

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

JACKSON & SON DISTRIBUTORS, INC.,
dba JACKSON AND SON OIL,

Seaside, Oregon,

Respondent.

DOCKET NO. CWA-10-2025-0023

**COMPLAINANT’S MOTION FOR LEAVE
TO AMEND THE COMPLAINT**

COMES NOW, the United States Environmental Protection Agency Region 10 (“EPA” or “Complainant”), by and through its undersigned counsel and pursuant to 40 C.F.R. § 22.14(c), to respectfully request that this Tribunal grant Complainant’s Motion for Leave to Amend the Complaint. Complainant has conferred with Respondent and Respondent opposes this motion.

Complainant seeks to amend the Complaint for several reasons: (1) to include additional compliance information; (2) to update the volume relevant for the reasonable expectation of a discharge analysis; (3) to update the receiving water and pathway for the reasonable expectation of a discharge analysis; and (4) to adjust the statutory penalty to account for the most recent inflation adjustment.

PROCEDURAL HISTORY

The Complaint in this matter was filed on December 18, 2024. The Complaint alleges that Jackson & Son Distributors, Inc., dba Jackson and Son Oil (“Respondent”) is the owner or operator of a facility located at 84721 Happel Lane in Seaside, Oregon, (“Facility”) that is subject to the Oil Pollution Prevention regulations in 40 C.F.R. Part 112, including the requirement to develop a Spill Prevention Control and Countermeasure (“SPCC”) Plan.¹ The Complaint further alleges 28 violations of the 40 C.F.R. Part 112 regulations.² Pursuant to 40

¹ Complaint, ¶¶ 3.2, 3.14, 3.16.

² *Id.*, ¶¶ 3.15-3.56.

C.F.R. § 22.14(4)(ii), the Complaint does not make a specific penalty demand, and instead includes the number of days of violation for which a penalty is sought, a brief explanation of the severity of each violation alleged, and a recitation of the statutory penalty authority applicable for each violation that Complainant alleges.³ Respondent filed an Answer on January 17, 2025. A hearing on this matter has not yet been scheduled.

STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 22.14, Complainant may amend the complaint after the Respondent has filed an answer only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c) does not provide a standard for the Presiding Officer's review of such motion.⁴ As a result, the Environmental Appeals Board has adopted the standard provided in Federal Rule of Civil Procedure 15 and *Foman v. Davis*, 371 U.S. 178 (1962).⁵ The former states that leave to amend a complaint "shall be freely given when justice so requires."⁶ The latter states that the decision to grant or deny a motion to amend a complaint is "within the discretion of the [court]," but that leave should be "freely given" consistent with Fed. R. Civ. P. 15(a) unless there is "undue delay, bad faith or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party."⁷

³ *Id.*, ¶¶ 3.15-3.56, 4.1.

⁴ *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002).

⁵ *Id.*; see also *In re Asbestos Specialists*, 4 E.A.D. 819, *830 (EAB 1993) ("[I]t is our view that the policy component of Rule 15(a) should apply to Agency practice. The objective of the Agency's rules should be to get to the merits of the controversy."); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993) ("[A]dministrative pleadings should be liberally construed and easily amended to serve the merits of the action."); *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992) ("[T]he Board adheres to the generally accepted legal principle that 'administrative pleadings are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted.'" (quoting *Yaffe Iron & Metal Co., Inc. v. U.S. Env't Prot. Agency*, 774 F.2d 1008, 1012 (10th Cir. 1985)).

⁶ Fed. R. Civ. P. 15(a).

⁷ *Foman*, 371 U.S. at 182.

The most significant factor is undue prejudice to the opposing party.⁸ If leave is to be denied, it must generally be shown that the amendment will result in prejudice to the opposing party, and that the prejudice would constitute a serious disadvantage that goes beyond mere inconvenience.⁹

ARGUMENT

1. Respondent's Compliance Efforts.

Complainant first seeks to amend the Complaint to address information provided by the Respondent to the EPA about its compliance efforts after the Complaint was filed.¹⁰ This information is relevant to the 28 violations of the 40 C.F.R. Part 112 regulations that the EPA alleged. Specifically, for several of the violations, information related to Complainant's compliance efforts changes certain facts supporting the violations and the number of days of violation. In *In re Adamas Constr. and Dev. Serv., PLLC*, the Presiding Officer granted the EPA's motion to amend a complaint to add information that was in the Respondent's possession prior to filing the original Complaint and that was provided to the EPA after the original Complaint was filed, finding that the proposed amendments would not unduly prejudice the Respondent.¹¹ The Court also found that the EPA was not acting in bad faith or with undue delay when, as here, the proposed amendments were filed before the prehearing exchange was due.¹² Updating the Complaint to include Respondent's most recent compliance efforts should not prejudice the Respondent because Respondent had this information in its possession when the

⁸ *In re Carroll Oil Co.*, 10 E.A.D. at 650.

⁹ *In re Port of Oakland*, 4 E.A.D. at 205-06, fn. 84.

¹⁰ Respondent emailed this information to Complainant after the Complaint was filed. Based on the compliance dates and dates of certain documents provided, this information was available to Respondent before Complainant filed the Complaint.

¹¹ *In re Adamas Constr. & Dev. Serv., PLLC*, 2020 EPA ALJ LEXIS 10, *7 (Jan. 2, 2020).

¹² *Id.*

EPA filed the original Complaint, and Respondent can therefore readily respond to it in its answer and prehearing exchange.

2. Reasonable Expectation of a Discharge

Second, Complainant seeks to amend the Complaint related to the reasonable expectation of a discharge from the Facility. As alleged in paragraph 2.5 of both the original Complaint and the Amended Complaint, the requirements of 40 C.F.R. Part 112 apply to certain facilities, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.¹³

In determining whether there is a reasonable expectation of a discharge, the EPA considers several factors, as alleged in paragraph 3.11 of the both the original Complaint and the Amended Complaint. These factors include the surrounding area's topography and drainage patterns and the physical properties of oil infiltration and flow, as well as the quantity of the oil stored at the Facility.

In *In re Crown Central Petroleum*, the Presiding Officer used Appendix D of 40 C.F.R. Part 112 to calculate the volume of oil for determining whether there is a reasonable expectation of a discharge from the facility that would subject the facility to the 40 C.F.R. Part 112 regulations, including the requirement to develop a SPCC Plan.¹⁴ Relevant here, the volume for a worst-case discharge is calculated by adding the capacity of the largest aboveground storage tank within secondary containment to the capacity of any aboveground storage tanks without secondary containment.¹⁵ At the time that the EPA filed the original Complaint, the volume for a worst-case discharge calculated pursuant to Appendix D was 40,000 gallons because the capacity

¹³ 40 C.F.R. § 112.1(b).

¹⁴ *In re Crown Central Petroleum*, 2002 EPA ALJ LEXIS 12 at *109-110.

¹⁵ 40 C.F.R. Part 112, App. D.

of the largest aboveground storage tank within secondary containment at the Facility was 20,000 gallons and the Facility also had two 10,000-gallon tanks that lacked secondary containment.

After filing the original Complaint on December 18, 2024, Respondent informed the EPA that it had replaced the two 10,000-gallon single-walled tanks with a double-walled tank effective November 30, 2024. Given that to the best of the EPA's knowledge and belief, all of the aboveground storage tanks at the Facility now have secondary containment, the volume for a worst-case discharge pursuant to 40 C.F.R. Part 112, Appendix D, is 20,000 gallons. As a more conservative number, the EPA also typically considers the capacity of the largest aboveground storage tank at a facility.

Based on *In re Crown Central Petroleum*, it is appropriate to evaluate whether there is a reasonable expectation of a discharge from the Facility using 40,000 gallons for the time period prior to the Facility replacing the two 10,000-gallon tanks that lacked secondary containment – the vast majority of the time applicable to the Complaint. To remove any question, however, of whether there remains a reasonable expectation of a discharge from the Facility, the EPA has also modeled a discharge using 20,000 gallons as the spill volume, and seeks to amend the Complaint to add 20,000 gallons as a relevant volume. Adding 20,000 gallons as a relevant volume for a spill analysis is again in response to Respondent's compliance efforts.¹⁶ The addition of a smaller, more conservative volume is also to the Respondent's advantage because it means that this analysis of whether there is a reasonable expectation of a discharge involves less oil – in this case, half the volume of oil originally pleaded. As a result, the EPA does not believe that amending the Complaint in this manner prejudices the Respondent.

¹⁶ *In re Adamas Constr. & Dev. Serv., PLLC*, 2020 EPA ALJ LEXIS 10 at *7 (granting the EPA's motion to amend a complaint to add information that was in Respondents' possession prior to filing the original Complaint and that was provided to the EPA after the original Complaint was filed).

3. Receiving Water and Pathway

Third, in its most recent unopposed motion for an extension of time to file the prehearing exchange, the EPA explained that the Complaint alleges that “there is a reasonable expectation that a discharge from [Respondent’s] Facility would flow . . . north via multiple pathways to field-verified and National Wetlands Inventory-mapped wetlands (“wetlands”)”.¹⁷ The Complaint further alleges that these wetlands “abut and have a continuous surface connection to a relatively permanent tributary (“unnamed tributary”) of Circle Creek.”¹⁸ Respondent denies these allegations in the Answer.¹⁹ The EPA further explained in its most recent unopposed motion for an extension of time that it has been actively gathering recommendations through public comments and listening sessions on, among other things, the scope of “relatively permanent” waters, and “continuous surface connection.” When this Presiding Officer granted the EPA’s unopposed motion for an extension of time, it noted that the EPA planned to use the extension to conduct further briefings, and “[b]arring unforeseen circumstances, the EPA anticipates that this will be the last request for an extension to the deadline to file the EPA’s prehearing exchange.”²⁰

Since filing the most recent unopposed motion for an extension of time to file the prehearing exchange, the EPA has conducted further briefings about this case. In addition, on June 17, 2025, the EPA has announced that it intends to issue a new proposed rule defining waters of the United States “in the coming months.”²¹

¹⁷ Complaint, ¶ 3.10.

¹⁸ *Id.*

¹⁹ Answer, ¶ 3.10.

²⁰ Order on Complainant’s Unopposed Motion for Additional Extension of Time at 1, Dkt. No. CWA-10-2025-0023 (June 3, 2025).

²¹ *EPA and Army Wrap Up Initial Listening Sessions, Move Toward Proposal to Revise 2023 Definition of WOTUS*, EPA (June 17, 2025), <https://www.epa.gov/newsreleases/epa-and-army-wrap-initial-listening-sessions-move-toward-proposal-revise-2023>.

The EPA seeks to avoid further delays with this case. The EPA typically evaluates whether there is a reasonable expectation of a discharge based on the closest waterbody, and in this case, it had originally considered whether a discharge from the Facility could reasonably be expected to enter the wetlands located north of the Facility. As identified in paragraph 3.10 of the Complaint, the EPA concluded that the Facility would discharge into the wetlands and that the wetlands are waters of the United States. The EPA has now also modeled whether a discharge from the Facility will flow less than 1,000 feet through the wetlands located north of the Facility and into Circle Creek.²² Circle Creek is perennial. Water bodies that flow year-round are routinely recognized as waters of the United States.²³ Therefore, in order to reduce of number of contested issues before this Court and to avoid further delays in this matter, the EPA seeks to amend the Complaint to remove the allegation that there is a reasonable expectation of a discharge to the wetlands and add that there is a reasonable expectation that a discharge of oil from the Facility would flow north via multiple pathways and into Circle Creek.

Regarding the waters that are downstream of Circle Creek, the EPA alleged in the Complaint that Circle Creek connects to the Necanicum River at approximately River Mile 5.2, and that the Necanicum River flows into the Pacific Ocean.²⁴ The EPA determined that Circle Creek connects to the Necanicum River at approximately River Mile 5.2 using United States Geological Survey (“USGS”) topographic maps and the National Hydrology Dataset. Indeed, USGS topographic maps have mapped the connection from Circle Creek to the Necanicum River in this location since 1955 and continue to do so. After filing the Complaint, the EPA more

²² In the original Complaint, the EPA also plead that oil may flow south and west from the Facility and directly into Circle Creek. Based on further analysis of topographic information, the EPA is no longer pursuing this claim.

²³ *Sackett v. U.S. Env’t Prot. Agency*, 598 U.S. 651, 671-72 (2023).

²⁴ Complaint, ¶ 3.10.

closely reviewed LiDAR²⁵ for this area and determined that this connection between Circle Creek and the Necanicum River only occurs during high flows. It is possible that the construction of a power line through this area altered the connection. Regardless of the reason, however, Circle Creek continues to flow downstream to the north and connects to the Necanicum River via Little Muddy Creek, which is also perennial, at River Mile 2.7. Given that the connection at the downstream location is clearer, amending the Complaint to change where the connection occurs simplifies the issues in this case.

Allowing Complainant to substitute the reasonable expectation of a discharge to Circle Creek and adjust the downstream connection is in the interest of justice.²⁶ If the underlying facts or circumstances relied upon by [the Complainant] may be a proper subject of relief, [the Complainant] ought to be afforded an opportunity to test his claim on the merits.”²⁷ Eliminating any question as to whether the wetlands are themselves regulated waters narrows and simplifies the issues in this case, which furthers judicial efficiency. In other words, this Court’s determination of whether the wetlands are regulated waters of the United States is unnecessary if there is also a reasonable expectation of a discharge to Circle Creek. In addition, the purpose of the SPCC Program is to provide a comprehensive spill prevention program that minimizes the potential for discharges.²⁸ If there is a reasonable expectation of a discharge to waters of the

²⁵ LiDAR stands for Light Detection and Ranging, and is a remote sensing method that is used to create high-resolution models of the ground elevation. *What is LiDAR Data and Where Can I Download It?*, USGS, <https://www.usgs.gov/faqs/what-lidar-data-and-where-can-i-download-it> (last updated May 13, 2025).

²⁶ While the upstream connection does occur at high flows, amending the complaint to adjust the connection point is minor and thus similar to other cases where presiding officers have granted motions to amend to correct factual inaccuracies. *In re Homeca Recycling*, 2024 EPA ALJ LEXIS 9, *5 (granting motion to amend complaint to “correct two citations in the counts of violation”); *In re Adamas Constr. & Dev. Servs., PLLC*, 2022 EPA ALJ LEXIS 22, *14-16 (allowing amendment even where the Presiding Officer found that the amendments went beyond mere clarification and changed the cited regulatory provisions); *In re Empire Lumber Co.*, 2013 EPA ALJ LEXIS 1, *4 (granting motion to amend to correct “two minor factual errors in the calculation of the economic benefit of noncompliance component of the penalty.”).

²⁷ *Foman*, 371 U.S. at 182.

²⁸ *In re VSS Int’l Inc.*, 2020 EPA ALJ LEXIS 20, *127.

United States, the Facility should be required to comply with the 40 C.F.R. Part 112 regulations, including the requirement to develop an SPCC Plan. This Court's determination of whether the Facility is subject to the 40 C.F.R. Part 112 regulations is to the benefit of the homes and businesses that are nearby the Facility and could be impacted by a spill. Circle Creek is also home to many species, including one of the most iconic anadromous fish, salmon. Coho salmon rear and migrate in Circle Creek.²⁹ The Oregon Coast Coho Salmon Evolutionary Significant Unit, which includes Coho salmon that rear and migrate in Circle Creek, is listed as threatened pursuant to the Endangered Species Act.³⁰ As a result, maintaining high water quality and preventing the discharge of oil into Circle Creek is of utmost importance.

In addition, amending the Complaint to adjust the receiving water and pathway will not result in prejudice to the opposing party that constitutes a serious disadvantage. The EPA is filing this motion to amend early in the 40 C.F.R. Part 22 hearing process, before any potential discovery and before a hearing has been scheduled. The EPA will file its prehearing exchange first, which will include a report that explains the model it used to determine that there is a reasonable expectation of a discharge. Respondent can address the EPA's allegations and its model in its prehearing exchange. In addition, the model and underlying factors that the EPA used for determining whether there is a reasonable expectation of a discharge are the same whether the discharge is to the wetlands or Circle Creek. The only difference between the two is how far the oil will travel from the Facility. Respondent would have needed to answer the EPA's

²⁹ *National NMFS ESA Critical Habitat Mapper*, Nat'l Oceanic & Atmospheric Admin., <https://www.fisheries.noaa.gov/resource/map/national-esa-critical-habitat-mapper> (last visited Aug. 15, 2025) (navigate to the search bar and enter terms "Circle Creek, Oregon"; select the results tab titled "All_critical_habitat_line_20220404", and scroll down species list to view listing and habitat status for Salmon, coho.).

³⁰ *Id.*; see also *Oregon Coast Coho Salmon*, Nat'l Oceanic & Atmospheric Admin., <https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/oregon-coast-coho-salmon> (last updated May 7, 2025).

model regarding a reasonable expectation of a discharge regardless of whether the discharge is to the wetlands or Circle Creek. And just as the EPA could adjust its model, if Respondent has developed a model to contest the EPA's allegations, it can be adjusted to account for a discharge to Circle Creek. In addition, for a waterbody to be regulated, the waters that are downstream of that waterbody must also be regulated. As a result, the EPA had included an allegation in the original Complaint that Circle Creek and the downstream waters are waters of the United States. It should not, therefore, be a surprise to the Respondent that the EPA considers these waters to be navigable waters as defined in the Clean Water Act. While the EPA is adjusting the downstream flowpath, Respondent was already on notice that it needed to determine whether it was going to contest the EPA's allegations regarding the downstream waters.

4. Inflation Adjustment

Fourth, as cited in paragraph 4.1 of the Complaint, the 2015 amendments to the Federal Civil Penalties Inflation Adjustment Act requires that the EPA adjust the statutory civil monetary penalties for the statutes that it administers annually to account for inflation. The EPA issued the most recent inflation adjustment on January 8, 2025, after the EPA filed the Complaint in this case on December 18, 2024.³¹ Updating the statutory civil monetary penalty is ministerial, and presiding officers have previously granted motions to amend a complaint to reflect inflationary increases mandated by Congress.³² As a result, the EPA seeks to amend the Complaint to update the statutory civil monetary penalties using the most recent inflation adjustment.³³

³¹ *Civil Monetary Penalty Inflation Adjustment*, 90 Fed. Reg. 1375 (Jan. 8, 2025).

³² See, e.g., *In re Empire Lumber Co.*, 2013 EPA ALJ LEXIS 1 at *2-4; *In re Borla Performance Indus.*, 2021 EPA ALJ LEXIS 3.

³³ 90 Fed. Reg. at 1377.

In sum, amending the Complaint here will not result in prejudice to the opposing party that constitutes a serious disadvantage. The EPA is not adding new violations, new parties, or proposing any additional penalties.³⁴ The EPA is also filing this motion to amend early in the 40 C.F.R. Part 22 hearing process. As previously stated, a hearing has not yet been scheduled for this matter.³⁵ Respondent has the opportunity to address the amendments in their prehearing exchange, and the proposed amendments will not cause prejudice. Each proposed amendment is well supported by cases where motions to amend have been granted in similar or nearly identical circumstances. Finally, the proposed amendments are in the public interest and will promote the justiciable disposition of this matter.

For the reasons cite above, Complainant respectfully requests leave of the Court to amend the Complaint.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION 10:

DATE

Ashley Bruner
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue Suite 155, M/S 11-C07
Seattle, Washington 98101
(206) 553-0702
Brunner.Ashley@epa.gov

³⁴ *In re Homeca Recycling*, 2024 EPA ALJ LEXIS 9 at *5 (noting when granting a motion to amend a complaint that the EPA was not adding new counts or parties or proposing any additional penalties).

³⁵ *In re Adamas Constr. & Dev. Serv., PLLC*, 2022 EPA ALJ LEXIS 22 (granting motion to amend the complaint and stating that Respondents have ample time to address the proposed amendments as Complainant filed its Motion to Amend in the early stages of the litigation process and a hearing has not yet been scheduled in the matter).

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 Leave to Amend the Complaint**, dated August 15, 2025, was sent this day to the following parties in the manner indicated below.

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: August 15, 2025