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 REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a purely legal question about whether the Army Corps of Engineers (Corps) followed the proper procedures in delineating wetlands on Tin Cup's property. In its answering brief, the Corps argues that reversing the district court would force the Corps to follow outdated standards for delineating wetlands. Ans. Br. at 26. That is simply not true. The Corps is free to update its wetlands standards, so long as it follows Congress' directive. The only thing preventing the Corps from applying new standards for delineating wetlands is the Corps' unwillingness to perform the proper, legally required process for adopting a new wetlands delineation manual.

In the Energy and Water Development Appropriations Act of 1993 (1993 Act), Congress directed the Corps "to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted." Title I, Pub. L. No. 102–377, 106 Stat. 1315, 1324 (1992). The Corps argues that that this language merely reflects Congress' understanding of what the Corps would do in fiscal year 1993, not a directive to the Corps. Ans. Br. at 19–20. But the Corps' argument ignores several canons of statutory construction, including the canon that Congress does not

needlessly include language in a statute. *Corley v. United States*, 556 U.S. 303, 314 (2009).

The 1993 Act clearly directs the use of one manual, until the Corps adopts a new manual. Title I, 106 Stat. at 1324. The 1987 Manual sets out nationally applicable standards for delineating wetlands and so too must the new manual, because any manual must still interpret the same nationally applicable regulatory definition of "wetland." 33 C.F.R. § 328.3(c)(4) (2018). Thus, the Corps is free to adopt new nationally applicable standards to replace those of the 1987 Manual, so long as the agency does so through "a final wetlands delineation manual." Title I, 106 Stat. at 1324.

The Corps is also free, even now, to supplement the 1987 Manual, and to use regional proxies to satisfy the 1987 Manual's standards. But in the absence of a new final wetlands delineation manual, the agency may not adopt region-specific standards, or use so-called "proxies" that in reality bear no relationship to the standard they are meant to establish. A regional supplement must actually supplement the 1987 Manual, and any regional proxies must be reasonably related to the national standards. That is not the case with the Alaska Supplement,

which replaces the nationally applicable standards with new, contradictory standards that bear no relation to the 1987 Manual, but instead effectively create new and different standards. *See* 4 ER 310 (Corps review officer admitting that the standards of the Alaska Supplement essentially replace the standards of the 1987 Manual).

The Corps' unlawful use of the Alaska Supplement in place of the 1987 Manual prejudiced Tin Cup. Tin Cup does not dispute that a small portion of its property contain wetlands, even under the 1987 Manual. *See* Op. Br. at 17. But the amount of "waters of the United States" on its property, and the scope of the corresponding mitigation requirements, was increased by the Corps' use of the Alaska Supplement. This is confirmed by statements of the Corps' own review officers. 2 ER 232; 4 ER 296; 4 ER 310.

Accordingly, this Court should reverse the judgment of the district court and vacate the permitting decision.

ARGUMENT

I.

The language of the 1993 Act is clear, and the Corps' interpretation is inconsistent with several canons of statutory interpretation.

The 1993 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. To the Corps, this language is merely a statement of Congress' understanding of what the Corps would voluntarily do in fiscal year 1993. Ans. Br. at 19–20. At most, the Corps believes that any restriction in this language is limited to fiscal year 1993. But the Corps' interpretation renders this language superfluous.

"[O]ne 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." *Corley*, 556 U.S. at 314 (quotations and citation omitted). If the Corps' interpretation is correct, then Congress did not need to include the "continue to use" language in the Act. All of the meaning that the Corps gives to that language is achieved by the preceding paragraph, which provides:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.

Title I, 106 Stat. at 1324. This provision prevents the Corps from using the 1989 Manual, or a subsequent manual adopted without notice and comment, in fiscal year 1993. As a result, during fiscal year 1993, the Corps had to use the previously adopted manual—the 1987 Manual—to delineate wetlands, unless it adopted a new manual (as no other final manual was then in existence). If Congress only wanted to direct the Corps' actions for fiscal year 1993, then it achieved that purpose with this paragraph. But Congress also wanted to bind the Corps beyond fiscal year 1993, so it added clear language expressing that intent in the subsequent paragraph. Indeed, that Congress preceded the critical clause with "Furthermore" confirms that Congress considered the material before that word to be distinct from that which followed it. *See* Merriam-Webster Dictionary 213 (Home and Office Ed., 1995) (defining "furthermore" as "in addition to what precedes").

The Corps, however, ignores the 1993 Act's plain language and instead focuses much of its argument on the absence of the word

"hereafter." Ans. Br. at 17. But "hereafter" is not the only word of futurity. U.S. Gov't Accountability Office, Office of the Gen. Counsel, *Principles of Federal Appropriations Law* 2–87 (4th ed. 2016) (Red Book) "Hereafter" has a very specific meaning, and does not indicate when the obligation ends. *See* Merriam-Webster Dictionary, *supra*, 242. Congress, however, did not want to necessarily require the use of the 1987 Manual forever, it only wanted to require its use until a new manual was adopted. To achieve that purpose, Congress used "until," which is also a word of futurity.

Indeed, Congress used "until" in other parts of the 1993 Act to indicate the effect of certain provisions beyond the fiscal year. In fact, earlier in the same portion of the Act, Congress used "until" to indicate futurity. Title I, 106 Stat. at 1324. Congress appropriated "[f]or expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $86,000,000, to remain available *until expended*." *Id.* (emphasis added). The use of the word "until" allows the funds to be used beyond the fiscal year. Red Book at 2-9 ("A no-year appropriation is usually identified by appropriation language such as 'to remain available until expended.'"). The Senate Appropriations Committee has explicitly

recognized the straightforward meaning of "until" and that it is a clear statement of futurity when used in an appropriations bill. H.R. Rep. No. 88–1040, at 55 (1963) (the "most common technique" to make funds "available for longer than a one-year period" is to add the words "'to remain available until expended'"); Red Book at 2-67 (quoting H.R. Rep. No. 88–1040). Thus, with the 1993 Act Congress intended the Corps to use the 1987 Manual beyond fiscal year 1993 "until a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324.

The only remaining argument the Corps has against the plain language of the 1993 Act is that Congress stated that the Corps "will," not "shall," use the 1987 Manual. Ans. Br. at 18–19. Again, a basic canon of statutory construction explains Congress' use of the word "will" rather than "shall." "It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (quotations and citations omitted). In the 1993 Act, as in most appropriations acts, the words "shall" and "is directed to" are used in connection with the use of funds. *See, e.g.*, Title I, 106 Stat. at 1315, 1318; Red Book at 1-7 ("Whenever the Congress specifies the manner in which

a Federal entity *shall be funded* and makes such funds available for obligation and expenditure, that constitutes an appropriation . . . ." (emphasis added) (quotation omitted)).

On the other hand, "will" is a clear word of futurity. Merriam-Webster Dictionary, *supra*, 603 (defining "will" as "used as an auxiliary verb to express . . . simple futurity"). And, contrary to the Corps' contention, the word "will" can reflect a mandatory obligation. *See* Black's Law Dictionary 1771 (Revised 4th Ed. 1968) (Defining "will" as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must.'"). The other examples of "will" in the 1993 Act reinforce this.

The feasibility study section contradicts the Corps' argument that the word "will" does not reflect a command. *See* Ans. Br. at 20. In that section, the Chief of Engineers "is directed to" use the appropriated funds to continue the feasibility study. Title I, 106 Stat. at 1316. The next sentence then specifies that "[t]he feasibility study will consider the agricultural benefits using both traditional and nontraditional methods . . . ." Title I, 106 Stat. at 1316. If this latter language does not have any legal effect, then there is no reason to include it.

Congress did include it, however, because it wanted to require the feasibility study to consider certain aspects of the problem. Moreover, Congress used "will" instead of "shall" to ensure the persistence of this requirement beyond the fiscal year. Given that the feasibility study evidently had not been completed in the previous fiscal year, it was reasonable for Congress to conclude that the study might not be completed within fiscal year 1993. As a result, Congress used "will" to ensure that the requirements for the study's contents would remain applicable beyond fiscal year 1993.

The Corps' other example of "will" actually contradicts its contention that "will" only denotes a continuing practice. *See* Ans. Br. at 20. Congress appropriated "$3,700,000" that "shall be available for infrastructure studies . . . ." Title I, 106 Stat. at 1334. In a different sentence, Congress stated that those funds "will be administered by" the Department of Energy. Title I, 106 Stat. at 1334. Only $750,000 of that appropriation was "to continue funding" a study by the University of Nevada, Las Vegas. *Id.* The other $2,950,000, which the Department was required to administer, was available for new studies. *Id.* Therefore, the Department was required to administer funds for new projects, not just

for continuing projects, as the Corps would have it. Further, the appropriated funds were available "until expended"—that is, beyond the fiscal year—and thus for this reason as well Congress appropriately used "will" to indicate the obligation's futurity. Title I, 106 Stat. at 1333.

Finally, Congress' actions for fiscal years 1992, 1993, and 1994 demonstrate that the 1987 Manual language in the 1993 Act was meant to apply beyond the fiscal year. *Cf. Atl. 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." (citing *United States v. Mitchell*, 109 U.S. 146, 148 (1883)). Based on negative feedback from the public, Congress clearly did not want the Corps to use the 1989 Manual. This was not merely an issue with the procedures used in adopting that manual; Congress believed that the 1989 Manual was substantively bad. S. Rep. No. 102–80, at 54-55 (1991) (noting that the use of the 1989 Manual resulted in "erroneous wetlands jurisdictional determinations which have caused so many complaints").

As a result, Congress prohibited the use of the 1989 Manual, and required the use of the 1987 Manual, for fiscal year 1992 in the 1992 Act. Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102–104, 105 Stat. 510 (1991) (1992 Act); S. Rep. No. 102–80, at 55 ("[T]he Corps is restricted to the pre-1989 criteria it used in identifying and delineating lands as wetlands. These criteria were set forth in the 1987 manual . . . ."). But the language in the 1992 Act was temporary, so Congress had to add the same restriction, using almost the same language in the 1993 Act. Title I, 106 Stat. at 1316. In order to avoid having to renew the restriction year-after-year, Congress added language in the 1993 Act that did not appear in the 1992 Act, and directed the Corps to use the 1987 Manual until it adopted a new, final manual. *Id.* Because this new language applied beyond fiscal year 1993, there was no need for Congress to include any similar language in the 1994 Act or subsequent appropriations legislation. If Congress had believed that the language in the 1993 Act was temporary, it likely would have included similar language in the 1994 Act; otherwise, the Corps could have gone straight back to using the maligned 1989 Manual. That Congress did not

add similar language suggests that Congress believed such language was unnecessary in light of the 1993 Act's continuing obligation.

The Corps counters that Congress did not include such language in subsequent appropriations acts because the Corps had voluntarily agreed to use the 1987 Manual. Ans. Br. at 24. This argument is inconsistent with the Corps' position that the 1993 Act's Manual clauses are merely an expression of Congress' expectation of the Corps' conduct, not a legally binding directive. *Compare* Ans. Br. at 20 (the 1987 Manual language is not "a specific statutory requirement"), *with id.* at 24 (The Corps had agreed to use the 1987 Manual "until further notice" so "no additional statutory directive was necessary."). In any event, the Corps' agreement with EPA to use the 1987 Manual offers no support for the Corps' limited reading of the 1993 Act; there was no reason for the EPA to agree to follow the Corps' use of the 1987 beyond the fiscal year if Congress had not directed the Corps to do so.

The better interpretation of Congress' actions in 1994 is that, because Congress understood the 1993 Act's direction to use the 1987 Manual to extend beyond that fiscal year, additional language in subsequent appropriations acts was unnecessary. This interpretation is

consistent with the 1993 Act's text, structure, and history. The Corps' contrary interpretation should be rejected.

II.

The Corps may articulate new national standards for delineating wetlands in a final, nationwide manual, but it has chosen not to do so.

A. The Corps is required to set out nationwide standards for delineating wetlands in a wetlands delineation manual.

1. The 1993 Act requires the Corps to adopt "a final wetlands delineation manual," not "manuals."

The plain language of the 1993 Act directs the Corps to adopt national standards for delineating wetlands. *Cf. Nixon v. United States*, 506 U.S. 224, 232 (1993) ("[T]he plain language of the enacted text is the best indicator of intent."). The 1993 Act requires the Corps to adopt "a final wetlands delineation manual," not manuals, indicating the intent to adopt national standards for wetlands delineation. Title I, 106 Stat. at 1324. The national standards requirement is confirmed by the Corps' own regulations, which define "wetlands" with a singular, national definition. 33 C.F.R. § 328.3(c)(4) (2018).

Congress' intent that the Corps use national standards for wetlands delineation is also supported by the legislative history of the 1992 and

1993 Acts. One of Congress' concerns in rejecting the 1989 Manual, and requiring the use of the 1987 Manual, was the lack of national consistency in wetlands delineation. *See* S. Rep. No. 102–80, at 54–55; S. Rep. No. 102–344, at 56 (1992). The 1989 Manual's approach had caused significant concerns, "in particular about the increase in lands identified and delineated as wetlands . . . ." S. Rep. No. 102–80, at 54. To address that issue, Congress mandated the use of the 1987 Manual, recognizing that it had been "used in various regions throughout the country for almost a decade." S. Rep. No. 102–80, at 55. Therefore, in passing the 1992 and 1993 Acts, Congress evinced an intent for the Corps to use the national standards of the 1987 Manual.

Congress reaffirmed this intent through its inaction after 1993. For fiscal year 1993, Congress appropriated money to the EPA to contract with the National Research Council to study and make recommendations on wetlands delineation. H.R. Rep. No. 102–710, at 51 (1992); H.R. Conf. Rep. No. 102–902, at 41 (1992). Congress sought input 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. The National Research

Council published the report in 1995, and one recommendation was either to abandon "growing season" as a standard for wetland delineation, or to make wetland delineation a function of region-specific criteria. Nat'l Research Council, Comm. on Characterization of Wetlands, *Wetlands: Characteristics & Boundaries* 3 (1995) (National Research Council Report), 2 ER 76.

Congress did not act in response to the National Research Council report. It could have passed a law indicating that wetland delineation standards should be more regionalized, but it did not. Instead, Congress chose to leave in place the requirement that the Corps use national standards for delineating wetlands.[1]

Congress' requirement that the Corps adopt national standards for delineating wetlands does not prevent it from adopting new standards based on scientific advancements. The Corps is just required to incorporate these developments into a single, national manual. The Corps could have followed the National Research Council's

[1] One likely explanation for why Congress did not act to regionalize standards is that it was "very concerned about the extent to which the section 404 program is intruding on privately owned property" and, in particular, was "concerned about reports that the program is diminishing the value of private property . . . ." S. Rep. No. 102–344, at 56.

recommendation to abandon the "growing season" standard.[2] This would have satisfied the Corps' desire to update the standards for delineating wetlands while also satisfying Congress' requirement to use national standards. Indeed, the Corps itself admitted during the process of adopting the Alaska Supplement that it instead could have "update[d] and republish[ed] the 1987 Manual." 2 ER 58. The only stated obstacle to this approach was that it would have taken time to "identify all of the national technical problems."[3] *Id.*

Finally, because the 1993 Act deals in part with the meaning of wetlands, it presents to this Court not just a question of science but of policy as well. *See Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981), *rev'd in part on other grounds sub nom. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); James S. Wakeley, Eng'r Research & Dev. Ctr., U.S. Army Corps of

[2] Tin Cup does not concede that abandoning the growing season standard is consistent with scientific standards for delineating wetlands. But that is not at issue in this case. Despite the Corps' statements, this case is not about wetlands science. This case involves a legal question about whether the Corps followed the proper procedures for delineating wetlands on Tin Cup's property.

[3] In fact, in 1991, the Corps had proposed a new national wetlands delineation manual. 56 Fed. Reg. 40,446-01 (Aug. 14, 1991).

Eng'rs, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations* 5 (Aug. 2002), 2 ER 43. A "'wetlands' is what Congress (as reflected by the regulations) says it is." *Avoyelles*, 511 F. Supp. at 288. Congress intended for the Corps to update the wetlands delineation manual but, consistent with sound regulatory policy, it also required the use of national standards.

The Corps ignored this latter requirement and forged ahead with illegal regional "supplements" rather than follow the proper procedures by adopting a new manual with national standards. This Court should reject the Corps' approach, and hold that the Corps is required to apply the 1987 Manual until it adopts a new, final manual.

2. The Corps is not entitled to *Skidmore* deference on the meaning of "final wetlands delineation manual."

The Corps argues that it is entitled to *Skidmore* deference on the meaning of "final wetlands delineation manual" in the 1993 Act. Ans. Br. at 28.[4] *Skidmore* deference is less deferential than *Chevron* deference,

[4] The Corps notes that the district court applied *Chevron* deference, but does not argue for its application on appeal. Ans. Br. at 26. While the Corps does argue that it is entitled to deference on the meaning of the

and the Court will only accord deference under the former to the extent that the agency's interpretation has the "power to persuade." *Hall v. E.P.A.*, 273 F.3d 1146, 1156 (9th Cir. 2001) (quotations omitted). And like *Chevron*, *Skidmore* deference only applies if the statute is ambiguous. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004).

The 1993 Act unambiguously requires the Corps to adopt "a final wetlands delineation manual," not regional manuals. Title I, 106 Stat. at 1324. The plain meaning of the text is reinforced by the legislative history of the Act, which demonstrates that Congress intended the Corps to adopt a national manual for wetlands delineation. *See*, Part II.A.1, *supra*. Accordingly, *Skidmore* does not apply in this case.

Even if *Skidmore* applied, the Corps would not be entitled to that low level of deference. Courts "do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency

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terms of the 1993 Act, it only argues for *Skidmore* deference, not *Chevron* deference. *Id.* at 28 ("These factors uniformly point toward *Skidmore* deference here."). Therefore, the Corps has abandoned any argument that it is entitled to *Chevron* deference. *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("Issues raised in a brief which are not supported by argument are deemed abandoned."); *see also Glob. Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 407–08 (D.C. Cir. 2017) (arguing in dicta that a court should not determine whether an agency receives *Chevron* deference if the agency has abandoned that argument).

interpretation." *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008). The Corps would have this Court believe that its position in this litigation is consistent with its longstanding practice in interpreting the 1993 Act. Ans. Br. at 26. In fact, the Corps' "interpretation appears to be purely a litigation position, developed during the course of the present case." *Alaska*, 544 F.3d at 1095. At a minimum, the Corps' position is not the type of longstanding, consistent interpretation that warrants *Skidmore* deference. *See Voss v. C.I.R.*, 796 F.3d 1051, 1066 (9th Cir. 2015) (refusing to apply *Skidmore* deference to a six-year-old guidance document from the IRS Chief Counsel).

The official agency interpretation of what constitutes a wetland is "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." 33 C.F.R. § 328.3(c)(4) (2018). This definition, which was adopted in the 1970s, sets out a national standard for delineating wetlands. *See* United States Environmental Protection Agency, *Section 404 of the Clean Water Act: How Wetlands are Defined and Identified*, https://www.epa.gov/cwa-404/section-404-clean-water-

act-how-wetlands-are-defined-and-identified (last visited Apr. 17, 2018). For over four decades, the Corps has maintained this definition, even when it has attempted to change other definitions related to the Clean Water Act. *See* 80 Fed. Reg. 37,054 (June 29, 2015).

In 1987, the Corps adopted its first technical manual for delineating wetlands. National Academies of Science, *Wetlands: Characteristics and Boundaries* 70 (National Academies Press 1995).[5] Like the regulatory definition of wetlands, the 1987 Manual sets out national standards for delineating wetlands. *See* Op. Br. at 37–43. Except for the brief period when the Corps employed the 1989 Manual, the agency applied the national standards of the 1987 Manual until it adopted the interim Alaska Supplement in 2006.

The Corps argues that the adoption of regional supplements is a longstanding, consistent practice. But the Corps did not adopt the final Alaska Supplement until October, 2007, over forty years after the agency had adopted the regulatory definition of wetlands, twenty years after the 1987 Manual, fourteen years after the 1993 Act, and twelve years after

[5] *Available at* https://www.nap.edu/read/4766/chapter/6.

the National Research Council Report that purportedly justified the use of regional standards.[6] U.S. Army Corps of Engineers, *Actual or anticipated release dates for Regional Supplements* (Jan. 13, 2012).[7] The most recent regional supplement was only adopted in May of 2012, further demonstrating that the use of regional "supplements" is a very recent phenomenon. *Id.*

The Corps' previous litigation positions also demonstrate the recency of the Corps' regional approach to delineating wetlands. Elsewhere, the Corps has contended that it is bound to follow the 1987 Manual until it adopts a new 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."); *See* Brief of Appellee the United States at 42, *United States v. Bailey*, 2008 WL 4127307 (8th Cir. Aug. 2008). Now, the Corps argues that it has

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[6] This large gap between the 1995 National Research Council Report and the 2007 adoption of the Alaska Supplement further demonstrates that the inability to update the national standards for delineating wetlands falls squarely on the Corps. The Corps estimated that revising the 1987 Manual would have taken just five or six years. 2 ER 58.

[7] *Available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/supp_sched2012.pdf.

always taken a regional approach to wetlands delineation. This position "is closer to a mere litigating position than to an agency interpretation of longstanding duration," and for that reason does not warrant deference. *Voss*, 796 F.3d at 1066–67 (quotations and alterations omitted).

As a result, the plain language of the 1993 Act controls, and the Corps must apply the national standards of the 1987 Manual until it adopts a new, final manual. The Corps can rely on the Alaska Supplement only to the extent that it actually supplements the national standards of the 1987 Manual. When the Supplement sets out new standards that are inconsistent with the national standards, like the standards applied in this case, the Corps cannot rely on the Alaska Supplement.

B. The Alaska Supplement sets out regional standards that are inconsistent with the national standards of the 1987 Manual.

1. The Alaska Supplement is not a true supplement to the 1987 Manual.

Tin Cup does not dispute that the Corps can legally supplement the 1987 Manual, so long as it is actually a true supplement. The Corps contends that vacating the permitting decision would invalidate all of the regional supplements adopted by the Corps. *See* Ans. Br. at 26. That is

not necessarily true. To the extent that those other supplements do not contradict the 1987 Manual, they remain valid for delineating wetlands. In fact, to the extent that some portions of the Alaska Supplement are complementary to the 1987 Manual, those portions remain valid.

The issue for the Corps is that the relevant portions of the Alaska Supplement are not supplementary to the 1987 Manual, they are in fact contradictory to the Manual. Wetlands are defined by regulation. 33 C.F.R. § 328.3(c)(4) (2018). The 1987 Manual sets out three criteria to elucidate that definition. *See* 1987 Manual, 2 ER 120–21 (the delineation process is guided by three criteria: hydrophytic vegetation, hydric soils, and wetland hydrology).

The 1987 Manual then sets out nationally applicable standards for satisfying these criteria. *See id*. The relevant criterion here is wetlands hydrology. The 1987 Manual defines hydrology in terms of a "growing season," which is further defined by soil temperature. *See* 1987 Manual, 2 ER 125, 130. "Growing season" is expressly defined as "[t]he portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero . . . ." 2 ER 130.

Again, the Corps did not have to define wetlands hydrology in terms of growing season. Nor did it have to define growing season in terms of soil temperature. But because it has not amended these standards in a new, final national manual, any supplements to the 1987 Manual must be consistent with these standards.

It is also possible that the Corps could adopt regional proxies in regional supplements for these national standards. But in order for them to be compatible with the 1987 Manual, the proxies must be reasonably related to the standards and not contradict those standards. *See M.R. v. Dreyfus,* 697 F.3d 706, 716 (9th Cir. 2012) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997), for the proposition that an "agency interpretation of a regulation not controlling if 'plainly erroneous or inconsistent with the regulation'"). Otherwise, they would not be legitimate proxies. *See Ctr. For Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127 (9th Cir. 2010) (habitat can be used as a proxy for measuring wildlife impacts only if the proxy is linked to and performs the same function as the primary standard).

What the Corps cannot do is what the Alaska Supplement attempts to do: use a "proxy" for growing season that bears no relationship to the

nationally applicable definition for growing season, *i.e.*, soil temperature. 1987 Manual, 2 ER 125, 130. The Alaska Supplement uses a procedure based on median dates of air temperatures in spring and fall, as well as by direct observation of vegetation green-up, growth, and maintenance, to determine "growing season." 4 ER 310. The Alaska Supplement ignores the soil temperature definition of "growing season" and thereby effectively establishes a new (regional) definition for growing season. *See* Alaska Supplement, 2 ER 105–106. This establishment of a new regional definition was recognized by the Corps review officer, who stated that soil temperature "is essentially irrelevant to determining the growing season in Alaska." 4 ER 310.[8] But, based on the definition of "growing season,"

[8] A 1992 Corps "User Note" to the 1987 Manual provides that the length of the growing season can be approximated by the number of frost-free days. 1987 Manual, 2 ER 126. This substitute method is irrelevant to Tin Cup's challenge for two reasons: first, the Corps did not rely on the method during the administrative process, *see* 2 ER 138–40, 4 ER 310, and therefore cannot rely on it now, *see Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011). Second, the use of frost-free days is only an approximation for the actual definition of soil temperature. To the extent that there are some regions where frost-free days are a reasonable approximation of soil temperature, the Corps can use it as a regional proxy. But in situations, as in Alaska, where the number of frost-free days does *not* provide a reliable substitute for estimating subsurface soil temperature, its use would be inconsistent with the national standard in the 1987 Manual. The Corps could define

what the Corps is actually arguing is that soil temperature is irrelevant to determining soil temperature in Alaska.

The Corps responds that the Alaska Supplement is consistent with the national standards because the soil temperature standard has been abandoned on a national level. Ans. Br. at 10. In fact, the Alaska Supplement is the only regional supplement to abandon soil temperature completely. *See* Army Corps of Engineers, *Regional Supplements to Corps Delineation Manual*, *available at* http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/ (last visited Apr. 17, 2018); *see also* U.S. Army Corps of Eng'rs, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valley, and Coast Region (Version 2.0)* (May 2010), 2 ER 53–54.

The Alaska Supplement itself concedes that some portions of the Supplement are contradictory to the 1987 Manual. *See* Eng'r Research & Dev. Ctr., U.S. Army Corps of Engr's, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)* 2

"growing season" itself in terms of frost-free days, but it must do so in a new manual.

(Sept. 2007) (AK Suppl.), MJN Exh. 2, p. 14. This was confirmed by the Corps review officer who decided Tin Cup's administrative appeal. 4 ER 310 ("Alaska Regional Supplement applies here . . . rather than . . . the soil temperature criteria in the [1987] Manual." (footnote omitted)); 4 ER 302. Simply put, the Alaska Supplement is not a true supplement of the 1987 Manual. Instead the Alaska Supplement sets out new, contradictory regional standards. The Corps therefore acted unlawfully when it relied on them to issue Tin Cup's permitting decision.

2. The Corps is not entitled to *Auer* deference on its interpretation of the 1987 Manual.

The Corps is not entitled to *Auer* deference on its interpretation of the 1987 Manual in this case. Courts do not apply *Auer* deference when a regulation is unambiguous. *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1180 n.4 (9th Cir. 2015). Nor do courts defer "when the agency's interpretation is plainly erroneous or inconsistent with the regulation." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quotations omitted). The 1987 Manual defines "growing season" in very specific, unambiguous terms. The Alaska Supplement's definition of "growing season," and its application in this case, are inconsistent with the clear definition in the 1987 Manual.

The Corps could have defined "growing season" differently in a national wetlands delineation manual, which would have allowed the use of regional proxies different from those regional proxies authorized by the 1987 Manual. *But see Christopher*, 567 U.S. at 158 (deferring to agency interpretations of ambiguous regulations "creates a risk that agencies will promulgate vague and open-ended regulations"). These new regional proxies would have been entitled to *Auer* deference to the extent they were consistent with the new definition of "growing season." But the Corps did not redefine "growing season," or abandon "growing season" as a standard; instead, it chose to continue to use the 1987 Manual. As a result, the Corps must use the specific definition of growing season articulated in the 1987 Manual until it decides to adopt a final manual with new nationally applicable standards.

For Tin Cup's permitting decision to be compatible with the standards in the 1987 Manual, only those areas of the property where "soil temperatures at 19.7 in. below the soil surface are higher than biologic zero" during a portion of the year can be labeled as wetlands. 1987 Manual, 2 ER 130. Tin Cup does not dispute that there are some areas of the property that qualify as wetlands under the 1987 Manual.

See Op. Br. at 17 (the Corp's jurisdictional process concluded "that approximately 350 acres of Tin Cup's property, including about 200 acres of permafrost" were jurisdictional wetlands). But the record clearly indicates that at least some areas of the property would not qualify as wetlands under the 1987 Manual. As a result, if the Corps had applied the proper standard, there would have been fewer acres of property labeled as wetlands, and the corresponding mitigation would have been lessened.

Indeed, the Corps' own officials admitted that there are areas of the property that would not qualify as wetlands under the standards set in the 1987 Manual. 4 ER 296. That is exactly why the Corps applied the standards of the Alaska Supplement over the standards of the 1987 Manual. *See* 2 ER 232. The Corps now tries to confuse the issue by arguing that there is no evidence of permafrost at the proper depth, but that argument is directly contradicted by the record. *Compare* Ans. Br. at 9, *with* 2 ER 183.

In November, 2011, Tin Cup's consultants submitted evidence of permafrost on Tin Cup's property at the proper depth. *See* 1 SER 016; 1 SER 020; 1 SER 024; 4 ER 299. Greg Mazer, the Corps' project manager

for Tin Cup's permit application, initially rejected the evidence, 4 ER 298, but sought a second opinion within the agency. In April, 2012, Marcus Palmer, chief of the geotechnical and materials section of the Corps' Alaska district, responded to Mazer's inquiry with the conclusion that, of the 21 bore logs he reviewed, 11 "are permafrost", 5 "are inconclusive because they are shallow, but likely permafrost", and 5 "are seasonal frost." 4 ER 296. Admittedly, Mr. Palmer's interpretation differed from Tin Cup's consultants, but he still concluded that at least some of the property contained permafrost. *Id.* As a result, the Corps' subsequently revised jurisdictional determination acknowledged the presence of permafrost on Tin Cup's property. *See* 3 ER 291 (confirming that areas on and near Tin Cup's property contain "both seasonal frost and permafrost").

This Court, however, does not have to decide how many acres of permafrost are on Tin Cup's property. The record clearly indicates that there are at least some areas of permafrost on the property, and those areas cannot qualify as wetlands under the 1987 Manual. Therefore, the Corps' use of the Alaska Supplement clearly had bearing on "the substance of decision reached," and thus the permitting decision was not

harmless error. *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011) (quotation omitted). This Court should vacate the permitting decision, and remand to the Corps to issue a new decision consistent with the appropriate standards. *Id.* at 1095.

C. The Alaska Supplement is not "final."

Finally, even if the Alaska Supplement could be considered a "wetlands delineation manual" within the meaning of the 1993 Act, the Corps would still be precluded from applying it because it is not "final." The Corps argues that Congress did not intend for the adoption of a new manual to comply with every rulemaking requirement of the Administrative Procedure Act. Ans. Br. at 45. The legislative history of the 1993 Act contradicts that argument. S. Rep. No. 102–344, at 56. But even if the 1993 Act authorized a less stringent rulemaking process, that would not defeat the requirement that any manual be properly finalized according to law.

The Congressional Review Act applies to more than just those rules that the Administrative Procedure Act defines as "legislative rules." 5 U.S.C. § 804(3). Indeed, the Administrative Procedure Act itself recognizes that a "rule" includes more things than notice-and-comment

regulations. 5 U.S.C. § 553(b)(3)(A). As a result, the definition of "rule" in the Administrative Procedure Act and the Congressional Review Act covers agency action such as guidance documents. *See Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 320–21 (D.C. Cir. 2011). Thus, even if the Alaska Supplement is a "wetlands delineation manual" it is not "final" until submitted to Congress for review. 5 U.S.C. § 801(a)(1)(A).[9]

CONCLUSION

This Court should reverse the judgment of the district court and direct the district court to vacate the permitting decision.

DATED: April 20, 2018.

Respectfully submitted,

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[9] Although the CRA was passed after the 1993 Act, the use of the word "final" indicates that Congress wanted the Corps to finalize the manual under whatever applicable standards were in effect at the time of adoption. Indeed, one of the issues Congress had with the 1989 Manual was that it was not "submitted to the Congress for consideration or debate." S. Rep. No. 102–80, at 54. Therefore, interpreting "final" to incorporate the Congressional Review Act requirements is consistent with Congress' intent in passing the 1993 Act.

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