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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNIVERSAL WELDING & FABRICATION, INC., an
Alaska corporation,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
and COLONEL CHRISTOPHER D. LESTOCHI, in
his official capacity as Commander of the Alaska
District of the CORPS,

Defendants.

No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Universal Welding & Fabrication, Inc., (Universal Welding) hereby brings this action under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge the proffered permit decision of Defendants United States Army Corps of Engineers and Colonel Christopher D. Lestochi (collectively “Corps”), which determines that Universal Welding’s property is subject to the Corps’ control under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

JURISDICTION AND VENUE

2. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question); 5 U.S.C. § 702 (judicial review of agency action); 28 U.S.C. § 2201 (authorizing declaratory judgments); and *id.* § 2202 (authorizing relief in addition to declaratory judgment).

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(2), because a substantial part of the events or omissions giving rise to the claim occurred in this District, and because the property that is the subject of the action is located in this District. *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act generally proper in “a court of competent jurisdiction”).

PARTIES

Plaintiff

4. Universal Welding is an Alaska corporation based in the City of North Pole. Established in 1980, the company fabricates steel buildings, as well as miscellaneous materials such as catwalks, platforms, stairs, and ladders. The company provides labor to put together buildings once it has fabricated the component parts. It also provides pipeline supports, tanks, and oil well drilling for the oil and gas industry.

5. Universal Welding currently does business on two parcels—totaling about nine acres—within the North Pole’s Quinnell Subdivision. The company also owns an adjoining parcel, about 20 acres in size, that is the subject of this action.

Defendants

6. The Corps is a branch of the Department of the Army. It is divided into divisions which in turn are divided into districts. The Corps' Alaska District oversees the Corps' activities in Alaska. That District issued the permit challenged in this action.

7. Colonel Christopher D. Lestochi is sued in his official capacity as Commander of the Alaska District of the Corps. In that capacity, Colonel Lestochi is responsible for the Alaska District's implementation and administration of the Clean Water Act, including the permit challenged in this action.

LEGAL BACKGROUND

8. Under the Clean Water Act, the Corps has authority (with the United States Environmental Protection Agency) to regulate the placement of dredged and fill material into "navigable waters." *See* 33 U.S.C. § 1344(a).

9. The Clean Water Act defines "navigable waters" as "waters of the United States." *Id.* § 1362(7).

10. Pursuant to regulation, the Corps has defined "waters of the United States" to include, among other things, "wetlands" that are "adjacent" to other waters. 33 C.F.R. § 328.3(a)(7).

11. The Corps has defined "adjacent" to mean "bordering, contiguous, or neighboring." *Id.* § 328.3(c).

12. The Corps also has defined wetlands that are separated from other waters of the United States by "man-made dikes or barriers, natural river berms, beach dunes and the like [to be] 'adjacent wetlands.'" *Id.*

13. The Corps has declined to assert jurisdiction over wetlands that are themselves adjacent to other jurisdictional wetlands. *See id.* § 328.3(a)(7) (asserting jurisdiction over wetlands "adjacent to waters (other than waters that are themselves wetlands)."

14. Legally to place dredged or fill material into "navigable waters" requires a permit under 33 U.S.C. § 1344(a). These permits are known as Section 404 permits.

15. United States Supreme Court case law has limited the scope of jurisdiction otherwise claimed under the Corps' regulations.

16. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court held that the Clean Water Act cannot be interpreted to cover "isolated ponds." *Id.* at 171.

17. In the consolidated cases of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, 547 U.S. 715 (2006), the Supreme Court, in a split decision, further limited the Clean Water Act's reach, in particular with respect to wetlands. A four-justice plurality opinion, authored by Justice Scalia, set forth a two-part test for determining whether a wetland is jurisdictional. First, the wetland must have a "continuous surface connection" to another jurisdictional water. *Id.* at 742 (plurality opinion). Second, the connection must be such as to "mak[e] it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* See also *id.* at 755 (jurisdictional wetlands must have a "physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States").

18. Justice Kennedy authored an opinion concurring only in the judgment. In contrast to the plurality, Justice Kennedy's concurrence approaches the jurisdictional question under the rubric of "significant nexus": a wetland is jurisdictional if it bears a significant nexus to a traditional navigable waterway. A significant nexus is present if the wetland, either by itself or in combination with similarly situated wetlands in the same region, significantly affects the physical, biological, and chemical integrity of the downstream traditional navigable waterway. See *id.* at 780 (Kennedy, J., concurring in the judgment). In contrast, if the wetland has only an insignificant effect on the downstream traditional navigable waterway, it is not jurisdictional. See *id.*

19. In this Circuit, Clean Water Act jurisdiction can be proved under either *Rapanos* test. See *Northern California River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2010).

20. The Corps has issued a guidance document, jointly with the Environmental Protection Agency, interpreting and applying the *Rapanos* tests. See *Clean Water Act Jurisdiction Following*

the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), a true and correct copy of which is attached hereto and incorporated herein as Exhibit 1. The Guidance provides, among other things, that a wetland is “adjacent” to another jurisdictional water—and therefore itself jurisdictional under the agencies’ regulations—if at least one of the following three criteria is satisfied: (i) an unbroken surface or shallow subsurface connection exists between the waters; (ii) the waters are physically separated by man-made dikes, barriers, and the like; or (iii) the waters are reasonably close, supporting an inference of ecological interconnection. Exhibit 1 at 5-6.

21. In April, 2014, the Corps and the Environmental Protection Agency jointly proposed to amend their regulations interpreting “waters of the United States.” *See* 79 Fed. Reg. 22,188 (Apr. 21, 2014). The amendments would, among other things, eliminate the regulatory exception for wetlands adjacent to other wetlands. *See id.* at 22,209. The comment period on the proposed amendments has not yet closed, and the agencies have no deadline by which to issue a final rule. They are not required to finalize any rule, much less finalize the rule as proposed.

FACTUAL ALLEGATIONS

22. Because of increased business, Universal Welding wishes to expand its operation to an adjoining parcel that it already owns. The company proposes to convert this 20-acre lot (“property” or “site”) to a staging area to lay down raw steel and finished modules prior to their delivery. Administrative Record 2, POA-2008-0550, Channel C, at 000057 (July 2012) [hereinafter “2012 AR _____”]. (Prior to briefing, Plaintiff intends to lodge with the Court true and correct copies of the 2010 and 2012 administrative appeals records.)

23. The site is about 1.6 miles east of Channel C. *See* page 5 of Approved Jurisdictional Determination Form, a true and correct copy of which is attached hereto and incorporated herein as Exhibit 2. Channel C is a flood control channel constructed by the Corps. *See* page 4 of Administrative Appeal Decision (Jan. 31, 2011), a true and correct copy of which is attached hereto and incorporated herein as Exhibit 3. Channel C flows into the Chena Slough, which flows into the

Chena River. *Id.* at 3-4. The Corps contends that Channel C is a relatively permanent water (although not navigable-in-fact), and that the Chena Slough is navigable-in-fact. Exhibit 2 at 2. Immediately west of the site lies Peridot Street, a county-owned public road. *See id.* at 5. West of Peridot Street lies a large wetland. *Id.* This wetland is immediately adjacent to Channel C. *Id.*

24. In April, 2008, Universal Welding submitted an application for a Section 404 permit for the site. *See* page 000459 of Administrative Record, POA-2008-0550, Channel C (Aug. 2010) [hereinafter “2010 AR _____”]. The company did not pursue the application further, and the Corps closed the file in July of that year. 2010 AR 000407.

25. In January, 2010, Universal Welding applied to the Corps for a jurisdictional determination as to whether the same site contains any features subject to Clean Water Act jurisdiction. 2010 AR 000426-000432.

26. In March, 2010, the Corps issued an approved jurisdictional determination, concluding that the site contains wetlands, and that these wetlands are jurisdictional because they are adjacent to Channel C. 2010 AR 000411-000416. The Corps based its adjacency determination on the assertion of a shallow subsurface connection between the alleged wetlands on the site and Channel C. 2010 AR 000408-000410.

27. In February, 2011, following Universal Welding’s administrative appeal of the jurisdictional determination, the Corps reaffirmed on remand its conclusion that the site contains jurisdictional wetlands by reason of a shallow subsurface connection to Channel C. 2012 AR 000184-000187.

28. In July, 2011, Universal Welding again submitted to the Corps an application for a Section 404 permit. 2012 AR 000169-000170. In April, 2012, the Corps issued to Universal Welding an “initial proffered permit,” 2012 AR 000047-000079, which included a mitigation condition to which Universal Welding objected, 2012 AR 000040-000045.

29. In June, 2012, the Corps issued to Universal Welding a final “proffered permit” with several conditions. 2012 AR 000025-000026. Among them is a revised mitigation

condition—“Special Condition 5”—which requires Universal Welding to pay a mitigation fee to The Conservation Fund, purportedly to mitigate for the impacts of the permitted project, 2012 AR 000050, 000072-000073, or in lieu of the fee to propose its own mitigation plan, 2012 AR 000027. The mitigation fee is \$5,000 per acre of wetlands. 2012 AR 000043. Because the permitted project is alleged to affect 14 acres of wetlands, the cost of Special Condition 5 is approximately \$70,000.

30. The following month, Universal Welding, objecting to Special Condition 5, administratively appealed the proffered permit. 2012 AR 000010-000015.

31. The Corps’ appellate officer ultimately agreed with several of Universal Welding’s objections. *See* page 15 of Administrative Appeal Decision (Aug. 22, 2013), a true and correct copy of which is attached hereto and incorporated herein as Exhibit 4. Most important for this action, the Corps’ appellate officer determined that the permit decision had failed adequately to explain why the Corps had jurisdiction over any wetlands on Universal Welding’s property. *Id.* at 11-12. Specifically, the appellate officer called out the regulatory exception for wetlands adjacent to other jurisdictional wetlands, as that provision was interpreted in *Great Northwest, Inc. v. United States Army Corps of Engineers*, No. 4:09-cv-0029-RRB, 2010 WL 9499372 (D. Alaska June 8, 2010), *reconsideration denied*, 2010 WL 9499071 (D. Alaska July 20, 2010). *See* Exhibit 4 at 11-12.

32. In *Great Northwest*, the Corps asserted Clean Water Act jurisdiction over some 230 acres of wetlands, located about one-third of a mile from the navigable-in-fact Tanana River. *See* 2010 WL 9499372, at *1. The Corps argued that it had jurisdiction over Great Northwest’s wetlands because they were adjacent to the Tanana. *See id.* at *4-*5. In contrast, Great Northwest argued that its wetlands were subject to the jurisdictional exception for wetlands adjacent to other jurisdictional wetlands. Great Northwest explained that its property was separated from the Tanana by a railroad berm and a flood control levee, and therefore that its property was adjacent to the wetlands that lay between these features. *See id.* at *1, *5-*6. The court ultimately agreed with Great Northwest, reasoning that so long as the relevant barriers actually separated the wetlands such that they were no longer “continuous” or “intact,” the jurisdictional exception for wetlands adjacent to other

wetlands applies. *See id.* at *7-*9. The court also observed that the exception applies notwithstanding that the wetlands might otherwise be subject to regulation under *Rapanos*. *See* 2010 WL 9499071, at *2.

33. The appellate officer for Universal Welding’s appeal concluded that, given the close factual similarity between the property at issue in *Great Northwest* and Universal Welding’s property, Universal Welding’s permit should be remanded to the District to allow the latter to, among other things, explain whether the *Great Northwest* decision precludes jurisdiction. *See* Exhibit 4 at 11-12.

34. On May 12, 2014, the District issued its remand decision, affirming its original jurisdictional determination and reissuing the proffered permit to Universal Welding with Special Condition 5 unchanged. *See* page 16 of Memorandum for Record, POA-2008-550 Channel C – Response to Remand (May 2014), a true and correct copy of which is attached hereto and incorporated herein as Exhibit 5.

35. The District explained that *Great Northwest* and the adjacent wetlands exception are inapplicable to Universal Welding’s site for two reasons. *See id.* at 2-3. First, the District noted that, in *Great Northwest*, the subject wetlands were separated from other waters by two barriers (the railroad berm and flood levee), whereas Universal Welding’s property is separated from other waters by only one barrier (Peridot Street). *Id.* at 2. Second, in *Great Northwest* there was no assertion of a shallow subsurface connection, whereas here the District concluded that such a connection to the wetlands west of the road and to Channel C exists. *Id.* at 2-3. Therefore, the District concluded that Universal Welding’s property is “adjacent” to Channel C, both because of the existence of Peridot Street, as well as the presence of a shallow subsurface connection. *Id.* at 2-3, 16. On the same grounds, the District concluded that *Great Northwest* and the exception for wetlands adjacent to other jurisdictional wetlands were inapplicable. *Id.*

DECLARATORY RELIEF ALLEGATIONS

36. All of the preceding paragraphs are incorporated fully herein.

37. The Corps' proffered permit, reaffirming Clean Water Act jurisdiction over Universal Welding's property, is the subject of a live controversy. Universal Welding contends that any wetlands on its property are not jurisdictional because they would be wetlands adjacent to other jurisdictional wetlands and thus exempt from Clean Water Act regulation under 33 C.F.R. § 328.3(a)(7). In contrast, the Corps contends that its adjacent wetlands exemption does not apply because any wetlands on the site should be considered the same as the jurisdictional wetlands west of the site and Peridot Street.

38. No further factual development is necessary to resolve the legal issues raised by this action. Universal Welding is informed and believes that the Corps does not dispute the facts relevant to the dispute, namely, that Universal Welding's property is separated from Channel C by jurisdictional wetlands and Peridot Street, a "man-made . . . barrier[]." *Id.* § 328.3(c). *See* Exhibit 5 at 2 ("[T]he Universal Welding wetland is separated from Channel C by only one linear, artificially created barrier (Peridot Street).").

39. Universal Welding has been, is, and will continue to be injured by the Corps' assertion, through the proffered permit, of Clean Water Act jurisdiction over its property. The permit contains Special Condition 5, which requires the payment of approximately \$70,000 to The Conservation Fund, or the development of an expensive substitute mitigation plan. Further, compliance with other general and special conditions in the permit impose substantial costs on Universal Welding. Finally, the Corps' assertion of Clean Water Act jurisdiction by virtue of the proffered permit means that Universal Welding is subject to burdensome regulation under other provisions of the Clean Water Act, such as the National Pollutant Discharge Elimination System Program, 33 U.S.C. § 1342(a), as well as the Stormwater Pollution Prevention Program, 33 U.S.C. § 1342(p).

40. Accordingly, an actual and substantial controversy exists between Universal Welding and the Corps as to the parties' respective legal rights and duties. Universal Welding contends that its property is not subject to the Clean Water Act, and thus is not bound by any of the general or

special conditions of its permit, the National Pollutant Discharge Elimination System Program, or the Stormwater Pollution Prevention Program. In contrast, the Corps contends that Universal Welding's property is subject to the Clean Water Act, and thus that Universal Welding is bound by the general and special conditions of its permit in particular, and the Clean Water Act in general. A judicial determination of the parties' rights and responsibilities arising from this actual controversy is necessary and appropriate at this time.

INJUNCTIVE RELIEF ALLEGATIONS

41. All of the preceding paragraphs are incorporated fully herein.

42. Universal Welding wishes to discharge fill material on its property, which the Corps asserts to be subject to its Clean Water Act permitting authority.

43. Universal Welding has been, is, and will continue to be injured by the Corps' assertion, through the proffered permit, of Clean Water Act jurisdiction over its property. The Corps' assertion of jurisdiction subjects Universal Welding to the general and special conditions of the proffered permit, including Special Condition 5. Also, the Corps' determination means that Universal Welding is subject to burdensome regulation under the National Pollutant Discharge Elimination System Program and the Stormwater Pollution Prevention Program. Compliance with the permit conditions and the aforementioned programs imposes substantial costs on Universal Welding. Unless the Court grants relief, Universal Welding will continue to be irreparably harmed by the Corps' unlawful assertion of Clean Water Act jurisdiction through the proffered permit.

44. Setting aside the Corps' proffered permit will redress Universal Welding's injuries by allowing it to proceed with development of its property.

45. Universal Welding has no plain, speedy, and adequate remedy at law, and absent judicial intervention, Universal Welding will suffer irreparable injury.

46. The Corps, if not enjoined, will continue to enforce the general and special conditions of the proffered permit, as well as other provisions of the Clean Water Act, based on its erroneous position that Universal Welding's property is subject to the Clean Water Act.

CLAIM FOR RELIEF

**(Violation of the Administrative Procedure Act, 5 U.S.C. § 706,
as well as the Clean Water Act, 33 U.S.C. § 1344, and
Regulations Promulgated Thereunder, 33 C.F.R. § 328.3(a)(7))**

47. All the preceding paragraphs are incorporated fully herein.
48. Under the Clean Water Act, the Corps has permitting jurisdiction only over the waters of the United States. *See* 33 U.S.C. §§ 1344(a), 1362(7).
49. Under its own regulations, the Corps does not have jurisdiction over wetlands adjacent to other waters that are themselves wetlands. *See* 33 C.F.R. § 328.3(a)(7).
50. Also under its own regulations, the Corps defines wetlands that are separated from other waters of the United States by “man-made dikes or barriers, natural river berms, beach dunes and the like [to be] ‘adjacent wetlands.’” *Id.* § 328.3(c). The presence of just one such feature or barrier is sufficient to create adjacency. *Cf.* Exhibit 1 at 7 n.29 (interpreting adjacency based on whether a wetland is separated from another water by “uplands, a berm, dike, or similar feature”) (emphasis added).
51. In issuing the proffered permit, the Corps determined that it had jurisdiction over Universal Welding’s property. *See* Exhibit 2 at 1-9. The Corps reasoned that the property contains 14 acres of low-quality wetlands. *See id.* at 1, 3-4. *See also* 2012 AR 000054 (“The District has rated the on-site wetland as . . . degraded/low functioning . . .”). The Corps further reasoned that these wetlands are jurisdictional because they maintain a shallow subsurface connection with Channel C, a jurisdictional water. Exhibit 5 at 3-10.
52. Peridot Street is a man-made barrier that separates Universal Welding’s property from the wetlands west of Peridot Street. Exhibit 5 at 2 (“[T]he Universal Welding wetland is separated from Channel C by only one linear, artificially created barrier (Peridot Street).”). *See also* Exhibit 2 at 5 (site “separated from Channel C by Peridot Road”). Any wetlands on the property are, pursuant to the Corps’ regulations, adjacent to the wetlands west of Peridot Street, which themselves are adjacent to Channel C, a jurisdictional water. *See* Exhibit at 2 at 5 (“[The] subject

wetland is approximately 1.6 miles east of where the large wetland area west of Peridot Street adjoins Channel C.”). *Cf.* 33 C.F.R. § 328.3(c). Therefore, pursuant to the Corps’ regulations, any wetlands on Universal Welding’s property are wetlands adjacent to other jurisdictional wetlands and therefore not subject to the Corps’ authority. *See id.* § 328.3(a)(7).

53. Nothing in the *Rapanos* Guidance changes that conclusion. The Guidance provides that adjacency can be established in one of three ways: (i) an unbroken surface or shallow subsurface connection between jurisdictional waters; (ii) physical separation of jurisdictional waters by man-made dikes, barriers, and the like; or (iii) the waters are reasonably close, supporting an inference of ecological interconnection. Exhibit 1 at 5-6.

54. The Corps contends that the alleged wetlands on Universal Welding’s property maintain a shallow subsurface connection with the wetlands west of Peridot Street. *See* Exhibit 5 at 5. The property is physically separated by Peridot Street, a man-made barrier, from the wetlands west of Peridot Street. *See* Exhibit 2 at 5; Exhibit 5 at 2. Therefore, under the *Rapanos* Guidance as well, any wetlands on Universal Welding’s property are adjacent to the wetlands west of Peridot Road, and are therefore not subject to the Corps’ authority. *Cf.* 33 C.F.R. § 328.3(a)(7).

55. That two sets of wetlands may be connected by a shallow subsurface connection at most determines whether the wetlands are adjacent to each other; it does not establish that the wetlands are “continuous.” Moreover, wetlands cannot be “continuous” where they are separated by a man-made barrier, such as Peridot Street. *See id.* § 328.3(c).

56. The Corps’ assertion of jurisdiction under the proffered permit is contrary to the Clean Water Act and its implementing regulations, and is therefore arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

57. The Corps’ permitting decision is a final agency action, ripe for judicial review. *See* 5 U.S.C. § 704.

58. Universal Welding has exhausted all administrative remedies. *Cf.* 33 C.F.R. § 331.5(b)(3).

59. This action is timely. 28 U.S.C. § 2401(a).

PRAYER FOR RELIEF

Universal Welding prays for judgment from this Court as follows:

1. A declaratory judgment stating that any wetlands on Universal Welding's property are not subject to Clean Water Act jurisdiction, pursuant to 33 C.F.R. § 328.3(a)(7);
2. A declaratory judgment stating that the Corps' assertion of Clean Water Act jurisdiction over Universal Welding's property, pursuant to the proffered permit, is arbitrary and capricious, and contrary to law, under 5 U.S.C. § 706;
3. A declaratory judgment stating that, because Universal Welding's property is not subject to the Corps' permitting authority, the permit issued to Universal Welding is null and void;
4. A preliminary and permanent prohibitory injunction barring the Corps, its agents, employees, officers, and representatives from asserting Clean Water Act jurisdiction over Universal Welding's property;
5. An award of Universal Welding's reasonable attorneys' fees and costs, pursuant to 28 U.S.C. § 2412, or to any other authority, including the Court's inherent authority, as appropriate; and
6. An award of any other such further relief as the Court may deem proper.

DATED: September 5, 2014.

Respectfully submitted,

/s/ James S. Burling
JAMES S. BURLING

Attorney for Plaintiff Universal
Welding & Fabrication, Inc.