

**IN THE UNITED STATES DISTRICT COURT
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.

Case No. 4:14-cv-00021-TMB

**ORDER GRANTING
DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Universal Welding & Fabrication, Inc. (“Universal Welding”) brought this action under the Administrative Procedure Act, [5 U.S.C. §§ 706–710](#), seeking a ruling from the Court that the United States Army Corps of Engineers lacks authority under the Clean Water Act (“CWA”) to regulate Universal Welding’s fill activity on approximately 20 acres of property located in North Pole, Alaska’s Quinnell Subdivision.¹ Universal Welding has moved for summary judgment on the administrative record.² Defendants United States Army Corps of Engineers and Christopher D. Lestochi (collectively, the “Corps”) filed a cross-motion for

¹ [Dkt. 1](#) (complaint).

² [Dkt. 20](#) (motion for summary judgment); [Dkt. 26](#) (combined opposition and reply); [Dkt. 33](#) (sur-sur-reply).

summary judgment.³ Neither party has requested oral argument, and the Court finds that it is not necessary.

For the reasons that follow, the Court DENIES Plaintiff's Motion for Summary Judgment at Docket 20 and GRANTS Defendants' Cross-Motion for Summary Judgment at Docket 25.

II. FACTUAL BACKGROUND

Universal Welding is an Alaska corporation based in North Pole, Alaska that fabricates steel buildings and other steel products such as catwalks, platforms, stairs, and ladders.⁴

Universal Welding currently conducts its operations on two parcels of land located at 2710 and 2720 Hurst Road.⁵ To accommodate an increase in business, Universal Welding proposes to develop a third parcel of land—Lot 3 Quinnell Subdivision—immediately north of these two parcels of land.⁶ This third parcel of land (the “subject property”) is approximately 20 acres in size, 14 of which are wetlands.⁷

Universal Welding proposes to develop the subject property by placing approximately 33,000 cubic yards of gravel fill onto the property in order to create a flat surface suitable for storing raw materials and finished steel modules prior to shipment.⁸ Such development would permanently eliminate the 14 acres of wetlands on the subject property.⁹

³ [Dkt. 25](#) (cross-motion for summary judgment); [Dkt. 32](#) (sur-reply).

⁴ [Dkt. 1](#) at 4.

⁵ AR Tab 153 at COE001059; AR Tab 42 at COE000366.

⁶ AR Tab 42 at COE000366.

⁷ *Id.*; AR Tab 1 at COE000014.

⁸ AR Tab 91 at COE000559–560; AR Tab 42 at COE000366.

⁹ AR Tab 42 at COE000367.

The subject property is located within Section 4, T. 2 S., R. 2 E., Fairbanks Meridian.¹⁰ Just west of the subject property is Peridot Road, a public roadway.¹¹ To the west of Peridot Road is a large wetland.¹² Directly west of the wetland—approximately 1.6 miles from the subject property—is a flood control channel constructed by the Corps called Channel C.¹³ Channel C flows into the Chena Slough, which in turn flows into the Chena River.¹⁴ Channel C is a relatively permanent water, and the Chena Slough is a traditional navigable water.¹⁵

The administrative record shows that the wetlands on the subject property contribute shallow subsurface flow to Channel C.¹⁶ The administrative record also shows that the wetlands on the subject property, together with similarly situated wetlands and Channel C, perform a variety of hydrologic, physical, geochemical, and biological functions critical to the integrity of Chena Slough, including, for example, filtering pollutants, supplying nutrients and organic carbon, and supporting wetland-dependent and aquatic biota.¹⁷

¹⁰ AR Tab 66 at COE000477.

¹¹ AR Tab 1 at COE000022; AR Tab 126 at COE000753.

¹² AR Tab 3 at COE000054; AR Tab 148 at COE001051.

¹³ AR Tab 1 at COE000016; AR Tab 3 at COE000054.

¹⁴ AR Tab 1 at COE000015; AR Tab 109 at COE000624.

¹⁵ AR Tab 1 at COE000015.

¹⁶ *Id.* at COE000018, COE000022, COE000025–032.

¹⁷ *Id.* at COE000019, COE000032–38; AR Tab 126 (significant nexus findings).

III. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the CWA in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁸ To that end, the Act, *inter alia*, prohibits the discharge of dredged or fill material into "navigable waters" unless authorized by a permit issued by the Corps pursuant to [33 U.S.C. § 1344\(a\)](#) (i.e., a Section 404 permit).¹⁹

A. Wetlands constituting "waters of the United States"

The CWA defines "navigable waters" as "waters of the United States."²⁰ The Corps, in turn, has defined "waters of the United States" to include, *inter alia*, traditional navigable waters, tributaries of traditional navigable waters, and "[w]etlands adjacent to waters [of the United States] (other than waters that are themselves wetlands)."^{21, 22} The Corps has defined "adjacent"

¹⁸ 86 Stat. 816, *codified at* [33 U.S.C. § 1251\(a\)](#).

¹⁹ [33 U.S.C. § 1311\(a\)](#); [33 U.S.C. § 1344\(a\)](#); *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 589 (9th Cir. 2008).

²⁰ [33 U.S.C. § 1362\(7\)](#).

²¹ [33 C.F.R. § 328.3\(a\)\(1\)–\(7\)](#). The Corps' regulations define "wetlands" as "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id. at* [§ 328.3\(b\)](#). Universal Welding does not dispute that its property contains wetlands as defined by the Corps.

²² The Corps and the EPA jointly published a final rule clarifying the scope of "waters of the United States" protected under the CWA on June 29, 2015. *See* [80 Fed. Reg. 37054 \(June 29, 2015\)](#). The final rule eliminates the current regulatory exception for wetlands adjacent to other wetlands. *See id. at* [37104–05](#). The rule was to become effective on August 28, 2015. *Id. at* [37054](#). On August 27, 2015, however, Chief Judge Ralph R. Erickson of the District of North Dakota granted a preliminary injunction blocking implementation of the new rule, at least in the 13 states that are parties to the action, of which Alaska is one. *State of North Dakota v. U.S. Env'tl. Prot. Agency*, No. 3:15-cv-59 (Aug. 27, 2015) (order granting preliminary injunction). Accordingly, the phrase "current regulations" in this opinion means the regulations that were in effect on August 27, 2015. The Court further notes that even if the new rule had become effective on August 28, 2015, it would not have any effect on this case. *See W. States Petroleum*

to mean “bordering, contiguous, or neighboring,”²³ and its regulations specify that wetlands “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like” are “adjacent wetlands.”²⁴

B. The Rapanos decision

The Supreme Court most recently addressed how the term “navigable waters” should be construed under the CWA in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (hereinafter “*Rapanos*”).²⁵ In *Rapanos*, a 4-4-1 plurality opinion, the Corps was found potentially to have exceeded its Congressional mandate by attempting to regulate “four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters.”²⁶ The plurality reversed on the grounds that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”²⁷

Justice Kennedy—who provided the decisive fifth vote—concurred only in the judgment. His concurrence holds that “the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional

Ass’n v. EPA, 87 F.3d 280, 283 (9th Cir. 1996) (regulatory decisions should be made pursuant to standards in effect at the time the decision is made).

²³ 33 C.F.R. § 328.3(c).

²⁴ *Id.*

²⁵ 547 U.S. 715 (2006).

²⁶ *Id.* at 729 (plurality opinion).

²⁷ *Id.* at 742.

sense.”²⁸ A significant nexus exists “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”²⁹ “When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”³⁰

According to Justice Kennedy, “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction.”³¹ “Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”³²

In the Ninth Circuit, Justice Kennedy’s “significant nexus” standard is the controlling standard,³³ although jurisdiction premised upon the plurality standard has not been foreclosed.³⁴

C. *Post-Rapanos guidance*

Following the *Rapanos* decision, the EPA and the Corps jointly issued a guidance memorandum addressing “which waters are subject to CWA § 404 jurisdiction” based on the

²⁸ *Id.* at 779 (Kennedy, J., concurring).

²⁹ *Id.* at 780.

³⁰ *Id.*

³¹ *Id.* at 782.

³² *Id.*

³³ *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (upholding district court’s conclusion that ponded wetlands bordering other wetlands were jurisdictional because they possess significant nexus to navigable-in-fact waters).

³⁴ *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (citing *Healdsburg*, 496 F.3d at 999–1000).

reasoning of the *Rapanos* opinions.³⁵ The guidance provides that the Corps will assert jurisdiction over “wetlands adjacent to, but not directly abutting, a relatively permanent tributary” only if such wetlands also “have a significant nexus to a traditional navigable water.”³⁶ The guidance further provides that the Corps will consider wetlands adjacent to jurisdictional waters if: (1) “there is an unbroken surface or shallow sub-surface connection to jurisdictional waters,” (2) “they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like,” or (3) “their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.”³⁷

IV. PROCEDURAL HISTORY

Universal Welding first submitted an application for a Section 404 permit for the subject property in April 2008.³⁸ Universal Welding did not pursue the application further, however, and the Corps closed the permit application file in July 2008.³⁹

About 18 months later, on January 7, 2010, Universal Welding submitted a request to the Corps for an approved jurisdictional determination of its property.⁴⁰ The Corps issued its

³⁵ U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 4 (Dec. 2, 2008) (hereinafter “*Rapanos* Guidance”). The guidance is not a regulation, nor does it impose legally binding requirements. See *Reno v. Koray*, 515 U.S. 50, 61 (1995) (holding internal agency guideline entitled only to “some deference”).

³⁶ *Rapanos* Guidance 8.

³⁷ *Id.* at 5–6.

³⁸ AR Tab 146 at COE001092; see also AR Tab 145 at COE001040.

³⁹ AR Tab 154 at COE001066.

⁴⁰ AR Tab 153.

determination on March 22, 2010.⁴¹ The Corps concluded that it had jurisdiction over the subject property pursuant to the CWA because “[t]he on-site water is part of a large wetland area directly abutting . . . Channel C, a relatively permanent waterway (RPW).”⁴² Universal Welding appealed the Corps’ determination on May 18, 2010,⁴³ but later withdrew the appeal to allow the Corps to make a significant nexus determination.⁴⁴

The Corps then issued a revised jurisdictional determination on July 23, 2010.⁴⁵ The revised jurisdictional determination concluded that the subject property is a water of the United States subject to the Corps’ regulatory jurisdiction because “it is adjacent to Channel C, a relatively permanent water, and sustains a significant nexus with Chena Slough, a traditional navigable water.”⁴⁶ The Corps explained that its revised jurisdictional determination considered the wetlands on the subject property “adjacent to” Channel C rather than “directly abutting” Channel C (as its original jurisdictional determination had) because it “does not have enough documentation at this time to determine whether Peridot Road comprises a barrier to continuous surface connection.”⁴⁷ The Corps further explained that it determined the wetlands on the subject property are adjacent to Channel C because the evidence available to the Corps “indicates

⁴¹ AR Tab 144.

⁴² *Id.* at CEO001037; *see also* AR Tab 145 at CEO001041; AR Tab 146 at CEO001047.

⁴³ AR Tab 133.

⁴⁴ AR Tab 131 at COE000933; AR Tab 112 at COE000637.

⁴⁵ AR Tab 125.

⁴⁶ AR Tab 128 at COE000911; *see also* AR Tab 126 at COE000742–784 (significant nexus analysis).

⁴⁷ AR Tab 133 at COE000977; *see also* AR Tab 112 at COE000637.

that near-surface ground water leaving the site leads to Channel C.”⁴⁸ Universal Welding administratively appealed this determination on July 28, 2010.⁴⁹ Universal Welding’s appeal challenged, *inter alia*, the Corps’ finding that there is “shallow subsurface flow across, through, and over Peridot Road.”⁵⁰

On appeal, the reviewing officer found that the Corps needed to provide additional documentation to support its determination that the Chena Slough is a traditional navigable water, but otherwise upheld the Corps’ revised jurisdictional determination.⁵¹ In particular, the reviewing officer found that “[t]he District did not act outside the zone of discretion delegated to the District by Corps regulations in finding that the groundwater conditions in this area constitute a shallow subsurface connection.”⁵²

On remand, the Corps provided additional information in support of its determination that the Chena Slough is a traditional navigable water and reaffirmed its jurisdiction over the subject property.⁵³

On July 1, 2011, after receiving confirmation that the Corps’ jurisdictional determination was final,⁵⁴ Universal Welding again submitted to the Corps an application for a Section 404

⁴⁸ AR Tab 126 at COE000745.

⁴⁹ AR Tab 122.

⁵⁰ *Id.* at COE000720–723.

⁵¹ AR Tab 109 at COE000623.

⁵² *Id.* at COE000629–630.

⁵³ AR Tab 106; AR Tab 107 at COE000619–620.

⁵⁴ AR Tab 104 at COE000613.

permit to place fill onto the subject property.⁵⁵ The Corps issued an initial proffered permit to Universal Welding in April 2012.⁵⁶ The initial permit included several general and specific mitigation conditions, including Special Condition 5, which required Universal Welding to pay a \$70,000 in-lieu mitigation fee to compensate for permanently eliminating the 14 acres of wetlands on the subject property.⁵⁷ Universal Welding administratively appealed the initial permit on April 17, 2012, objecting to Special Condition 5.⁵⁸

After considering Universal Welding's objection, the Corps issued to Universal Welding a final proffered permit on June 1, 2012.⁵⁹ The final permit modified the terms of Special Condition 5. The modification allowed for permittee-responsible compensatory mitigation instead of or in combination with an in-lieu mitigation fee.⁶⁰ Universal Welding administratively appealed the final proffered permit on July 6, 2012, arguing that the Corps "does not provide the science required to assert jurisdiction" and that, assuming it did, "the wetlands on the Universal Welding property would be wetlands adjacent to adjacent wetlands" and therefore nonjurisdictional under the Corps' current regulations.⁶¹

⁵⁵ AR Tab 103.

⁵⁶ AR Tab 66; AR Tab 67.

⁵⁷ AR Tab 66 at COE000480; AR Tab 64 at COE000474.

⁵⁸ AR Tab 64 at COE000474.

⁵⁹ AR Tab 60.

⁶⁰ *Id.* at COE000450; *see also* Tab 63 at COE000469.

⁶¹ AR Tab 57 at COE000430, COE000433.

The Corps issued its decision on the administrative appeal in August 2013.⁶² The reviewing officer remanded the final proffered permit to the Corps, with instructions to re-evaluate whether the wetlands on the subject property are adjacent to Channel C, and specifically to “clearly document” the connection between the wetlands on the subject property and Channel C, to reconsider whether the Corps had jurisdiction over the wetlands on the subject property in light of the *Great Northwest* decision,⁶³ and to “clearly describe” the pollutant trapping characteristics of the wetlands on the subject property and similarly situated wetlands.⁶⁴

After coordinating with and seeking clarification from the United State Environmental Protection Agency (“EPA”) regarding the *Great Northwest* decision,⁶⁵ the Corps issued its decision on remand on May 12, 2014.⁶⁶ The decision responded in depth to the remand instructions and reaffirmed “with renewed confidence and clarity” that the wetlands on the subject property are “waters of the United States” subject to the Corps’ jurisdiction under the CWA:

Despite the artificial barrier (Peridot Road) that prevents the subject wetland from directly abutting Channel C, the subject wetland maintains an unbroken hydrologic connection to this [relatively permanent water] via shallow subsurface flow. As stated above, the subject wetland, in combination with similarly situated wetlands and Channel C, sequesters pollutants and performs other services

⁶² AR Tab 23.

⁶³ *Great Northwest, Inc. v. United States Army Corps of Eng’rs*, No. 4:09-cv-0029-RRB, 2010 WL 9499372 (D. Alaska June 8, 2010), *reconsideration denied*, 2010 WL 9499071 (D. Alaska July 20, 2010).

⁶⁴ AR Tab 23 at COE000232, COE000241, COE000243, COE000245–246.

⁶⁵ *See, e.g.*, AR Tab 2; AR Tab 3; AR Tab 18.

⁶⁶ AR Tab 1.

sufficient to sustain a significant nexus with Chena Slough, the downstream [traditional navigable water].⁶⁷

Concurrent with the decision on remand, the Corps reissued to Universal Welding the final proffered permit.⁶⁸ The final proffered permit includes Special Condition 5, as modified by the Corps on June 1, 2012.⁶⁹

Universal Welding filed the instant action on September 8, 2014, and moved for summary judgment on February 5, 2015.⁷⁰ In support of its motion, Universal Welding submitted a declaration from Edmond C. Packee, Jr.⁷¹ On March 10, 2015, the Corps filed a cross-motion for summary judgment, and also moved to strike Packee's declaration.⁷² The Court struck the declaration on July 2, 2015.⁷³

V. 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.”⁷⁴ When the dispute requires review of an administrative record, as is the case here, “summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it

⁶⁷ *Id.* at COE0000022, COE000038.

⁶⁸ *Id.* at COE000007–010.

⁶⁹ *Id.* at COE000008.

⁷⁰ [Dkt. 1](#) (complaint); [Dkt. 20](#) (motion for summary judgment).

⁷¹ [Dkt. 21](#).

⁷² [Dkt. 24](#) (motion to strike); [Dkt. 25](#) (cross-motion for summary judgment).

⁷³ [Dkt. 34](#).

⁷⁴ Fed. R. Civ. P. 56(a).

did.”⁷⁵ 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.”⁷⁶ “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.’”⁷⁷ An abuse of discretion necessarily occurs when there has been an error of law.⁷⁸

VI. DISCUSSION

The parties agree that no triable issues of material fact remain in this case.⁷⁹ The parties disagree, however, about whether the Corps’ assertion of jurisdiction over the wetlands on Universal Welding’s property is contrary to the Corps’ own regulations, and therefore arbitrary, capricious, and not in accordance with law.⁸⁰ Specifically, the parties disagree about whether 33 C.F.R. § 328.3(a)(7)’s parenthetical language—what Universal Welding calls the “adjacent

⁷⁵ *City & Cty. 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)).

⁷⁶ 5 U.S.C. § 706(2)(A); *see also Indep. Acceptance Co. v. State of California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (noting standard of review is highly deferential with a judicial presumption that an agency’s action is valid where a reasonable basis exists for agency’s decision).

⁷⁷ *Nat. 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)).

⁷⁸ *Koon v. United States*, 518 U.S. 81, 100 (1996).

⁷⁹ *See* Dkt. 20 at 6; Dkt. 25 at 8.

⁸⁰ Dkt. 20 at 13–14; Dkt. 25 at 20–22.

wetlands jurisdictional exception”—precludes the Corps from asserting jurisdiction over the subject property.⁸¹

A. *The Corps’ interpretation of 33 C.F.R. § 328.3(a)(7) is entitled to deference*

Universal Welding contends that the Corps lacks jurisdiction under the CWA to regulate fill activity on the subject property as a matter of law. According to Universal Welding, because Peridot Road (a man-made barrier)⁸² separates the wetlands on the subject property from the wetlands on the west side of Peridot Road (wetlands which directly abut Channel C and are therefore jurisdictional), the wetlands on the subject property are “adjacent” to jurisdictional wetlands and therefore “fall squarely” within 33 C.F.R. § 328.3(a)(7)’s adjacent wetlands jurisdictional exception.⁸³

The Corps, on the other hand, maintains that Universal Welding “misreads the regulation,”⁸⁴ and argues that the adjacent wetlands jurisdictional exception precludes the Corps from asserting CWA jurisdiction over a wetland only where the *sole* basis for asserting jurisdiction over the wetland is the wetland’s adjacency to a jurisdictional wetland: “Nothing in (a)(7) suggests that a wetland that is adjacent to a non-wetland jurisdictional water would be ‘exempted’ or ‘excluded’ from CWA jurisdiction simply because it is also adjacent to another

⁸¹ Dkt. 20 at 6–7; Dkt. 25 at 20–21; *see also* Dkt. 26 at 5 (“The sole issue in this case is whether the Corps of Engineers’ . . . wetlands adjacent to wetland exception applies to the wetlands on Universal Welding’s property.”).

⁸² The Corps has conceded, at least for purposes of this action, that Peridot Road is a man-made barrier under 33 C.F.R. § 328.3(c). *See* Dkt. 25 at 23.

⁸³ Dkt. 20 at 6–7, 14.

⁸⁴ Dkt. 25 at 21.

wetland.”⁸⁵ Under the Corps’ interpretation of 33 C.F.R. § 328.3(a)(7), the adjacent wetlands jurisdictional exception would not apply in this case because the wetlands on the subject property, in addition to being adjacent to the jurisdictional wetlands west of Peridot Road, are adjacent to Channel C.⁸⁶

Where, as here, a regulation’s language is ambiguous,⁸⁷ an agency’s interpretation of its own regulations is “controlling” unless “plainly erroneous or inconsistent with the regulation.”⁸⁸ Universal Welding argues that the Corps’ interpretation of 33 C.F.R. § 328.3(a)(7)’s parenthetical language is plainly erroneous and inconsistent with the current regulation because the interpretation leads to absurd results and renders the adjacent wetlands jurisdictional exception meaningless.⁸⁹

But the opposite, in fact, seems true. Suppose, for example, Wetland A. Wetland A is located directly north of a railroad berm. Another wetland, Wetland B, is located directly south of the railroad berm. Just south of Wetland B is River X, a traditional navigable water. Wetlands A and B are both bounded on the west by a natural river berm. Just west of the berm is

⁸⁵ *Id.*

⁸⁶ *Id.* at 20–21; *see also Wilcox*, 633 F.3d at 774 (“It is well established that the Corps may regulate ‘wetlands adjacent to navigable waters and their tributaries.’” (quoting *Healdsburg*, 496 F.3d at 997)).

⁸⁷ Universal Welding, citing *Great Northwest*, 2010 WL9499372, at *5, takes the position that the plain meaning of the adjacent wetlands jurisdictional exception is unambiguous and that the Corps’ interpretation of the exception is therefore not entitled to deference. Dkt. 20 at 14; Dkt. 26 at 12–13 (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)). The Court, however, disagrees; how the language of 33 C.F.R. § 328.3(a)(7) should be applied in this case is not straightforward.

⁸⁸ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁸⁹ Dkt. 26 at 6.

Tributary Y, a relatively permanent water that flows into River X. Under the Corps' interpretation of the adjacent wetlands jurisdictional exception, the Corps would have jurisdiction under the CWA to regulate fill activity on Wetland A due to Wetland A's adjacency to Tributary Y. Under Universal Welding's interpretation, however, the Corps would lack jurisdiction to regulate fill activity on Wetland A, despite its adjacency to Tributary Y, because of Wetland A's adjacency to Wetland B (a jurisdictional wetland). This result strikes the Court as entirely inconsistent with purpose of the CWA and the Corps' regulations.

The Corps' interpretation of the adjacent wetlands jurisdictional exception, moreover, does not render the exception meaningless. Indeed, under the Corps' interpretation, the Corps can assert CWA jurisdiction over a wetland that is adjacent to a jurisdictional wetland *only* if the wetland is *also* adjacent to a non-wetland jurisdictional water; the Corps cannot assert CWA jurisdiction over a wetland that is adjacent only to a jurisdictional wetland, even if the wetland has a significant nexus with a traditional navigable water. As such, the Court finds that the Corps' interpretation of 33 C.F.R. § 328.3(a)(7)'s parenthetical language is not plainly erroneous or inconsistent with the regulation,⁹⁰ especially in light of the Ninth Circuit's instruction that "[c]laims of exemption, from jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA."⁹¹

⁹⁰ See *Decker v. Nw. Env't'l Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) ("[J]udicial review of an agency's interpretation of its own regulations is limited to ensuring that the agency's interpretation is not plainly erroneous or inconsistent with the regulation.").

⁹¹ *Healdsburg*, 496 F.3d at 1001 (citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)).

B. The wetlands on the subject property are adjacent to Channel C and share a significant nexus with the Chena Slough

Having determined that the Corps' interpretation of 33 C.F.R. § 328.3(a)(7) is entitled to deference, the Court must now determine whether the Corps' determination that it has the authority under the CWA to regulate fill activity on the subject property is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁹² In this case, the Corps based its jurisdictional determination on its findings that the wetlands on the subject property are adjacent to Channel C and have a significant nexus to the Chena Slough.⁹³ The Corp concluded that the wetlands on the subject property are adjacent to Channel C because they "contribute[] shallow subsurface flow to Channel C."⁹⁴

Universal Welding's summary judgment motion does not argue that any of the Corps' factual findings are arbitrary or capricious based on the administrative record, nor does the motion challenge the Corps' legal conclusion that wetlands that possess a shallow subsurface connection to a relatively permanent water are "adjacent" under 33 U.S.C. § 328.3(c). Universal Welding instead argues that "under the current regulations, a finding of 'significant nexus' cannot trump the wetlands adjacent to wetlands exception."⁹⁵

⁹² 5 U.S.C. § 706(2)(A).

⁹³ AR Tab 1 at COE000022; Dkt. 25 at 20.

⁹⁴ AR Tab 1 at COE000015. The Corps maintains that the wetlands on the subject property satisfy each of the three criteria sufficient to establish adjacency under the *Rapanos* Guideline. Dkt. 25 at 16–17. But because the Court finds that the shallow subsurface connection between the wetlands on the subject property and Channel C is sufficient to establish adjacency under the current regulations, it does not address whether the administrative record in this case supports a finding of adjacency based on either the second or third *Rapanos* Guideline criteria, nor does it address whether either of those criteria are sufficient to establish adjacency under the current regulations.

⁹⁵ Dkt. 26 at 5.

The Court agrees with Universal Welding that the Corps would have committed legal error in this case had it based its jurisdictional determination solely on a finding of a significant nexus between the wetlands on the subject property and the Chena Slough without also determining that the wetlands were adjacent to non-wetland jurisdictional water. In that scenario, the Corps would be attempting to assert CWA jurisdiction over a wetland adjacent only to a jurisdictional wetland, in contravention of its own regulations.⁹⁶ But that is not the scenario here. Here, the Corps made an adjacency finding, independent of its significant nexus analysis. Based on on-site investigations and other scientific authority, the Corps found that the wetlands on the subject property contribute shallow sub-surface flow to Channel C and, based on that finding, concluded that the wetlands on the subject property are adjacent to Channel C, as “adjacent” is defined in the current regulations.⁹⁷ Universal Welding could have challenged the Corps’ interpretation of 33 U.S.C. § 328.3(c) to include shallow subsurface connections, but it has not; the Court will not make the argument for it.

Finally, the Court finds Universal Welding’s argument that *Great Northwest* is dispositive of this case in its favor unpersuasive.⁹⁸ In *Great Northwest*, the Corps concluded that it had authority under the CWA to regulate gravel mining activity on a parcel of property owned by Great Northwest and located about one-third of a mile from the Tanana River in Fairbanks, Alaska.⁹⁹ The property, which contained wetlands as defined in 33 C.F.R. § 328.3(b), was

⁹⁶ See *Great Northwest*, 2010 WL 9499372, at *10.

⁹⁷ See, e.g., AR Tab 1 at COE000015.

⁹⁸ See Dkt. 20 at 17–18; Dkt. 26 at 8–11.

⁹⁹ 2010 WL 9499372, at *1.

separated from the Tanana River by a railroad berm and a flood control levee.¹⁰⁰ There was no evidence in the administrative record that the wetlands on Great Northwest's property contributed shallow subsurface flow to the Tanana River. The Corps argued that the wetlands on Great Northwest's property were part of a "contiguous wetland system" which extended from the property to the Tanana River, and that the Corps therefore had jurisdiction over the wetlands on Great Northwest's property because they were adjacent to the Tanana River, a traditional navigable water.¹⁰¹ Great Northwest, however, argued that the railroad berm and levee divided the wetlands on Great Northwest's property and the wetlands which directly abutted the Tanana River into two distinct wetlands, and that the wetlands on Great Northwest's property were therefore nonjurisdictional under 33 C.F.R. §328.3(a)(7)'s adjacent wetlands jurisdictional exception.¹⁰²

The court ultimately agreed with Great Northwest, reasoning that so long as the railroad berm and/or levee actually separated the wetlands on Great Northwest's property from the wetlands directly abutting the Tanana River such that the two wetlands were no longer "continuous" or "intact," the adjacent wetlands jurisdictional exception applied.¹⁰³ The court also declined to remand the matter to the Corps to allow the Corps to perform a significant nexus analysis:

But 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). Thus, even if the Corps were to determine that there exists an 'ecological interconnection' or 'significant nexus' between the wetlands and the Tanana

¹⁰⁰ *Id.* at *2.

¹⁰¹ *Id.* at *5, 9.

¹⁰² *Id.*

¹⁰³ *Id.* at *7-9.

River . . . , the wetlands would still not be ‘waters of the United States’ as defined by the Corps itself.¹⁰⁴

Universal Welding interprets *Great Northwest* to foreclose the Corps from establishing adjacency on the basis of a shallow subsurface connection between a wetland and a non-wetland jurisdictional water.¹⁰⁵ The Court, however, reads *Great Northwest* differently. The Court understands *Great Northwest* to stand for the proposition that the Corps may not circumvent the adjacent wetlands jurisdictional exception, as articulated in the Corps’ current regulations, by finding that a wetland otherwise adjacent only to a jurisdictional wetland has a significant nexus with a non-wetland jurisdictional water. In other words, the court in *Great Northwest* declined to remand the matter back to the Corps because, having found that the wetlands on Great Northwest’s property were adjacent only to other jurisdictional wetlands, a finding by the Corps of a significant nexus between Great Northwest’s wetlands and the Tanana River would have had no effect on the Corps’ authority to regulate the property; the property would remain adjacent only to the jurisdictional wetlands directly abutting the Tanana River and therefore outside of the Corps’ regulatory authority under 33 C.F.R. § 328.3(a)(7)’s parenthetical language.¹⁰⁶

C. Issue preclusion does not prevent the Corps from litigating the instant action

Universal Welding argues that it is entitled to summary judgment in its favor for the additional reason that the Corps is precluded from litigating this action under the concept of issue preclusion because “the legal issue of whether a man-made barrier between wetlands justifies the

¹⁰⁴ *Id.* at *10; see also *Great Northwest, Inc. v. United States Army Corps of Eng’rs*, No. 4:09-cv-0029-RRB, 2010 WL9499071 (D. Alaska July 20, 2010).

¹⁰⁵ Dkt. 26 at 9–10.

¹⁰⁶ To the extent the court in *Great Northwest* intended to be read consistent with Universal Welding’s position, the case is not binding on the Court, see *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001), and does not change the Court’s opinion in this case.

application of the regulatory exception for wetlands adjacent to wetlands . . . was decided in the affirmative in *Great Northwest*.”¹⁰⁷ But the argument is a non-starter. This case presents factual and legal issues distinguishable from those at issue in *Great Northwest*.

CONCLUSION

For the above reasons, the Court **DENIES** Plaintiff’s Motion for Summary Judgment at **Docket 20** and **GRANTS** Defendants’ Cross-Motion for Summary Judgment at **Docket 25**.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 30th day of September, 2015.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

¹⁰⁷ Dkt. 26 at 11–12 (citing *Taylor v. Strugell*, 553 U.S. 880, 892 (2008)).