No. 17-35889

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIN CUP, LLC, an Alaska limited liability company,

Plaintiff – Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellee.

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

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for Tin Cup, LLC, certifies that Tin Cup, LLC, holds the property at issue in this case for Flowline Alaska, Inc. No publicly held corporation owns 10% or more of Flowline Alaska's stock. Tin Cup, as an LLC, does not issue stock.

DATED: February 15, 2018.

Respectfully submitted,

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STATEMENT OF JURISDICTION

In May, 2016, Plaintiff and Appellant Tin Cup, LLC (Tin Cup), brought suit pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706, in the United States District Court for the District of Alaska, invoking that court's federal question jurisdiction, 28 U.S.C. § 1331. On September 26, 2017, the district court entered an order denying Tin Cup's motion for summary judgment and granting Defendant and Appellee United States Army Corps of Engineers' (Corps) cross-motion for summary judgment. Vol. 1, Excerpts of Record (ER) 1–22. On October 4, 2017, the district court entered final judgment, and Tin Cup filed this timely appeal on October 31, 2017. 2 ER 23. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Energy and Water Development Appropriations Act of 1993, which provides in relevant part that "the Corps of Engineers will continue to use the Corps of Engineers 1987 [Wetlands Delineation] Manual . . . until a final wetlands delineation manual is adopted," binds the Corps beyond the pertinent fiscal year so as to require the Corps to

use the 1987 Manual until a final wetlands delineation manual is adopted.

2. Whether the Corps' use of the so-called Alaska Supplement to the 1987 Manual to delineate wetlands on Tin Cup's property, which resulted in the Corps' application of standards that contradict those within the 1987 Manual, complies with the 1993 Budget Act's requirement to use the 1987 Manual.

3. Whether the Corps' adoption of the Alaska Supplement—one of ten regional supplements none of which sets out nationally applicable standards for delineating wetlands—satisfies the 1993 Budget Act's "final wetlands delineation manual" clause.

STATUTORY AND REGULATORY PROVISIONS

The pertinent legal provisions are set forth in the addendum to this brief.

INTRODUCTION AND STATEMENT OF THE CASE

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*, 566 U.S. 120, 132 (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 . . . ."). *Cf. Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *4 (U.S. Jan. 22, 2018) (referring to the Clean Water Act's implementing regulations as "a complex administrative scheme"). The Corps and the United States Environmental Protection Agency (EPA), as the agencies that 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 the Corps, when delineating wetlands potentially subject to the Clean Water Act, "to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted." Energy and Water Development Appropriations Act of 1993, Title I, Pub. L. No. 102–377, 106 Stat. 1315, 1324 (1992) (1993 Budget Act or 1993 Act); *see also Wetlands Delineation Manual* (Jan. 1987) (1987 Manual), 2 ER 109–130.[1] Since the passage of the 1993 Budget Act, the Corps has never adopted a new, final manual.

Instead, the Corps has promulgated various regional "supplements" to the 1987 Manual. But rather than merely interpret the 1987 Manual,

[1] For the Court's convenience, the pages of the 1987 Manual cited in this brief are included in the excerpts of record. The entire 1987 Manual is available at http://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf.

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, this Court should reverse the judgment of the district court and direct that court to set aside the Corps' permitting decision. *Cf.* 5 U.S.C. § 706(2)(A) (requiring that agency action not in accordance with law be set aside).

I.

Congress passes the Clean Water Act, the reach of which rapidly expands through environmental litigation.

Under the Clean Water Act, the Corps has authority (with EPA) to regulate the placement of dredged and fill material into "navigable waters," *see* 33 U.S.C. § 1344(a), which are defined elsewhere in the Act simply 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) (2018); *id.* § 328.3(b) (2014) (defining "wetlands").

[2] In 2015, 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 subject to litigation across the country. *See Nat'l Ass'n of Mfrs.*, 2018 WL 491526. On February 6, 2018, the Corps and the EPA entered an order delaying the applicability of the regulations for two years. 83 Fed. Reg. 5200 (Feb. 6, 2018). 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 the first time, and therefore is not subject to them. Second, the new regulations do not change the relevant provision of the old regulations.

II.

The Corps adopts the 1987 Wetlands Manual.

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 Wetlands Delineation Manual. 1987 Manual, 2 ER 109–130. 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." 1987 Manual, 2 ER 116. To that end, the 1987 Manual directs that the delineation process be guided by three criteria—hydrophytic vegetation, hydric soils,

[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.").

and wetland hydrology. *See* 1987 Manual, 2 ER 120–121. Generally, all of these criteria must be satisfied for an area to be designated a wetland. *See id*. 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* 1987 Manual, 2 ER 125, 130. Thus, if an area's soil temperature never warms to the level set forth in the 1987 Manual, that area will by definition have no "growing season," and therefore will not satisfy the 1987 Manual's wetland hydrology criterion.

III.

Congressional response to Corps' abandonment of the 1987 Manual.

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* 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).

Members of the public took their concerns to Congress, objecting to the Corps' unannounced abandonment of the 1987 Manual. *See Hearings on H.R. 2427 Before a S. Subcomm. of the Comm. on Appropriations*, 102d Cong., S. Hrg. 102–208, Part 2, at 228 (1991) (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*. Part 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"). In particular, many complained 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).

In response, Congress passed several limiting provisions in the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102–104, 105 Stat. 510 (1991) (1992 Budget Act or 1992 Act). *See* Kalen, *supra*, at 912 n.205. With the 1992 Act, Congress initially took a short-term approach to the issue, prohibiting the use of funds to delineate wetlands under 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. The Act also required the Corps to use the 1987 Manual to delineate any wetlands in any ongoing enforcement actions or permit application reviews. *Id.*

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. After reviewing the impacts of the 1992 Budget Act, the Senate Appropriations Committee 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). This satisfaction was shared by the Corps officials, who 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, Part 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 "[g]etting the Corps back to the 1987 manual was sufficient. We intend to remain with the 1987 manual until all involved in this are able to reach some new conclusion." *Id*. at 405.

The positive consequences from the previous year led Congress to use a long-term approach in the 1993 Budget Act rather than the short-term approach it used in the 1992 Budget Act. Like its predecessor, the 1993 Budget Act prohibited using any funds to implement the 1989 Manual or any subsequent manual "adopted without notice and public comment." Title I, 106 Stat. at 1324. But the 1993 Budget Act went beyond the 1992 Budget Act by providing that "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." Title I, 106 Stat. at 1324. *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)).

IV.

The Corps' Regional Supplements to the 1987 Manual.

At the same time that it mandated continued use of the 1987 Manual, Congress appropriated money to EPA to contract with the National Research Council to analyze federal wetlands regulation. *See* H.R. Rep. No. 102–710, at 51 (1992); H.R. Conf. Rep. No. 102–902, at 41. Congress requested that the National Research Council make recommendations to EPA and Congress. H.R. Rep. No. 102–710, at 51. 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) (National Research Council Report), 2 ER 76. One suggestion was that the 1987 Manual's approach to the

"growing season" should be abandoned. In its place, the report recommended either jettisoning altogether the concept of the growing season as a constraint on wetland delineation, or making wetland delineation a function of region-specific criteria. National Research Council Report, 2 ER 87.

In response to the National Research Council report, the Corps declined to change its regulatory definition of "wetlands" and declined to issue a new final wetlands delineation manual. Instead, the Corps purportedly implemented the Council's recommendations through the issuance of regional "supplements" to the 1987 Manual. *See* 2 ER 233. (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 supersede 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.), 2 ER 95–108.[4] 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., 2 ER 106. Adoption of this standard—substantially less demanding than the 1987 Manual's—ostensibly allows the Corps to regulate permafrost. *See* 2 ER 233–234. *See also* 4 ER 310 (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)).

[4] The entire Alaska Supplement is available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/erdc-el_tr-07-24.pdf.

V.

Tin Cup's permit application.

Tin Cup owns an approximately 455-acre parcel in North Pole, Alaska. *See* 4 ER 331. 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. 4 ER 343. The company desires to relocate from its current leased location which the business has outgrown. 4 ER 343, 345–346. The chosen relocation site, bordered by a junk car dealer, a scrap metal dealer, and a concrete products supply company, 4 ER 344, will be used in part for the temporary storage of pipe and other manufactured material, 4 ER 334. The relocation project will entail the placement of a gravel pad, as well as the construction of several buildings and a railroad spur. 2 R 197. 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).

In 2004, Tin Cup obtained a Corps permit for the relocation project. *See* 4 ER 329–330. 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.[5] 4 ER 358. Thinking that the expiration date for its permit was fast approaching, Tin Cup requested a deadline extension from the Corps. *See* 4 ER 353. The Corps responded that the permit actually had expired in 2007, and therefore Tin Cup would be required to reapply for a permit. 4 ER 351. Tin Cup duly submitted a renewed permit application for essentially the same previously authorized project. *See* 4 ER 330. The Corps then commenced, as a first step in the reinitiated permit process, a review 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* 4 ER 296, constitute "waters of the United States." 4 ER 324, 4 ER 331.

In December, 2010, Tin Cup administratively appealed the Corps' jurisdictional determination. 4 ER 314. Among the grounds for appeal was the contention that the site's permafrost cannot qualify as a wetland

[5] The reason for the delay to the relocation project was the decision of several of Flowline Alaska's clients to postpone their own projects. 4 ER 358.

under the 1987 Manual, and thus cannot be "waters of the United States." 4 ER 320. 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* 4 ER 310. In October, 2012, the Corps issued Tin Cup an initial proffered permit. 3 ER 253. *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. 2 ER 217–218.

Tin Cup formally objected to the permit's conditions, in particular Special Conditions 3 and 4. *See* 2 ER 245. Among other points, Tin Cup argued that the permit impermissibly used the Alaska Supplement's

standards to assert jurisdiction over the property's permafrost. 2 ER 246–247. 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* 2 ER 233. 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. 2 ER 233–234.

In November, 2013, the Corps issued a final permit to Tin Cup, subject to the same special conditions. *See* 2 ER 190. In January, 2014, Tin Cup lodged another administrative appeal. 2 ER 169. The company again pressed, among other arguments, its contention that the permit decision should be set aside because it wrongfully asserts control over permafrost. 2 ER 182–185. In March, 2015, the Corps' appellate officer issued his decision affirming the permit. *See* 2 ER 132. 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.

2 ER 138–140. The appellate officer explained that the Corps is required to follow the Alaska Supplement, even when it conflicts with the 1987 Manual. 2 ER 139–140. Dissatisfied with the Corps' decision, Tin Cup commenced this action about a year later.

VI.

This litigation.

On May 2, 2016, Tin Cup filed a complaint seeking to set aside the Corps' permitting decision. Specifically, Tin Cup alleged that the Corps' assertion of jurisdiction over the permafrost on its property was arbitrary and capricious, and contrary to law because the decision was not based on the standards for delineating wetlands set forth in the Corps' 1987 Manual. After cross-motions for summary judgment were filed, the court entered judgment in favor the Corps and affirmed the Corps' permitting decision. The district court held that the 1993 Budget Act only applied to fiscal year 1993 and, alternatively, that the Alaska Supplement is not contradictory to the 1987 Manual. 1 ER 20–22.[6] Tin Cup thereafter filed this timely appeal.

[6] The order also granted Tin Cup's unopposed motion for judicial notice, which was filed concurrently with its motion for summary judgment. 1 ER 22.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the district court and set aside the Corps' permitting decision for Tin Cup's property. In making the determination that it has jurisdiction over about 200 acres of permafrost on Tin Cup's property, the Corps did not use the standards set forth in the Corps' 1987 Wetlands Delineation Manual. 2 ER 233–234. Instead it used the standards set forth in the so-called Alaska Supplement to the 1987 Manual. *Id.* The use of the Alaska Supplement to delineate wetlands on Tin Cup's property was not in accordance with law.

The 1993 Budget Act provides that the "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." Title I, 106 Stat. at 1324. This provision clearly binds the Corps beyond fiscal year 1993, and requires the agency to use the 1987 Manual to delineate wetlands, until it adopts a new, final wetlands delineation manual. The Corps did not follow this requirement in delineating the wetlands on Tin Cup's property, because it used neither the 1987 Manual nor a final manual adopted since the 1993 Budget Act.

The so-called Alaska Supplement is not truly a supplement to the 1987 Manual, rather it is a different document altogether. The Alaska Supplement sets out contradictory standards that cannot be reconciled with the standards contained in the 1987 Manual. *See, e.g.*, 2 ER 139–140. Even the Corps' review officers admitted that the standards are different, and that the Corps elected to use the Alaska Supplement in lieu of the 1987 Manual. *Id.*; 4 ER 302; 4 ER 310. Thus, the Corps did not "use the 1987 Manual" in this case.

Because the Alaska Supplement is not the 1987 Manual, the Corps can rely on it only if it qualifies as a "final wetlands delineation manual" within the meaning of the 1993 Budget Act. It does not for two reasons. First, the Alaska Supplement is not a "wetlands delineation manual" because it does not set out nationwide standards for delineating wetlands, as Congress intended when it passed the 1993 Budget Act. *See* S. Rep. No. 102–80, at 54–55. Second, the Alaska Supplement is not "final" because the Corps has not followed the proper procedures for finalizing the adoption of a rule.

As a result, the Corps was required to use the standards set forth in the 1987 Manual when it delineated wetlands on Tin Cup's property. Had it followed those standards, the Corps would not have been able to exercise jurisdiction over the approximately 200 acres of permafrost on the Tin Cup property. Thus, this Court should reverse the judgment of the district court and set aside the Corps' permitting decision.

STANDARD OF REVIEW

This Court reviews a district court's grant or denial of summary judgment de novo. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1065 (9th Cir. 2004). De novo "review is independent, with no deference given to the trial court's conclusion." *In re Deitz*, 760 F.3d 1038, 1043 (9th Cir. 2014). Under the Administrative Procedure Act, a court must set aside an agency decision if it is, among other things, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

ARGUMENT

I.

The 1993 Budget Act requires the Corps to delineate wetlands by using the 1987 Wetlands Manual until it adopts a new, final wetlands delineation manual.

A. The 1993 Budget Act binds the Corps beyond fiscal year 1993.

The 1993 Budget Act provides that "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." Title I, 106 Stat. at 1324. Although this language is contained in an appropriations bill, the text, structure, and legislative history of this provision demonstrate that Congress intended to bind the Corps beyond just fiscal year 1993.

There are no "magic words" that Congress must use to ensure that provisions within an appropriations bill will remain in effect after the appropriations year expires. Rather, what suffices are words of "futurity." *See Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 n.19 (9th Cir. 2005) (noting the requirement of "a clear statement of 'futurity'"); *see also United States v. Vulte*, 233 U.S. 509, 514 (1914)

(requiring "words of prospective extension" rather than "temporary operation"). The words "will" and "until" are words of futurity that clearly indicate that Congress intended that the Corps use the 1987 Manual beyond fiscal year 1993.

The word "will" directs the Corps to continue to use the 1987 Manual into the future. *See* Merriam-Webster Dictionary 603 (Home and Office Ed., 1995) (defining "will" to mean "used as an auxiliary verb to express . . . simple futurity"); *Standard All. Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 819–20 (6th Cir. 1978) ("Since all contracts contain future promises, *words of futurity such as 'will'* are common." (emphasis added)). The word "until" sets the time for what point, in the future, the requirement to use the 1987 Manual ends. *See* Merriam-Webster Dictionary, *supra*, 570 (defining "until" as "up to the time that"). The requirement to use the 1987 Manual ends not when fiscal year 1993 is over, but when "a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324.

If Congress intended to require the Corps to use the 1987 Manual only for fiscal year 1993, then it did not need to include this language. The preceding provision already limited the Corps' action in fiscal year

1993, preventing the agency from using "the funds in this Act" to delineate wetlands under the manual "that was adopted in January 1989 or any subsequent manual adopted without notice and public comment." *Id.* That means that when the Corps delineated wetlands in fiscal year 1993, it had to use the 1987 Manual. An interpretation that also places a one-year time-limit on the requirement to use the 1987 Manual "until a final wetlands delineation manual is adopted" renders the latter provision superfluous. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) ("one of the most basic interpretive canons" is that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (citation omitted)).

This is confirmed by comparing the 1993 Act to the previous year's budget act. *Compare* Title I, 106 Stat. at 1324, *with* 105 Stat. at 518; *see Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 227 (1st Cir. 2003) ("[I]n the course of interpreting appropriations bills, courts may compare enactments in one year to corresponding enactments in other years in order to discern congressional intent."). The 1992 Budget Act simply prohibited the Corps from using "the funds in this Act" to delineate

wetlands under the manual "that was adopted in January 1989 (1989 Manual) or any subsequent manual not adopted in accordance with the requirements for notice and public comment." *See* 105 Stat. at 518. The 1993 Act has similar language, but also includes the additional requirement that the Corps use the 1987 Manual until a final wetlands delineation manual is adopted. *See* Title I, 106 Stat. at 1324. Interpreting the latter requirement naturally, to extend beyond fiscal year 1993, ensures that it has meaning separate from the preceding provision.

The structure of the 1993 Act provides further proof that the requirement to use the 1987 Manual extends beyond fiscal year 1993. The 1987 Manual provision appears as a separate paragraph from the preceding, appropriations-dependent provision, suggesting that the two provisions are independent. *See* Title I, 106 Stat. at 1324. This arrangement differs from other parts of the 1993 Act, where Congress restricted the use of funds across different sentences by using "*Provided*" or "*Provided further*" with no paragraph break. *See, e.g.*, *id.* at 1323–24.[7] If Congress had intended for the 1987 Manual provision to apply only to

[7] In fact, many of the appropriation-dependent sections do not even contain separate sentences. *See, e.g.*, Title I, 106 Stat. at 1323–24. The words "*Provided*" or "*Provided further*" follow colons, not periods. *Id.*

fiscal year 1993, it would have used, based on its practice in other parts of the 1993 Budget Act, the words "*Provided*" or "*Provided further*" and would have included the provision in the same paragraph as the preceding provision.

The legislative history also supports the natural reading of the 1987 Manual provision. The Senate Appropriations Committee Report for the 1993 Budget Act provides "that these Corps guidelines [*i.e.*, those contained with the 1987 Manual] should continue to be used until a subsequent delineation manual is finally adopted in accordance with the requirements for notice and public comment of the Administrative Procedure Act." S. Rep. No. 102–344, at 56. This requirement arose in part because of the Corps' testimony before the Senate Appropriations subcommittee. *See Hearings before the H.R. Subcomm. on Energy & Water Development of the Comm. On Appropriations, on Energy & Water Development Appropriations for 1993*, 102d Cong. (1992). The Corps itself understood that the best course of action would be to use the 1987 Manual to delineate wetlands unless and until it adopted a new, final manual. *Id.* Part 1, at 57 (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.").[8]

The meaning of the 1993 Budget Act is clear. The text, structure, and legislative history confirm that the 1993 Act requires the Corps to use the 1987 Manual, until a final wetlands delineation manual is adopted. The district court erred in concluding otherwise. This Court should correct that error and hold that 1993 Budget Act requires the Corps to delineate wetlands using the 1987 Manual until the agency adopts a new, final wetlands delineation manual.

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[8] Since the passage of the 1993 Budget Act, both the Corps and the courts have understood the Act to have a 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.").

B. The Corps' interpretation of the 1993 Budget Act does not qualify for *Chevron* deference.

When interpreting the 1993 Budget Act, this Court should not defer to the Corps' interpretation of the Act. Below, the district court deferred to the agency's interpretation of the 1993 Act pursuant to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The district court erred because *Chevron* is irrelevant to this case. *Chevron* deference does not apply to the interpretation of a statute that the agency itself does not administer or to an interpretation that the agency advances for the first time in litigation. *See Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016) (before applying *Chevron* deference, the Court asks "whether the *Chevron* framework applies at all"). Further, even if *Chevron* applied in this case, the district court still erred in deferring to the Corps because the intent of Congress in passing the 1993 Budget Act is clear. *Chevron,* 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter . . . ."). This Court should avoid making the same mistakes as the district court, and afford no deference to the Corps' interpretation of the 1993 Budget Act.

1. The *Chevron* framework does not apply to the Corps' interpretation of the 1993 Budget Act.

Under the *Chevron* two-step framework, a court, when interpreting a statute, asks first whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 842–43. This framework is based on the assumption that if Congress "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[9] *Id.* at 843–44. Thus, critical to the question of whether a court should apply *Chevron* deference is whether the statute at issue is one that the agency itself administers. *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."). "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering . . . ." *Ass'n of Civilian Techs., Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000).

[9] Increasingly, judges and scholars have called into question this and other justifications for applying *Chevron* deference. *See, e.g., Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

It is implausible that Congress intended the Corps to "administer" the 1993 Budget Act. The 1987 Manual provision 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. And, unlike statutes that the Corps actually administers, the 1993 Budget Act does not grant authority to the Corps to prescribe rules and regulations interpreting the Act. *Cf. Oregon Rest & Lodging Ass'n v. Perez*, 816 F.3d at 1086 n.3 (apply *Chevron* in part because "[i]n 1974, Congress granted the Secretary of Labor the authority to 'prescribe necessary rules, regulations, and orders with regard to the [1974] amendments' to the FLSA"); *Ass'n of Civilian Techs.*, 200 F.3d at 592 ("the FLRA is not charged with administering the DOD Appropriations Act").

Moreover, that the Corps' interpretation arose in litigation is further reason why *Chevron* deference is unwarranted. "[W]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). The amount of deference a court gives to an agency interpretation of a statute differs significantly

"from great respect at one end . . . to near indifference at the other . . . ." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted). On the "indifference" end of the spectrum are instances—such as here—where an agency presents its interpretation for the first time in litigation. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212–13 (1988). Prior to this litigation, the Corps interpreted the 1993 Budget Act to require the use of the 1987 Manual. *See* 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* 3 (Aug. 2002), 2 ER 41 ("Since [August of 1991], use of the 1987 Corps manual has been mandatory in the Section 404 permitting program."); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 590 (9th Cir. 2008) ("To identify wetlands . . . , the Corps uses its 1987 Wetlands Delineation Manual . . . ." (citing the 1993 Budget Act)). The Corps now advances a new interpretation, but it has not promulgated any rules pursuant to the 1993 Budget Act. Rather, the Corps' new interpretation was first asserted in defense of Tin Cup's challenge to its permitting decision. Thus, this is not a case to apply

Chevron deference.[10] *Cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154 (2012) (deference is not warranted when an agency interpretation is principally a litigation position or post hoc rationalization).

2. Even if *Chevron* applies, the analysis ends at *Chevron* step one.

Even if *Chevron* applied to the Corps' interpretation of the 1993 Budget Act, the analysis should end at *Chevron* step one. When determining whether a statutory provision is ambiguous, courts apply the normal tools of statutory construction. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815 (9th Cir. 2016). *Chevron* step two only applies if the court is unable to discern congressional intent after engaging in statutory analysis. As demonstrated above, the intent of Congress in passing the 1993 Budget Act is clear. *See* Section I–A, *supra*.

[10] That no special agency expertise is necessary to interpret the 1993 Budget Act underscores *Chevron*'s inappositeness. *Cf. Barnhart v. Walton*, 535 U.S. at 222 ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens . . . .").

The district court, however, believed that the provision of the 1993 Budget Act at issue is ambiguous. The court specifically focused on the lack of the word "hereafter" in the provision, concluding that it does not contain words of futurity. 1 ER, 17, 19. The court's emphasis on the absence of the term "hereafter" is misplaced. "Hereafter" is not the only word of futurity; "will" is a word of futurity as well. *See* Merriam-Webster Dictionary, *supra*, 603 (defining "will" to mean "used as an auxiliary verb to express . . . simple futurity"). *Cf.* U.S. Gov't Accountability Office, Office of the Gen. Counsel, *Principles of Federal Appropriations Law* 2–87 (4th ed. 2016) (Red Book) ("Words of futurity other than 'hereafter' have also been deemed sufficient" to bind an agency beyond the fiscal year of an appropriations act.).

Although it is true that Congress used the word "hereafter" in other parts of the 1993 Budget Act, the use of the term in the 1987 Manual provision would have been inappropriate. "Hereafter" indicates an *indefinite* restriction or requirement. Merriam-Webster Dictionary, *supra*, 242 (defining "hereafter" as "after this in sequence or in time" and "in some future time or state"). Congress, however, did not intend to *permanently* require the Corps to use the 1987 Manual, but rather only

until such time as "a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324. If "hereafter" were the only word that Congress could use to bind an agency after an appropriations year ends, then Congress could never enact provisions that bind an agency for a set period of time independent of the fiscal year. *Cf.* Red Book, *supra*, at 2–87 ("[A]n appropriations provision requiring an agency action 'not later than one year' after enactment of the appropriations act, which would occur after the end of the fiscal year, is permanent because that prospective language indicates an intention that the provision survive past the end of the fiscal year."); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991) ("Had Congress intended to keep the restrictions of section 314 in place more than a year at a time, it could have so provided . . . ."). Therefore, the absence of the word "hereafter" does not make the 1987 Manual provision ambiguous.

There is, in short, no ambiguity in the 1993 Budget Act. The text, structure, and history of the Act's 1987 Manual provision confirm that Congress intended to bind the Corps beyond fiscal year 1993. Courts, as well as agencies, "must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842–43. Accordingly, this Court should

hold that the Corps is required to use the 1987 Manual to delineate wetlands until a new, final manual is adopted.

II.

The Corps violated the requirement of the 1993 Budget Act in delineating wetlands on Tin Cup's property because the agency did not use the 1987 Wetlands Manual or a new, final wetlands delineation manual.

The 1993 Budget Act required the use of the 1987 Manual to delineate wetlands on Tin Cup's property, unless the Corps had subsequently adopted a new, final wetlands delineation manual. Since the 1993 Budget Act's passage, however, 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* 2 ER 59–60. The Corps' use of the Alaska Supplement in this case is without justification, because the Supplement is neither a true supplement to the 1987 Manual, nor is it a new, final wetlands delineation manual.

A. The Alaska Supplement is not the 1987 Manual because the so-called supplement sets out contradictory standards for delineating wetlands.

As noted above, the 1987 Manual directs that the wetland delineation process be guided by three criteria—hydrophytic vegetation, hydric soils, and wetland hydrology. *See* 1987 Manual, 2 ER 120–121. Generally, all of these criteria must be satisfied for an area to be designated a wetland. *See id.*; *United States v. Banks*, 115 F.3d 916, 920 (11th Cir. 1997). 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, 2 ER 125. "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)." 1987 Manual, 2 ER 130. 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., 2 ER 106.

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." 2 ER 189 (citation omitted). 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* 2 ER 233. In contrast, under the Alaska Supplement's relaxed growing season standard, permafrost can satisfy the hydrology parameter. The Alaska Supplement's standards cannot be reconciled with those contained in the 1987 Manual and, thus, it is not actually a supplement. Instead, it is a completely new document that sets out new standards.

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. 4 ER 320. In response, the Corps' appellate officer concluded that the "Alaska Regional Supplement applies here . . . rather

than . . . the soil temperature criteria in the [1987] Manual." 4 ER 310 (footnote omitted); 4 ER 302 ("The 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." (emphasis added)).

Hence, the Corps determined that the 1987 Manual's standard "is essentially irrelevant to determining the growing season in Alaska." 4 ER 310. Similarly, in response to Tin Cup's objections to the initial proffered permit, the Corps stood by its position that the Alaska Supplement supersedes the 1987 Manual. *See* 2 ER 232. The Corps explained that the 1987 Manual's approach to the growing season is in the agency's view outdated, and that "a definition of growing season for the entire U.S. is not feasible or necessary."[11] 2 ER 233. Finally, in Tin Cup's last administrative appeal, the Corps' appellate officer made clear

[11] During the process of adopting the Alaska Supplement, however, the Corps acknowledged that, although taking more time, producing an updated national wetland delineation manual would be feasible. *See* 2 ER 58 (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").

the agency's view that its "responsibility in this case was to follow . . . the Regional Supplement in its appropriate context," not the 1987 Manual. 2 ER 156. 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.

That the standards are contradictory demonstrates that the Corps did not use the 1987 Manual when it delineated the wetlands on Tin Cup's property. If "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); *Banks*, 115 F.3d at 920 n.7 (observing that "the Corps' use of the 1989 version of this Manual . . . Congress ultimately banned").

The district court pointed to one sentence in reaching its determination that the Alaska Supplement does not contradict the 1987 Manual. The court stated that "[t]he 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.'" 1 ER 20 (citing 2 ER 118). The district court's reliance on this sentence was misplaced for two reasons.

First, the cited 1987 Manual provision provides as examples of such wetland types "prairie potholes" and "seasonal wetlands," not permafrost. 1987 Manual, 2 ER 118. The provision then directs the reader to Part IV, Section G, of the Manual, entitled "Problem Areas." *Id*. That section states that it "*is not intended to bring nonwetland areas having wetland indicators of two, but not all three, parameters into Section 404 jurisdiction*." 1987 Manual, 2 ER 127. Thus, what the Manual is contemplating are certain wetlands that do not *always* satisfy the three-parameter test under normal circumstances—*not* areas such as permafrost that can *never* satisfy that test under normal circumstances.

Second, the Corps' permitting decision was not based on that section of the 1987 Manual cited by the district court, but rather solely on the Alaska Supplement. 2 ER 156. The Corps, however, cannot rely upon such a post hoc rationalization to support its decision. *Fort Stewart*

Schs. v. Fed. Labor Relations Auth., 495 U.S. 641, 651–52 (1990) (An agency's decision "must be upheld on the rationale set forth by the agency itself."); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . .).

In sum, if the Corps were to apply the 1987 Manual's standards in reviewing Tin Cup's permit application, then the permafrost on the property would not qualify as wetlands. But the Corps did not use those standards and instead applied contradictory standards that resulted in the determination that the permafrost on Tin Cup's property qualifies as wetlands. Thus, the Corps' decision cannot be squared with the 1993 Budget Act's requirement to use the 1987 Manual.

B. The Alaska Supplement is not a new, final wetlands delineation manual within the meaning of the 1993 Budget Act.

Because the Alaska Supplement cannot be made consistent with the 1987 Manual, the only way that the Corps could apply the former would be if the Supplement constituted "a final wetlands delineation manual" under the 1993 Budget Act. The Alaska Supplement, however, is not such a manual because it is limited to region-specific standards, in

contrast to the 1993 Budget Act's requirement that the Corps adopt a *nationwide* standard for delineating wetlands. Further, even if the Alaska Supplement were a "wetlands delineation manual" under the 1993 Act, the Corps could not rely on it because the agency has failed to comply with all of the procedures required to adopt a final wetlands delineation manual.

1. The Alaska Supplement does not set out nationally applicable standards for delineating wetlands, as Congress intended when it passed the 1993 Budget Act.

The Corps purported to justify its use of the Alaska Supplement based on the National Research Council's 1995 report. The report advocated for the abandonment of the 1987 Manual's standards in favor of regional standards. 2 ER 233. The Corps accordingly concluded below 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. 2 ER 233–234. The Corps' conclusion does not comply with the law.

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 more regionalized approach. *See* National Research Council Report, 2 ER 76.[12] But that report is not the law.

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 until a final wetlands delineation manual is adopted. The 1993 Budget Act was passed in order 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. Thus, Congress required the Corps to 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"); 2 ER 40 (noting that "regional differences in

[12] However, the report also recommended that "[r]egional protocols should conform with national standards that ensure consistency among regions." National Research Council Report, 2 ER 89.

delineation methods . . . persisted" after the 1987 Manual's promulgation because originally "its use was not mandatory").

The National Resource Council Report's recommendations do not displace that requirement. "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*, at 2 ER 43. *See also id.* at 2 ER 48 (suggesting that "regulatory definitions of wetlands could be crafted, if desired, to reflect the wetland-protection priorities of each region"). Congress made the policy judgment, in the 1993 Budget Act, to require the Corps to adopt nationwide standards for delineating wetlands. Congress could have changed that policy after the National Resource Council issued the 1995 report, but it did not. As a result, the Corps is required to use nationally applicable standards for delineating wetlands.

Such standards are in fact compelled by the Corps' own regulation defining "wetlands" according to a single, nationally applicable standard. *See* 33 C.F.R. § 328.3(c)(4) (2018); *id.* § 328.3(b) (2014).[13] Hence, any

[13] Due to the delay in the applicability date of the most recent Corps' regulations, the 2014 version of the Code of Federal Regulations contains the current effective regulations. 83 Fed. Reg. 5200 (Feb. 6, 2018); 33

manual that purports to interpret (rather than amend) such a definition must itself be nationally applicable, as is the 1987 Manual. The supplements, however, provide inconsistent and contradicting *regional* standards and methods. *Compare, e.g.*, AK Suppl., 2 ER 106–107 (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), 2 ER 53–54 (the growing season may be ascertained by observance of biological activity of nonevergreen 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.

The use of regional "supplements," including the Alaska supplement, contradicts both the 1993 Budget Act and the Corps' own

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C.F.R. § 328.3(e) (2018). Regardless, the most recent regulations did not change the definition of "wetlands." 33 C.F.R. § 328.3(c)(4) (2018); *id.* § 328.3(b) (2014)

regulation defining wetlands. For these reasons, the Alaska Supplement cannot qualify as a "wetlands delineation manual" under the 1993 Budget Act, and thus the Corps remains subject to that Act's obligation to apply the standards set forth in the 1987 Manual. Because the Corps did not use those standards in delineating wetlands on Tin Cup's property, the Corps' permitting decision must be set aside.

2. The Alaska Supplement is not a "final" wetlands delineation manual.

Alternatively, even if the Alaska Supplement were a "wetlands delineation manual" under the 1993 Budget Act, the Corps still would have been prevented from using it to delineate wetlands on Tin Cup's property. The Act requires the Corps to adopt not simply a new wetland delineation manual, but a *final* such manual. Title I, 106 Stat. at 1324. On this point, the district court considered relevant the Corps' solicitation of comments prior to its issuance of the Alaska Supplement.[14] 1 ER 5. But, equally relevant are other requirements an agency must

[14] Although the Corps provided a truncated form of public notice in promulgating the Alaska Supplement, this notice was never published in the Federal Register. *See* 2 ER 59–60; 5 U.S.C. § 553(b) (under the APA, notice- and comment-rulemaking requires that "notice of proposed rule making . . . be published in the Federal Register").

follow to adopt a final rule, requirements that the Corps flouted in promulgating the Alaska Supplement.

In 1996, Congress passed the Congressional Review Act (CRA), which added a chapter to the Administrative Procedure Act that governs the promulgation of rules. 142 Cong. Rec. S3683 (daily ed. Apr. 18, 1996) (The CRA "adds a new chapter" to the Administrative Procedure Act.). Under the CRA, "[b]efore a rule can take effect," the agency must submit to Congress and the Comptroller General a report on the proposed rule. 5 U.S.C. § 801(a). Congress then has a set time-period to pass a joint resolution under streamlined procedures that, if signed by the President, will invalidate the rule. *Id.* § 802.

The CRA defines "rule" broadly, covering most rules of general applicability that affect the rights or obligations of non-agency parties. *Id.* § 804(3). *See id.* § 551(4). Under that definition, the Alaska Supplement certainty qualifies, as it is applicable to many landowners and businesses in Alaska. Yet the Corps never sent the rule to Congress or the Government Accountability Office, as required by the CRA.[15]

[15] The Government Accountability Office maintains a database with a record of all reports submitted to the office pursuant to the CRA. U.S. Government Accountability Office, *Congressional Review Act*,

Therefore, the Alaska Supplement cannot be a "final wetlands delineation manual," for purposes of the 1993 Budget Act, because it cannot go into effect until the Corps complies with the CRA.

In sum, even if the Alaska supplement could be considered a "wetlands delineation manual" within the meaning of the 1993 Budget Act, the Corps failed to follow the proper procedures in adopting it. Thus, the document is not a "final" wetlands delineation manual. The Corps' reliance on a non-final document to delineate wetlands is an additional reason why the Corps' action in this case violates the 1993 Budget Act.

CONCLUSION

To delineate wetlands on Tin Cup's property, the 1993 Budget Act required the Corps to use the standards in the 1987 Wetlands Delineation Manual. Instead, the Corps used the contradictory standards set forth in the Alaska Supplement. The Corps thus did not act in accordance with the law. Therefore, this Court should reverse the

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https://www.gao.gov/legal/congressional-review-act/overview (last visited Feb. 14, 2018).

judgment of the district court, and direct that court to set aside the Corps' permitting decision.

DATED: February 15, 2018.

Respectfully submitted,

JAMES S. BURLING
DAMIEN M. SCHIFF
JEFFREY W. McCOY

By s/ Jeffrey W. McCoy
JEFFREY W. McCOY

Attorneys for Appellant

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are aware of no related cases within the meaning of Circuit Rule 28–2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 32-1, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 10,175 words, **or**

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DATED: February 15, 2018.

s/ Jeffrey W. McCoy
JEFFREY W. McCOY

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2018, 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/ Jeffrey W. McCoy
JEFFREY W. McCOY

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Public Law 102-104
102d Congress

An Act

Aug. 17, 1991
[H.R. 2427]

Making appropriations for energy and water development for the fiscal year ending September 30, 1992, and for other purposes.

Energy and Water Development Appropriations Act, 1992.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1992, for energy and water development, and for other purposes, namely:

TITLE I

DEPARTMENT OF DEFENSE—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, beach erosion, and related purposes.

GENERAL INVESTIGATIONS

For expenses necessary for the collection and study of basic information pertaining to river and harbor, flood control, shore protection, and related projects, restudy of authorized projects, miscellaneous investigations, and when authorized by laws, surveys and detailed studies and plans and specifications of projects prior to construction, $194,427,000, to remain available until expended: *Provided,* That with funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to undertake the following items under General Investigations in fiscal year 1992 in the amounts specified:

Red River Waterway, Index, Arkansas, to Denison Dam, Texas, $500,000;
Casino Beach, Illinois, $375,000;
Chicago Shoreline, Illinois, $150,000;
Illinois Waterway Navigation Study, Illinois, $2,185,000;
McCook and Thornton Reservoirs, Illinois, $2,000,000;
Miami River Sediments, Florida, $200,000;
Lake George, Hobart, Indiana, $330,000;
Little Calumet River Basin (Cady Marsh Ditch), Indiana, $170,000;
St. Louis Harbor, Missouri and Illinois, $900,000;
Fort Fisher and Vicinity, North Carolina, $250,000;
Passaic River Mainstem, New Jersey, $7,150,000, of which $400,000 shall be used to initiate the General Design Memoran-

fiscal year 1991. This plan shall require a cost sharing agreement between local sponsors and the Secretary of the Interior based on the requirements of section 103 of the Water Resources Development Act of 1986, with the costs for foregone water and power sales to be computed on the basis of actual reductions in supply attributable to greater operations for flood control in that year.

REGULATORY PROGRAM

For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $86,000,000, to remain available until expended.

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.

In addition, regarding Corps of Engineers ongoing enforcement actions and permit application involving lands which the Corps or EPA has delineated as waters of the United States under the 1989 Manual, and which have not yet been completed on the date of enactment of this Act, the landowner or permit applicant shall have the option to elect a new delineation under the Corps 1987 Wetland Delineation Manual, or completion of the permit process or enforcement action based on the 1989 Manual delineation, unless the Corps of Engineers determines, after investigation and consultation with other appropriate parties, including the landowner or permit applicant, that the delineation would be substantially the same under either the 1987 or the 1989 Manual.

None of the funds in this Act shall be used to finalize or implement the proposed regulations to amend the fee structure for the Corps of Engineers regulatory program which were published in the Federal Register, Vol. 55, No. 197, Thursday, October 11, 1990.

REVOLVING FUND

None of the funds from the revolving fund established by the Act of July 27, 1953, chapter 245 (33 U.S.C. 576), may be used to reimburse other Department of Defense appropriations used to acquire Standard Army Automated Contracting System equipment for Corps of Engineers activities.

FLOOD CONTROL AND COASTAL EMERGENCIES

For expenses necessary for emergency flood control, hurricane, and shore protection activities, as authorized by section 5 of the Flood Control Act, approved August 18, 1941, as amended, $15,000,000, to remain available until expended.

GENERAL EXPENSES

For expenses necessary for general administration and related functions in the office of the Chief of Engineers and offices of the Division Engineers; activities of the Board of Engineers for Rivers and Harbors, the Coastal Engineering Research Board, the Engineer

Public Law 102-377
102d Congress

An Act

Making appropriations for energy and water development for the fiscal year ending September 30, 1993, and for other purposes.

Oct. 2, 1992
[H.R. 5373]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1993, for energy and water development, and for other purposes, namely:

Energy and Water Development Appropriations Act, 1993.

TITLE I

DEPARTMENT OF DEFENSE—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, beach erosion, and related purposes.

GENERAL INVESTIGATIONS

For expenses necessary for the collection and study of basic information pertaining to river and harbor, flood control, shore protection, and related projects, restudy of authorized projects, miscellaneous investigations, and when authorized by laws, surveys and detailed studies and plans and specifications of projects prior to construction, $175,780,000, to remain available until expended: *Provided,* That with funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to undertake the following items under General Investigations in fiscal year 1993 in the amounts specified:

Los Angeles County Drainage Area Water Conservation and Supply, California, $200,000;

Los Angeles River Watercourse Improvement, California, $300,000;

Rancho Palos Verdes, California, $400,000;

Miami River Sediments, Florida, $50,000;

Monroe County (Smathers Beach), Florida, $500,000;

Casino Beach, Illinois, $110,000;

Chicago Shoreline, Illinois, $600,000;

McCook and Thornton Reservoirs, Illinois, $3,500,000;

Lake George, Hobart, Indiana, $260,000;

Little Calumet River Basin (Cady Marsh Ditch), Indiana, $170,000;

Mississippi River, Vicinity of St. Louis, Missouri, $500,000;

Ste. Genevieve, Missouri, $750,000;
Passaic River Mainstem, New Jersey, $10,000,000; and
Red River Waterway, Shreveport, Louisiana, to Daingerfield, Texas, $2,800,000:

Provided further, That using $320,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the cost-shared feasibility study of the Calleguas Creek, California, project based on the reconnaissance phase analyses of full intensification benefits resulting from a change in cropping patterns to more intensive crops within the floodplain. The feasibility study will consider the agricultural benefits using both traditional and nontraditional methods, and will include an evaluation of the benefits associated with the environmental protection and restoration of Mugu Lagoon: *Provided further,* That using $200,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to conduct a cost-shared feasibility study for flood control at Norco Bluffs, California, based on flood related flows and channel migration which have caused bank destabilization and damaged private property and public utilities in the area: *Provided further,* That using $300,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to expand the study of long-term solutions to shoaling problems in Santa Cruz Harbor, California, by incorporating the study of erosion problems between the harbor and the easterly limit of the City of Capitola, particularly beach-fill type solutions which use sand imported from within or adjacent to the harbor: *Provided further,* That using $210,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to include the study of Alafia River as part of the Tampa Harbor, Alafia River and Big Bend, Florida, feasibility study: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is directed to undertake a study of a greenway corridor along the Ohio River in New Albany, Clarksville, and Jeffersonville, Indiana, using $125,000 of the funds appropriated under this heading in Public Law 101–101 for Jeffersonville, Indiana, $127,000 of the funds appropriated under this heading in Public Law 101–514, and $250,000 of the funds appropriated under this heading in Public Law 102–104: *Provided further,* That using $450,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the development of a comprehensive waterfront plan for the White River in central Indianapolis, Indiana: *Provided further,* That using $250,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to conduct a feasibility study of the Muddy River, Boston, Massachusetts: *Provided further,* That using $50,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to undertake feasibility phase studies for the Clinton River Spillway, Michigan, project: *Provided further,* That using $600,000 of the funds appropriated herein and $900,000 of the funds appropriated under this heading in Public Law 102–104, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue preconstruction engineering and design of the St. Louis Harbor, Missouri and Illinois, project: *Provided further,* That using $3,500,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of

Engineers, is directed to continue preconstruction engineering and design of the Raritan River Basin, Green Brook Sub-Basin, New Jersey, project in accordance with the design directives for the project contained in Public Law 100–202: *Provided further,* That using $440,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to review and evaluate the plan prepared by the City of Buffalo, New York, to relieve flooding and associated water quality problems in the north section of the city and to recommend other cost-effective alternatives to relieve the threat of flooding: *Provided further,* That using $150,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to undertake a reconnaissance study of the existing resources of the Black Fox and Oakland Spring wetland areas in Murfreesboro, Tennessee, and examine ways to maintain and exhibit the wetlands, including an environmental education facility: *Provided further,* That using $950,000 of the funds appropriated under this heading in Public Law 102–104, the Secretary of the Army, acting through the Chief of Engineers, is directed to complete preconstruction engineering and design for the Richmond Filtration Plant, Richmond, Virginia, project: *Provided further,* That using $250,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the study of the disposition of the current Walla Walla, Washington, District headquarters including preparation of the environmental assessment and design work associated with demolition of the building: *Provided further,* That using $2,800,000 of the funds appropriated herein, the Secretary of the Army is authorized, in partnership with the Department of Transportation, and in coordination with other Federal agencies, including the Department of Energy, to evaluate the results of completed research and development associated with an advanced high speed magnetic levitation transportation system and to prepare and present documents summarizing the research findings and supporting the resultant recommendations concerning the Federal role in advancing United States maglev technology: *Provided further,* That using $300,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to initate the feasibility phase of the study of the Devil's Lake Basin, North Dakota, and shall address the needs of the area for water management; stabilized lake levels, to include inlet and outlet controls; water supply; water quality; recreation; and enhancement and conservation of fish and wildlife: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is directed to utilize up to $100,000, within available funds, to initiate studies to determine the necessary remedial measures to restore the environmental integrity of the lake area and channel depths necessary for small recreational boating in the vicinity of Drakes Creek Park on Old Hictory Lake, Tennessee: *Provided further,* That using $500,000 of available funds, the Secretary of the Army, acting through the Chief of Engineers, is directed to initiate preconstruction engineering and design; and environmental studies for the Kaumalapau Harbor, Lanai, Hawaii, project: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers is directed to utilize up to $500,000, within available funds, to undertake a reconnaissance level study on flooding problems associated with the sanitary landfill on the Salt River Pima-Maricopa Indian Res-

the Chief of Engineers, is directed to undertake further construction aspects of the Bethel, Alaska, Bank Stabilization Project as authorized by Public Law 99–662 including but not limited to the installation of steel whalers and additional rock toe protection to the pipe pile, bulkheads and other areas vulnerable to collapse: *Provided further,* That no fully allocated funding policy shall apply to construction of the Bethel, Alaska, Bank Stabilization Project and to the greatest extent possible the work described herein should be compatible with the authorized project: *Provided further,* That using funds made available in this Act or any previous appropriations Act, the Secretary of the Army shall construct a project for streambank protection along 2.2 miles of the Tennessee River adjacent to Sequoyah Hills Park in Knoxville, Tennessee, at a total cost of $600,000, with an estimated first Federal cost of $450,000 and an estimated first non-Federal cost of $150,000: *Provided further,* That with $3,000,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is authorized and directed to excavate the St. George Harbor, Alaska, entrance to –20 MLLW in accordance with the cost-sharing provisions in Public Law 99–662: *Provided further,* That using $250,000 of funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to demolish and remove the India Point Railroad Bridge in the Seekonk River, Providence, Rhode Island as authorized by section 1166(c) of Public Law 99–662: *Provided further,* That with $600,000 of the funds appropriated herein, to remain available until expended, the Secretary of the Army, acting through the Chief of Engineers, to correct a design deficiency at the Falls Lake, North Carolina project, is authorized and directed to implement Plan 5 as described in the Design Memo Supplement dated November 1988, concurred in by the South Atlantic Division Engineer in March 1989, or any modifications to Plan 5 that would require raising the spillway only, or that minimize or eliminate the need for land acquisition by the Corps, provided such modifications are agreeable to the North Carolina Division of Water Resources and do not compromise the projected water supply levels, with cost sharing as prescribed in the referenced report for this design deficiency; and, in addition, $130,000,000, to remain available until expended, is hereby appropriated for construction of the Red River Waterway, Mississippi River to Shreveport, Louisiana, project, and the Secretary of the Army is directed to continue the second phase of construction of Locks and Dams 4 and 5; to continue construction of the Curtis and Eagle Bend, Phase I, Revetments in Pool 5 which were previously directed to be initiated in fiscal year 1992; to complete construction of the Carroll and Cupples Capouts, McDade, Moss, Sunny Point, and Eagle Bend, Phase II, Revetments in Pools 4 and 5 which were previously directed to be initiated; to award continuing contracts in fiscal year 1993 for construction of the following features of the Red River Waterway which are not to be considered fully funded: recreation facilities in Pools 4 and 5, Howard Capout, Westdale Capout, Piermont Capout, Coushatta flood damage repairs, and Twelvemile Bayou Bend Revetment adjacent to Wells Island Road.

FLOOD CONTROL, MISSISSIPPI RIVER AND TRIBUTARIES, ARKANSAS, ILLINOIS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, AND TENNESSEE

For expenses necessary for prosecuting work of flood control, and rescue work, repair, restoration, or maintenance of flood control projects threatened or destroyed by flood, as authorized by law (33 U.S.C. 702a, 702g–1), $351,182,000, to remain available until expended: *Provided,* That not less than $250,000 shall be available for bank stabilization measures as determined by the Chief of Engineers to be advisable for the control of bank erosion of streams in the Yazoo Basin, including the foothill area, and where necessary such measures shall complement similar works planned and constructed by the Soil Conservation Service and be limited to the areas of responsibility mutually agreeable to the District Engineer and the State Conservationist: *Provided further,* That the funds provided herein for operation and maintenance of Yazoo Basin Lakes shall be available for the maintenance of road and trail surfaces, alignments, widths, and drainage features: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is directed to use $1,000,000 of the funds appropriated herein to continue work on the Eastern Arkansas Region, Arkansas, project including the development and implementation of plans for one area to serve as a demonstration project.

OPERATION AND MAINTENANCE, GENERAL

For expenses necessary for the preservation, operation, maintenance, and care of existing river and harbor, flood control, and related works, including such sums as may be necessary for the maintenance of harbor channels provided by a State, municipality or other public agency, outside of harbor lines, and serving essential needs of general commerce and navigation; surveys and charting of northern and northwestern lakes and connecting waters; clearing and straightening channels; and removal of obstructions to navigation, $1,541,668,000, to remain available until expended, of which such sums as become available in the Harbor Maintenance Trust Fund, pursuant to Public Law 99–662, may be derived from that fund, and of which $16,000,000 shall be for construction, operation, and maintenance of outdoor recreation facilities, to be derived from the special account established by the Land and Water Conservation Act of 1965, as amended (16 U.S.C. 460l): *Provided,* That not to exceed $7,000,000 shall be available for obligation for national emergency preparedness programs: *Provided further,* That $2,285,000 of the funds appropriated herein shall be used by the Secretary of the Army, acting through the Chief of Engineers, to continue the development of recreational facilities at Hansen Dam, California: *Provided further,* That $2,000,000 of the funds appropriated herein, to remain available until expended, shall be used by the Secretary of the Army, acting through the Chief of Engineers, to continue the development of recreational facilities at Sepulveda Dam, California: *Provided further,* That using $2,000,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue the repair and rehabilitation of the Flint River, Michigan, flood control project: *Provided further,* That $40,000 of the funds appropriated herein shall be used by the Secretary of the Army, acting through the Chief of Engineers, to continue the project for removal

of silt and aquatic growth at Sauk Lake, Minnesota: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is directed to use up to $1,200,000 of available funds to undertake high priority recreational improvements at the Skiatook Lake, Oklahoma, project: *Provided further,* That using $1,500,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to continue work on measures needed to alleviate bank erosion and related problems associated with reservoir releases along the Missouri River below Fort Peck Dam, Montana, as authorized by section 33 of the Water Resources Development Act of 1988: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is authorized to operate and maintain at Federal expense the Passaic River flood warning system element of the Passaic River Mainstem Project, New Jersey, prior to construction of the project, and using $350,000 of the funds appropriated herein, the Secretary shall operate and maintain such element: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is directed to work with the United States Environmental Protection Agency to begin the immediate cleanup of the Ashtabula River, Ohio: *Provided further,* That using $600,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to update the project Master Plan for the Raystown Lake, Pennsylvania, project: *Provided further,* That using $1,000,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is authorized and directed to plan, design, and dredge an access channel and berthing area for the vessel NIAGARA at Erie Harbor, Pennsylvania, in an area known as the East Canal: *Provided further,* That the Secretary of the Army, acting through the Chief of Engineers, is authorized and directed to use up to $5,000,000 of available funds to undertake necessary maintenance of the Kentucky River Locks and Dams 5–14, Kentucky, prior to transfer of such facilities to the Commonwealth of Kentucky pursuant to the Memorandum of Understanding executed in 1985 concerning the Kentucky River Locks and Dams 5–14: *Provided further,* That using $1,000,000 of the funds appropriated herein, the Secretary of the Army, acting through the Chief of Engineers, is directed to construct and maintain bank stabilization measures along the west bank of the Calcasieu River Ship Channel in Louisiana from mile 11.5 through mile 15.5: *Provided further,* That the Secretary is directed during fiscal year 1993 to maintain a minimum conservation pool level of 475.6 at Wister Lake in Oklahoma.

REGULATORY PROGRAM

For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $86,000,000, to remain available until expended.

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.

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.

None of the funds in this Act shall be used to finalize or implement the proposed regulations to amend the fee structure for the Corps of Engineers regulatory program which were published in Federal Register, Vol. 55, No. 197, Thursday, October 11, 1990.

FLOOD CONTROL AND COASTAL EMERGENCIES

For expenses necessary for emergency flood control, hurricane, and shore protection activities, as authorized by section 5 of the Flood Control Act approved August 18, 1941, as amended, $10,000,000, to remain available until expended.

GENERAL EXPENSES

For expenses necessary for general administration and related functions in the office of the Chief of Engineers and offices of the Division Engineers; activities of the Board of Engineers for Rivers and Harbors, the Coastal Engineering Research Board, the Humphreys Engineer Center Support Activity, and the Water Resources Support Center, $142,000,000, to remain available until expended.

Funds are provided for the management and direction of the United States Army Corps of Engineers Civil Works Program, except that such funds shall not be used to close any district office of the Corps of Engineers. To further a more efficient headquarters and division office structure, the Secretary may transfer not to exceed $7,000,000 from other appropriations under this title to be merged with, and remain available for the same time period as, this appropriation: *Provided,* That this appropriation shall not be increased by more than 5 per centum by any such transfers, and the Committees on Appropriations of the House and Senate shall be promptly advised of such proposed transfers.

ADMINISTRATIVE PROVISIONS

Appropriations in this title or appropriations made in this title in subsequent Energy and Water Development Appropriations Acts shall hereafter be available for expenses of attendance by military personnel at meetings in the manner authorized by section 4110 of title 5, United States Code, uniforms, and allowances therefor, as authorized by law (5 U.S.C. 5901–5902), and for printing, either during a recess or session of Congress, of survey reports authorized by law, and such survey reports as may be printed during a recess of Congress shall be printed, with illustrations, as documents of the next succeeding session of Congress. Appropriations in this title shall be available for official reception and representation expenses (not to exceed $5,000); and during the current fiscal year the revolving fund, Corps of Engineers, shall be available for purchase (not to exceed 100 for replacement only) and hire of passenger motor vehicles. 33 USC 540a.

GENERAL PROVISIONS

CORPS OF ENGINEERS—CIVIL

SEC. 101. Public Law 101–302 (104 Stat. 213) is amended by striking the words "to meet the present emergency needs" under

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1344

§ 1344. Permits for dredged or fill material

Currentness

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material--

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which--

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State--

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such

written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E), or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton [1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 404, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 884; amended Pub.L. 95-217, § 67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub.L. 100-4, Title III, § 313(d), Feb. 4, 1987, 101 Stat. 45.)

Notes of Decisions (487)

Footnotes

1 So in original. Probably should be "action".

33 U.S.C.A. § 1344, 33 USCA § 1344

Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1362

§ 1362. Definitions

Effective: October 1, 2014
Currentness

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters

(A) In general

The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions

The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material

(A) In general

The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions

The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator

The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production

The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel

(A) In general

The term "recreational vessel" means any vessel that is--

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion

The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works

The term "treatment works" has the meaning given the term in section 1292 of this title.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 502, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 886; amended Pub.L. 95-217, § 33(b), Dec. 27, 1977, 91 Stat. 1577; Pub.L. 100-4, Title V, §§ 502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub.L. 100-688, Title III, § 3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 104-106, Div. A, Title III, § 325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub.L. 106-284, § 5, Oct. 10, 2000, 114 Stat. 875; Pub.L. 109-58, Title III, § 323, Aug. 8, 2005, 119 Stat. 694; Pub.L. 110-288, § 3, July 29, 2008, 122 Stat. 2650; Pub.L. 113-121, Title V, § 5012(b), June 10, 2014, 128 Stat. 1328.)

Notes of Decisions (205)

33 U.S.C.A. § 1362, 33 USCA § 1362
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 551

§ 551. Definitions

Effective: January 4, 2011
Currentness

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; [1]

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

Notes of Decisions (252)

Footnotes

1 See References in Text note set out under this section.

5 U.S.C.A. § 551, 5 USCA § 551

Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 8. Congressional Review of Agency Rulemaking

5 U.S.C.A. § 801

§ 801. Congressional review

Effective: March 29, 1996
Currentness

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing--

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress--

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of--

(A) the later of the date occurring 60 days after the date on which--

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date--

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is--

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring--

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though--

(i) such rule were published in the Federal Register (as a rule that shall take effect) on--

(I) in the case of the Senate, the 15th session day, or

(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though--

(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

CREDIT(S)

(Added Pub.L. 104-121, Title II, § 251, Mar. 29, 1996, 110 Stat. 868.)

Notes of Decisions (4)

5 U.S.C.A. § 801, 5 USCA § 801
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 8. Congressional Review of Agency Rulemaking

5 U.S.C.A. § 802

§ 802. Congressional disapproval procedure

Effective: March 29, 1996
Currentness

(a) For purposes of this section, the term "joint resolution" means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term "submission or publication date" means the later of the date on which--

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the rule is published in the Federal Register, if so published.

(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule--

(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

(1) The joint resolution of the other House shall not be referred to a committee.

(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution--

(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(B) the vote on final passage shall be on the joint resolution of the other House.

(g) This section is enacted by Congress--

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

CREDIT(S)

(Added Pub.L. 104-121, Title II, § 251, Mar. 29, 1996, 110 Stat. 871.)

Notes of Decisions (1)

5 U.S.C.A. § 802, 5 USCA § 802
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 8. Congressional Review of Agency Rulemaking

5 U.S.C.A. § 804

§ 804. Definitions

Effective: March 29, 1996
Currentness

For purposes of this chapter--

(1) The term "Federal agency" means any agency as that term is defined in section 551(1).

(2) The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in--

(A) an annual effect on the economy of $100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

(3) The term "rule" has the meaning given such term in section 551, except that such term does not include--

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

(B) any rule relating to agency management or personnel; or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

CREDIT(S)

(Added Pub.L. 104-121, Title II, § 251, Mar. 29, 1996, 110 Stat. 873.)

5 U.S.C.A. § 804, 5 USCA § 804
Current through P.L. 115-90. Also includes P.L. 115-92 to 115-117, 115-119, and 115-122. Title 26 current through 115-122.

End of Document

Code of Federal Regulations
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 328. Definition of Waters of the United States (Refs & Annos)

33 C.F.R. § 328.3

§ 328.3 Definitions.

Effective: February 6, 2018
Currentness

For the purpose of this regulation these terms are defined as follows:

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100–year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100–year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) Definitions. In this section, the following definitions apply:

(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs

(a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) Neighboring. The term neighboring means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100–year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100–year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) Wetlands. The term wetlands means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when

they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(d) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(e) Applicability date. Paragraphs (a) through (c) of this section are applicable beginning on February 6, 2020.

(f) [Redesignated as subsection (d) by 80 FR 37104]

Note: Section 2(a) of Exec. Order No. 13778 provides: "The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,' " 80 Fed. Reg. 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."

Credits

[58 FR 45036, Aug. 25, 1993; 80 FR 37104, June 29, 2015; 83 FR 5208, Feb. 6, 2018]

SOURCE: 51 FR 41250, Nov. 13, 1986; 80 FR 37104, June 29, 2015, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Notes of Decisions (209)

Current through February 8, 2018; 83 FR 5572.

End of Document

Code of Federal Regulations
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 328. Definition of Waters of the United States (Refs & Annos)

This section has been updated. Click here for the updated version.

33 C.F.R. § 328.3

§ 328.3 Definitions.

Effective: [See Text Amendments] to August 27, 2015

<For statutes affecting validity, see: 33 USCA § 1344.>

<Text of section effective until Aug. 28, 2015.>

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

(d) The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Credits
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