UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORCHARD HILL BUILDING COMPANY DBA GALLAGHER & HENRY,	)	
Plaintiff,	)	Case No.: _____
v.	)	
UNITED STATES ARMY CORPS OF ENGINEERS,	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Orchard Hill Building Company, dba Gallagher & Henry ("Gallagher & Henry"), for its Complaint seeking declaratory and injunctive relief alleges as follows:

NATURE OF THE ACTION

1. The Plaintiff seeks review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, of a final agency action of the United States Army Corps of Engineers (the "Corps") determining that portions of certain property owned by the Plaintiffs (the "Warmke Property," sometimes referred to as the "Property") is a "water of the United States" under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, known as the Clean Water Act ("CWA"), and therefore subject to the Corps' jurisdiction.

2. As a result of the Corps' unlawful assertion of jurisdiction, Plaintiffs are unable to use a portion of the Warmke Property without fear of a CWA enforcement action, fines, and penalties. The Corps' improper assertion of jurisdiction also subjects Plaintiffs to unlawful and burdensome permitting requirements.

3. Plaintiffs seek by this action a declaration that the portion of the Warmke Property over which the Corps' has asserted jurisdiction is not a water of the United States under the CWA. Plaintiffs also seek an injunction enjoining the Corps from exercising jurisdiction over such portion of the Warmke Property.

4. The Court's review of the agency action that is the subject of this proceeding is based upon the administrative record.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary and proper relief"); and 5 U.S.C. §§ 702, 704, and 706 (providing for judicial review of final agency action under the APA). Injunctive relief is authorized by 28 U.S.C. § 2202.

6. The Warmke Property consists of approximately 100 acres of real estate located in Tinley Park, Cook County, Illinois (the "Village"). Venue in this judicial district is proper under 28 U.S.C. § 1931(e)(2) because the Warmke Property is located within this district.

PARTIES

7. Plaintiff, Gallagher & Henry, is an Illinois partnership with its principal place of business in Countryside, Illinois. Plaintiff owns the Warmke Property.

8. Defendant United States Army Corps of Engineers is a branch of the Department of the Army and an agency of the United States.

LEGAL BACKGROUND

"Waters of the United States"

9. In 1972, Congress enacted the Federal Water Pollution Control Act, amended as the Clean Water Act ("CWA") to regulate "navigable waters."

10. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredged and fill material into "navigable waters."

11. Section 502(7) of the CWA, *id.* § 1362(7), defines "navigable waters" to mean the "waters of the United States, including the territorial seas."

12. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged and fill material into "navigable waters."

13. By regulation, the Corps determines whether a particular parcel of property contains "waters of the United States" by issuing an Approved Jurisdictional Determination ("JD"). 33 C.F.R. §§ 320.1(a)(6), 331.2.

14. The Corps has promulgated regulations defining "waters of the United States." *Id.* § 328.

15. Under the regulations cited in paragraph 14, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered "waters of the United States."

16. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), held that isolated, intrastate, non-navigable bodies of water are not "waters of the United States."

17. After *SWANCC*, the Corps and EPA continued to interpret their authority under the CWA to extend to waterbodies and wetlands so long as those features had a "hydrological connection" to navigable-in-fact waterbodies. *See e.g.*, *United States v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004), *vacated, remanded by Rapanos v. United States*, 547 U.S. 715 (2006).

18. In *Rapanos v. United States*, the Supreme Court rejected the agencies' hydrological connection theory of CWA jurisdiction. *See* 547 U.S. at 739 (plurality opinion); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

19. In *Rapanos v. United States*, Justice Scalia authored a plurality opinion, joined by three other Justices, which concluded that the Corps' jurisdiction over the non-navigable waters only extends to "relatively permanent, standing or continuously flowing bodies of water that are "connected to traditional intestate navigable waters." *Id.* at 739, 742 (plurality opinion). In addition, wetlands adjacent to such jurisdictional waters will qualify as jurisdictional waters when "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins". *Id.* at 742.

20. Justice Kennedy concurred in the judgment but adopted a broader interpretation of the Corps' jurisdiction over non-navigable wetlands, finding them jurisdictional if they "possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice Kennedy, a significant nexus exists where non-navigable wetlands, either alone or in combination with similarly situated waterbodies, "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters (also know as "traditional navigable waters"). *Id.* at 780. The Seventh Circuit recognizes Justice Kennedy's significant nexus test as controlling. *See United States v.*

Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006). *See also U.S. v. Johnson*, 467 F.3d 56, 61 (1st Cir. 2006); *U.S. v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009).

21. After *Rapanos*, the Corps, in conjunction with EPA, issued a non-binding guidance document opining on the scope of the agencies' CWA jurisdiction. *See* Clean Water Act Jurisdiction Following the United States Supreme Court's decision in *Rapanos v. United States* (Dec. 2, 2008). In that guidance document, the Corps and EPA asserted their intention to exercise jurisdiction over "waters of the United States" that satisfy either the Scalia "relatively permanent" test or the Kennedy "significant nexus" test.

22. On June 29, 2015, the Corps and the United States Environmental Protection Agency ("EPA") jointly promulgated a rule in which the term "waters of the United States" is defined to include traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of jurisdictional waters; covered tributaries of such waters; and adjacent waters, including adjacent wetlands. 33 U.S.C. Section 328.3(a), 80 Fed. Reg. 37054, 37104 (June 29, 2015). In addition, the rule includes within the definition of the term "waters of the United States" any "other waters" that either alone or in combination with similarly situated waters in the region have a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. *Id.*

"Prior Converted Cropland"

23. The CWA exempts farming operations from the dredged and fill material permitting requirements. 33 U.S.C. § 1344(f).

24. By regulation, the Corps has exempted from the permitting requirements lands formerly used for agricultural purposes, known as "prior converted cropland." 33. C.F.R. § 228.3(a)(8).

25. The preamble to the regulations defines the term "prior converted cropland" as "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, of having the effect, of making production of a commodity crop possible." In addition, prior converted cropland "is inundated for no more than 14 consecutive days during the growing season and excludes potholes or playa wetlands." 58 Fed. Reg. 45,008-01, 45,031 (Aug. 25, 1993). The Corps adopted the definition from the National Food Security Act Manual, which incorporated the definition used by the Soil Conservation Service. *Id.*

26. The preamble also stated that "[i]n response to commentators who opposed the use of [prior converted] croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA Jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas." *Id.* at 45,033. The preamble further states that prior converted cropland may return to the Corps' jurisdiction if it has been "abandoned" and the lands "revert back to wetlands." *Id.*

27. In January, 2009, the Corps' Jacksonville Field Office prepared an issue paper announcing that prior converted cropland that is shifted to non-agricultural use is subject to regulation by the Corps. *See* Issue Paper Regarding Normal Circumstances(the "Issue Paper") (**Exh. A**). The Issue Paper was written in response to five pending applications for jurisdictional determinations involving the transformation of prior converted cropland to limestone quarries. The Issue Paper found that active management such as continuous pumping to keep out wetland conditions would subject the prior converted cropland to the Corps' jurisdiction. *Id.*

28. In an affirming Memorandum, the Issue Paper was adopted by the Corps as being an accurate reflection of the Corps' national position. *See* Memorandum for South Atlantic Division

Commander (Apr. 30, 2009) (the "Affirming Memorandum") (**Exh. B**). The Issue Paper and the Affirming Memorandum are collectively referred to as the "Stockton Rules."

29. In 2010, the United States District Court for the Southern District of Florida set aside the Stockton Rules on the ground that they had not been promulgated in accordance with the Administrative Procedure Act, and enjoined the Corps' from implementing them "without engaging in rulemaking using appropriate notice-and-comment procedures." *New Hope Power Company v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1282-83 (2010).

30. This Court has held that where prior converted cropland is switched to nonagricultural use "that area will no longer come under the Corps' jurisdiction." *See United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1040 (N.D. Illinois 1998).

"Jurisdictional Determinations"

31. The Corps of Engineers has primary responsibility for determining whether any particular geographic area, including a wetland, is subject to the Corps' regulatory authority under CWA section 404. *See* 60 Fed. Reg. 37,289-01, 37,282 (July 19, 1995).

32. Delineating wetlands is a two-step process. First, a decision is made regarding whether an area falls within the technical definition of a wetland, which is set forth at 33 C.F.R. § 328.3(b). Second, the boundary line between regulated wetlands and unregulated uplands is established. Guidelines for taking both steps are set forth in the 1987 Corps of Engineers Wetland Delineation Manual. *See* 60 Fed. Reg. at 37,282.

33. Jurisdictional determinations are made by the Regulatory Division of the Corps' District Office responsible for the geographic area at issue. *Id.*

34. There is one level of administrative appeal from a jurisdictional determination made by the relevant Corps District Office. 33 C.F.R. § 331.7(a). That appeal is made to and decided by

the Corps' Division Engineer with oversight responsibility for the jurisdictional determinations of the District Engineer, or by a duly designated delegate of the Division Engineer. 33 C.F.R. § 331.3(a)(1). *See id.* at 331.1(b).

35. The administrative appeal must be decided on the basis of the then-existing administrative record. *Id.* at 331.3(b)(2); 331.7(f).

36. The Corps' regulations allow the Corps to conduct a site investigation and meet at the site with the persons seeking the jurisdictional determination and its representatives. 33. C.F.R. § 331.7(c).

37. In relevant part, the term "jurisdictional determination" means "a written Corps determination that a wetland . . . is subject to regulatory jurisdiction under section 404 of the [CWA]." *Id.* at 331.2

38. In relevant part, the term "approved jurisdictional determination" means "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document." *Id.*

39. If the Division Engineer determines that the appeal is without merit, the final Corps decision is the Division Engineer's letter advising the applicant that the appeal is without merit. *Id.* at 331.10(a).

40. If the Division Engineer determines that the appeal has merit, the final Corps decision is the District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action. *Id.* at 332.10(b).

41. The final decision on the merits of the appeal "concludes the administrative appeal process." *Id.* at 331.9(b).

FACTUAL ALLEGATIONS

42. The Warmke Property is approximately 100 acres of generally flat terrain, which have been historically farmed.

43. Gallagher & Henry contracted to purchase the Warmke Property in 1990, whereby portions were paid for and deeded in stages between September, 1991, through December, 1995.

44. Farming operations on the Warmke Property were never abandoned.

45. Gallagher & Henry actively and properly changed the use of the Warmke Property pursuant to an annexation, rezoning and phased development agreement with the Village executed in April of 1995 (the "Annexation Agreement").

46. The 100-acre property is configured in the shape of a rectangle with the northern boundary at 179th Street and southern boundary at 183rd Street. Pursuant to the Annexation Agreement, the south 25 acres(Phase I) is approved for 168 townhomes and the north 61 acres (Phase II) for 169 single family lots. The 14-acre parcel lying between the two residential areas was approved by the Village as a storm water management system, including two storm water detention ponds, one wet and one dry, to detain storm water and service both the Phase I townhomes to the south and the Phase II single family lots to the north, as well as other offsite properties. **(Exh. C)**.

47. The Warmke Property was designed and approved as a unified development with streets and utilities, including water mains, sanitary sewers and storm sewers interconnecting not only between the two residential areas of Phase I and Phase II, but also engineered and designed to connect to surrounding Village streets and utilities.

48. Construction began on the Warmke Property in early 1996 with the excavation of the two storm water detention ponds. Excavation materials from the ponds were stockpiled north of the 14-acre storm water management area and within the area of the approved single family lots, later

purported to be wetlands, but at the time part of an active farm. Up to six feet of fill materials were stockpiled and intended to be used to "level and balance" the area of single family lots. (*See* pp. 2 and 4 of letter dated June 11, 2008, from David Zajicek to Paul Leffler, reproduced in **Exh. D**).

49. Although the storm water detention system and detention ponds were completed in 1997, the systematic buildout and sale of the Phase I townhome area continued for another 10 years through 2007.

50. The 1996 excavation and grading of the two storm water detention ponds which led to filling the two current wetland areas are man-made conditions which have reduced the historic drainage and allowed wetlands characteristics to develop in that area, which had not been identified as wetlands in the past.

51. The remaining acreage (excluding the townhome area, the storm water management system area and the two now purported wetlands areas) continues to be farmed.

52. The storm water management system including the two detention ponds are part of a drainage system serving an approximate 600-acre tributary to the Little Calumet River. The drainage system consists of six retention/detention ponds (three wet and three dry) all connected by approximately 6,000-feet of underground pipe extending from Pond I and beneath and through the other five ponds, ultimately terminating at the headwater of Midlothian Creek, which is not a traditionally navigable water.

53. Midlothian Creek flows approximately 11.3 miles into the Little Calumet River, which is a traditionally navigable water.

54. The detention ponds are located within a historical depression that can be seen on the National Resource Conservation Service National Wetland Inventory Map (Exhibit E).

55. Consistent with the National Wetland Inventory, the detention ponds correspond with a Palustrian Emergent Farmed Wetland with a temporary flooded water regime.

56. The National Resource Conservation Service Wetland Inventory Map identified this area as non-wetland prior converted ("NW/PC"). (*See* **Exh. E**).

57. The Corps first asserted jurisdiction over the Warmke Property in its JD dated November 17, 2006 (the "First JD"). In that JD, jurisdiction was asserted over two purported wetlands (I) a 0.63-acre area ("Wetland A") and (ii) a 12.24-acre area ("Wetland B"). The JD did not address the jurisdictional standards set forth in *Rapanos v. United States*.

58. In the First JD, dated November 17, 2006, the Corps based jurisdiction on 33 C.F.R. § 328.3(a)(5) and (7), the presence of a tributary to a water of the United States, as well as the presence of wetlands adjacent to the tributary. (**Exh. F**).

59. On January 12, 2007, Gallagher & Henry appealed the JD, on the ground that it did not take into account the Supreme Court's decision in *Rapanos*. ("First Administrative Appeal").

60. The Corps responded to the appeal by letter dated October 21, 2007, indicating that it would review the JD in light of *Rapanos*. The letter also served to remand the JD to the District, stating "this letter serves as the decision document for your RFA and this concludes the Corps' administrative appeal process.

61. On June 11, 2008, Gallagher & Henry submitted to the Corps a request for a "No Jurisdiction" determination from the Corps, based upon the Supreme Court's decision in *Rapanos*, addressing Justice Scalia's plurality test (surface hydrology) and Justice Kennedy's concurring test (significant nexus) and arguing that the site (i) lacks continuous surface connection and (ii) lacks a significant nexus to a traditionally navigable water. (**Exh. G**).

62. The Corps proceeded to reconsider its prior decision in light of the remand.

63. In a letter dated July 10, 2009, Robert Jankowski, District Conservationist, National Resources Conservation Service ("NRCS") stated that the area in question had been designated as prior converted cropland. **(Exh. H)**.

64. On March 31, 2010, the Corps issued a Preliminary Memorandum for Record ("MFR") that again asserted jurisdiction over Wetland A and Wetland B.

65. On April 14, 2010, the United States Environmental Protection Agency ("EPA") wrote the Corps stating the EPA concurs with the Corps assertion of Jurisdiction.

66. On May 26, 2010, Gallagher & Henry responded to the MFR, citing errors and omissions in the document.

67. On October 6, 2010, the Corps responded by again claiming jurisdiction over Wetland A and Wetland B, asserting a significant nexus to the Little Calumet River.

68. The October 6, 2010, letter stated, "the 0.01-acre wetland on the eastern edge of the soil pile in the center of the site [was] isolated and therefore not under the Jurisdiction of this office."

69. The October 6, 2010, letter stated that it was to be considered an "approved jurisdictional determination" for the site and included an approved jurisdictional determination form (the "Second JD").

70. The October 6, 2010, letter rejected the NRCS designation of the areas as prior converted cropland, on the ground that the designation was "uncertified."

71. By letter and supporting legal and factual analysis dated January 21, 2011, Gallagher & Henry appealed the Second JD, asserting that the Corps's significant nexus finding and its rejection of the prior converted cropland exclusion were in error because they were not based on substantial evidence in the record.

72. On June 21, 2011, the Corps denied the appeal of the Second JD on the ground that the record supported the Corps' jurisdictional determination (the "Second Appeal Decision").

73. The Second Appeal Decision stated, "[t]his concludes the Corps' administrative appeal process."

74. On July 7, 2011, Gallagher & Henry requested the Corps to reconsider its Second Appeal Decision on the issue of prior converted cropland and significant nexus.

75. In November 2011, the Division remanded to the District for reconsideration of the prior converted cropland exemption.

76. On or about March 26, 2012, the District restated its position that the prior converted cropland exemption does not apply (the "Third JD").

77. On May 24, 2012, Gallagher & Henry appealed the District's Third JD to the Division on the ground that the District was in error on the converted cropland exemption and that the record did not contain substantial evidence to support a significant nexus finding (the "Third Appeal").

78. On September 12, 2012, representatives from the Corps met with representatives of Gallagher & Henry at the Property to conduct a site investigation, and the issues were limited to those in the administrative record at the time the Third Appeal was taken, namely, May 24, 2012.

79. On October 4, 2012, Gallagher & Henry submitted to the Corps' post-meeting written comments to address issues and questions, and the comments were limited to matters in the administrative record.

80. The Division decided the appeal based on the administrative record, as reflected in its letter dated May 9, 2013, by which the Division remanded to the District stating that the Third Appeal "has merit because the District failed to provide the requisite explanation for its significant nexus determination" and that the District should "include sufficient documentation to support its

decision and to reconsider its decision." The Division's May 9, 2013, remand stated that "[t]he administrative record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form" and that "no new information may be submitted on appeal." The Division stated that the final Corps' decision on Jurisdiction "will be the Chicago district Engineer's decision made pursuant to my remand." **(Exh. I)**.

81. Nothing in the remand by the Division authorized the District to supplement the administrative record in making the final decision.

82. By letter dated May 21, 2013, Gallagher & Henry reminded the District Officer to whom the decision to decide the Third Appeal had been delegated that (i) the appeal must be decided within 60 days, (ii) the "District is bound by the administrative record in explaining its significant nexus finding on remand," and (iii) the "District may not supplement that record or create any new record on remand." **(Exh. J)**.

83. On July, 19, 2013, the District made its final jurisdictional determination on remand, confirming its prior positions that Wetland A and B "exhibit a significant nexus to the navigable Little Calumet River," and that the prior converted cropland exemption did not apply (the "Third Appeal Decision"). (Exhibit K).

84. With regard to the significant nexus issue, the Third Appeal Decision was based on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal. In basing its decision on this new document, the District acted in violation of the Corps' Regulations limiting the scope of the remand from the Division Engineer to reviewing the administrative record and further analyzing and evaluating specific issues. 33 C.F.R. § 331.10(b). *See* **Exh. K.**

85. Gallagher & Henry never had the opportunity in any proceeding to review, comment, or otherwise address the new information in the "Warmke Site Wetlands Functions and Benefits to Downstream Waters" document or its attachments.

86. On September 25, 2013, Gallagher & Henry sent a letter to the Chicago District confirming its understanding that the Third Appeal Decision is the Corps' final action on the issues.

87. On October 24, 2013, the Corps responded with a letter confirming the fact that the Third Appeal Decision was the "final Corps decision" in connection with Gallagher & Henry's request for a jurisdictional determination regarding the Warmke Property. **(Exh. L).**

88. The Third Appeal Decision constitutes a final agency action within the meaning of 5 U.S.C. § 704.

89. The Third Appeal Decision is an agency action by which obligations of the Plaintiff have been determined or from which legal consequences flow.

90. The Third Appellate Decision is (i) unsupported by credible evidence in the record, (ii) arbitrary and capricious, and (iii) contrary to law.

DECLARATORY RELIEF ALLEGATIONS

91. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

92. The Corps acted unlawfully when it based the Third Appeal Decision on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal, thereby violating its own regulations.

93. The Corps acted unlawfully when it improperly determined pursuant to the Third Appeal Decision that the prior converted cropland exemption does not apply to Wetland A or Wetland B, thereby violating its own regulations.

94. An actual and substantial controversy exists between the Plaintiff and the Corps over the Corps' failure to comply with the CWA and its own regulations in determining that Plaintiff's Property contains a jurisdictional waterbody.

95. Plaintiff contends that its Property contains no jurisdictional waterbodies, whereas the Corps, through its Third Appeal Decision, contends that it does. The Corps has had nine years to develop information supporting its allegations of jurisdiction, there is an extensive and complete administrative record, and any further administrative proceedings before the Corps would be futile. Therefore, no further factual development is necessary to resolve the legal issues raised by this action.

96. The case is currently justiciable because the Corps has unlawfully asserted jurisdiction over Plaintiff's Property.

97. Plaintiff is therefore entitled to a declaratory judgement declaring that the Third Appeal decision is invalid and that the Corps does not have jurisdiction over the Property pursuant to the CWA.

INJUNCTIVE RELIEF ALLEGATIONS

98. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as thought fully set forth herein.

99. Plaintiff wishes to continue its business activities on the Property that the Corps' wrongfully claims to be subject to its CWA permitting authority.

100. Plaintiff is and will continue to be directly affected and injured by the Corps' unlawful assertion of CWA jurisdiction over its Property.

101. The Third Appeal Decision imposes significant injury on Plaintiff by preventing it from using its Property as it wishes without risk of enforcement proceeding, fines, and penalties. The Third Appeal decision also imposes on Plaintiff the illegal, burdensome, and expensive requirement that it obtain a Section 404 CWA permit in order to further conduct its lawful activities on the Property. As a result, Plaintiff's use of the Property has been, is being, and (unless the Court grants relief) will continue to be adversely affected. Hence, the Corps' unlawful exercise of jurisdiction causes Plaintiff irreparable injury.

102. The Plaintiff is currently and continuously injured by the Corps' unlawful exercise of jurisdiction because the existence of the Third Appeal Decision decreases the value of its Property and prevents the Plaintiff from exercising its lawful business pursuits.

103. Setting aside the Third Appeal Decision, which embodies the Corps' illegal assertion of jurisdiction over the Property, will redress Plaintiff's injury by allowing Plaintiff to use its Property without reference to the Corps' assertion of jurisdiction.

104. Plaintiff has no plain, speedy, and adequate remedy at law. Absent judicial intervention by injunctive relief, Plaintiff will continue to suffer irreparable injury.

COUNT 1

(Declaratory and Injunctive Relief - Final Jurisdictional Decision Based on Evidence Not in the Administrative Record On Appeal)

105. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

106. The Corps' Third Appeal Decision is subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

107. The Corps acted unlawfully when it based the Third Appeal Decision on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal.

108. Under the Corps' own regulations, the Corps may not use extra-record materials on appeal. *See* 33 C.F.R. § 331.10(b).

109. The Corps' Third Appeal Decision is a final agency action ripe for judicial review. *See* 5 U.S.C. § 704.

110. The Plaintiff has exhausted all administrative remedies. *See* 33 C.F.R. § 331.5(b)(3).

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

COUNT 2

(Declaratory and Injunctive Relief - Failure to Properly Apply the Regulatory Exclusion for Prior Converted Cropland)

112. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

113. The Corps' Third Appeal Decision is subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

114. The Corps acted unlawfully when it improperly determined pursuant to the Third Appeal Decision that the prior converted cropland exemption does not apply to Wetland A or Wetland B, thereby violating its own regulations. *See* 33. C.F.R. § 228.3(a)(8).

115. The Corps' Third Appeal Decision is a final agency action ripe for judicial review. *See* 5 U.S.C. § 704.

116. The Plaintiff has exhausted all administrative remedies. *See* 33 C.F.R. § 331.5(b)(3).

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Gallagher & Henry requests that this Court:

1. Order a speedy hearing of this declaratory judgment action;

2. Declare unlawful the Corps' resort to extra-record evidence in determining that Wetland A and Wetland B have a significant nexus to the Little Calumet River;

3. Declare that Wetland A and Wetland B constitute prior converted cropland;

4. Declare unlawful and set aside the Corps' final jurisdictional determination as embodied in the Third Appeal Decision;

5. Enjoin the Corps from asserting jurisdiction over Wetlands A and B

6. Award Plaintiff Gallagher & Henry attorney's fees and costs of court; and

7. Grant such other and further relief as the Court deems just and necessary.

DATED: July 21, 2015.

Respectfully submitted,

By /s/David E. Zajicek
DAVID E. ZAJICEK

DAVID E. ZAJICEK
Hinshaw & Culbertson LLP
4343 Commerce Court, Suite 415
Lisle, Illinois 60532
Telephone: (630) 505-4167
Facsimile: (630) 505-0959

M. REED HOPPER, CA Bar No. 132291
THEODORE HADZI-ANTICH, CA Bar No. 264663
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs Gallagher & Henry

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2015, I electronically filed the foregoing COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by Certified Class Mail, Return Receipt Requested, postage prepaid, to the following non-CM/ECF participants:

LORETTA E. LYNCH, Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

ZACHARY T. FARDON, United States Attorney for the Northern District of Illinois
United States Attorney=s Office
Northern District of Illinois, Eastern Division
219 South Dearborn Street, 5th Floor
Chicago, IL 60604

LIEUTENANT GENERAL THOMAS P. BOSTICK, Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

LEESA BEAL, Chief
Regulatory Branch
U.S. Army Corps of Engineers
Chicago District
231 South LaSalle Street, Suite 1500
Chicago, IL 60604

/s/David E. Zajicek
DAVID E. ZAJICEK