetlands and the Gastineau Channel because a divided four-lane highway (Egan Drive) forms a conspicuous elevated physical barrier separating by hundreds of feet, at its closest, the Mendenhall Wetland's jurisdictional wetlands from the Glacier Highway median. The separation from the jurisdictional

¹⁷ See DOT&PF's Prehearing Exchange at 4-7.

¹⁸ *Sackett*, 598 U.S. at 678-79.

¹⁹ *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 678 (2023).

wetlands that is created by the Egan Drive and the Glacier Highway transportation structure is discrete and obvious.

The scale of this separation between jurisdictional wetlands and the Glacier Highway worksites is also noteworthy. All sites are over 300 feet away from the Mendenhall Wetlands at bare minimum, though DOT&PF's Hydraulics Report indicates much greater distances; as summarized below, Sites 1 and 4 are particularly far removed from the Mendenhall Wetlands, with Site 4 being over a mile away.

Site 1	At least 1,525ft from Honsinger Pond, most likely 4,000ft from Mendenhall Wetlands (RX 02 at 5, 13).
Site 2	At least 345ft from Mendenhall Wetlands (RX 02 at 5, 14).
Site 3	At least 700ft, most likely 900ft from Mendenhall Wetlands (RX 02 at 5, 15).
Site 4	At least 5,300ft, most likely 5,700ft from Mendenhall Wetlands (RX 02 at 6, 16).
Site 5	At least 345ft, most likely 500ft from Mendenhall Wetlands (RX 02 at 6, 19).
Site 6	At least 345ft, most likely 350ft from Mendenhall Wetlands (RX 02 at 6, 17).
Site 7	At least 345ft, most likely 600ft from Mendenhall Wetlands (RX 02 at 18).
Site 8	At least 345ft, most likely 400ft from Mendenhall Wetlands (RX 02 at 6, 20).
Site 9	At least 330ft, most likely 300ft from Mendenhall Wetlands (RX 02 at 6, 21).

As noted in DOT&PF's Prehearing Exchange,²⁰ if a mere thirty-foot distance created by a single road prism was sufficient to sever jurisdiction in *Sackett*, then a three-hundred-foot distance (if not over a mile) created by multiple roads prisms is surely sufficient to do the same here.

Second, there is not a continuous surface connection between the Glacier Highway worksites and the Gastineau Channel because "[t]he culverts and ditches in general may

²⁰ DOT&PF's Prehearing Exchange at 6-7.

lack standing water, especially in summer.”²¹ Relatedly, the slope of the natural topography plus the multiple roadbeds and other physical features form multiple discrete barriers between the worksites and federal jurisdictional waters. The Court in *Sackett* noted that “a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction.”²² Here, DOT&PF’s Hydraulics Report demonstrates that the worksites along Glacier Highway are at least ten to twenty feet higher than the northern boundary of the Mendenhall Wetlands. In addition to this elevation difference, the raised roadbed of Egan Drive is roughly eight feet tall along most sites, and the southern edge of Honsinger Pond is nearly twelve feet in elevation above the northernmost edge of the Mendenhall Wetlands. Site 4 in particular is also further separated by Yandukin Drive in addition to Egan Drive, plus multiple structures including portions of Juneau International Airport. As DOT&PF’s Hydraulics Report

²¹ RX 02 (DOT&PF Hydraulics Report) at 5. *See also* RX 03 at 1 (“Most streams in this area, upstream of Egan Drive are ephemeral and are occasionally dry...”) and 33 C.F.R. § 328.3(b)(8) (swales and gullies with low infrequent flow do not qualify as waters of the United States under USACE regulations).

²² *Sackett*, 598 U.S. 651, 678, n.16. EPA’s Jurisdictional Analysis (CX 02) relies mostly on a 2008 internal memorandum offering guidance on the *Rapanos* decision. This guidance document does not have the force of law. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (“[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”); *see also San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 708 (9th Cir. 2012) (Department of Interior guidance memo lacked force of law). Moreover, footnote 16 of the *Sackett* decision refutes the guidance document’s passing assertion in this guidance document regarding road crossings and jurisdictional wetlands. *See* 2008 memorandum at 6, available online at: https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

visibly demonstrates, there is clearly a distinguishable barrier separating the Glacier Highway worksites from the federal jurisdictional wetlands south of Egan Drive.

Moreover, recent case law applying the new *Sackett* standard lends credence to DOT&PF's position. In *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, an environmental group alleged that a developer violated the Clean Water Act due to unauthorized fills of wetlands.²³ However, the court granted a motion to dismiss for lack of jurisdiction under the "new rule of federal law" created and applied in *Sackett*.²⁴ The court first rejected the environmentalists' contention that the possibility that storm runoff from the subject property might reach Dunbar Creek, the traditional navigable water, "via culverts and pipes" was sufficient to establish jurisdiction because it was not a "continuous *surface* connection" between the two.²⁵ The court also noted the amount of distance between Dunbar Creek and the subject property, as well as the variety of barriers in between the two:

Based on [imagery] provided, Dunbar Creek is *hundreds of feet* away from the Subject Property. [] Between the Subject Property and Dunbar Creek (from west to east) there is: a salt marsh; upland; the road leading from Sea Island Road to Defendant's hotel; a median; the road from Defendant's hotel to Sea Island Road; and, finally, the Subject Property.²⁶

²³ *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. CV 219-050, 2024 WL 1088585 (S.D. Ga. Mar. 1, 2024).

²⁴ *Id.* at *3-4.

²⁵ *Id.* at *5 (emphasis in original). Notably, in his concurrence to *Sackett*, Justice Kavanaugh posed the question: "Can a continuous surface connection be established by a ditch, swale, pipe, or culvert?" *See Sackett*, 598 U.S. at 727 (KAVANAUGH, J., concurring). *Glynn* answers the question in the negative.

²⁶ *Id.* at *5 (emphasis added, internal cites omitted).

Accordingly, the *Glynn* court held that a “clear demarcation” existed that severed jurisdiction under *Sackett* since wetlands were not adjacent due to the hundreds of feet of distance from traditional navigable waters and because the system of culverts and pipes precluded the existence of a continuous surface connection.

The situation in *Glynn* is quite similar to the case at bar. The Glacier Highway worksites are at minimum hundreds (if not thousands) of feet away from the Mendenhall Wetlands, and even further removed from the Gastineau Channel proper. At each of the nine sites listed in EPA’s Complaint, storm water must travel through multiple roadway prisms consisting of multiple culverts, ditches, and a divided four-lane highway in order to potentially reach the Mendenhall Wetlands.²⁷ Thus, as with *Glynn*, the distance of hundreds or thousands of feet and the interruption in surface connection created by culvert systems show that federal jurisdiction ends south of Egan Drive in this case.

Finally, while *Sackett* held that “the CWA does not define the EPA’s jurisdiction based on ecological importance,”²⁸ it must be observed that the potential for anadromous fish habitat in the highway median north of Egan Drive should not be overstated. Although a few of the culverts under Egan Drive may allow for anadromous fish passage in certain years, the sheer possibility of fish passage does not demonstrate that federal jurisdiction exists in this area. As noted by the Alaska Department of Fish and Game, “[m]ost streams in this area, upstream of Egan Drive are ephemeral and are occasionally

²⁷ See RX 02 (DOT&PF Hydraulics Report) at 2-3.

²⁸ *Sackett*, 598 U.S. at 683.

dry,”²⁹ and any anadromous fish habitat in the highway median north of Egan Drive is “marginal to poor” if not nonexistent. RX 03 at 1. It is difficult if not impossible for anadromous fish to even access the areas north of Egan Drive, and those few fish that are able to make the passage are likely to become stranded and die. Only two of the eight streams analyzed in DOT&PF’s Fish Habitat Report may have anadromous fish present. RX 03 at 2 (Stream 1 and Stream 4). Stream 1 is partially backwatered, providing some anadromous fish passage, but “[s]tream habitat improvements are needed to improve stream connectivity for fish passage.” RX 03 at 3. Similarly, Stream 4 is partially backwatered, and only provides “restricted” fish passage, and anadromous fish were not witnessed in at least one year likely due to frozen water precluding habitat. RX 03 at 4. Aside from these two, the remaining streams do not have anadromous fish habitat, and Streams 2, 5, and 6 feature perched culverts.

Consequently, EPA does not have jurisdiction here because the Glacier Highway worksites are not adjacent to the Gastineau Channel and lack a continuous surface connection with the same.

II. DOT&PF’s maintenance work is exempt under Section 404(f) of the Clean Water Act.

As discussed below, DOT&PF’s work along the Glacier Highway meets the statutory and regulatory definition of exempt maintenance under Section 404(f)(1) and its

²⁹ See also 33 C.F.R. § 328.3(b)(8)(stating that swales and gullies with low infrequent flow do not qualify as waters of the United States).

implementing regulations. DOT&PF's work is supported by case law and does not violate the recapture provision of Section 404(f)(2).

A. DOT&PF's activities meet the statutory and regulatory definition of exempted discharge of materials for the purpose of maintenance of currently serviceable transportation structures.

This case presents an ideal demonstration of why the Clean Water Act's maintenance exemption exists. This maintenance exemption is set forth in Section 404(f)(1) and states that 404 permits are not required for the following activities:

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;³⁰

Exempt activities under Section 404(f)(1) must avoid the so-called "recapture" provision of Section 404(f)(2), which prohibits otherwise exempt actions from bringing an area of navigable waters into a new use "to which it was not previously subject."³¹

In addition, EPA's regulations further clarify this exemption, noting that maintenance activities must not change the "character, scope, or size of the original fill

³⁰ 33 USC 1344(f)(1)(B), (C).

³¹ 33 USC 1344(f)(2) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.").

design.”³² To qualify for the exemption, structures must be “currently serviceable,” and any emergency restoration must occur within a “reasonable” timeframe.³³ Case law interpreting this exemption notes that while exceptions to the general permitting requirement of the Clean Water Act must be narrowly construed, exemptions must also be “analyzed in light of the Act’s purposes.”³⁴

In this case, Glacier Highway is clearly a transportation structure that qualifies for the Section 404(f)(1)(B) exemption. Courts have recognized that “[a]n embankment supporting a road for transit by motor vehicles is a ‘transportation structure’” and exempt under 404(f)(1)(B).³⁵ The Glacier Highway road prism was constructed a hundred years ago and long predates the passage of the Clean Water Act. Constructed along the foot of the mountains north of the Gastineau Channel, it was the first road built connecting Juneau with the Mendenhall Valley. It was the only such road until the completion of the Egan Drive Expressway in the 1970’s. Glacier Highway was still “currently serviceable” in the summer of 2021 when the relevant maintenance work was performed as vehicle traffic was never interrupted by the winter storm damage several months earlier.³⁶ The culverts underneath the road bed were clogged with soil and debris and needed to be

³² 33 CFR 323.4(a)(2).

³³ *Id.* “Currently serviceable” is defined as “[u]seable as is or with some maintenance, but not so degraded as to essentially require reconstruction.” 72 Fed.Reg. 11196.

³⁴ *United States v. Moses*, 496 F.3d 984, 992 (9th Cir. 2007).

³⁵ *June v. Town of Westfield, New York*, 370 F.3d 255, 257–58 (2d Cir. 2004).

³⁶ RX 01 (DOT&PF Background Summary) at 6.

cleaned before the next winter season approached, at which point significant damage to the road prism would be likely.³⁷

Moreover, DOT&PF's maintenance performed along the Glacier Highway did not change the "character, scope, or size of the original fill design."³⁸ The point of DOT&PF's maintenance work was simply to return Glacier Highway to the status quo ante and restore the full functionality of the culvert system. The road prism was not expanded or otherwise improved beyond its original condition prior to the winter storm event. As a result, DOT&PF only performed what work was reasonably necessary in order to preserve the functionality of the transportation structure.³⁹ There was no more minimal or less intrusive means of restoring the culverts and ditches to their functionality.⁴⁰ Finally, as discussed further in Section II.D. *infra*, DOT&PF did not violate the "recapture" provision of Section 404(f)(2) because DOT&PF's maintenance work did not bring an area of navigable waters into a new use "to which it was not previously subject."

Accordingly, DOT&PF's maintenance work qualifies as exempt simply based on the plain language of Section 404(f)(1) and the statute's implementing regulations.

³⁷ RX 01 (DOT&PF Background Summary) at 3.

³⁸ 44 CFR 323.4(a)(2).

³⁹ See RX 02 (DOT&PF Hydraulics Report) at 9-10.

⁴⁰ See RX 01 (DOT&PF Background Summary) at 6 and RX 02 (DOT&PF Hydraulics Report) at 9-10.

B. The legislative history of Section 404(f) demonstrates that Congress intended for the maintenance of transportation structures such as Glacier Highway to be exempt from permitting requirements.

The plain text of Section 404(f) and its implementing regulations make clear that the Clean Water Act was not intended to be used to needlessly regulate de minimis maintenance activities, nor was it intended to thwart emergency repairs. This is borne out by the legislative history of Section 404(f).

Section 404(f) was not originally included in what is now the Clean Water Act but was added shortly after its passage due to Congress's recognition that the Act could be abused, resulting in significant over-regulation of de minimis activities that were not within the Act's intended scope. In 1972, Congress passed significant amendments to the Water Pollution Control Act (now the Clean Water Act), which included the implementation of Section 404, introducing a dredge and fill permitting program. The 1972 version of Section 404 did not include exemptions for farming, foresting, mining, or other construction. As a result, Section 404 was met with legal and political challenges. Addressing issues with the 1972 version of Section 404, legislators noted that:

[t]estimony received concerning the types of activities that are subject to section 404 permits revealed two basic problems: confusion over whether permits are required for certain 'gray area' types of activities, and the inappropriate use of the permit mechanism for regulating certain discharges of dredged or fill material.⁴¹

⁴¹ S. REP. 95-370 at 75-6 (1977).

Due in part to widespread confusion and concern, in 1975 USACE was ordered by a district court to promulgate proposed regulations “clearly reflecting the full mandate of the [Clean Water Act].”⁴²

USACE promulgated regulations placing limits on permit requirements and clarifying the definition of waters of the United States. These prior regulations included exemptions to the 404 permit requirements, including for “[m]aterial placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, rip-rap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures...”⁴³ Legislators acknowledged that:

[t]he Corps took special precautions in its July 25, 1975, regulations to ensure its program did not extend to areas where it did not belong, that it did not become mired in the processing of innumerable individual permits for trivial matters and that it cooperated fully with state and local authorities and programs. The Corps regulations provide:...that fills for the purpose of the maintenance of existing structures such as dikes, dams, highways, ect., will not be covered.”⁴⁴

⁴² *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (directing USACE to publish “proposed regulations clearly recognizing the full regulatory mandate of the Water Act.”).

⁴³ CONG. REC. Extensions of Remarks (March 4, 1977) (statement of Rep. Robert W. Edgar).

⁴⁴ Hearings before the Senate Committee on Public Works, 94-H49, 94th CONG. at 341-2 (1976).

In 1976, the U.S. Senate initiated hearings to reconsider the scope of USACE's jurisdiction under Section 404.⁴⁵ The ultimate result of those hearings would be the 1977 Clean Water Act amendments, which included the introduction of what is now 404(f)(1); exemptions to the Section 404 dredge and fill permitting requirements. In debating and developing the 1977 amendments, Congress recognized that the routine maintenance of transportation structures—including culverts—was not intended to be regulated by a federal wetland permitting program:

[t]he Kansas Department of Transportation advises me that routine cleaning of culverts, repair and replacement of bridge abutments and piers, and even debris clearance could possibly require a permit under current Corps regulations. *I do not believe that Congress intended for such activities to be regulated by the Federal Government.* For these reasons, permit exemptions for normal activities of private business need the full force of congressional clarification and public law.⁴⁶

This was corroborated by testimony from the American Association of State Highways and Transportation Officials, which noted that the association supported water protection efforts but felt that:

[b]ecause highway and railroad construction is of linear configuration, almost all highway and railway projects touch some body of water. We feel that many of these contacts that are made do not have an environmental significance in and of themselves. Public highway projects are already subject to stringent environmental controls at both the State and the Federal level.⁴⁷

⁴⁵ Hearings before the Senate Committee on Public Works, 94-H49, 94th CONG. at 1.

⁴⁶ Hearing before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95-H25, 95th CONG. at 35 (Statement of Sen. Bob Dole) (emphasis added).

⁴⁷ *Id.* at 159.

A Senate Report from the legislative history in support of amending Section 404 addresses the concerns of transportation officials. The proposed amendment exempted:

[t]he maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. This does not include maintenance that changes the character, scope, or size of the original fill. Emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure to qualify for this exemption.⁴⁸

Continuing to explain that the 404(f)(1) exceptions were not in conflict with the greater goals of the Clean Water Act because:

[t]hese specified activities should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody, and that will not reduce the reach of the affected waterbody.⁴⁹

The original bill providing for the 1977 amendments did not include the (f)(1) exemptions. A Senate amendment followed that provided an exemption for “the maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures.”⁵⁰

Ultimately, the 1977 Clean Water Act amendments were passed into law, and the final 1977 exception read, and continues to read: “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable

⁴⁸ S. REP. 95-370 at 76.

⁴⁹ *Id.* at 77.

⁵⁰ H.R. CONF. REP. 95-830 at 98.

structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.”⁵¹

With all this background in mind, it is clear that requiring an individual Section 404 permit in the case of Glacier Highway directly contradicts Congress’s intention in drafting Section 404(f) and the Clean Water Act as a whole. Section 404(f) is a commonsense recognition that certain activities should not be burdened by onerous permitting requirements because (a) their impact, if any, is minimal on wetland environments, and (b) these sorts of activities must necessarily occur on a frequent basis in order for the nation’s infrastructure to be maintained in a safe and effective manner. Consequently, because courts will not read a statute in such a way as to “produce an absurd and unjust result which congress could not have intended,”⁵² EPA’s attempt to intervene and overregulate basic infrastructure maintenance runs contrary to the purposes of the statute.⁵³

Accordingly, DOT&PF’s maintenance work qualifies as exempt simply based on the plain language of Section 404(f)(1) and the statute’s implementing regulations as well as the Clean Water Act’s legislative history.

⁵¹ Pub. L. No. 95-217 (Dec. 27, 1977) at 36.

⁵² *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982).

⁵³ In addition, the policy ramifications of this case further illustrate why Congress intended for the maintenance of transportation structures to be exempt. *See* RX 04 (Policy Considerations).

ITMO: SOA, DOT&PF

C. Case law demonstrates that DOT&PF’s maintenance work qualifies as exempt under Section 404(f)(1).

DOT&PF’s position here is consistent with federal court case law that has analyzed the Section 404(f) exemptions. In *June v. Town of Westfield*, a local government deposited fill consisting of “several tens of thousands of cubic yards” dirt, gravel, sand, rocks, and cement to shore up a road embankment and, in so doing, “expanded the embankment adjoining the road and filled in part of the [adjacent] gully.”⁵⁴ Even though acknowledging that 404(f) exemptions are to be narrowly construed, the Second Circuit upheld the district court’s determination that the town’s road maintenance was exempt because to hold otherwise would contradict the purpose of the Clean Water Act:

To treat a thoroughfare like Mt. Baldy Road otherwise would be to thwart the apparent purpose of the [404(f)(1)] provision: to permit routine government maintenance of transportation, public water-supply, and similar facilities without the expense, consumption of time, and consequent danger to people and facilities that would inhere in a requirement for a prior permit.⁵⁵

Thus, this was a clear-cut issue to the Second Circuit: maintenance of a currently serviceable road structure—even if includes tens of thousands of cubic yards of fill, some of which change the topography of the adjacent area—is exempt under Section 404(f)(1)(B).

Other cases support application of the Section 404(f) exemptions on a broad scale. In *Sargent County Water Resource District*, a county water district was sued for

⁵⁴ *June v. Town of Westfield, New York*, 370 F.3d 255, 256 (2d Cir. 2004).

⁵⁵ *Id.* at 258.

conducting maintenance on a 35-mile network of drainage ditches constructed between 1917-1924 without a Section 404 permit.⁵⁶ The district dredged and sidecast accumulated silt into adjacent wetlands. In a subsequent proceeding, the court concluded that the ditch maintenance in question was exempt from the permitting requirement under Section 404(f)(1)(C) because no new construction occurred.⁵⁷ While acknowledging that Section 404(f) exemptions are to be narrowly construed, the court “conclude[d] that the County's objective of cleaning out the drainage ditch was accomplished. The work was maintenance.”⁵⁸

At an even broader scale, in *Peconic Baykeeper*, a local government used heavy machinery to ditch and dredge roughly 147 miles of canals within the Peconic and South Shore estuary, which also entailed depositing dredged material into adjacent wetlands.⁵⁹ The dredging was done to a preexisting “mosquito grid ditch system” that had been in place since the 1930’s, designed to reduce insect-borne disease. Despite the expansive scope of the maintenance work and the redeposition of dredged material into adjacent wetlands, the court found that “the removal of accumulated silt and foliage in the

⁵⁶ *United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1084 (D.N.D. 1992) (“Sargent I”).

⁵⁷ *United States v. Sargent County Water Res.*, 876 F. Supp. 1090, 1101-02 (D.N.D. 1994) (“Sargent II”).

⁵⁸ *Sargent II*, 876 F. Supp. at 1099. The *Sargent II* court also noted that “reviewing courts have consistently looked beyond the stated or subjective intentions and determined the effect or ‘objective’ purpose of the activity conducted. In this case, the ‘objective’ purpose was consistent with the County's stated intentions.” *Id.* at 1101.

⁵⁹ *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 585 F. Supp. 2d 377, 424 (E.D.N.Y. 2008), *aff’d in relevant part*, 600 F.3d 180 (2d Cir. 2010).

preexisting grid ditch system is not prohibited and does not require a permit, as stated in 33 U.S.C. § 1344(f)(1).”⁶⁰ Moreover, the court noted that the county complied with the requirements in 33 CFR 323.4(a) because it conducted maintenance of currently serviceable structures (i.e., the mosquito grid ditch system) and did not modify the character, scope or size of the original fill.⁶¹ The court in *Peconic* noted that, “[i]n the Court's view, this and similar decisions, are not only legally correct but make common sense.”⁶² This holding was upheld on appeal by the Second Circuit.⁶³

Case law further indicates that the only instances of maintenance where the Section 404(f) exemption does not apply are situations where a new use or new feature is added as part of the work performed. For example, in *United States v. Sweeney*, a court determined that the Section 404(f) exemption did not apply because the defendants in that case built an entirely new levee in areas far outside the original alignment.⁶⁴ Relatedly, in *Sierra Club v. MasTec*, the court denied that Section 404(f) was applicable because the defendants replaced a number of culverts as part of the construction of an entirely new natural gas line.⁶⁵ Notably, however, the *MasTec* court held that new culverts *would be*

⁶⁰ *Peconic Baykeeper*, 585 F. Supp. 2d at 426 (citing Section 404(f)(1)(B) and (C)).

⁶¹ *Id.* (citing 33 CFR 323.4(a)(2) and (3)).

⁶² *Id.* at 427 (citing *June, Sargent I* and *Sargent II*).

⁶³ *See* 600 F.3d 180 (2d Cir. 2010) (remanding the case on FIFRA grounds only).

⁶⁴ *United States v. Sweeney*, 483 F. Supp. 3d 871, 932 (E.D. Cal. 2020).

⁶⁵ *Sierra Club v. MasTec N. Am.*, No. 06-6071-HO, 2009 WL 426205, at *2 (“MasTec's activities were, of course, far beyond the purpose of maintenance or replacement of serviceable structures.”).

exempt if that was the primary focus on the project rather than building a new gas line.⁶⁶

In addition, in *United States v. Moses*, the court confirmed that completely “rerouting, reshaping and otherwise controlling the flow of the waters of [Teton] Creek” does not qualify for 404(f)(1) because the creek was a natural feature, not a transportation structure, and therefore could not be “repaired” or maintained.⁶⁷

Beyond case law, federal agencies themselves qualify for the Section 404(f) exemption in situations involving more extensive repairs than DOT&PF performed along Glacier Highway. In 2017, the USDOJ Bureau of Reclamation proposed removing and retrofitting a 50-plus year-old culvert along a service road. The culvert had “recently failed due to long-term issues related to the chemistry of the underlying soil reacting with the metal of the culvert in combination with high flows from weather events” the previous winter.⁶⁸ This project entailed digging up the existing roadbed, removing the failed culvert, and retrofitting the structure with a new culvert in addition to excavating a new lined roadside drainage ditch, complete with backfill to restore the original elevation.⁶⁹ Although one might argue that this project failed to meet the “currently serviceable” requirement or the prohibition on modifications that change the “character,

⁶⁶ *MasTec*. 2009 WL 426205, at *2. (“Nonetheless, it is worth noting that MasTec, the Army Corps of Engineers, and Coos County understood that the project also involved replacing culverts at many crossings and that MasTec and Coos County had reason to believe that replacement of culverts did not require a permit.”).

⁶⁷ *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007).

⁶⁸ RX 06 (Whiskeytown BOR Document) at 2.

⁶⁹ RX 06 (Whiskeytown BOR Document) at 2.

scope, or size of the original fill design,” the U.S. Army Corps of Engineers nonetheless determined that the culvert replacement and retrofitting was exempt under Section 404(f)(1)(b) of the Clean Water Act.⁷⁰

In this case, DOT&PF’s maintenance along the Glacier Highway stands in stark contrast to the types of work that courts have found outside the scope of Section 404(f). Unlike *Moses*, DOT&PF repaired an existing, currently serviceable transportation structure, and all work was performed within DOT&PF’s existing right-of-way. Unlike *Sweeney* and *MasTec*, DOT&PF did not build entirely new structures to handle stormwater runoff, and it was the explicit and objective purpose of DOT&PF’s maintenance work to simply repair the damage done by the 2020 storm event, not create new infrastructure. All work was done as soon as it could have under the circumstances.⁷¹ Moreover, DOT&PF did not replace or retrofit any culverts. Instead, DOT&PF simply cleaned out the culverts and reformed their outlets in order to restore their functionality—although the Whiskeytown project indicates that DOT&PF would nonetheless have qualified for the 404(f) exemption even if it had gone so far as to dig up the roadbed of Glacier Highway and replace and retrofit the culverts.

⁷⁰ RX 06 (Whiskeytown BOR Document) at 5 (“The US Army Corps of Engineers reviewed the culvert replacement project on July 21, 2017 and determined the Project is exempt from the Clean Water Act (CWA) Section 404 permitting requirements under Section 404(f)(1)(b), which is further clarified in 33 CFR 323.4 (a) (2). Therefore a Department of Army authorization is not required.”).

⁷¹ RX 01 (DOT&PF Background Summary) at 3, 6.

The scale of DOT&PF’s maintenance work is also vastly smaller than the types of maintenance approved by the various courts mentioned above. While the *Sargent* cases and *Peconic Baykeeper* dealt with 35- and 127-mile-long ditch systems, here DOT&PF’s maintenance was restricted to a handful of culverts and associated ditchwork that was isolated to a matter of feet from the outlet of each culvert. Similarly, the Second Circuit in *June* upheld a local government depositing “tens of thousands of cubic yards” of fill to shore up a road embankment, whereas even in the worst-case scenario as envisioned in EPA’s Discharge Report, DOT&PF is responsible for no more than 231 total cubic yards of disturbance.⁷² Moreover, *June* featured the fill of a gully adjacent to the road prism—a factor not present in the instant case. Given that various courts have deemed these vastly more extensive projects to fall within the “narrowly construed” confines of the Section 404(f) exemptions, it is eminently reasonable to conclude that the minimum possible maintenance performed by DOT&PF along the Glacier Highway is likewise exempt from the Clean Water Act’s permitting requirement. An accelerated decision in DOT&PF’s favor is therefore warranted here.

D. DOT&PF’s maintenance work does not violate the recapture provision of Section 404(f)(2).

Finally, DOT&PF’s work along the Glacier Highway did not violate the recapture provision of Section 404(f)(2) because it did not “bring[] an area of the navigable waters

⁷² See CX 01 at 9 (EPA Discharge Report) (citing DOT&PF’s Response to Complainant’s Information Request).

into a use to which it was not previously subject.”⁷³ As fully analyzed above, the highway median between the Egan Drive expressway and Glacier Highway is not a navigable water. In addition, the case law cited above demonstrates why ditch and culvert maintenance activities for transportation structures do not violate the recapture provision.

As the court in *Sargent I* noted, “[i]f the proof shows that the project was strictly maintenance, then its purpose necessarily was not “bringing an area of the navigable waters into a use to which it was not previously subject,” and the recapture clause does not apply as a matter of law.”⁷⁴ Consequently, after establishing that the cleaning of a 70-year-old maintenance ditch clearly qualified as exempt maintenance work, the court in *Sargent II* subsequently concluded that the county did not violate the recapture provision.⁷⁵ Because the maintenance work did not impede the flow of water, the court held that the recapture provision was satisfied.⁷⁶ Notably, the court further held that “the placement of excavated material on top of old spoil piles from previous work” and the sidecasting of material from the cleaned ditches were irrelevant because this had “a very minor, infinitesimal affect [sic] on the flow or reach of the waters.”⁷⁷ Similarly, the court in *June* held that Section 404(f)(2) was satisfied because it was not the purpose of the local government’s maintenance work to “bring[] an area of the navigable waters into a

⁷³ 33 USC 1344(f)(2).

⁷⁴ *Sargent I*, 876 F. Supp. at 1088.

⁷⁵ *Sargent II*, 876 F. Supp. at 1102.

⁷⁶ *Id.* at 1103.

⁷⁷ *Id.*

use to which it was not previously subject.”⁷⁸ This conclusion was likewise echoed by the court in *Peconic Baykeeper*.⁷⁹

Here, the record is clear that DOT&PF’s maintenance work was done solely to repair damage from the 2020 storm event. Any minor sidecasting of dredged material did not bring an area into a new use, and all work was performed within DOT&PF’s right-of-way.⁸⁰ The worksites in question are roughly one mile away from the Gastineau Channel and are separated from the Mendenhall Wetlands by Egan Drive, a four-lane divided highway, and by an extensive array of ditchwork and culverts which, in the case of Site 4, includes portions of Juneau International Airport. To be clear, DOT&PF’s work along Glacier Highway restored the functional hydrologic capacity of the transportation structure,⁸¹ which cannot constitute a new use. Given that DOT&PF’s purpose was strictly maintenance of the existing transportation structure, and given the much smaller scope of DOT&PF’s project in comparison to the work performed in *June, Peconic Baykeeper*, and the *Sargent* cases, the relevant case law demonstrates that the Glacier Highway maintenance work satisfies Section 404(f)(2).

⁷⁸ *June*, 370 F.3d at 258.

⁷⁹ *Peconic Baykeeper*, 600 F.3d at 189.

⁸⁰ *See* RX 01 (DOT&PF’s Background Summary) at 6.

⁸¹ *See* RX 02 (DOT&PF Hydraulics Report) at 3-5.

III. DOT&PF's maintenance work was authorized by Nationwide Permit 3(a).

Alternatively, aside from the Section 404(f) exemption, DOT&PF's maintenance work was also preauthorized by Nationwide Permit 3(a) ("NWP 3(a)").⁸² The Permit provides in relevant part:

The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area ... are authorized.⁸³

NWP 3(a) goes on to state that "stream channel modification is limited to the minimum necessary" to complete the repairs provided that any modifications "must be immediately adjacent to the project."⁸⁴ Removing of "accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill" is also authorized, as is "the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events" provided repair work is commenced or under contract within two years.⁸⁵ Notably, while preconstruction notice is not required with NWP 3(a) or (c) permits, but only with NWP 3(b) permits, as confirmed by the U.S.

⁸² As noted at pp. 12-13 of DOT&PF's prehearing brief, Nationwide Permit 3(c) may be applicable in this case although, as noted previously the cease and desist order contained in the Notice of Violation required any material to be left in situ for all these years.

⁸³ RX 08 (Nationwide Permit 3 (2021)) at 1. Also available online at: <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/19768>.

⁸⁴ *Id.*

⁸⁵ *Id.*

Army Corps of Engineers.⁸⁶ Case law also confirms that most nationwide permits automatically apply.⁸⁷

In this case, DOT&PF's work along Glacier Highway is precisely the type of activity that falls within the scope of NWP 3(a). As previously stated, Glacier Highway's culvert system was currently serviceable when the maintenance occurred, and the transportation structure was not put to a new or different use than it was prior to the commencement of the repairs. The minimal ditching and fill required to restore hydrologic function that EPA bases its complaint upon is simply the "minor deviations" and minimally necessary stream channel modifications allowed for in the Permit. The entire project can be described as the removal of "accumulated sediment and debris within, and in the immediate vicinity of," the road prism, and work commenced roughly nine months after the December 2020 storm event necessitated the maintenance—well within the two-year period stated in NWP 3(a). It is worth noting that the court in *Peconic Baykeeper* also held that NWP 3(a) authorized the maintenance⁸⁸ at issue in that case; again it bears repeating that if dredging 147 miles of drainage ditches qualify for

⁸⁶ *Id.*; see also RX 09 (Summary Table of 2021 NWPs) at 1. Also available online at: <https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Hot%20Topics/2021%20NWP%20Summary%20Table.pdf?ver=hYnhZyeHVwon3ob3O1nr8g%3D%3D> (noting that preconstruction notice is not required under NWP 3(a) or NWP 3(c)).

⁸⁷ See e.g., *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) ("Such a permit is automatic in that if one qualifies, no application is needed before beginning the discharge activity.").

⁸⁸ *Peconic Baykeeper*, 585 F. Supp. 2d at 427.

NWP 3(a), then this Permit is all the more applicable within the much smaller scale of the Glacier Highway work sites.

CONCLUSION

For the reasons given above, summary judgment should be granted in DOT&PF's favor because: (1) EPA lacks jurisdiction under *Sackett*; (2) DOT&PF's maintenance along the Glacier Highway was exempt under Section 404(f); and (3) alternatively, DOT&PF's maintenance work was preauthorized under Nationwide Permit 3.

DATED: March 3, 2025.

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Memorandum in Support of Respondent's Motion
For Accelerated Decision

Case No.: CWA-10-2024-0154
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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

The undersigned certifies that the original **Respondent's Motion for Accelerated Decision** in the above-captioned action was filed with the OALJ E-Filing System to:

Mary Angeles, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Further the undersigned certifies that a true and correct copy of the original **Respondent's Motion for Accelerated Decision** was served on Complainant United States Environmental Protection Agency via email to:

Patrick Johnson
johnson.patrick@epa.gov

Dated this 3rd day of March, 2025.

By: /s/ Brian E. Gregg
Brian E. Gregg
Assistant Attorney General