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No. 15-35906

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

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On Appeal from the United States District Court  
for the District of Alaska  
Honorable Timothy M. Burgess, District Judge

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

Under its own regulations, Appellee United States Army Corps of Engineers has chosen not to extend its Clean Water Act authority to wetlands based on their adjacency to other wetlands. *See* 33 C.F.R. § 328.3(a)(7) (2014). Appellant Universal Welding argues that this “adjacent wetlands” exception applies to the wetlands on its property because they are adjacent to other wetlands. Opening Br. at 25-27. The Corps, however, contends that Universal Welding’s wetlands are adjacent to Channel C, a non-wetland water. Ans. Br. at 37-48. Even if true, the point is irrelevant because the purported adjacency of Universal Welding’s wetlands to Channel C is solely a function of their adjacency to other wetlands that lie between them and Channel C. *See* Opening Br. at 30-31. *Cf.* Ans. Br. at 46 (acknowledging that the development of the wetlands between Peridot Road and Channel C would “sever[] the hydrologic connection” that ostensibly supports the Corps’ adjacency finding). In other words, it is *solely* because Universal Welding’s wetlands are adjacent to other wetlands that they *also* are arguably adjacent to Channel C. To withhold application of the adjacent wetlands exception in such circumstances would be unreasonable, because the exception then would

rarely if ever operate. Hence, under a reasonable interpretation of the adjacent wetlands exception, Universal Welding's wetlands are not subject to the Corps' regulatory authority.

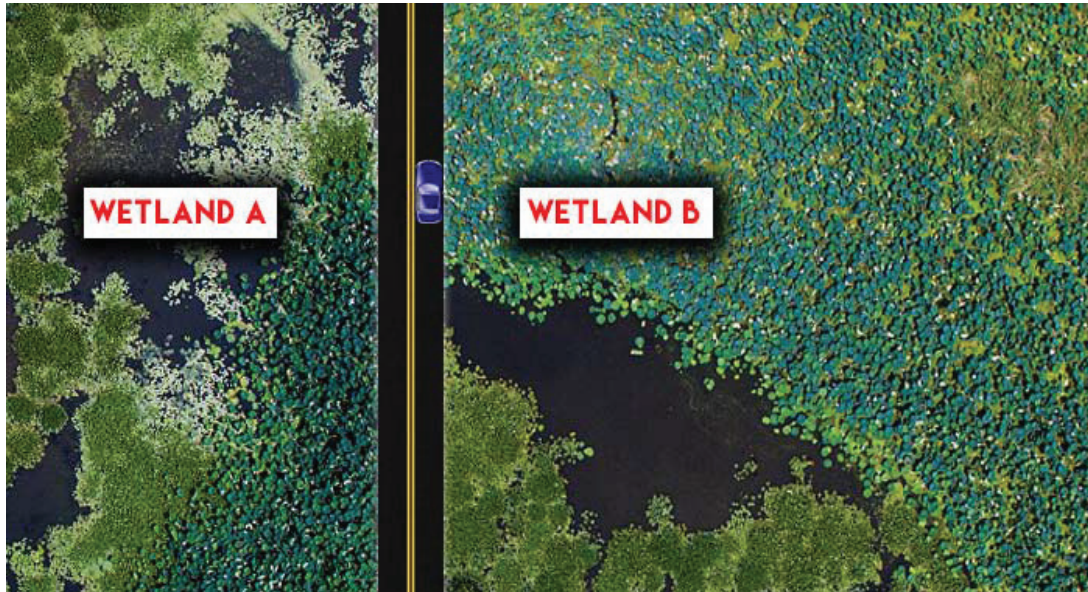
## **ARGUMENT**

### **I**

#### **There Are Three Interpretations of the Adjacent Wetlands Exception at Issue**

Universal Welding contends that the Corps' regulatory exception for wetlands adjacent to other wetlands applies to the wetlands found on its property because they are, properly understood, solely adjacent to other jurisdictional wetlands. *See* Opening Br. at 23-24, 29-31. Confusingly, much of the Corps' answering brief comprises (i) an argument against an interpretation of the agency's adjacent wetlands exception that Universal Welding does *not* advance, and (ii) a mistaken assumption that Universal Welding actually accepts the agency's plainly erroneous interpretation of that exception. Accordingly, a graphical clarification of the various positions is warranted, using a hypothetical Wetland A, Wetland B, Tributary X, Tributary Y, and a Road:

(1) The Corps' position is that the adjacent wetlands exception applies only if (i) Wetland A is adjacent to Wetland B, and (ii) Wetland A is not adjacent *in any way* to any other non-wetland jurisdictional water:

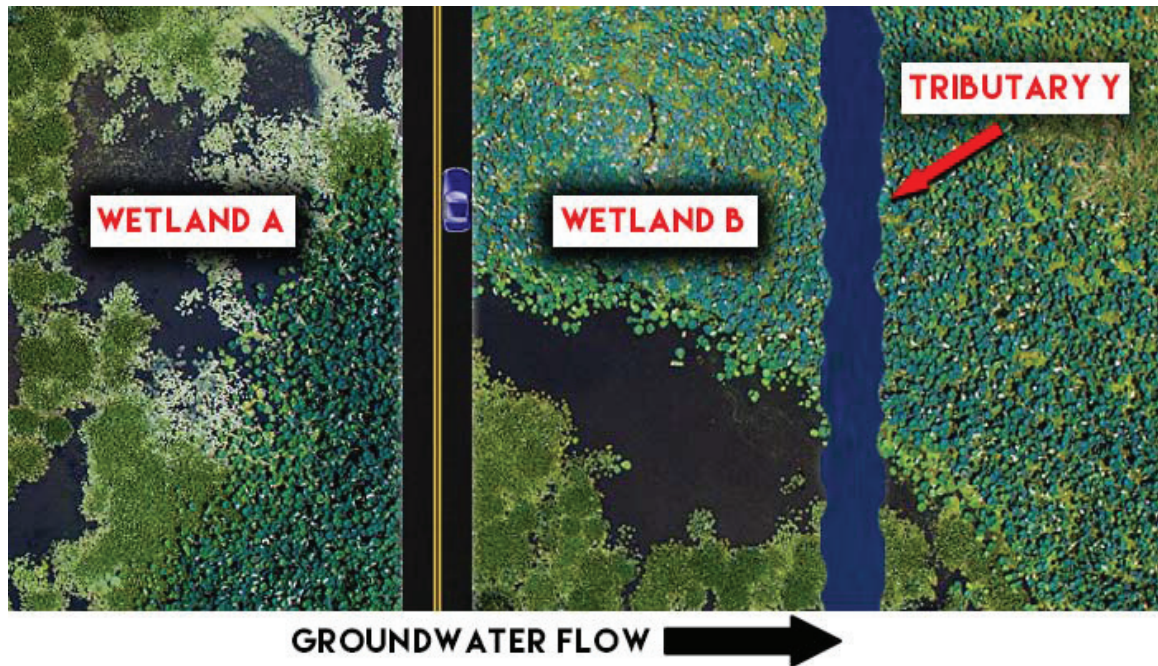


This is what the Corps evidently means by “solely adjacent.”

(2) In contrast, Universal Welding's position is that the adjacent wetlands exception, reasonably interpreted, applies if (i) Wetland A is adjacent to Wetland B, and (ii) Wetland A is adjacent to no other non-wetland jurisdictional water *except by virtue of the same connections or features* that make Wetland A adjacent to Wetland B. Thus, the exception would apply in the graphical representation below because Wetland A is adjacent to Wetland B, and is arguably adjacent to Tributary Y, but only



because of the intervening presence of Wetland B, which enables a hydrological connection from Wetland A to Tributary Y:



This is what Universal Welding means by “solely adjacent.”<sup>1</sup> See Opening Br. at 23 (“A wetland is still ‘solely’ adjacent to another wetland even if

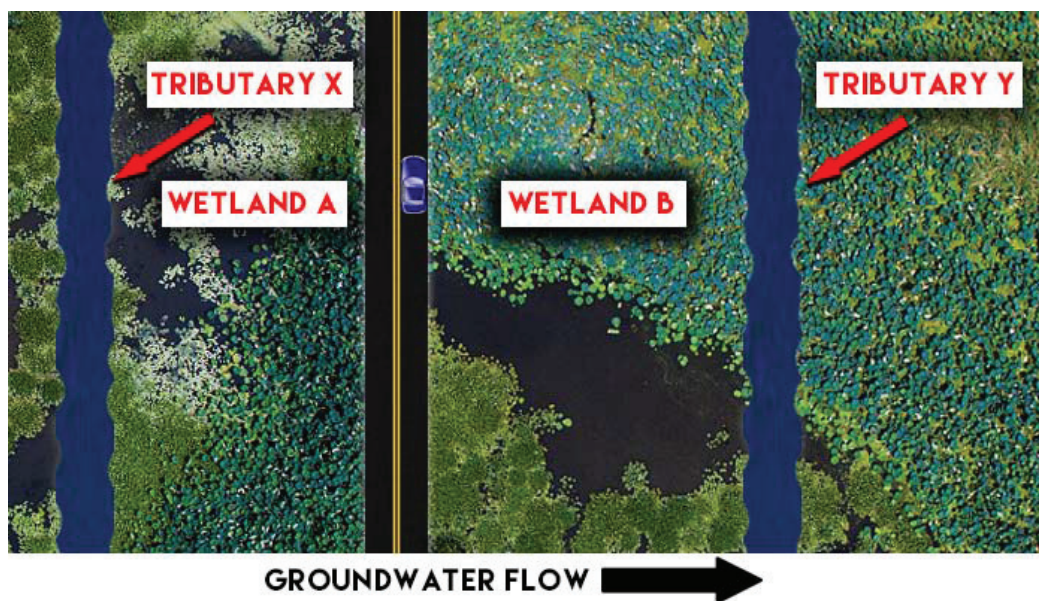
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<sup>1</sup> Contrary to the Corps’ understanding, Ans. Br. at 40-41, 55, a requirement of “immediate” adjacency (as discussed in Universal Welding’s opening brief on appeal) does not render superfluous the “neighboring” component of “adjacent.” Cf. 33 C.F.R. § 328.3(c) (defining “adjacent” to mean “bordering, contiguous, or neighboring”). Rather, as used in the opening brief, “immediate” is simply a shorthand for describing a type of wetland adjacency to a non-wetland water—namely, adjacency (*however determined*) to a non-wetland water that is *solely* a function of the wetland’s adjacency to other wetlands. See Opening Br. at 34.



water flows from the one wetland, through the other wetland, toward a non-wetland water.”).

A third interpretation, which the Corps mistakenly ascribes to Universal Welding, would apply the adjacent wetlands exception to Wetland A below, even though Wetland A is adjacent to the non-wetland water Tributary X (“bordering” or “contiguous”) by virtue of connections or relationships independent of those that make Wetland A arguably adjacent to Tributary Y (“neighboring” by virtue of groundwater connections):



Both the Corps and Universal Welding would agree that, in these circumstances, Wetland A is not “solely adjacent” to Wetland B. Thus, the

deficiencies in this third interpretation of the adjacent wetlands exception have no bearing on the soundness of Universal Welding's interpretation. And as set forth in the proceeding section, Universal Welding's construction constitutes the only reasonable interpretation of the adjacent wetlands exception.

## II

### **The Corps' Interpretation of Its Adjacent Wetlands Exception Merits No Deference**

#### **A. Unreasonable Agency Interpretations of Regulatory Text Are Not Entitled to Deference**

Universal Welding argues that the Corps' interpretation of its adjacent wetlands exception is unreasonably narrow, and therefore is entitled to no judicial deference. Opening Br. at 30-31. In response, the Corps appears to argue that the reasonableness of its interpretation is irrelevant to whether that interpretation is plainly inconsistent with the regulatory text or otherwise erroneous. *See* Ans. Br. at 34-35. In other words, the Corps apparently contends that its interpretation should be deferred to even if unreasonable.

That is not the law. Rather, only *reasonable* interpretations of regulatory text receive judicial deference. *See Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013) (“EPA’s determination is a reasonable interpretation of its own regulation; and, in consequence, deference is accorded to the interpretation under *Auer v. Robbins*, 519 U.S. 452 (1997).”); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931-32 (9th Cir. 2006) (deferring to an agency interpretation that “reasonably” interpreted a vague regulatory term). Hence, if Universal Welding is correct that the Corps’ interpretation of the adjacent wetlands exception is unreasonable, then that interpretation is plainly inconsistent with the exception, or is otherwise erroneous, and therefore is entitled to no deference under *Auer*.<sup>2</sup>

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<sup>2</sup> The Corps contends that Universal Welding eschews any argument that the agency’s interpretation merits no deference. Ans. Br. at 34. The Corps purportedly finds this eschewing intent in Universal Welding’s acknowledgment that *Auer* binds this Court. *Id.* (citing Opening Br. at 30 & n.15). The agency labors under the misapprehension that an acknowledgment of the applicability of the *Auer* framework is not also an acknowledgment of the *exceptions* to deference under that same framework. In fact, a substantial portion of the argument in Universal Welding’s opening brief is devoted to the contention that the Corps’ interpretation is unreasonable and therefore entitled to no deference under *Auer*. *See* Opening Br. at 30-34.

**B. The Corps' Interpretation of the Adjacent Wetlands Exception Is Unreasonable Because It Would Substantially Undercut the Exception's Purpose**

Universal Welding contends that the Corps' interpretation is unreasonable because it would render the adjacent wetlands exception a dead letter. To be sure, the Corps' interpretation would exempt adjacent isolated wetlands, but those wetlands are not regulable anyway. Opening Br. at 33 (citing *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171 (2001)). That the Supreme Court's exclusion of isolated wetlands from the Clean Water Act's scope came several years after the adjacent wetlands exception was enacted is irrelevant. What matters is whether the Corps' current interpretation of that exception continues to comport with the original *purpose* underlying the exception. *See Ak. Trojan P'ship v. Gutierrez*, 425 F.3d 620, 628 (9th Cir. 2005) ("An agency's interpretation of a regulation must 'conform with the wording and purpose of the regulation.'") (quoting *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166 (9th Cir. 2003)). The exception's evident purpose is to *limit* the Corps' regulatory authority, a purpose that would not be served if the exception rarely if ever operated to exclude otherwise jurisdictional wetlands from the Corps' control. Yet, following *Solid Waste Agency*, such

a purpose-undercutting result would follow were the Corps' interpretation to be ratified.<sup>3</sup>

That nullifying outcome would result under the Corps' interpretation for another reason. A wetland that is adjacent to another wetland by virtue of the flow of water between them almost always will be adjacent to another, non-wetland water, by means of that same flow of water. Hence, relying on that hydrological connection to establish adjacency—as the Corps purports to do here, *see* 2 ER 70—would mean that the adjacent wetlands exception would never operate. The Corps does not deny this point in theory; it simply denies that the point has been established in fact. *See* Ans. Br. at 53-55. The Corps' objection is misplaced. The adjacent wetlands exception *presupposes* that both wetlands would otherwise be regulable under the statute, else there would be nothing for the regulation

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<sup>3</sup> The Corps suggests that its interpretation also would have effect where a wetland is solely adjacent to an *interstate* wetland. *See* Ans. Br. at 53 (citing 33 C.F.R. § 328.3(a)(2) (asserting control over all interstate waters)). But the same Commerce Clause concerns that led the Supreme Court to exclude isolated wetlands from the Clean Water Act's scope, *see Solid Waste Agency*, 531 U.S. at 172-74, also would apply to the Corps' purported regulation of interstate wetlands. That is especially so given that the Corps' ostensible regulation of interstate wetlands is expressly *not based* on their susceptibility to use in interstate commerce. *Compare* 33 C.F.R. § 328.3(a)(2) (interstate waters) *with id.* § 328.3(a)(1) (waters susceptible to use in interstate or foreign commerce).

to except. *See United States v. Grandberry*, 730 F.3d 968, 981 (9th Cir. 2013) (observing that “a statute [or regulation] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (internal quotation marks omitted) (brackets in original). But the outermost statutory limit of wetland jurisdiction is always based on the quantitative or qualitative relationship that a given wetland has with a downstream non-wetland water. *See Rapanos v. United States*, 547 U.S. 715, 755 (2006) (plurality op.) (jurisdictional wetlands must have a “physical connection, which makes them as a practical matter indistinguishable from waters of the United States”) (emphasis in original removed); *id.* at 780 (Kennedy, J., concurring in the judgment) (jurisdictional wetlands must “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’ ”). Hence, the legal predicate necessary for the adjacent wetlands exception even to be presumptively relevant—namely, the presence of adjacent wetlands otherwise regulable under the statute—necessarily ensures the factual predicate that the Corps demands.



Nothing in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), is to the contrary. Even the Corps admits that *City of Healdsburg*, in its discussion of the relevance of hydrological connections to Clean Water Act jurisdiction, “focused on the significant nexus question.” Ans. Br. at 47. To be precise, the decision discussed groundwater at two points of its analysis: (i) in determining whether a rock quarry pit constitutes a “wetland” under the Corps’ regulatory definition, 33 C.F.R. § 328.3(b), and (ii) in determining whether that pit bears a significant nexus to the Russian River. *See City of Healdsburg*, 496 F.3d at 997-98, 1000-01. As explained in the preceding paragraph, the presence or absence of a significant nexus (as well as, for that matter, the presence or absence of a feature defined as a “wetland”) is merely a necessary legal predicate for the application of the Corps’ adjacent wetlands exception. Thus, *City of Healdsburg* simply does not address the logically *subsequent* steps in the operation of the adjacent wetlands exception, the very steps which are at issue in this case. Such a conclusion is not untoward—for there is nothing inconsistent with treating groundwater connections in one manner to determine whether there is presumptive jurisdiction under the statute, and treating them in a

different manner to determine whether regulatory control ultimately will be asserted.<sup>4</sup>

Finally, for two more reasons, the interpretation of the adjacent wetlands exception that the Corps advances is suspect. First, it was articulated *decades after* the exception was promulgated, *see* Ans. Br. at 51-52, and therefore provides little evidence of relevant intent. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation must be adjudged according to the "indications of the [agency's] intent at the time of the regulation's promulgation") (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). And second, the interpretation was published while the administrative process below was still ongoing, *compare* 79 Fed. Reg. 22,188, 22,209 (Apr. 21, 2014) *with* 2 ER 68 (Corps Response to Remand (May 2014)), thereby suggesting a post-hoc motivation. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference not warranted when the interpretation is principally a litigation position or post hoc rationalization). Thus, for all

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<sup>4</sup> The Corps is right that claims of exemption from Clean Water Act jurisdiction are narrowly construed. *City of Healdsburg*, 496 F.3d at 1001. But that principle cannot help the agency here because its construction would eviscerate—not just narrowly interpret—the adjacent wetlands exception.

of the foregoing reasons, the Corps' interpretation of the adjacent wetlands exception merits no deference.

### III

#### **The Adjacent Wetlands Exception, Reasonably Interpreted, Precludes Jurisdiction Over Universal Welding's Property**

The Corps lacks jurisdiction over Universal Welding's wetlands because those wetlands are solely adjacent to other wetlands. Opening Br. at 29-34. None of the Corps' arguments to the contrary has merit.

To begin with, the Corps' reliance on the findings contained within its 2010 jurisdictional determination, *see, e.g.*, Ans. Br. at 42-43, is misplaced. During subsequent administrative proceedings, the Corps' appellate officer determined that those findings were flawed and therefore directed the agency to redo its analysis. *See* 2 ER 101 (ordering the Corps (i) to "re-evaluate [its] decision . . . to determine if the on-site wetland is adjacent to Channel C," (ii) to "clearly document the connection between the onsite wetlands and Channel C," and (iii) to "revise the AR accordingly to document and reflect the factual data considered in this analysis and provide the appellant a new . . . decision"). Hence, the analysis that would justify the Corps' assertion of jurisdiction over Universal Welding's

wetlands must be found (if at all) within the Corps' final permitting decision. *Cf. Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 959 (9th Cir. 2005) (“[I]nternally contradictory agency reasoning renders resulting action ‘arbitrary and capricious . . . .’”), *rev’d on other grounds sub nom. Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

That decision explains only two bases for adjacency: Peridot Road and groundwater connections to Channel C.<sup>5</sup> *See* 2 ER 69-70. Neither establishes that Universal Welding’s wetlands are adjacent to Channel C. With respect to Peridot Road, the Corps argues that the road makes Universal Welding’s wetlands “neighboring” and therefore adjacent to Channel C. *Ans. Br.* at 40-41. But the road’s presence does not make Universal Welding’s wetlands “neighboring” to Channel C, because with or without the road the wetlands would remain over a mile-and-a-half

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<sup>5</sup> The decision does contain a passing reference to a third basis—“reasonable proximity.” *See* 2 ER 83. But given the deficiencies found by the prior administrative appeal decision concerning the Corps’ initial “reasonable proximity” analysis, *see* 2 ER 101 (“The District included a number of confusing, contradictory, and unsupported statements . . . . Therefore, the District did not support their assertion that the on-site wetland is connected, and thus adjacent, to Channel C.”); *see also* SER 90-91, the Corps cannot now reasonably rely on such a slight and unexplained reference in the final permitting decision to justify its renewed assertion of jurisdiction. *See, e.g., Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (an agency “must explain why it decided to act as it did” in a way that goes beyond mere “conclusion”).

away. *See* 2 ER 148. The road’s presence in no way affects whether or how Universal Welding’s property neighbors Channel C. Instead, the road’s presence simply results in the site’s wetlands bordering, or being contiguous to, *the wetlands* west of the road.<sup>6</sup> To interpret the “neighboring” component of adjacency as the Corps suggests would mean that even if Channel C were 50 miles to the west of Universal Welding’s wetlands, it would still be “neighboring” to those wetlands because of the intervening road. Such an absurd result cannot prevail. *Cf. State of Hawaii ex rel. Att’y Gen. v. FEMA*, 294 F.3d 1152, 1159 (9th Cir. 2002) (agency interpretations that produce absurd results should be rejected).

With respect to subsurface hydrological connections, the Corps does not dispute that the groundwater connection here depends on the intervening presence of the wetlands between Peridot Road and Channel C. Instead, the Corps contends that it should not be precluded

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<sup>6</sup> Even the Corps acknowledges that point. *See* 2 ER 69 (“Prior to construction of Peridot Street, the subject wetland had been continuous with the wetland that directly abuts Channel C . . .”). *See also* 2 ER 97 (email from Corps Fairbanks Field Office Supervisor Benjamin Soiseth) (“The subject wetland is not continuous with the nearby wetland that directly abuts [Channel C]” and therefore “the subject wetland is non-jurisdictional”). As do the agency’s regulations. *See* 33 C.F.R. § 328.3(c) (“Wetlands separated from other waters of the United States by man-made . . . barriers . . . are ‘adjacent wetlands.’”).

from taking into account such a connection when determining adjacency. *See* Ans. Br. at 45-47. The agency's argument again misses the point. Universal Welding does not argue that the Corps must ignore the reality of groundwater connections when, for example, determining presumptive jurisdiction under *Rapanos* and *City of Healdsburg*. Rather, Universal Welding argues that: (i) the subsurface hydrological connections that make Universal Welding's wetlands ostensibly adjacent to Channel C are *the same* connections that would support a finding of adjacency between its wetlands and the wetlands between Peridot Street and Channel C; (ii) without those intervening wetlands the subsurface hydrological connection to Channel C would be severed; thus, (iii) Universal Welding's wetlands are adjacent to Channel C solely by virtue of their adjacency to the intervening wetlands; and, therefore, (iv) Universal Welding's wetlands are solely adjacent to those intervening wetlands. Accordingly, far from establishing adjacency, the subsurface hydrology of Universal Welding's wetlands actually confirms the application of the adjacent wetlands exception.



## CONCLUSION

The Corps' adjacent wetlands exception, reasonably interpreted, applies to wetlands that are immediately—*i.e.*, solely—adjacent to other jurisdictional wetlands. Universal Welding's wetlands are solely adjacent to other jurisdictional wetlands. Consequently, the Corps lacks jurisdiction over those wetlands.

The judgment of the district court affirming the Corps' assertion of jurisdiction over Universal Welding's property should be reversed.

DATED: January 12, 2017.

Respectfully submitted,

DAMIEN M. SCHIFF  
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By s/ Damien M. Schiff  
DAMIEN M. SCHIFF

Counsel for Plaintiff - Appellant

**CERTIFICATE OF  
COMPLIANCE WITH RULE 32(a)**  
CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE  
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: January 12, 2017.

s/ Damien M. Schiff  
Attorney for Plaintiff - Appellant

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Damien M. Schiff  
DAMIEN M. SCHIFF