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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. 4:14-cv-00021-TMB **PLAINTIFF'S MOTION FOR AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SUMMARY JUDGMENT (Fed. R. Civ. P. 56; D. Ak. LR 16.3)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Federal Statutes

Federal Regulations

Page

Rules of Court

Miscellaneous

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), District of Alaska Local Rule 16.3, the parties' joint stipulation, and this Court's Order, Plaintiff Universal Welding and Fabrication, Inc. ("Universal Welding"), respectfully moves this Court for an order granting Universal Welding summary judgment on the administrative record. Universal Welding has filed herewith in support of this motion a memorandum of points and authorities, with exhibits, as well as a declaration of Edmund C. Packee, Ph.D. This motion is made on the grounds that there is no triable issue of material fact and that Universal Welding is entitled to judgment as a matter of law.

Universal Welding's motion for summary judgment is based on the pleadings and papers filed in this action and this motion, as well as the memorandum and its exhibits, the declaration, and any additional response, evidence, or argument that Universal Welding will make in connection with the briefing, and in connection with any oral argument requested and granted under Local Rule 7.2(a).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Universal Welding hereby brings this action under the Administrative Procedure Act, 5 U.S.C. §§ 706-710, to challenge the proffered permit decision of Defendants United States Army Corps of Engineers, et al. (the "Corps"), which was issued pursuant to a determination made by the Corps that wetlands located on Universal Welding's property are subject to the Corps' jurisdiction under the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* The Corps contends that it has jurisdiction because the wetlands on Universal Welding's property have a shallow subsurface connection to other, jurisdictional wetlands. But the Corps' own regulations do not permit the Corps to assert CWA jurisdiction over wetlands "adjacent" to jurisdictional wetlands if they are separated by "man-made dikes or barriers." It is undisputed that a man-made barrier, Peridot Road, a publicly owned road, separates the Universal Welding wetlands from the other wetlands.

Accordingly, Universal Welding's wetlands are themselves nonjurisdictional. Consequently, the Corps' determination is contrary to law and must be vacated.

LEGAL BACKGROUND

Under the CWA, 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). The CWA defines "navigable waters" as "waters of the United States." *Id.* § 1362(7). In turn, the Corps' regulations define "waters of the United States" to include, among other things, "wetlands" that are "adjacent" to other, jurisdictional waters. 33 C.F.R. § 328.3(a)(7) ("jurisdictional wetlands"). "Adjacent" means "bordering, contiguous, or neighboring." *Id.* § 328.3(c). Although wetlands separated from "waters of the United States" by "man-made dikes or barriers, natural river berms, beach dunes and the like" are deemed to be "adjacent" wetlands, *id.*, the regulations exclude from the Corps' jurisdiction wetlands that are themselves adjacent to *other* wetlands. *See id.* § 328.3(a)(7) (asserting jurisdiction over wetlands "adjacent to waters (*other than* waters that are *themselves* wetlands)" (Emphasis added).

Placing 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. The United States Supreme Court has limited the scope of the Corps' jurisdiction under the CWA. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 171 (2001), the Supreme Court held that the Clean Water Act cannot be interpreted to cover "isolated ponds."

Then, 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").

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. Under the Kennedy formulation, 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.*

In this Circuit, CWA jurisdiction can be proved under either the Scalia or Kennedy tests. *See Northern California River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2010).

The Corps has issued a guidance document, jointly with the United States Environmental Protection Agency ("EPA"), 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). 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. The Guidance does not address the regulatory exception for wetlands adjacent to wetlands.

In April, 2014, the Corps and EPA 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 closed on November 14, 2014, although 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 AND PROCEDURAL BACKGROUND

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 construct buildings once it has fabricated the component parts. It also provides pipeline supports, tanks, and oil well drilling for the oil and gas industry. Packee Decl. ¶ 4.

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 (the "site" or "property"). *Id.* ¶ 5; AR-COE000369.

Because of increased business, Universal Welding wishes to expand its operation to the site. The company proposes to convert the site to a staging area to lay down raw steel and finished modules prior to their delivery. There are wetlands on the site. Packee Decl. ¶ 6

The site is about 1.6 miles east of Channel C. AR-COE000054. Channel C is a flood control channel constructed by the Corps. AR-COE000624-625. Channel C flows into the Chena Slough, which flows into the Chena River. *Id.* 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. AR-COE000205. Immediately west of the site lies Peridot Road, a county-owned public road. Packee Decl. ¶ 7; AR-COE000753-000754, 000759. West of Peridot Road lies a large wetland. Packee Decl. ¶ 8; AR-COE000208. That wetland is immediately adjacent to Channel C. Packee Decl. ¶ 9; AR-COE000208. The wetlands on the site and the wetlands west of Peridot Road are separated by Peridot Road, and they are not continuous, *i.e.*, there is no surface connection between them. Packee Decl. ¶¶ 9-11; AR-COE000208-209.

In April, 2008, Universal Welding submitted an application for a Section 404 permit for the site. AR-COE001092. The company did not pursue the application further, and the Corps closed the file in July of that year. AR-COE001066.

On January 7, 2010, Universal Welding applied to the Corps for a jurisdictional determination as to whether the same site contains any features subject to CWA jurisdiction. AR-COE001059-1065. On March 12, 2010, the Corps issued an approved jurisdictional determination, concluding that the site contains wetlands, and that those wetlands are jurisdictional because they are adjacent to Channel C. AR-COE001044-1049. The Corps based its adjacency determination on the assertion of a shallow subsurface connection between the alleged wetlands on the site and Channel C. AR-COE000038, 001040-1043.

On February 14, 2011, following Universal Welding's administrative appeal of the jurisdictional determination, the Corps reaffirmed on remand its conclusion that the site contains jurisdictional wetlands. AR-COE000617-618.

On July 1, 2011, Universal Welding again submitted to the Corps an application for a Section 404 permit. AR-COE000601-602. In April, 2012, the Corps issued to Universal Welding an "initial proffered permit," AR-COE000475-485, which included a mitigation condition to which Universal Welding objected, AR-COE000474.

On June 1, 2012, the Corps issued to Universal Welding a final "proffered permit" with several conditions. AR-COE000445-452. 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 adequate to "preserve in perpetuity 14 acres of waters of the U. S., including wetlands within interior Alaska to compensate for permanent impact via fill to 14 acres of low functioning wetlands (1:1 ratio) authorized by this permit." AR-COE000385-386; 000480. Universal Welding objected to the condition. AR-COE000474. In response, the Corps provided Universal Welding with the option of proposing its own mitigation plan. AR-COE000338. The Conservation Fund specified that the

mitigation fee would be approximately $5,000 per acre of wetlands. AR-COE000474. Because the permitted project is alleged to affect 14 acres of wetlands, the cost of Special Condition 5 is approximately $70,000.

On July 6, 2012, Universal Welding, objecting to Special Condition 5, administratively appealed the proffered permit. AR-COE00430-435. The Corps' appellate officer agreed with several of Universal Welding's objections. AR-COE000246. 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. AR-COE000242-243. Specifically, the appellate officer called out the regulatory exception for wetlands adjacent to other 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), *see* Exhibit2, *reconsideration denied*, 2010 WL 9499071 (D. Alaska July 20, 2010).[1] *See* Exhibit 3.

In *Great Northwest*, the Corps asserted CWA 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

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[1] *Great Northwest* is an unpublished decision of this Court. Local Rule 7.1(c)(2) provides that the Court may take judicial notice of the contents of such decisions to establish that "[A] other proceedings have taken place; [B] the same or similar claims have been raised and adjudicated; and [C] like or similar matters." Universal Welding hereby requests that the Court take judicial notice of *Great Northwest*. Although not required by rule, a true and correct copy of the initial *Great Northwest* decision is included in Exhibit 2, while a true and correct copy of the reconsideration denial is included in Exhibit 3. These copies have been provided for the convenience of the Court.

"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* reconsideration denial, 2010 WL 9499071, at *2, reproduced in Exhibit 3.

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. AR-COE000242-243.

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. AR-COE000038.

The District explained that *Great Northwest* and the adjacent wetlands exception are inapplicable to Universal Welding's site for two reasons. First, the District noted that, in *Great Northwest*, the subject wetlands were separated from the other wetlands by two barriers (the railroad berm and flood levee), whereas Universal Welding's site is separated from other wetlands by only one barrier (Peridot Road). AR-COE000024. 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. AR-COE000024-25. Therefore, the District concluded that Universal Welding's property is "adjacent" to Channel C. AR-COE000024-25, 000038. On the same grounds, the District concluded that *Great Northwest* and the exception for wetlands adjacent to other jurisdictional wetlands were inapplicable. *Id.* The final decision of the District injures Universal Welding by imposing an expensive condition for developing the site, set forth in Section 5 of the proffered permit, and by subjecting Universal Welding to other costly regulatory programs and requirements. Packee Decl. ¶ 15. This action followed the District's final decision.

STANDARD OF REVIEW

Summary judgment must be granted if "there is no genuine dispute as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the dispute requires review of an administrative record, as in this case, "'summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.'" *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985)). "'[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision that it did.'" *San Francisco*, 130 F.3d at 877 (quoting *Occidental Eng'g*, 753 F.2d at 769).

A district court reviews an agency's decision under the APA to determine whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In making this inquiry, [the court] ask[s] whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (quoting *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)). An abuse of discretion necessarily occurs where there has been an error of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996).

ARGUMENT

I

THE CORPS LACKS JURISDICTION OVER UNIVERSAL WELDING'S PROPERTY BECAUSE THE PROPERTY'S WETLANDS ARE ADJACENT TO OTHER WETLANDS AND ARE THEREFORE EXEMPT FROM CWA REGULATION

The Corps issued a permit to Universal Welding, including Special Condition 5, notwithstanding the fact that a man-made barrier, Peridot Road, separated the site's wetlands from jurisdictional wetlands that are immediately adjacent to Channel C. AR-COE000208, 000024-25, 000038-39. The Corps' assertion of jurisdiction is contrary to its own regulations, and therefore

arbitrary, capricious, and not in accordance with law. The Corps has duly promulgated a regulation that is in effect, which exempts wetlands "adjacent" to other wetlands from the CWA's scope. 33 C.F.R. § 328.3(a)(7). Universal Welding's wetlands on the site fall squarely within this regulatory exception.

A. The "Wetlands Adjacent to Wetlands" Jurisdictional Exception

1. The Exception's Plain Meaning

The Corps' regulations provide a general rule of jurisdictional adjacency. Wetlands adjacent to jurisdictional *waters* are themselves jurisdictional. Adjacent wetlands are defined as wetlands separated from other waters by man-made or natural barriers. *See* 33 C.F.R. §§ 328.3(a)(7), 328.3(c). But there is an exception to the general rule. Wetlands are not jurisdictional if they are merely adjacent to jurisdictional *wetlands*. *See id.* § 328.3(a)(7). This straightforward interpretation of the CWA's plain language was applied in this district in *Great Northwest*, where the Court opined that "a wetland adjacent to a jurisdictional wetland . . . [is] outside the Corps' jurisdiction under 33 C.F.R. § 328.3(a)(7). 2010 WL 9499372 at *5, reproduced in Exhibit 2. Although *Great Northwest* is an unpublished decision, as this Court pointed out in that case, the plain meaning of the regulatory language is controlling. *Id. See Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) ("A regulation should be construed to give effect to the natural and plain meaning of its words.") (quoting *Crown Pac. v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)); *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002) ("[T]he plain meaning of a regulation governs and deference to an agency's interpretation of its regulation is warranted only when the regulation's language is ambiguous.").

Significantly, the adjacent wetlands jurisdictional exception has been in force for approximately 30 years.

2. The Exception's Regulatory History

The Corps and EPA have joint authority to administer the Section 404 program under the CWA, which governs the discharge of dredged and fill material into waters of the United States. 33 U.S.C. § 1344. As part of its authority, EPA has the responsibility to promulgate Guidelines under which Section 404 permits are issued. *See* 33 U.S.C. § 1344(b)(1). In 1980, EPA promulgated a revision of its Section 404 Guidelines. *See* 45 Fed. Reg. 85,336 (Dec. 24, 1980). The final EPA rule noted that the Corps had just amended its own regulations, and that both agencies would work together to ensure coordination of their overlapping regulatory programs. *See id.* at 85,340. To that end, the preamble to the final rule stated that EPA's definition of "waters of the United States" was based upon "the wording in the . . . Consolidated Permit Regulations [of EPA and the Corps] . . . as the standard."[2] *Id.*

The 1980 EPA final rule defined "waters of the United States" to include "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." *Id.* at 85,346, *codified at* 40 C.F.R. § 230.3(s)(7) (1981). Echoing EPA, the Corps first promulgated the "wetlands adjacent to wetlands" exception as part of its own regulations in 1982. *See* 47 Fed. Reg. 31,794, 31,811 n.1 (July 22, 1982), *codified at* 33 C.F.R. § 323.2(a)(7) (1983) (extending jurisdiction to "[w]etlands adjacent to waters (other than waters that are themselves wetlands"). Accordingly, the source for the Corps' adjacent wetlands jurisdictional exception can be found in the prior and parallel EPA rulemaking.[3]

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[2] The consolidated permit regulations' definition of "waters of the United States" included the adjacent wetlands jurisdictional exception. *See* 45 Fed. Reg. 33,290, 33,298 (May 19, 1980) *codified at* 40 C.F.R. § 122.3 (1981).

[3] For its part, the final EPA rule adopted a threshold definition of adjacent wetlands identical to that which the Corps had adopted in 1977. *See* 45 Fed. Reg. at 85,345 *codified at* 40 C.F.R. § 230.3(b) (1981). Thus, it is almost certain that the Corps, when it promulgated amended regulations in 1982, adopted EPA's adjacent wetlands exception without comment out of a spirit of cooperation with EPA, which EPA had earlier extended to the Corps. *See* 47 Fed. Reg. at 31,795 (noting that the Corps' rephrasing of the "waters of the United States" definition was intended "to be consistent" (continued...)

The Corps undertook additional proposed rulemaking "to bring about more efficient, effective operation of the Corps' regulatory program and to implement the . . . decisions of the Presidential Task Force on Regulatory Relief," which directed the Corps to "redefine and clarify the scope of the [Section 404] permit program," and to reduce conflicting and overlapping policies with other federal agencies. 48 Fed. Reg. 21,466 (May 12, 1983). In an effort to accomplish those goals, the Corps' proposed rules contained changes to the existing adjacent wetlands definition and jurisdictional exception. *See id.* at 21,467. The proposal would have created a new Part 328 within 33 C.F.R., to which most of the existing definitions in Section 323.2 would be transferred. *Id.* at 21,470. In the proposed Part 328, all wetlands adjacent to non-tidal, jurisdictional waters would be deemed jurisdictional, *see id.* at 21,474 (proposed 33 C.F.R. § 328.5(b)(2)), and the proposal would have deleted (without explanation) the adjacent wetlands jurisdictional exception. Notably, EPA had neither made nor proposed any such changes to its corresponding rules.

In 1986, the Corps finalized its rulemaking, 51 Fed. Reg. 41,206 (Nov. 13, 1986). In an effort to maintain consistency with EPA's rules, the Corps did not amend the exception for wetlands adjacent to wetlands. *See* 51 Fed. Reg. at 41,250-51. The Corps' final rule stated that it was intended "to clarify the scope of the Section 404 permit program." *Id.* at 41,216. The rule's codification of the adjacent wetlands exception is that which has been continuously enforced by the Corps since then.[4]

In sum, the Corps' adjacent wetlands jurisdictional exception has been in force since 1982, while EPA's corresponding provision has been in force since 1980. The regulated community has relied on the exceptions since then. Packee Decl. ¶ 12; *see Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996) (failure of agency to follow its own established standards is abuse

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[3] (...continued)
with EPA's definition).

[4] The section was last amended in 1994 to add a jurisdictional exception for prior converted cropland. *See* 58 Fed. Reg. 45,008, 45,036 (Aug. 25, 1993), *codified at* 33 C.F.R. § 328.3(a)(8) (1994).

of discretion). The plain meaning of the exception is the same today as it was when this Court decided *Great Northwest*. Nothing in the CWA, the regulation, or the regulatory history provides any reason to depart from that plain meaning. *Transwestern Pipeline Co., LLC v. 17.19 Acres of Property Located in Maricopa County*, 627 F.3d 1258, 1270 (9th Cir. 2010) (unless otherwise defined, words in a regulation are construed "as taking their ordinary, contemporary, common meaning." (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979))).

The fact that the Corps has recently proposed to delete the exception is irrelevant, for two reasons. First, the current rule is in effect, and there is no indication of when it will be changed, if ever. As indicated, the Corps once proposed to delete the exception, only to drop its plans. *Compare* 48 Fed. Reg. at 21,474 *with* 51 Fed. Reg. at 41,250-51. Second, even if the regulatory exception is amended or rescinded before the resolution of this case, the rules in effect at the time of the jurisdictional and permitting decisions are the ones that should govern here. *See Western States Petroleum Ass'n*, 87 F.3d at 283 (regulatory decisions should be made pursuant to standards in effect at the time decision is made); *see also, Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007) (governing law at the time of alleged violation controls); *Rhue v. Wells Fargo Mortgage, Inc.*, No. CV 12-05394, 2012 WL 8303189, at *3 (C.D. Cal. Mar. 3, 2014) (bank "succeeds to those liabilities, whatever the governing law at the time may be").[5]

3. Case Law Interpreting the Exception

This District's decision in *Great Northwest* is directly on point. In that case, Great Northwest owned approximately 170 acres of wetlands. The property was located approximately one-third of a mile north of the Tanana River, a traditional navigable waterway. Immediately adjacent to and touching the property were a levee and a railroad berm. On the other side of those structures was a jurisdictional wetland, which was itself adjacent to the Tanana River. The Court held that "Great Northwest's wetlands [are] outside the CWA jurisdiction as a matter of law." 2010 WL 9499372, at *10, reproduced in Exhibit 2. The Court elaborated: "while the wetlands may be

[5] *See* Local Rule 7.1(c)(2) regarding unpublished opinions.

'contiguous' in the sense of being adjacent to one another, they are distinct and separate wetlands for purposes of CWA regulation. Great Northwest's wetlands are therefore adjacent to the wetlands on the south side of the railroad berm, not to the Tanana River." *Id.* at *9. The Court concluded that "the Corps' regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the CWA, as defined by 33 C.F.R. § 328.3(a)(7)." *Id.* at *10.

The instant case echoes *Great Northwest*. Here, the site is about 1.6 miles away from Channel C (a flood control channel constructed by the Corps), which ultimately flows into the Chena River. Adjacent to Channel C is a jurisdictional wetland. Separating the Channel C jurisdictional wetland from the site wetlands is the county-owned Peridot Road. Because Peridot Road is a man-made barrier between the two wetlands, the Corps' rules except the site's wetlands from CWA jurisdiction, in the same way that Great Northwest's wetlands were excepted from CWA jurisdiction because of the man-made barriers between the two wetlands. As stated in *Great Northwest*, "the Corps' own regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the CWA." 2010 WL 949932, at *10.

Although the Corps' adjacent wetlands jurisdictional exception has been in effect for well over two decades, it has received little treatment outside of *Great Northwest*. In *North Carolina Shellfish Growers Association v. Holly Ridge Associates, LLC*, 278 F. Supp. 2d 654 (E.D.N.C. 2003),[6] the plaintiffs alleged that the defendants violated the CWA by conducting ditching and

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[6] The First Circuit discussed the exception in *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), but that decision has since been vacated on other grounds, 467 F.3d 56 (1st Cir. 2006). The original panel decision, concurrence, and dissent addressed whether wetlands not immediately adjacent to other wetlands can nevertheless fall within the regulatory exception if at some point the hydrological connection between the site and the traditional navigable waterway is intercepted by another wetland. *See Johnson*, 437 F.3d at 187-88 (Torruella, J., dissenting). The court had no occasion to consider the application of the exception as presented here.

The Eleventh Circuit briefly discussed the exception in *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997). The court affirmed the district court's unpublished decision finding that the exception was inapplicable because the wetlands in question were part of "one continuous wetland." *Id.* at 921 n.10. In contrast here, the wetlands between Universal Welding's property and Channel C are divided by Peridot Road, a man-made barrier.

excavation activities on a 1,262-acre tract in Onslow County, North Carolina. *Id.* at 660. The defendants admitted that they had no permit, but denied that the property was subject to CWA jurisdiction. *Id.*

The district court held that, because the property's wetlands were adjacent to Stump Sound, a traditional navigable water, they were jurisdictional. *See id.* at 674. The court observed that the property contained a continuous network of wetlands connected by tributaries. *Id.* Although some of these wetlands were not directly adjacent to a water of the United States, some were. Since part of the single wetland network was immediately adjacent to a water of the United States, all of the wetlands were subject to CWA regulation. *Id.* The district court rejected the adjacent wetlands defense, explaining that, "taken to its logical conclusion, Defendants' [articulation of that defense] means that only the first millimeter of wetlands adjacent to a jurisdictional water could be covered by the CWA. This result is absurd, particularly where there is evidence of a hydrological connection within the wetland network." *Id.* at 674 n.5.

Holly Ridge is readily distinguishable, for two reasons. First, the wetlands immediately adjacent to Channel C, are separated from Universal Welding's property by Peridot Road, a county-owned public road, and none of the site wetlands touches Channel C or its abutting wetlands. Unlike the facts in *Holly Ridge*, Peridot Road creates a barrier between the two wetlands, AR-COE000753-000754, 000759, and the two wetlands do not comprise one continuous, physically connected wetlands network. Rather, Peridot Road creates two distinct sections of wetlands, each of which is "adjacent" to its neighboring section (albeit separated by the road), making the site wetlands "adjacent" to the jurisdictional wetlands under the Corps' regulations. Second, *Holly Ridge*'s "absurd results" objection has no relevance here. Application of the adjacent wetlands exception would not reduce the Corps' regulatory jurisdiction to within a millimeter of Channel C; instead, the Corps' jurisdiction would include all wetlands immediately adjacent to Channel C, but would end at the first barrier separating those immediately adjacent wetlands from other, adjacent wetlands

(such as Universal Welding's). The *Great Northwest* case distinguished *Holly Ridge* for similar reasons:

> It would seem that the *Holly Ridge* Court's concern for "absurd" results in applying the "wetlands adjacent to wetlands" exception is limited to cases in which the "network of wetlands" is "continuous." Where the wetlands are "continuous" it would indeed be absurd to draw an arbitrary line of adjacency in order to limit jurisdiction. However, the Corps' regulations must presume some delineation between adjacent wetlands, or else the § 328.3(a)(7) exception to jurisdiction would be rendered a nullity.

2010 WL 9499372, at *6.

B. Universal Welding's Wetlands Fall Squarely Within the Jurisdictional Exception

The Corps concedes that, pursuant to its definition of adjacency, the wetlands on Universal Welding's site are divided from the wetlands adjacent to Channel C by Peridot Road, a man-made barrier. AR-COE000038 (stating that the site is separated from the Channel C wetlands "by an artificial berm (Peridot Road)" and recognizing that Peridot Road is a man-made barrier under 33 C.F.R. § 328.3(c)). *See* Packee Decl. ¶¶ 7-11. Under that same definition, wetlands separated by such man-made features are deemed to be "adjacent wetlands." 33 C.F.R. § 328.3(c). Assuming arguendo that the wetlands immediately adjacent to Channel C are jurisdictional, it follows that (1) the wetlands on Universal Welding's property are adjacent to those wetlands immediately adjacent to Channel C within the meaning of Section 328.3(c), and (2) Universal Welding's wetlands are therefore wetlands "adjacent to . . . waters that are themselves wetlands" under Section 328.3(a)(7). Accordingly, they are not jurisdictional under the CWA.

It is no answer to argue that, regardless of any intervening wetlands separated from the site by a man-made barrier, Universal Welding's wetlands remain adjacent to Channel C in the sense that they are in the neighborhood of that channel. As the Court in *Great Northwest* held, such an interpretation of the wetlands exception would render it meaningless. 2010 WL 9499372, at *6. In every case in which a wetland is immediately adjacent to another jurisdictional wetland (the predicate for application of the exception), that wetland will be within the general "neighborhood" of a jurisdictional, nonwetland water. Hence, that incorrect interpretation would mean that every

otherwise nonjurisdictional adjacent wetland would remain adjacent by "leapfrogging" over the intervening wetlands to the nearest, nonwetlands jurisdictional water; and the Corps' regulatory exception would have zero meaning. In order to give meaning to every part of the Corps' regulations, the wetlands exception must therefore be read in accordance with its plain language to exclude wetlands adjacent to other jurisdictional wetlands. *See, e.g., In re Kagenveama*, 541 F.3d 868, 872 (9th Cir. 2008) ("Courts must give meaning to every clause and word of a statute.").

The Corps' summary conclusion in the final appeal that there is a shallow, subsurface connection between the two wetlands is irrelevant. As this Court made clear in its decision denying the government's motion to reconsider in *Great Northwest*:

> The Court has already stated why it will not remand to the Corps for consideration of the "significant nexus" standard espoused by Justice Kennedy in *Rapanos*. Justice Kennedy's opinion was that the CWA permits the Corps to regulate wetlands with a "significant nexus" to navigable waters. In other words, the Corps *may* regulate such wetlands. But the Corps' current regulations, which define "waters of the United States" for purposes of the CWA, do not mention any such "significant nexus" standard. Instead, they premise wetlands jurisdiction on adjacency to jurisdictional waters "other than waters that are themselves wetlands." So although the Corps could choose to regulate wetlands with a significant biological nexus to navigable waters under Justice Kennedy's interpretation of the CWA, it does not regulate them under the current regulations. For the Corps to exercise jurisdiction over wetlands under the "significant nexus" standard rather than the adjacency stsandard, it would have to contravene its own regulations. The Court cannot permit this to occur. When the Corps adopts regulations, it is bound by them.

2010 WL 9499071 at *2, reproduced in Exhibit 3. Thus, the exception applies notwithstanding that the wetlands might otherwise be subject to regulation under *Rapanos*. Moreover, the administrative record does not support the Corps' conclusion of a shallow, subsurface connection. Packee Decl. ¶ 14.

Accordingly, the Corps' assertion of jurisdiction over Universal Welding's wetlands by virtue of their adjacency to Channel C is contrary to law and arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Universal Welding's motion for summary judgment should be granted.

DATED: February 5, 2015.

Respectfully submitted,

JAMES S. BURLING
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By s/THEODORE HADZI-ANTICH
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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, a copy of the foregoing PLAINTIFF'S MOTION FOR AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SUMMARY JUDGMENT, with three exhibits, was served electronically on Austin David Saylor and Elizabeth Boucher Dawson through CM/ECF for the United States District Court for the District of Alaska.

s/THEODORE HADZI-ANTICH
THEODORE HADZI-ANTICH