IN THE 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.	Case No. 4:16-cv-00016-TMB ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on the parties' cross motions for summary judgment at docket 15 and docket 22, respectively. Defendant U.S. Army Corps of Engineers ("Corps") issued Plaintiff Tin Cup, LLC ("Tin Cup") a permit pursuant to Section 404 of the Clean Water Act ("CWA") allowing Tin Cup to discharge fill material on 118 acres of wetlands in order to construct a pipe fabrication facility in North Pole, Alaska. Special conditions in the permit also require that Tin Cup convert its gravel extraction site into a reclamation pond and leave undisturbed approximately forty-seven acres of wetlands on the property. Believing these special conditions to be too onerous, Tin Cup now challenges the Corps' determination that permafrost on the property that Tin Cup wishes to develop are wetlands requiring federal authorization under the CWA before Tin Cup can fill them.[1] Tin Cup argues that the Corps improperly relied on an Alaska-specific regional supplement to the Corps' 1987 Wetlands Delineation Manual in violation of the Administrative Procedure Act ("APA"). Tin Cup contends that this alleged violation requires setting aside the Corps' wetlands determination with respect to Tin Cup's

[1] Dkt. 15 at 9; Dkt. 22 at 6.

development permit. The Corps asserts that it properly relied on the Alaska Supplement in delineating wetlands on Tin Cup's property. Neither party has requested oral argument, nor would the Court's decision be aided by it. For the reasons that follow, Tin Cup's Motion for Summary Judgment at docket 15 is **DENIED**, and the Corps' Motion for Summary Judgment at docket 22 is **GRANTED**.

II. BACKGROUND

A. Parties

Tin Cup is a subsidiary of Flowline Alaska ("Flowline"), a Fairbanks-based company specializing in heavy construction and fabrication of large pipe and steel structures used in the North Slope oil fields.[2]

The U.S. Army Corps of Engineers, is one of two federal agencies, along with the Environmental Protection Agency ("EPA"), tasked with implementing the CWA.[3] The CWA makes it unlawful to discharge dredged and fill material into the waters of the United States except in accordance with a permitting regime jointly administered by the Corps and the EPA.[4]

B. Statutory and Regulatory Background

The CWA protects waters of the United States from the discharge of pollutants, including dredged fill material, into "navigable waters."[5] There has been considerable litigation over what qualifies as "navigable waters" or "waters of the United States" subject to Corps and EPA

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[2] Dkt. 15 at 19.

[3] Dkt. 15 at 1–2; Dkt. 22 at 6.

[4] *Fairbanks North Star Borough v. U.S. Army Corps of Eng'r*, 543 F.3d 586, 589 (9th Cir. 2008) (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985)); 33 U.S.C. §§ 1311(a), 1344(a).

[5] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 162 (2001); 33 U.S.C. § 1344(a).

regulation under the CWA.[6] "The Corps has issued regulations defining the term 'waters of the United States' to include most wetlands adjacent to waters of the United States that are not themselves wetlands."[7] The parties have done a thorough job discussing how the Corps' authority to regulate the discharge of pollutants onto wetlands has evolved over the years through regulation and litigation.[8] Rather than repeat that recitation here, the Court will instead focus on two documents promulgated by the Corps which guide wetlands delineation determinations in Alaska.

1. 1987 Wetlands Delineation Manual

Wetlands are defined in regulation as "those 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."[9] In 1987, the Corps promulgated a Wetlands Delineation Manual ("1987 Manual")[10] with the purpose of providing "users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the CWA."[11] The 1987 Manual identifies three

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[6] *See e.g. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding regulations defining "waters of the United States" as encompassing wetlands adjacent to traditional navigable waters); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion proposing different tests for what constitute "waters of the United States").

[7] *Fairbanks North Star Borough*, 543 F.3d at 589 (internal citations omitted).

[8] *See* Dkt. 15 at 8–19; Dkt. 22 at 6–14.

[9] 33 C.F.R. § 328.3(c)(4).

[10] *See* Dkt. 15-1.

[11] Dkt. 15 at 11; Dkt. 15-1 at 13; Dkt. 22 at 10–11.

guiding criteria in delineating wetlands: hydrology, soil, and vegetation.[12] However, the 1987 Manual also observes:

> Certain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual. Examples include prairie potholes during drought years and seasonal wetlands that may lack hydrophytic vegetation during the dry season . . . . However, such wetland areas may warrant additional research to refine methods for their delineation.[13]

2. 1989 Wetlands Delineation Manual and NRC Study

The Corps promulgated another Wetlands Delineation Manual in 1989, however, the 1989 Manual was subject to substantial criticism and legislative opposition,[14] and ultimately the Corps mandated the continued use of the 1987 Manual. After rejecting the 1989 Manual, Congress tasked the National Research Council ("NRC") with studying the scientific basis for the characterization of wetlands.[15] The NRC issued a report in 1995 that "recommended a number of changes to the Corps' wetlands delineation process."[16] In particular the NRC observed:

> [i]mprovements in the scientific understanding of wetlands since 1987 and refinement of regulatory practice through experience over almost a decade of intensive wetland regulation suggest that a new federal delineation manual should be prepared for common use by all federal agencies involved in the regulation of wetlands. This new manual should draw freely from the strengths of each of the existing manuals, but would not be identical to any of the present manuals. The new manual should incorporate some changes in present practice and some solutions to

[12] Dkt. 15-1 at 18; Dkt. 15 at 11; Dkt. 22 at 11.

[13] Dkt. 15-1 at 17.

[14] Congress included riders to two Appropriations bills for fiscal years 1992 and 1993 prohibiting the Corps from using the 1989 Manual. *See infra* Part IV.A.

[15] Dkt. 16-1 at 15.

[16] Dkt. 15 at 17.

> past problems of regulatory practice, as well as an increased emphasis on regionalization within a framework of national standards.[17]

3. Alaska Supplement to the 1987 Manual

Taking its cue from the NRC report, in 2006, the Corps began to promulgate regional supplements designed for use with the 1987 Manual.[18] The regional supplements were developed by working groups comprised of wetlands experts from the federal, state, and local level.[19] Between 2007 and 2012, the Corps issued ten supplements covering all regions of the United States.[20] The Corps promulgated an Alaska-specific supplement[21] to the 1987 Manual in September 2007 as part of "nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation practices."[22] The Corps observed that "[r]egional differences in climate, geology, soils, hydrology, plant and animal communities, and other factors are important to the identification and functioning of wetlands. These differences cannot be considered adequately in a single national manual."[23] The Alaska Supplement was subject to public notice, comment, review by the Corps' National Advisory

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[17] Dkt. 16-1 at 25.

[18] Dkt. 22 at 11.

[19] *See, e.g.* Dkt. 15-2 at 11–13.

[20] Dkt. 22 at 11–12; *see also* Actual or anticipated release dates for Regional Supplements (as of 13 Jan. 2012), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/supp_sched2012.pdf (last visited Sep. 11, 2017).

[21] *See* Dkt. 15-2. U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ("Alaska Supplement").

[22] Dkt. 15-2 at 14; *see also* AR Tab 2 at COE000011.

[23] Dkt. 15-2 at 14.

Team for Wetland Delineation, as well as independent peer review prior to finalization and publication.[24]

Most relevant to this lawsuit, the Alaska Supplement takes a different approach to determining the "growing season" as it pertains to wetland hydrology as a delineation criteria identified in the 1987 Manual.[25] Whereas the 1987 Manual calculates growing season based on soil temperature or as approximated by air temperature and frost free days,[26] the Alaska Supplement advises that observation of vegetation activity is the preferred approach for determining the growing season because the 1987 Manual's approach "is often impractical in Alaska due to the scarcity of meteorological stations and differences in elevation, aspect, and other conditions between project sites and the locations of existing weather stations."[27] Accordingly, the Corps determined that "direct observation of vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground," is the preferred method to determine growing season dates in Alaska.[28]

[24] Dkt. 15-2 at 12; Dkt. 16-2 at 2; Dkt. 16-3 at 2.

[25] Dkt. 15-2 at 15.

[26] *See* Dkt. 15-1 at 41. ("The 1987 Manual (see glossary, Appendix A) defines 'growing season' as the portion of the year when soil temperature (measured 20 inches below the surface) is above biological zero (5° C or 41° F). This period 'can be approximated by the number of frost-free days.' Estimated starting and ending dates for the growing season are based on 28° F air temperature thresholds at a frequency of 5 years in 10."); *see also id.* at 109.

[27] Dkt. 15-2 at 60–61.

[28] *Id.* at 61.

C. Procedural History

Tin Cup owns a 455-acre parcel of land in North Pole, Alaska,[29] which it holds for its parent company, Flowline.[30] The parcel is located approximately two and a half miles south of the Chena River,[31] near the Tanana River,[32] and directly abuts the Drainage Channel B watershed.[33] The parcel contains approximately 352 acres of a larger 2,500 acre wetland that extends off site to the south and east.[34] Native vegetation on the subject wetlands include Shrub-Scrub, Black Spruce Closed Forest, Alaska Birch/Shrub Birch, Grasslike and Dwarf Shrub, and Alaska Birch/Calamagrostis.[35] The Corps determined that the wetlands on the property are adjacent to the Channel B watershed and sustain a significant nexus with the Chena River based on hydrological and ecological connections.[36]

Flowline wishes to relocate from its current leased Fairbanks facilities to the parcel owned by Tin Cup. The proposed relocation project involves the "placement of a gravel pad, as well as the construction of several buildings and a railroad spur."[37] Because the project requires

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[29] The subject property is located within Sections 26, 27, 34, and 35, T. 1 S., R. 1 E., Fairbanks Meridian. AR Tab 2 at COE000007.

[30] Dkt. 15 at 19; Dkt. 22 at 14.

[31] AR COE000265. The Corps determined that the subject wetlands share a significant nexus with the Chena River. AR Tab 20 at COE000144.

[32] *See* AR Tab 10 at COE 000084; AR Tab 70 at COE000570.

[33] AR Tab 2 at COE00016.

[34] AR Tab 30 at COE000265.

[35] AR Tab 67 at COE000529.

[36] *Id.* at COE000527–60. "The significant nexus stems from the hydrologic and ecological connections between the subject wetlands and the Chena River." *Id.* at COE000527.

[37] Dkt. 15 at 19.

both excavation and the use of gravel fill material on wetlands, the Corps determined that the project requires a Section 404 permit under the CWA.[38]

In 2003, Tin Cup applied to the Corps for a Section 404 permit to discharge fill on the proposed relocation site in support of the pipe fabrication and storage facility. The Corps issued a permit in May 2004 allowing Tin Cup to place 1,000,000 cubic yards of fill into approximately 165 acres of wetlands.[39] Flowline ultimately decided to delay the relocation project and did not utilize the permit issued by the Corps to Tin Cup prior to its expiration.[40]

Tin Cup applied for a new permit in May 2008. Although Tin Cup's second application was similar to its 2003 application, the Corps requested an updated wetland delineation to "determine the extent of the impacts associated with the new application."[41] In September 2009, Tin Cup's agent[42] submitted a preliminary wetland delineation for the Tin Cup property.[43] Although Tin Cup's agent acknowledged the "presence of wetland areas across the entire tract," Tin Cup opined that the wetlands did not meet the requirements for adjacency and were therefore "not subject to Clean Water jurisdiction."[44] The Corps and Tin Cup exchanged additional letters, requests for information, responses, and conducted field investigations in an effort to determine

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[38] AR Tab 67 at COE000527; AR Tab 91 at COE000711.

[39] AR Tab 92 at COE000717.

[40] *Id.*

[41] *Id.*

[42] Tin Cup was represented by Travis/Peterson Environmental Consulting, Inc. throughout the permitting process.

[43] AR Tab 114 at COE000860–1031.

[44] *Id.* at COE000883.

whether the wetlands on Tin Cup's property had a significant nexus to the adjacent wetlands and traditional navigable waters.[45] In November 2010, the Corps issued a Jurisdictional Determination letter, which concluded that Tin Cup's property "contains waters of the United States (U.S.), including wetlands, under the Corps of Engineers' regulatory jurisdiction."[46] Accordingly, the Corps informed Tin Cup that a 404 permit was required if Tin Cup wished to place dredged or fill material into the wetlands on its property.[47]

Tin Cup administratively appealed the Corps' jurisdictional determination on seven grounds,[48] one of which was that the permafrost on the proposed relocation site did not meet the 1987 Manual's definition of a "growing season," and therefore could not satisfy the hydrology requirement of wetlands over which the Corps has jurisdiction.[49] Although the Corps' review officer ultimately remanded the jurisdictional determination to the Alaska District, he rejected Tin Cup's permafrost argument as meritless, concluding that "[t]he Corps' 2007 Alaska Regional Supplement to the 1987 Manual recognizes local and regionally developed methods to determine growing seasons, which were appropriately applied in this case in lieu of the 1987 Manual's criteria."[50]

On October 22, 2012, the Corps issued an Initial Proffered Permit allowing Tin Cup to discharge "1,000,000 cubic yards of gravel fill into 118 acres of jurisdictional wetlands to create

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[45] AR Tab 92 at COE000717–18.

[46] AR Tab 91 at COE000711.

[47] *Id.*

[48] AR Tab 89 at COE000653–709.

[49] *Id.* at COE000659.

[50] AR Tab 87 at COE000635.

a gravel pad to support facilities for pipe manufacturing, coating, and storage."[51] The permit contained four special conditions requiring Tin Cup to: (1) mark the boundaries of the construction areas;[52] (2) complete clearing, excavation, and fill activities in a manner mitigating impacts to breeding migratory birds;[53] (3) convert the on-site gravel source into an 18-acre reclamation pond[54] and riparian fringe to compensate for resource losses from the development project;[55] and (4) create a 250-foot wide buffer area around the reclamation pond and wetland fringe to prevent further degradation to fish and wildlife habitat and maintain the function and integrity of wetlands adjacent to the permitted area.[56] Special condition four would have the effect of permanently protecting forty-seven acres of the 455-acre parcel from future development.[57]

Believing the special conditions in the proffered permit to be too onerous, Tin Cup again objected to the permit on multiple grounds, including that the Corps impermissibly used the Alaska Supplement to assert jurisdiction over permafrost on the parcel.[58] In November 2013, the

[51] AR Tab 30 at COE000249–50.

[52] *Id.* at COE000251, 275.

[53] *Id.*

[54] The reclaimed pond would both accommodate excess runoff from the gravel pad during spring snowmelt, *Id.* at COE000262–63, as well as convert the project's gravel source area into a functioning pond and wetland area to be preserved in perpetuity. *Id.* at COE000272.

[55] *Id.* at COE000275–76.

[56] *Id.* at COE000276.

[57] *Id.* at COE000251, 264, 275–76,

[58] Dkt. 15 at 21.

Corps rejected Tin Cup's objections[59] and issued a final permit to Tin Cup containing the same four special conditions from the initial proffered permit.[60]

In January 2014, Tin Cup submitted a Request for Appeal (RFA) of the final permit, renewing numerous objections to the Corps' permitting decision.[61] In March 2015, the Corps' Office of Administrative Appeals rejected all five accepted reasons for appeal raised by Tin Cup, including the argument that the Corps impermissibly relied on the Alaska Supplement in delineating wetlands.[62] Following the denial of its appeal, Tin Cup initiated the present lawsuit. Tin Cup's sole challenge is to the Corps' use of the Alaska Supplement in delineating wetlands.

III. LEGAL STANDARD

In the District of Alaska, appeals of agency decisions under the APA are reviewed on cross-motions for summary judgment.[63] "Procedurally, summary judgment is appropriate for resolving a challenge to a federal agency's administrative decision when review is based primarily upon the administrative record."[64] When a court's review is based upon the administrative record, there are no material facts in dispute and the court does not perform any fact finding.[65] "Thus the court does not use the standard summary judgment analysis for

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[59] AR Tab 20 at COE000185–96.

[60] *Id.* at COE000144–96.

[61] AR Tab 13 at COE00099–101.

[62] AR Tab 2 at COE 000004–05; AR Tab 3 at COE000026–28.

[63] *See* D. Ak. L.R. 16.3.

[64] *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 996 (D. Ariz. 2011) (citing *Ecology Ctr., Inc. v, Austin*, 430 F.3d 1057, 1062 (9th Cir. 2005))

[65] *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985).

determining whether a genuine issue of material fact exists, and instead uses summary judgment as a mechanism for deciding whether, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did."[66]

The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[67] Under the APA, a court may only invalidate a final agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[68]

IV. DISCUSSION

This lawsuit requires the court to determine whether the Corps properly relied on the Alaska Supplement to the 1987 Wetlands Delineation Manual in determining that the Tin Cup parcel contains wetlands which require a 404 permit under the CWA prior to Tin Cup's discharge of fill material. "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)."[69] Tin Cup claims that the Corps is bound by the national wetland delineation standards contained in the 1987 Manual and cannot rely on the standards from the Alaska Supplement.[70] Specifically, Tin Cup argues that: (1) language from enacted 1992 and 1993 Energy and Water Appropriations

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[66] *Salazar*, 804 F. Supp. 2d at 996 (citing *Occidental*, 753 F.2d at 769–70).

[67] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

[68] 5 U.S.C. § 706(2)(A).

[69] Dkt. 15 at 8.

[70] Dkt. 23 at 14.

legislation requires the Corps to use the 1987 Manual;[71] (2) that the Corps impermissibly used the Alaska Supplement's "growing season" standard in asserting jurisdiction over wetlands on Tin Cup's property;[72] and (3) that the Alaska Supplement's standard for determining the growing season cannot be reconciled with the 1987 Manual.[73]

In its cross-motion for summary judgment, the Corps asserts that: (1) the language from 1992 and 1993 appropriations bills is no longer operative;[74] (2) that even if the language from these bills were operative, it does not bar the Corps from issuing regional supplements;[75] and (3) even if the Corps improperly relied on the Alaska Supplement in determining that certain areas of Tin Cup's property are wetlands, that the Court should nonetheless uphold the decision because the Corps' permit determination was sound.[76] The Court first addresses the relevant provisions contained in the Energy and Water Appropriations Acts from 1992 and 1993.

A. The 1992 and 1993 Energy and Water Appropriations riders do not preclude the Corps from using the Alaska Supplement to delineate wetlands.

Tin Cup asserts that Congress limited the Corps' discretion in how the agency delineates wetlands via language included in 1992 and 1993 appropriations legislation.[77] The Corps contends that the decades-old appropriations bills do not prohibit the Corps from relying on

[71] Dkt. 15 at 23–26.

[72] *Id.* at 26–27.

[73] *Id.* at 27–29.

[74] Dkt. 22 at 19–24.

[75] *Id.* at 24–28.

[76] *Id.* at 28–30.

[77] Dkt. 15 at 12–17.

regional supplements to the 1987 Manual because neither rider contains the requisite "words of futurity" expressing congressional intent for the text to apply permanently.[78]

The parties' differing interpretations of the riders included in the 1992 and 1993 appropriations legislation presents an issue of statutory construction. In cases involving statutory construction, courts start with the statutory text and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.[79] Under the well-established two-step test from *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[80]

With these standards in mind, the Court evaluates the relevant provision from the 1992 Energy and Water Development Appropriations Act,[81] which provides:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 (1989 Manual) or any subsequent manual not adopted in accordance with the requirements for notice and public comment of the rule-making process of the Administrative Procedure Act.[82]

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[78] Dkt. 22 at 19–24.

[79] *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citations omitted).

[80] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

[81] Pub. L. 102–104, Aug. 17, 1991, 105 Stat 510.

[82] *Id.*

Similarly, the relevant provision from the 1993 Energy and Water Development Appropriations Act[83] provides:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
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> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.[84]

1. The restrictive language prohibiting the Corps from using the 1989 Manual applies to funding from the respective appropriations legislation only.

The Court concludes that the operative language from both the 1992 and 1993 Energy and Water Appropriations bills which prohibit the Corps from delineating wetlands under the 1989 Manual applies only to "the funds in this Act." The statutory language clearly limits the applicability of the riders to the funds appropriated in the 1992 and 1993 appropriations bills respectively.[85]

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[83] Pub. L. 102–377, Oct. 2, 1992, 106 Stat. 1315.

[84] *Id.*

[85] Indeed, had Congress intended to make the limitation permanent, it would have been unnecessary to include the nearly identical limiting language in consecutive appropriations bills. *See Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 227 (1st Cir. 2003) ("After all, if Congress annually reenacts a provision, common sense suggests—and courts are free to presume—that Congress did not consider the language as creating permanent law.") (citing *United States v. Vulte*, 233 U.S. 509, 514 (1914)); *see also* GAO Principles of Federal Appropriations Law (4th ed. 2016 rev.) at 2–89 ("Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent.").

2. The ambiguous provision from 1993 Energy and Water Appropriations Act does not contain words of futurity or a clear statement of congressional intent required to find permanence.

Tin Cup, however, points to the addition of a sentence in the 1993 Energy and Water Appropriations Act which provides: "Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted," to argue that Congress intended to make the Corps' use of the 1987 Manual permanent.[86] Tin Cup asserts that this language is independent of any specific appropriation made in the 1993 Appropriations Act.[87]

The Corps takes the position that the additional sentence in 1993 bill does not overcome the strong presumption that language in appropriations legislation only applies for one fiscal year.[88] Additionally, the Corps contends that this provision must be read in the context of the sentence preceding it, and that the language does not evince Congress' clear intent to require the Corps use of the 1987 Manual indefinitely.[89] Tin Cup responds that the fact the language appears as a separate paragraph suggests that it is not constrained by the preceding paragraph's limitation to funds appropriated in the 1993 Act.[90] Additionally, Tin Cup asserts that because the additional sentence is a general provision and not appropriations-specific, it can be construed as having permanent application even in the absence of clear words of futurity.[91]

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[86] Dkt. 15 at 17 (emphasis added).

[87] Dkt. 23 at 10.

[88] Dkt. 22 at 23.

[89] *Id.* at 22–23.

[90] Dkt. 23 at 7.

[91] *Id.* at 8.

The Court concludes that it is not clear from the plain text of the 1993 Energy and Water Appropriations rider whether Congress intended this provision mandating the use of the 1987 Manual to apply beyond the 1993 Appropriations Act. Generally speaking, Congress is not presumed in annual appropriations bills to enact language having permanent application to future appropriations unless Congress expressly indicates its intention to make such provisions permanent.[92] The Court of Appeals for the Ninth Circuit has recognized "appropriations acts are generally only in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law."[93] Courts in other circuits have reached the same conclusion when addressing the permanence of riders attached to appropriations legislation.[94]

To rebut the strong presumption that appropriations riders do not create a permanent change in substantive law typically requires that Congress include "words of futurity."[95] "The most common word of futurity is 'hereafter' and provisions using this term have often been construed as permanent."[96] "If words of futurity indicate permanence, it follows that a proviso or

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[92] *Minis v. United States*, 40 U.S. 423, 445 (1841) ("It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.").

[93] *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 n.19 (9th Cir. 2005) (quoting *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991)).

[94] *See e.g., Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992) ("While appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not, and when they do, the change is only intended for one fiscal year.") (internal citations omitted).

[95] *See Nat. Res. Def. Council*, 421 F.3d at 806 n.19 (citing *Atl. Fish Spotters Ass'n*, 321 F.3d at 224–25 (1st Cir. 2003)); *Martin*, 961 F.2d at 273–74.

[96] GAO Principles of Federal Appropriations Law (4th ed. 2016 rev.) at 2-86.

general provision that does not contain words of futurity will generally not be construed as permanent."[97]

Although the additional sentence included in the 1993 Energy and Water Appropriations Act presents a closer question than the provisions prohibiting the expenditure of funds through the use of the 1989 Manual, the Court is unpersuaded that the additional text constitutes words of futurity sufficient to establish congressional intent to make the language permanent.[98] Because Congress has not clearly expressed its intention that this provision be permanent, the Court concludes that the Corps' interpretation[99] that this language is no longer operative is not unreasonable.[100]

This conclusion is bolstered by the guidance provided by the GAO Principles of Federal Appropriations Law:

> The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriated language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence . . . .

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[97] *Id.* at 2-89.

[98] *Atl. Fish Spotters Ass'n*, 321 F.3d at 224 ("Congress cannot rebut the presumption against permanence by sounding an uncertain trumpet.").

[99] Tin Cup contends the Corps interpretation of the 1993 Energy and Water Appropriations Act is entitled to no deference because "[i]t is implausible that Congress intended the Corps to 'administer' the 1993 Budget Act." Dkt. 15 at 25. It is plausible, however, that Congress intended the Corps to administer statutory language directly related to its regulation of wetlands. If Tin Cup's proposition were taken to its logical conclusion, than no federal agency would be entitled to any deference in interpreting legislative riders contained in Appropriations legislation. Tin Cup's argument that the Corps' interpretation is entitled to no deference is without merit.

[100] *See Atl. Fish Spotters Ass'n*, 321 F.3d at 224 ("Thus, the presumption against permanence in appropriation bills can be overcome if Congress clearly expresses its intention to create permanent law or if the nature of the provision would make any other interpretation unreasonable.").

> The closer the relationship, the less likely it is the provision will be viewed as permanent.[101]

Here, the relationship of the provision to both the 1993 Energy and Water Appropriations Act, and to the preceding language regarding the Corps' use of wetlands delineations manuals is undeniably close. Issues of Corps funding are in the regular jurisdiction of Energy and Water appropriations process,[102] and the presence of this sentence immediately after language restricting the use of funds for implementation of the 1989 Manual highlights the direct relationship, which makes it less likely the provision will be viewed as permanent.[103]

3. Congress knows what language to use to make provisions included in appropriations legislation permanent.

"[W]hen Congress wants to make explicit that a certain provision is to apply beyond the fiscal year to which the appropriation act applies, it knows how to do so."[104]As the Corps points out, in the very same 1993 Energy and Water Appropriations Act, Congress included language barring the Bureau of Reclamation from using funds for specific reclamations projects. In doing so, Congress used the word "hereafter" and explicitly indicated its intent to make the prohibition permanent by stating that it applied to "subsequent Energy and Water Development

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[101] GAO Principles at 2-90.

[102] Army Corps Civil Works funding is within the regular jurisdiction of Energy and Water Appropriations legislation. *See* U.S. House of Representatives Committee on Appropriations, Energy and Water Subcommittee Jurisdiction *available at* https://appropriations.house.gov/about/jurisdiction/energywater.htm (listing Army Corps of Engineers – Civil); U.S. Senate Committee on Appropriations, Energy and Water Development Subcommittee Jurisdiction *available at* https://www.appropriations.senate.gov/subcommittees/energy-and-water-development (listing Corps of Engineers–Civil).

[103] GAO Principles at 2-90.

[104] *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002).

Appropriations Acts."[105] In contrast, there is no such clear statement manifesting congressional intent that the Corps' use of the 1987 Manual extend permanently or indefinitely beyond fiscal year 1993. Accordingly, the Court rejects Tin Cup's argument that the provisions in the 1992 and 1993 Energy and Water Development Appropriations Acts prohibit the Corps from adopting the Alaska Supplement used in its wetlands delineation with respect to Tin Cup's application.

B. On the whole, the Alaska Supplement is not contradictory to the 1987 Manual.

Tin Cup argues that the regional supplements are "not even true supplements, for in many instances they contradict the 1987 Manual which they purport to supplement."[106] But this argument is unpersuasive. The 1987 Manual itself observes that certain wetland types will not always meet all of the wetland criteria defined in the 1987 Manual, and that "such wetland areas may warrant additional research to refine methods for their delineation."[107] Thus, the very language of the 1987 Manual lays the foundation for the regional supplements and their refinement of wetland delineation methods in non-traditional environments. Taking its cue from the 1987 Manual's language and the 1995 NRC study, the Alaska Supplement's stated intent is to "bring the [1987] Manual up to date with current knowledge and practice in the region and not to change the way wetlands are defined and identified. The procedures given in the [1987] Manual, in combination with wetland indicators and guidance provided in this supplement, can be used to identify wetlands for a number of purposes . . . ."[108] Even though there are five

[105] 106 Stat. at 1330.

[106] Dkt. 15 at 24.

[107] Dkt. 15-1 at 17.

[108] Dkt. 15-2 at 14.

discrete areas in which the Alaska Supplement takes precedent over the 1987 Manual,[109] the Alaska Supplement makes clear that it is designed to be used in conjunction with the 1987 Manual. The Court concludes that what Tin Cup characterizes as contradictions between the 1987 Manual and the Alaska Supplement do not frustrate the framework of the 1987 Manual, but instead refine the 1987 Manual to reflect the benefit of nearly two decades advancement in wetlands research and science.

Also without merit is Tin Cup's argument that the Corps' position in this lawsuit inconsistent with the agency's prior position with respect to the 1987 Manual.[110] Tin Cup accuses the Corps of engaging in an opportunistic, litigation-driven switch as regards to the applicability of the 1987 Manual.[111] The Court disagrees with Tin Cup's characterization of the Corps' position. Tin Cup quotes a 2008 decision from the Ninth Circuit, in which the Court states "[t]o identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual."[112] Although the Ninth Circuit issued its opinion in *Fairbanks North Star Borough* in 2008, as Tin Cup should be well aware,[113] the Plaintiff in that case filed suit in August 2006, over a year before the Corps had promulgated the final Alaska Supplement. Accordingly, the Corps could not have used a regional supplement that did not yet exist to delineate wetlands in that case, and the Court declines to construe the quoted language from *Fairbanks North Star*

[109] *See id.* at 15.

[110] Dkt. 23 at 9.

[111] *Id.*

[112] See *Fairbanks North Star Borough*, 543 F.3d at 590.

[113] The same attorneys that represented the Fairbanks North Star Borough represent Tin Cup in the present lawsuit.

Borough regarding the Corps use of the 1987 Manual to represent a changed position for litigation in this case.

C. Tin Cup's argument implies the invalidity of all regional supplements to the 1987 manual.

In arguing that the Corps' reliance on the Alaska Supplement is contrary to the appropriations bills passed by Congress in 1992 and 1993, Tin Cup's argument necessarily implies that the nine other regional supplements promulgated by the Corps are also invalid. The Corps began promulgating regional supplements to the 1987 Manual in 2006. These regional supplements have been utilized to guide wetlands delineations all over the country. Yet, after over a decade of use, in what the court can only guess is hundreds, if not thousands, of wetlands delineations, Tin Cup can point to no case where any of the ten regional supplements has been found to be invalid based on the provisions from the 1992 or 1993 Energy and Water Appropriations Acts by another court. This Court similarly declines Tin Cup's invitation to invalidate the Alaska Supplement on these grounds.

V. CONCLUSION

Based on the Administrative Record before the Court, the Court concludes that the Corps' use of the Alaska Supplement in conjunction with the the 1987 Manual to delineate wetlands on the Tin Cup parcel was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, Tin Cup's Motion for Summary Judgment at docket 15 is **DENIED** and the Army Corps Motion for Summary Judgment at docket 22 is **GRANTED**. Additionally, Plaintiff's Motion for Judicial Notice at docket 18 is **GRANTED**.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 26th day of September, 2017.

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