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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

TIN CUP, LLC, an Alaska limited liability company,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

No. 4:16-cv-00016-TMB

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Fed. R. Civ. Proc. 56, D. Ak. L.R. 16.3 & 56.1)

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Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 16.3 and 56.1, Plaintiff Tin Cup, LLC, moves for summary judgment on its sole claim for relief against Defendant United States Army Corps of Engineers. Tin Cup contends that the Corps' assertion of jurisdiction over some 200 acres of permafrost on Tin Cup's property is not in accordance with law, and therefore should be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Based on the administrative record filed in this action, along with Tin Cup's concurrently filed motion for judicial notice and standing declaration, no genuine issue of material fact exists, such that Tin Cup is entitled to judgment as a matter of law for the reasons set forth in the Memorandum of Points and Authorities below.

Memorandum of Points and Authorities In Support of Motion for Summary Judgment

Introduction

This case concerns the limits of the Corps' land-use authority under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), popularly known as the Clean Water Act. Determining whether an area is subject to Clean Water Act regulation is controversial and difficult. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) ("[B]ased on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . . ."). The Corps and the United States Environmental Protection Agency, as the agencies which jointly administer the Act, have earned a reputation for reading their Clean Water Act

authority expansively. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) ("[An] immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."). Their aggressive implementation of the Act has posed a longstanding and serious concern for property owners throughout the country. *See, e.g.*, Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873, 876 n.18 (1993) (collecting a variety of sources).

This concern has not been ignored. To infuse the regulatory process with a measure of national consistency and predictability, Congress has directed that, in delineating wetlands potentially subject to the Clean Water Act's strictures, the Corps must use its *Wetlands Delineation Manual* (Jan. 1987) (1987 Manual), Motion for Judicial Notice (MJN) Exh. 1. *See* Energy and Water Development Appropriations Act of 1993, Title I, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992). Similarly, Congress has mandated that the Corps continue to use its 1987 Manual unless and until, following notice and comment, "a final wetlands delineation manual is adopted." *Id*.

The Corps has ignored Congress' command. The agency has not adopted a new manual. Instead, it has promulgated various regional "supplements" to the 1987 Manual. Rather than merely interpret the 1987 Manual, these supplements often contradict and supersede the otherwise controlling delineation standards found in the 1987 Manual. In this case, Tin Cup challenges the Corps' use of an Alaska-specific wetland delineation standard to regulate hundreds of acres of permafrost that otherwise, under the nationally applicable 1987 Manual, would not be subject to the Corps' control. As set forth below, the Corps' employment of the relaxed, jurisdiction-expanding standards of the Alaska Supplement are not in accordance with law. Therefore, the Corps' permitting decision should be set aside.

Legal Background on the Corps' Regulation of Wetlands

A. The Corps Was Forced To Regulate Wetlands Not by Congress but Rather by Environmentalist-Directed Litigation

Under the Clean Water Act, the Corps has authority (with EPA[1]) to regulate the placement of dredged and fill material into "navigable waters," *see* 33 U.S.C. § 1344(a), which term the Act laconically defines as "the waters of the United States," *id.* § 1362(7). Shortly after the Act's passage, the Corps interpreted "waters of the United States" narrowly to cover only waters that are navigable-in-fact. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Following a successful environmentalist lawsuit, *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the Corps promulgated revised regulations, *see* Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 48 (1982). These regulations extended the Corps' authority to a variety of aquatic features in addition to navigable-in-fact waters, including many types of wetlands.[2] *See Riverside Bayview*, 474 U.S. at 123-24. *Cf.* 33 C.F.R. § 328.3(c)(4) (2015); *id.* § 328.3(b) (2014) (defining "wetlands").

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[1] Pursuant to a 1989 Memorandum of Agreement between the agencies, the Corps has principal authority for determining the scope of regulated waters subject to the Corps' permitting jurisdiction, except in certain "special cases" reserved to EPA. *See* Mem. of Agreement: Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989), MJN Exh. 3.

[2] Last year, the Corps and EPA jointly issued new regulations interpreting "waters of the United States." 80 Fed. Reg. 37,054 (June 29, 2015). These regulations have been stayed by judicial order. *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015). Whatever their ultimate fate, the new regulations are irrelevant to this case, for two reasons. First, the permit decision that is the subject of this action was issued before the regulations went into effect, and therefore is not subject to them. Second, the new regulations do not change the relevant provision of the old regulations.

B. The Corps Produced the 1987 Wetlands Manual To Provide the Regulated Public with National Guidance and Consistency

The Corps' ambitiously broad regulations[3] incited substantial controversy among landowners and developers, and spurred a movement within the Reagan Administration to limit the agency's authority. *See* Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. Colo. L. Rev. 773, 780-81 (1989). This effort resulted in, among other things, the Corps' promulgation of its 1987 Manual. MJN Exh. 1. The purpose of the 1987 Manual "is to provide users with guidelines and methods to determine whether an area is a wetland for purposes of [the Clean Water] Act." *Id.* at 1. To that end, the 1987 Manual directs that the delineation process be guided by three criteria—hydrophytic vegetation, hydric soils, and wetland hydrology. *See id.* at 9-10. Generally, all of these criteria must be satisfied for an area to be designated a wetland. *See id.* Especially relevant to this case, the 1987 Manual provides that satisfaction of the wetland hydrology criterion requires the presence of a "growing season," which the 1987 Manual defines in terms of soil temperature. *See id.* at 28, A5.

C. The Corps' Abandonment of the 1987 Manual Raised Concern With the Regulated Public as Well as Members of Congress

Controversy erupted again, however, when the Corps effectively abandoned the 1987 Manual and joined other federal agencies (including EPA) in using a joint *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Jan. 1989). *See*

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[3] *See* Daniel E. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 Nat. Resources Law. 467, 470 (1976) ("Congress . . . did not intend . . . that the scope of regulatory activity by the Army Corps [of Engineers] . . . take the direction of the [revised] regulations."); Parish & Morgan, *supra*, at 84 ("The existing [regulation] looks and has an effect similar to a program of federal land use control. There should be little doubt that Congress did *not* intend such a result.").

56 Fed. Reg. 40,446, 40,449 (Aug. 14, 1991). This 1989 Manual employed less stringent wetland delineation methods than those used by the 1987 Manual. *See* Kalen, *supra*, at 912 n.205. For that reason, the Corps' use of the 1989 Manual effectively expanded the scope of the agency's wetland jurisdiction. Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L.J. 1473, 1484 (1991). Not surprisingly, such expansion caused concern among property owners, including "some legislators from Alaska . . . who feared that an overbroad definition of wetlands would unduly restrict economic development within their state[]." Margaret N. Strand, *Federal Wetlands Law*, *in* Wetlands Deskbook 1, 14 n.62 (Envtl. L. Inst. 1993).

D. Congress Used the 1992 Budget Appropriations Process To Limit the Corps' Discretion in How the Agency Delineates Wetlands

The renewed controversy finally triggered congressional action, resulting in several limiting provisions of the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (1991). *See* Kalen, *supra*, at 912 n.205. During the hearings on the 1992 Budget Act, members of the public objected to the Corps' unannounced abandonment of the 1987 Manual, which resulted in overly broad wetland delineations.[4] *See Hearings on H.R. 2427 Before a S. Subcomm. of the Comm.*

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[4] These concerns were voiced in related contexts as well. *See, e.g.*, *Hearings on Implementation of Section 404 of the Clean Water Act, before the Subcomm. on Env't Protection of the Comm. on Env't & Public Works, United States Senate*, 102d Cong., S. Hrg. 102-450, at 17 (1991) (testimony of Dean Kleckner, President, American Farm Bureau Federation) ("The economic gears of this country are now filled with regulatory wetland sand. The 1989 Wetland Delineation Manual, which has caused all producers the most grief, is being revised in response to the cain that we raised and others raised . . . ."); *id.* at 18-19 (statement of Roger Gatewood, Nat'l Ass'n of Home Builders) (noting that "public support for wetland protection in recent years has eroded" because of "the lack of clear congressional direction" and "the failure of the resource agencies to provide notice and public comments for the program's rules and regulations," and that "the 1989 Federal Manual for Delineation of Wetlands . . . . has gone too far and (continued...)

on Appropriations, 102d Cong., S. Hrg. 102-208, Pt. 2, at 228 (1992) (statement of the Assoc. Gen. Contractors of Am.) (contending that the Corps' employment of the 1989 Manual has "resulted in significant restrictions on development," and that "[m]any of the definitions in the [1989] manual are very broad, allowing for subjective interpretations"). *See also id.* at 67 (statement of Senator J. Bennett Johnston, subcomm. chairman) (declaring that there is "no policy of the Federal Government that has caused as much consternation, as much difficulty, is as unreasonable as that policy on wetlands," and vowing "to do everything we can to bring reason and balance back into the Corps of Engineers and the EPA's wetlands policy"). *Cf. id.* Pt. 1, at 234 (statement of Senator Nickles) (observing that the 1989 Manual "is one of the most ludicrous manuals I have ever seen in my life").

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[4] (...continued)
included areas which are not truly wetlands"); *id.* at 79 (statement of Robert G. Szabo, Nat'l Wetlands Coal., an association of landowners and land users) (noting that the 1989 Manual "does not . . . reflect the policy judgments that should be made regarding the appropriate reach of Federal regulatory jurisdiction"); *id.* at 141 (statement of Am. Soybean Ass'n, Nat'l Ass'n of Wheat Growers, Nat'l Barley Growers Ass'n, Nat'l Corn Growers Ass'n, and Nat'l Cotton Council) ("Interpretation of Federal wetlands law has gone too far in denying use of lands which have little or no wetlands values, and in restricting activities which essentially deny economic use of the land. [¶] We believe that wetlands delineation methods are much too broad, and that they must be redrawn to more precisely target those wetlands which should be preserved."). *See also Hearings on Reauthorization of the Federal Water Pollution Control Act (Protection of Wetlands), before the Subcomm. on Water Resources of the Comm. on Public Works & Transp.*, 102d Cong., H.R. Hrg. 102-43, at 2 (1991) (statement of Rep. Henry J. Nowak, subcomm. chairman) ("The development and agricultural communities expressed great concern with the impact of the [1989] delineation manual . . . at hearings before the subcommittee . . . in February and March 1990."); *id.* at 9 (statement of Rep. Thomas E. Petri) (noting "widespread discontent with the 1989 wetlands delineation manual"); *Hearings on Effects of Wetlands Protection Regulations on Small Business, before the H. Comm. on Small Business*, 102d Cong., H.R. Hrg. 102-1, at 107 (1991) (testimony of Rep. John J. LaFalce, comm. chairman) (calling for a moratorium on the 1989 Manual's implementation).

Duly noting these concerns, the Senate Committee Report for the 1992 Budget Act confirmed that the Committee had "receive[d] many complaints . . . in particular about the increase in lands identified and delineated as wetlands . . . as a result of the implementation of the [1989] Manual." S. Rep. No. 102-80, at 54 (1991). The Committee Report went on to criticize the Corps' use of the 1989 Manual. *See id*. It called out the agency's failure to give the public adequate notice-and-comment opportunities in connection with the 1989 Manual's adoption. *Id*. It also criticized the 1989 Manual's contribution to "a program which regulates lands in private ownership," rather than "a program to regulate discharges into publicly owned navigable water of the United States." *Id*. To remedy these errors, the Committee Report proposed "language prohibiting the Corps from using any funds . . . under the 1989 delineation manual or any subsequent manual not adopted in accordance with the . . . Administrative Procedure[] Act." *Id*. at 55. It also proposed limiting the Corps' delineation power to the criteria contained within the 1987 Manual. *Id*. The Conference Bill maintained these limitations. *See* H.R. Conf. Rep. No. 102-177, at 14 (1991). As passed, the relevant provisions of the 1992 Budget Act prohibited, among other things, any funds to be used to implement the 1989 Manual or any subsequent manual "not adopted in accordance with the requirements for notice and public comment." Title I, 105 Stat. at 518. *See United States v. Banks*, 115 F.3d 916, 920 n.7 (11th Cir. 1997) (observing that "the Corps' use of the 1989 version of this Manual . . . Congress ultimately banned").

E. Continuing Concern About the Corps' Delineation Process Caused Congress To Weigh in Again During the 1993 Budget Appropriations Process

Shortly before the 1992 Budget Act was signed by President Bush, his Administration proposed substantial revisions to the 1989 Manual. *See* 56 Fed. Reg. 40,446 (Aug. 14, 1991). This revised 1991 Manual was, like its predecessors, a comprehensive manual in the vein of the 1987 and 1989 Manuals. Because it imposed a standard for wetland delineation more demanding than the other two Manuals, *see* Strand, *supra*, at 14-15, its proposal elicited a fresh debate, *see* Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 Urb. Law. 589, 613 (1993).

The ongoing controversy prompted renewed congressional oversight. During the Senate Appropriations Subcommittee's hearings on the 1993 budget bill, Corps officials testified approvingly of Congress' direction to use the 1987 Manual exclusively. For example, Assistant Secretary of the Army Nancy Dorn stated that she was "very confident" that the Corps could "both protect[] wetlands and also allow[] permits to be processed expeditiously using the 1987 manual." *Hearings on H.R. 5373 Before a S. Subcomm. of the Comm. on Appropriations*, 102d Cong., S. Hrg. 102-902, Pt. 1, at 403 (1992). She also observed that the "public seems to have confidence in the delineations that are resulting from using the 1987 manual." *Id.* She concluded that, as compared to the agency's use of the 1989 and 1991 Manuals, the "confusion and delays seem to have been reduced using the 1987 manual." *Id.* *See also id.* at 429 ("Based on all indications, the 1987 manual is working very well."). Similarly, Lieutenant General Henry Hatch, then Chief of the Corps, testified that maintaining the 1992 Budget Act's limitations would be appropriate: "Getting the Corps back to the 1987 manual was sufficient. We intend to remain the 1987 manual until all involved in this are able to reach some new conclusion." *Id.* at 405. The Subcommittee's Chairman, Senator

Johnston, agreed with the Corps' self-critique. *See id*. Pt. 2, at 345 (noting approvingly that the Corps is "prevent[ed] . . . from enforcing the 1989 manual on wetlands," and instead "will use the 1987 manual, which is much more reasonable"). *See also Hearings before the H.R. Subcomm. on Energy & Water Development of the Comm. on Appropriations, on Energy & Water Development Appropriations for 1993*, 102d Cong., Pt. 1, at 57 (1992) (answer for the record of Secretary Dorn) ("We believe that, until a revised manual is adopted, it is in the best interest of the Corps and the public to continue to use the 1987 manual for the identification and delineation of wetlands."); *id.* Part 2, at 2296 (statement of Maj. Gen. Arthur Williams, Corps Director of Civil Works) ("We will work to complete the new manual as quickly as possible. In the interim, we are using the Corps' 1987 manual which is not characterized by the problems associated with the 1989 interagency manual and is providing consistent delineations for the Corps regulatory program.").

In contrast to the Senate Committee Report for the 1992 Budget Act, the Senate Committee Report for the 1993 Budget Act was "pleased to note a significant decline in the number of complaints about wetlands delineations since the Corps of Engineers has been using the 1987 guidelines." S. Rep. No. 102-344, at 56 (1992). It also "agree[d] with the Corps that these Corps guidelines [namely, those contained within the 1987 Manual] should continue to be used until a subsequent delineation manual is finally adopted" following notice and comment. *Id*. The report went on to emphasize that "all policies" implementing the Corps' wetlands regulatory authority should be subject to the same rule-making process. *Id*. These basic requirements were carried through to the Conference version of the bill. *See* H.R. Conf. Rep. No. 102-866, at 20 (1992). As passed, the relevant provisions of the 1993 Budget Act prohibited, like their predecessors, any funds to be used to implement the 1989 Manual or any subsequent

manual "adopted without notice and public comment."[5] Title I, 106 Stat. at 1324. But the 1993 Budget Act went beyond the 1992 Budget Act by mandating that the Corps use the 1987 Manual exclusively for wetlands delineations until "a final wetlands delineation manual is adopted." *Id*. *See* James J.S. Johnson & William Lee Logan, III, *How An Uncodified Federal Appropriations Act Blocks Some Constitutional Challenges to the Regulatory Method Used to Define a Federal Jurisdictional Wetland*, 4 U. Balt. J. Envtl. L. 182, 207 (1994) ("By explicitly directing the Corps, until further notice otherwise, to use the 1987 Manual, Congress has effectively established the 1987 Manual as the statutory standard for defining federal jurisdictional wetlands.") (footnote omitted).

F. Having Mandated the Use of the 1987 Manual, Congress Asked for Scientific Input

At the same time that it mandated continued use of the 1987 Manual, Congress directed EPA to task the National Research Council with analyzing federal wetlands regulation. *See* H.R. Rep. No. 102-710, at 51 (1992); H.R. Conf. Rep. No. 102-902, at 41 (1992). The ensuing report, published in 1995, recommended a number of changes to the Corps' wetlands delineation process. *See* Nat'l Research Council, Comm. on Characterization of Wetlands, *Wetlands: Characteristics & Boundaries* (1995) (NRC Report), MJN Exh. 4, at 3. For Tin Cup's action against the Corps, the most significant of these recommendations was the report's suggestion that the 1987 Manual's approach to the "growing season" be abandoned. In its place, the report recommended either jettisoning altogether the concept of the growing season as a constraint on wetland

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[5] Congress' continued emphasis on notice and comment likely was in part the result of case law holding that the 1989 Manual, as an interpretive rule, was exempt from the Administrative Procedure Act's notice and comment requirements. *See United States v. Ellen*, 961 F.2d 462, 465-66 (4th Cir. 1992). *Cf*. 5 U.S.C. § 553(b)(3)(A) (exempting "interpretative" rules from notice and comment requirements).

delineation, or making its determination a function of region-specific criteria. *Id*. at 102.

G. The Corps Ignored Congress's Direction and Began Amending the 1987 Manual with So-Called Regional "Supplements"

In the years since, the Corps has followed the Council's recommendation. But the agency has done so *without* changing its regulatory definition of "wetlands" and *without* issuing a new final wetlands delineation manual. Instead, the Corps has implemented the Council's recommendations through the issuance of regional "supplements" to the 1987 Manual. *See* Administrative Record (AR) Tab 20, at 187 (hereinafter 20:187) (Corps response to objections to proffered permit) ("The Alaska Regional Supplement and all other supplements now in use . . . follow the [National Research Council] recommendations by abandoning the original . . . definition of growing season."). These supplements provide region-specific criteria for wetland delineation that purportedly supercede anything contrary in the 1987 Manual.

Consistent with this practice, the Corps promulgated in 2007 an Alaska Supplement to the 1987 Manual. U.S. Army Corps of Eng'rs, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)* (Sept. 2007) (AK Suppl.), MJN Exh. 2. The Alaska Supplement uses a relaxed standard to determine the dates of the "growing season," focusing on "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground." *Id*. at 48. Adoption of this standard—substantially less demanding than the 1987 Manual's—ostensibly allows the Corps to regulate permafrost. *See* AR20:187-188. *See also* AR87:643 (Corps administrative appeal decision) ("The 2007 Alaska Regional Supplement applies here and, rather than using the soil temperature criteria in the [1987] Manual, recognizes the existence of

permafrost and the need to rely instead upon locally or regionally developed methods to determine growing season dates . . . .") (footnote omitted).

Factual Background on Tin Cup's Attempts To Obtain a Permit from the Corps on Reasonable Terms

A. Tin Cup and Its Parent Company Flowline Alaska Need To Expand Their Pipe Fabrication Operations

Tin Cup owns an approximately 455-acre parcel in North Pole, Alaska. *See* AR92:718. The company holds the land for Flowline Alaska. Founded in 1982, Flowline Alaska is a service firm specializing in heavy construction, in particular the fabrication of large pipe and steel structures needed for the development of the North Slope oil fields. AR134:1175. The company desires to relocate from its current leased location which the business has outgrown. AR134:1175, 1177-1178. The chosen relocation site, bordered by a junk car dealer, a scrap metal dealer, and a concrete products supply company, AR134:1176, will be used in part for the temporary storage of pipe and other manufactured material, AR103:788. The relocation project will entail the placement of a gravel pad, as well as the construction of several buildings and a railroad spur. AR20:151. Thus, the project will require the excavation and laying down of gravel material, a regulated "pollutant" under the Clean Water Act. *See* 33 U.S.C. § 1362(6).

B. In 2008, Tin Cup Sought Renewed Authorization from the Corps for Its Relocation Project

In 2004, Tin Cup obtained a Corps permit for the relocation project. *See* AR92:717. Tin Cup proceeded to clear approximately 130 acres of the site but, by 2008, the company had not yet commenced gravel extraction or fill placement.[6] AR159:1301. Thinking that the expiration date for its permit was fast approaching, Tin Cup

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[6] The reason for the delay to the relocation project was the decision of several of Flowline Alaska's clients to postpone their own projects. AR159:1301.

requested a deadline extension from the Corps. *See* AR154:1290. The Corps responded that the permit actually had expired in 2007, and therefore Tin Cup would be required to reapply for a permit. AR153:1288. Tin Cup duly submitted a renewed permit application for essentially the same previously authorized project. *See* AR92:717. The Corps then commenced, as a first step in the reinitiated permit process, to determine the extent of its jurisdiction over Tin Cup's property. In November, 2010, the Corps completed this jurisdictional determination process, concluding that approximately 350 acres of Tin Cup's property, including about 200 acres of permafrost, *see* AR60:491, constitute "waters of the United States." AR91:711, AR92:718.

C. In 2010, Tin Cup Objected to the Corps' Jurisdictional Determination Asserting Control over Some 200 Acres of Permafrost Located on the Project Site

In December, 2010, Tin Cup administratively appealed the Corps' jurisdictional determination. AR89:653. Among the grounds for appeal was the contention that the site's permafrost cannot qualify as a wetland under the 1987 Manual, and thus cannot be "waters of the United States." AR89:659. In August, 2011, the Corps' review officer determined that Tin Cup's objections were partially meritorious, but he rejected Tin Cup's permafrost argument. The review officer explained that, because of the Alaska Supplement, the 1987 Manual's definition of growing season "is essentially irrelevant to determining the growing season in Alaska." *See* AR87:643.

In October, 2012, the Corps issued Tin Cup an initial proffered permit. AR30:249. *Cf.* 33 C.F.R. § 331.2 (an "initial proffered permit" is the first version of a permit offered to the applicant, which the applicant can object to and thereby demand reconsideration). The permit contained a number of special conditions, among them: (i) Special Condition 3, which requires the construction and maintenance of a "reclaimed pond and riparian fringe" of between 6 and 24 acres total in size; and

(ii) Special Condition 4, which requires a 250-foot-wide buffer area totaling at least 23 acres, to border the reclamation pond and riparian fringe. AR20:171-172.

D. In 2012, Tin Cup Objected to the Onerous Special Conditions Attached to the Corps' Proffered Permit

Tin Cup formally objected to the permit's conditions, in particular Special Conditions 3 and 4. *See* AR29:233. Among other points, Tin Cup argued that the permit impermissibly used the Alaska Supplement's standards to assert jurisdiction over the property's permafrost. AR29:234-235. The Corps rejected Tin Cup's objections. With respect to permafrost, the Corps acknowledged that the 1987 Manual's standards would not support regulation of permafrost. *See* AR20:187. But the Corps cited approvingly the National Research Council's 1995 report, which had advocated for the abandonment of the 1987 Manual's standards in lieu of regional standards. *Id*. The Corps accordingly concluded that, consistent with the report's recommendations, the agency should apply the Alaska Supplement's regional standards to claim authority over Tin Cup's permafrost. AR20:187-188.

E. In 2014, Tin Cup Renewed Its Objections to the Corps' Use of the Alaska Supplement Rather Than the Nationally Controlling 1987 Manual To Assert Jurisdiction over the Permafrost on Tin Cup's Property

In November, 2013, the Corps issued a final permit to Tin Cup, subject to the same special conditions. *See* AR20:144. In January, 2014, Tin Cup lodged another administrative appeal. AR13:104. The company again pressed, among other arguments, its contention that the permit decision should be set aside because it wrongfully asserts control over permafrost. AR13:117-120. In March, 2015, the Corps' appellate officer issued his decision affirming the permit. *See* AR2:4. The appellate officer again rejected Tin Cup's argument that the permit's wetlands delineation was illegal because it was not based on the 1987 Manual. AR2:10-12. The appellate officer explained that the Corps is required to follow the Alaska Supplement, even when it

conflicts with the 1987 Manual. AR2:11-12. Dissatisfied with the Corps' decision, Tin Cup commenced this action about a year later.

Standard of Review

The Administrative Procedure Act requires that an agency decision be set aside if, among other things, it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The Court's inquiry seeks to determine whether the agency has relied on impermissible or irrelevant factors, has failed entirely to consider an important aspect of the problem, or has provided a rationale for its decision-making that is unsupported by record evidence or is simply irrational. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). This review is "narrow," *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009), but nevertheless "searching and careful," such that the Court "may not automatically defer to an agency's conclusions, even when those conclusions are scientific," *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

With respect to interpretations of law, a court generally must accept an agency's reasonable construction of ambiguous language contained within a statute that the agency administers. *See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But the agency is not entitled to such deference if the language comes from a statute that the agency does not administer. *Ass'n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000).

Argument

I

The Corps' Permitting Decision Is Contrary to Law Because the Agency Used a Legally Inadequate Standard for Delineating Wetlands

A. The Wetland Delineation Standards and Methods Contained Within the 1987 Manual—Including Those for Determining the Relevant Growing Season—Bind the Corps

Congress intended that the 1993 Budget Act resolve the controversy over the Corps' wetland delineation process by requiring that the Corps use its 1987 Manual until the agency adopts "a final wetlands delineation manual." Title I, 106 Stat. at 1324. Both the Corps and the courts have understood the 1993 Budget Act to have this discretion-limiting effect. *See* Mem. of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program, 58 Fed. Reg. 4995, 4995 (Jan. 19, 1993) (noting that the 1993 Budget Act "require[s] the Corps to continue using the 1987 Manual"); *United States v. Bailey*, 571 F.3d 791, 803 n.7 (8th Cir. 2009) ("Congress has mandated that the 1987 Manual be used until a final wetlands-delineation manual is adopted."). Since the 1993 Budget Act's passage, the Corps has not promulgated a final wetlands delineation manual. Instead, it has chosen to "supplement" the 1987 Manual with ten regional mini-manuals, among them the Alaska Supplement. *See* U.S. Army Corps of Eng'rs, Regional Supplements to Corps Delineation Manual, MJN Exh. 5. For the following reasons, these so-called supplements do not comprise "a final wetlands delineation manual" within the meaning of the 1993 Budget Act.

First, they do not constitute a single manual, as envisioned by the 1993 Budget Act. Rather, they comprise in effect ten separate wetland delineation manuals—the 1987 Manual as modified by each regional supplement. *See, e.g.*, AK Suppl., MJN Exh. 2, at 1 ("This Regional Supplement presents wetland indicators, delineation

guidance, and other information *specific to the Alaska Region*.") (emphasis added). They are not even true supplements, for in many instances they contradict the 1987 Manual which they purport to supplement. *See, e.g.*, AK Suppl., MJN Exh. 2, at 2 ("Where differences in the two documents occur, this Regional Supplement takes precedence over the Corps Manual for applications in the Alaska Region.").

Second, neither the Alaska Supplement nor any other supplement can be considered a final wetlands delineation manual because these supplements, by definition, do not set forth nationally applicable standards. Such nationally applicable standards are compelled by the Corps' own regulation defining "wetlands" according to a single, nationally applicable standard. *See* 33 C.F.R. § 328.3(c)(4) (2015); *id.* § 328.3(b) (2014). Hence, any manual that purports to interpret (rather than amend) such a definition must itself be nationally applicable, as is the 1987 Manual (and, for that matter, the 1989 and 1991 Manuals). The supplements, however, provide inconsistent and contradicting *regional* standards and methods. *Compare, e.g.*, AK Suppl., MJN Exh. 2, at 48-49 (the growing season may be ascertained by onsite observance of biological activity of non-evergreen vascular plants, or from similar data derived from a normalized difference vegetation index) *with* U.S. Army Corps of Eng'rs, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region* (Version 2.0, May 2010), MJN Exh. 7, at 67-68, (the growing season may be ascertained by observance of biological activity of non-evergreen vascular plants, or by soil temperature). Such regionally inconsistent methods of wetlands delineation cannot be reconciled with the Corps' decision both to

define "wetlands" and to establish the methods for ascertaining the presence of wetlands on a national basis.[7]

Finally, the Corps cannot defend its regional "supplementation" practice based on deference to agency interpretation of statutes. Such deference is appropriate only to interpretations of statutes that the agency itself administers. *Ass'n of Civilian Techs.*, 200 F.3d at 592 ("[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering . . . ."). Whether an agency administers a statute depends on whether Congress has given the agency power to fill in the statute's gaps. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). It is implausible that Congress intended the Corps to "administer" the 1993 Budget Act. The Act does not provide the Corps anything to administer, but simply limits the agency's discretion to select a wetlands delineation methodology while providing a cabined authorization for program funding. Moreover, deferring to the Corps' supplementation process would be unreasonable, because it would contradict Congress's intent to have the Corps operate under a nationally applicable wetlands manual. *See* Title I, 106 Stat. at 1324 (making the 1987 Manual nationally applicable). *See also* S. Rep. No. 102-80, at 55 (noting that the 1987 Manual had previously been "used in various regions"); James S. Wakeley, Eng'r Research & Dev. Ctr., U.S. Army Corps of Eng'rs, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations* (Aug. 2002),

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[7] The Corps itself acknowledges that, although taking more time, producing an updated national wetland delineation manual would be feasible. *See* U.S. Army Corps of Eng'rs, Envtl. Assessment & Finding of No Significant Impact for the Ak. Regional Suppl. to the 1987 Wetland Delineation Manual, MJN Exh. 6, at 4 (acknowledging that "to update and republish the 1987 Manual" "would likely take an addition[al] 5-6 years to identify all of the national technical problems").

MJN Exh. 8, at 2 (noting that "regional differences in delineation methods . . . persisted" after the 1987 Manual's promulgation because originally "its use was not mandatory"). *Cf. Chevron*, 467 U.S. at 844-85 (an unreasonable agency interpretation is not entitled to deference).[8]

Hence, for all the foregoing reasons, the Corps must continue to abide by the 1987 Manual's standards and methods for delineating wetlands.

B. In Asserting Jurisdiction over Tin Cup's Property, the Corps Used the Growing Season Standard Contained Within the Alaska Supplement, Not the Standard Within the 1987 Manual

In determining that Tin Cup's permafrost is subject to its regulatory authority, the Corps relied on the standards contained within the Alaska Supplement, not those contained within the 1987 Manual. During its first administrative appeal, Tin Cup contended that the Corps' jurisdictional determination was faulty because Tin Cup's permafrost does not satisfy the 1987 Manual's growing season requirement. AR89:659. In response, the Corps' appellate officer concluded that the "Alaska Regional Supplement applies here . . . rather than . . . the soil temperature criteria in the [1987] Manual." AR87:643 (footnote omitted). Hence, the 1987 Manual's standard "is essentially irrelevant to determining the growing season in Alaska." *Id.* Similarly, in response to Tin Cup's objections to the initial proffered permit, the Corps stood by its

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[8] A 1992 Corps "User Note" to the 1987 Manual provides that the length of the growing season can be approximated by the number of frost-free days. 1987 Manual, MJN Exh. 1, at 29. This substitute method is irrelevant to Tin Cup's challenge for two reasons: first, the Corps did not rely on the method during the administrative process, *see* AR2:10-12, AR87:643, and therefore cannot rely on it now, *see Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself, not post-hoc rationalizations.") (internal quotation marks omitted); and second, the method has no application in situations, as in Alaska, where the number of frost-free days does *not* provide a reliable substitute for estimating subsurface soil temperature.

position that the Alaska Supplement supersedes the 1987 Manual. *See* AR20:186. The Corps explained that the 1987 Manual's approach to the growing season is purportedly outdated, and that "a definition of growing season for the entire U.S. is not feasible or necessary." AR20:187. Rather, the Corps' regional supplements, including the Alaska Supplement, "follow the [National Research Council] recommendations by abandoning the [1987 Manual's] definition of growing season." *Id.* Finally, in Tin Cup's last administrative appeal, the Corps' appellate officer made clear the agency's view that its "responsibility in this case was to follow . . . the Regional Supplement in its appropriate context," not the 1987 Manual. AR3:28. Thus, in asserting jurisdiction over Tin Cup's permafrost, the Corps used the growing season standard from the Alaska Supplement, not from the 1987 Manual.

C. The Alaska Supplement's Standard for Determining the Growing Season Cannot Be Reconciled with the 1987 Manual

The 1987 Manual directs that the wetland delineation process be guided by three criteria—hydrophytic vegetation, hydric soils, and wetland hydrology. *See* 1987 Manual, MJN Exh. 1, at 9-10. Generally, all of these criteria must be satisfied for an area to be designated a wetland. *See id.*; *Banks*, 115 F.3d at 920. The 1987 Manual states that the wetland hydrology parameter will be met if the soils in question are periodically inundated or saturated to the surface at some time during the "growing season." 1987 Manual, MJN Exh. 1, at 28. "Growing season" is defined as that "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)." *Id.* at A5. For its part, the Alaska Supplement uses a relaxed standard to determine the dates of the "growing season," focusing on "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground." AK Suppl., MJN Exh. 2, at 48.

The characteristics of permafrost reveal that these two standards are irreconcilable. The Alaska Supplement defines "permafrost" as a "thickness of soil or other superficial deposits, or even bedrock, which has been colder than 0°C for two or more years." *Id*. at 108. Under the 1987 Manual, permafrost would never qualify as a wetland because it cannot satisfy the hydrology parameter. That parameter depends on the existence of a growing season defined in relation to soil temperature. Because permafrost by definition never reaches the requisite soil temperature, it cannot satisfy the 1987 Manual's hydrology criterion, which is dependent on the presence of a qualifying growing season. *See* AR20:187. In contrast, under the Alaska Supplement's relaxed growing season standard, permafrost can satisfy the hydrology parameter. Hence, the Alaska Supplement's standard cannot be reconciled with that contained in the 1987 Manual.

The Alaska Supplement is also irreconcilable with Congress' intent in limiting the Corps' discretion to choose a wetland delineation methodology. The purpose behind the 1992 and 1993 Budget Acts' wetlands provisos was to bring nationwide consistency to the Corps' delineation process, as well as to rein in the agency's extravagant expansion of its jurisdiction through use of the 1989 Manual. *See* S. Rep. No. 102-80, at 54-55; S. Rep. No. 102-344, at 56. As the National Research Council itself acknowledged, the 1989 Manual "would typically provide the most expansive interpretation of wetlands boundaries." NRC Report, MJN Exh. 4, at 3. Yet Congress expressly rejected the 1989 Manual's approach. Title I, 105 Stat. at 518; Title I, 106 Stat. at 1324. To be sure, Congress requested that the National Research Council "evaluate and make recommendations on," among other things, "regionalizing the identification and delineation process to reflect different wetland vegetation and hydro-periods in various parts of the country." H.R. Rep. No. 102-710, at 51. And the Council's report ultimately did recommend a regionalized approach. *See* NRC Report,

MJN Exh. 4, at 3. But despite the passage of over two decades since the report's recommendations, Congress has not relaxed the 1993 Budget Act's mandate to use the 1987 Manual, nor has the Corps chosen to adopt a final wetlands delineation manual that incorporates a regional approach.[9] If, as the Corps presumably contends, "supplementation" of the 1987 Manual with standards that contradict the 1987 Manual is permissible under the 1993 Budget Act, then nothing would prevent the Corps from issuing a "supplement" that adopted the 1989 Manual's approach in its entirety. Yet even the Corps would acknowledge that Congress clearly intended to prohibit such an outcome. *See* 58 Fed. Reg. at 4995 (noting that the 1993 Budget Act "require[s] the Corps to continue using the 1987 Manual" rather than the 1989 Manual).

"Policy judgments are pervasive in the world of wetland regulation," and "[p]olicy issues cannot be avoided in a discussion of regionalization of wetland delineation methods." Wakeley, *supra*, MJN Exh. 8, at 5. *See also id.* at 10 (suggesting that "regulatory definitions of wetlands could be crafted, if desired, to reflect the wetland-protection priorities of each region"). Congress recognized this fact by making the policy judgment, in the 1993 Budget Act, to require the Corps to continue to follow a nationally applicable delineation method, until a new nationally applicable delineation method should be adopted. The Corps' refusal to abide by Congress' judgment vitiates its decision here.

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[9] Congress has made clear in related contexts that regulating permafrost as a wetland can be unwarranted. *See* 16 U.S.C. § 3801(a)(27) (excluding from the Food Security Act's definition of wetland "lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils").

Conclusion

The selection of methods to delineate wetlands is a significant decision which Congress has determined should be made at a national level according to nationally applicable standards. The Corps' employment of the Alaska Supplement's region-specific delineation criteria violates Congress' clear command. The Corps' permitting decision should be set aside.

DATED: October 21, 2016.

Respectfully submitted,

JAMES S. BURLING
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s/ Damien M. Schiff
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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed the foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF was served electronically on Amanda Shafer Berman through CM/ECF for the United States District Court for the District of Alaska.

s/ Damien M. Schiff
DAMIEN M. SCHIFF

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