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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

TIN CUP, LLC, an Alaska limited liability company,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

No. 4:16-cv-00016-TMB

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Tin Cup, LLC, brings this action pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge the permit decision of Defendant United States Army Corps of Engineers under the Clean Water Act, 33 U.S.C. §§ 1251-1388. The agency record for the Corps' actions, which will be filed in accordance with Local Rule 16.3(b), is contained in two volumes: Administrative Record, POA-2003-1422, Tanana River [hereinafter 2011 AR]; and Administrative Record, POA-2003-1422, Tanana River, 2011-2013 [hereinafter 2014 AR].

JURISDICTION AND VENUE

1. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (judicial review of agency action), 28 U.S.C. § 2201 (authorizing declaratory judgments), and *id.* § 2202 (authorizing relief in addition to declaratory judgment).

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(2), because a substantial part of the events or omissions giving rise to the claim occurred in this District, and because the property that is the subject of the action is located in this District. *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act generally proper in "a court of competent jurisdiction").

PARTIES

Plaintiff

3. Tin Cup, LLC, is an Alaska limited liability company. It is the owner of the property at issue in this litigation. It serves as a holding entity for Flowline Alaska, a family-owned firm that specializes in pipe fabrication, insulation, and related services for companies developing the North Slope oil fields.

Defendant

4. The Corps is a branch of the Department of the Army. It is divided into divisions which in turn are divided into districts. The Corps' Alaska District oversees the Corps' activities in Alaska. The Alaska District issued the permit challenged in this action.

LEGAL BACKGROUND

5. Under the Clean Water Act, the Corps has authority (with the United States Environmental Protection Agency) to regulate the placement of dredged and fill material into "navigable waters." *See* 33 U.S.C. § 1344(a).

6. The Clean Water Act defines "navigable waters" as "waters of the United States." *Id*. § 1362(7).

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

8. The Corps has defined "waters of the United States" to include, among other things, "wetlands" that are "adjacent" to other jurisdictional waters. *See* 33 C.F.R. § 328.3(a)(1)(6) (2015); 33 C.F.R. § 328.3(a)(7) (2014).

9. The Corps has defined "wetlands" to mean "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." *Id*. § 328.3(c)(4) (2015); *id*. § 328.3(b) (2014).

10. In 1987, the Corps issued a delineation manual to assist agency staff and the public in identifying wetlands pursuant to the agency's regulatory definition. *See* Envtl. Lab., Corps of Eng'rs, Waterways Experiment Station, Corps of Engineers Wetlands Delineation Manual (Jan. 1987) (1987 Manual).

11. The 1987 Manual directs that the delineation process be guided by three criteria—hydrophytic vegetation, hydric soils, and wetland hydrology. *See* 1987 Manual at 9-10. Generally, all of these criteria must be satisfied for an area to be designated a wetland. *See id*.

12. 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." *Id*. at 28. "Growing season" is defined as that "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)." *Id*. at A5. "[F]or ease of determination," this period can be approximated by the number of frost-free days within the year. *Id*.

13. In 1989, the Corps and other federal agencies began using less stringent wetland delineation methods than those set forth in the 1987 Manual. *See* 56 Fed. Reg. 40,446, 40,449 (Aug. 14, 1991). This decision caused considerable controversy, prompting legislative efforts to constrain the Corps' wetland delineation discretion.

14. These efforts culminated in a provision of the Energy and Water Development Appropriations Act of 1993, which mandated that the Corps must use the 1987 Manual exclusively for wetlands delineations until "a final wetlands delineation manual is adopted." Pub. L. No. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992).

15. The Corps has not followed Congress' direction. Instead, the Corps has issued regional "supplements" to the 1987 Manual. These supplements—which by themselves are not "final wetlands delineation manual[s]"—provide region-specific criteria for wetland delineation that purportedly supercede anything contrary in the 1987 Manual.

16. 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.).

17. The Alaska Supplement uses a relaxed standard to determine the dates of the "growing season," focusing on "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground." *Id*. at 48. Adoption of this standard—substantially less demanding that the 1987 Manual's—allows the Corps to regulate permafrost.

18. The Supplement defines "permafrost" as a "thickness of soil or other superficial deposits, or even bedrock, which has been colder than 0°C for two or more years." *Id*. at 108.

19. 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 never reaches the requisite soil temperature, it cannot satisfy the 1987 Manual's growing-season-dependent hydrology parameter.

20. In contrast, under the Alaska Supplement's relaxed growing season standard, permafrost can satisfy the hydrology parameter.

FACTUAL ALLEGATIONS

21. Tin Cup owns an approximately 455-acre parcel in North Pole, Alaska. The company holds the land for Flowline Alaska. Tin Cup purchased the parcel with the intention of relocating the Flowline Alaska business from its current leased location which the business has outgrown. The property is bordered by a junk car dealer, a scrap metal dealer, and a concrete products supply company. 2011 AR 000140.

22. Tin Cup and Flowline Alaska intend to use the property in part for the temporary storage of pipe and other manufactured material. The project would entail the placement of a gravel pad, as well as the construction of several buildings and a railroad spur. 2014 AR 000017. Thus, the project would require the excavation and laying down of gravel material, a regulated "pollutant" under the Clean Water Act. *See* 33 U.S.C. § 1362(6).

23. Concerned that some of the property might contain wetlands regulated under the Clean Water Act, Tin Cup applied to the Corps in 2008 for a jurisdictional determination. The Corps is authorized to issue such determinations, which set forth the agency's formal opinion as to the scope of its authority over a given property. *See* 33 C.F.R. § 320.1(a)(6). (In 2004, Tin Cup had received a permit to conduct a similar project on the site, but did not complete the work prior to the permit's expiration. 2011 AR 000067-000068).

24. In November, 2010, the Corps issued its jurisdictional determination that approximately 351 acres of the site constitute "waters of the United States." 2011 AR 000069; 2014 AR 000225. About 200 of those acres are permafrost. *Cf*. 2014 AR 000357 (eleven soil borings are of permafrost and five additional borings are likely to be permafrost).

25. Tin Cup administratively appealed the determination on several grounds, among them that the site's permafrost cannot qualify as a wetland under the 1987 Manual, and thus cannot be "waters of the United States." 2011 AR 000010.

26. 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* 2014 AR 000509.

27. In October, 2012, the Corps issued Tin Cup an initial proffered permit. *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). Tin Cup again objected. *See* 2014 AR 000051. The Corps ignored those objections and, in November, 2013, issued a final permit, *see* 2014 AR 000010, which Tin Cup again administratively appealed.

28. In March, 2015, the Corps' appellate officer issued his decision affirming the permit. *See* Exhibit A, a true and correct copy of Administrative Appeal Decision No. POA-2003-1422 (Mar. 2, 2015). 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. The appellate officer explained that the Corps District is required to follow the Supplement, which supersedes the 1987 Manual. *See id*. at 6-7.

DECLARATORY RELIEF ALLEGATIONS

29. The Corps' permit, which asserts Clean Water Act jurisdiction over the site's permafrost, is the subject of a live controversy. Tin Cup contends that none of the permafrost at the site is jurisdictional because permafrost cannot satisfy the wetland parameters of the 1987 Manual.

In contrast, the Corps contends that the site's permafrost areas are jurisdictional because permafrost satisfies the wetland parameters of the Alaska Supplement, which the agency contends supersede the 1987 Manual's contrary definition.

30. The Corps does not dispute that the site contains permafrost. Thus, no further factual development is necessary to resolve the legal issues raised by this action.

31. Tin Cup has been, is, and will continue to be injured by the Corps' assertion, through the permit, of Clean Water Act jurisdiction over the site. The permit contains several General and Special Conditions. Among them is Special Condition 4, which requires Tin Cup to set aside in perpetuity 23 acres of the site as a buffer zone around a reclamation pond (which the permit also requires). Further, compliance with other General and Special Conditions in the permit impose substantial costs on Tin Cup. Finally, the Corps' assertion of Clean Water Act jurisdiction by virtue of the permit means that Tin Cup is subject to burdensome regulation under other provisions of the Clean Water Act administered or overseen by the Environmental Protection Agency, such as the National Pollutant Discharge Elimination System Program, 33 U.S.C. § 1342(a), as well as the Stormwater Pollution Prevention Program, *id*. § 1342(p). *Cf*. Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program, 58 Fed. Reg. 4995, 4996 (Jan. 19, 1993) (EPA agrees to adhere to the 1987 Manual).

32. Accordingly, an actual and substantial controversy exists between Tin Cup and the Corps as to the parties' respective legal rights and duties. Tin Cup contends that the site's permafrost is not subject to the Clean Water Act. Tin Cup therefore argues that development of the permafrost does not bind Tin Cup to any of the General or Special Conditions of its permit, the National Pollutant Discharge Elimination System Program, or the Stormwater Pollution Prevention Program. In contrast, the Corps contends that the site's permafrost is subject to the Clean Water Act, and thus that Tin Cup is bound by the General and Special Conditions of its permit, as well as other provisions of the Clean Water Act.

33. A judicial determination of the parties' rights and responsibilities arising from this actual controversy is therefore necessary and appropriate at this time.

INJUNCTIVE RELIEF ALLEGATIONS

34. Tin Cup wishes to discharge fill material on the site's permafrost, which the Corps asserts to be subject to its Clean Water Act permitting authority.

35. Tin Cup has been, is, and will continue to be injured by the Corps' assertion, through the proffered permit, of Clean Water Act jurisdiction over its property. The Corps' assertion of jurisdiction subjects Tin Cup to the General and Special Conditions of the proffered permit, including Special Condition 4. Also, the Corps' determination means that Tin Cup is subject to burdensome regulation under the National Pollutant Discharge Elimination System Program and the Stormwater Pollution Prevention Program. Compliance with the permit conditions and the aforementioned programs imposes substantial costs on Tin Cup. Unless the Court grants relief, Tin Cup will continue to be irreparably harmed by the Corps' unlawful assertion of Clean Water Act jurisdiction through the proffered permit.

36. Setting aside the Corps' permit will redress Tin Cup's injuries by allowing it to proceed with development of the site's permafrost without adherence to the permit's conditions.

37. Tin Cup has no plain, speedy, and adequate remedy at law and, absent judicial intervention, Tin Cup will suffer irreparable injury.

38. The Corps, if not enjoined, will continue to enforce the General and Special Conditions of the proffered permit, as well as other provisions of the Clean Water Act, based on its erroneous position that the site's permafrost is subject to the Clean Water Act.

CLAIM FOR RELIEF

(Violation of the Administrative Procedure Act, 5 U.S.C. § 706)

39. All of the preceding paragraphs are incorporated fully herein.

40. When delineating wetlands for purposes of Clean Water Act jurisdiction, the Corps must use the parameters set forth in its 1987 Manual unless and until a final wetland delineation

manual is adopted. *See* 106 Stat. at 1324. The Corps, however, has not adopted any final wetland delineation manual since the 1987 Manual.

41. The Alaska Supplement is not a final wetland delineation manual, yet the Corps interprets it to supersede the 1987 Manual. AK Suppl. at 2 ("Where differences in the two documents occur, this Regional Supplement takes precedence over the Corps Manual for applications in the Alaska Region."). In particular, the Supplement's definition of growing season contradicts the definition of growing season in the 1987 Manual.

42. The 1987 Manual provides that, under normal circumstances, an area is a wetland only if it satisfies the vegetation, soil, and hydrology parameters. *See* 1987 Manual at 9-10.

43. "Under normal circumstances" means "situations in which the vegetation has not been substantially altered by man's activities." *Id*. at A13.

44. The 1987 Manual's hydrology parameter is satisfied, under normal circumstances, only if the area in question is inundated or saturated to the surface at some point during the growing season. *See id*. at 28.

45. The 1987 Manual defines the "growing season" as that "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)." *Id*. at A5.

46. The permafrost at the site is under normal circumstances and never exceeds biologic zero at 19.7 inches below its surface. For that reason, the permafrost is not subject to a "growing season" as defined by the 1987 Manual. The permafrost therefore cannot satisfy the 1987 Manual's hydrology parameter.

47. Thus, the site's permafrost does not qualify as a wetland under the Corps' regulations. Neither does it qualify as any other type of regulable feature. *Cf*. 33 C.F.R. § 328.3(a)(1)-(6). Accordingly, the site's permafrost is not a water of the United States.

48. The Corps' assertion of jurisdiction over the permafrost is contrary to the Clean Water Act, its implementing regulations, the agency's 1987 Manual, and the Energy and Water

Development Appropriations Act of 1993. Therefore, the Corps' action is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

49. The Corps' permitting decision is a final agency action, ripe for judicial review. *See* 5 U.S.C. § 704.

50. Tin Cup has exhausted all administrative remedies. *Cf.* 33 C.F.R. § 331.5(b)(3).

51. This action is timely because it has been brought within six years of the Corps' permitting decision. *Cf.* 28 U.S.C. § 2401(a).

PRAYER FOR RELIEF

Tin Cup prays for judgment from this Court as follows:

1. A declaratory judgment stating that no permafrost on the site is subject to Clean Water Act jurisdiction;

2. A declaratory judgment stating that the Corps' assertion of Clean Water Act jurisdiction over the site, pursuant to the proffered permit, is arbitrary and capricious, and contrary to law, under 5 U.S.C. § 706;

3. A declaratory judgment stating that, because the site's permafrost is not subject to the Corps' permitting authority, the permit issued to Tin Cup is null and void to the extent that it asserts control over the permafrost;

4. A preliminary and permanent prohibitory injunction barring the Corps, its agents, employees, officers, and representatives from asserting Clean Water Act jurisdiction over the site's permafrost;

5. An award of Tin Cup's reasonable attorney fees and costs, pursuant to 28 U.S.C. § 2412, or to any other authority, including the Court's inherent authority, as appropriate; and

6. An award of any other such further relief as the Court may deem proper.

DATED: May 2, 2016.

Respectfully submitted,

JAMES S. BURLING
DAMIEN M. SCHIFF (*pro hac vice pending*)

By /s/ James S. Burling
JAMES S. BURLING

Attorneys for Plaintiff Tin Cup, LLC

EXHIBIT A

DEPARTMENT OF THE ARMY
PACIFIC OCEAN DIVISION, U.S. ARMY CORPS OF ENGINEERS
FORT SHAFTER, HAWAII 96858-5440

Programs Directorate

2 MAR 2015

Mr. Larry Peterson
Travis/Peterson Environmental Consulting, Inc.
329 2nd Street
Fairbanks, Alaska 99701

Dear Mr. Peterson:

I have completed my review of your administrative appeal of the Alaska District proffered permit to Tin Cup, LLC (file number POA-2003-1422), located in wetlands directly abutting Channel B, near North Pole, Alaska. For reasons detailed in the enclosed decision document, the reasons for appeal do not have merit. Therefore, the Alaska District's decision of the proffered permit stands.

The review of this administrative appeal was conducted in accordance with the Final Rule Establishing an Administrative Appeals Process (33 Code of Federal Regulation (CFR) Sections 320, 326 and 331, dated March 28, 2000). Consistent with 33 CFR 331.10, the Alaska District Commander's decision is the final U.S. Army Corps of Engineers decision in this case.

I am forwarding a copy of this letter to Colonel Chris Lestochi, District Commander, Alaska District, as well as members of his Regulatory Branch Staff.

This concludes the Corps administrative appeal process. Please direct any questions regarding this appeal decision to Mr. Elliott Carman, Administrative Appeals Review Officer, at (469) 487-7061, by email at Elliott.N.Carman@usace.army.mil, or by writing to the address at the top of the page.

Sincerely,

Jeffrey L. Milhorn, P.E.
Brigadier General, US Army
Commanding

Enclosure
CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
TIN CUP, LLC – FILE No. POA-2003-1422
PROFFERED PERMIT
ALASKA DISTRICT

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (Corps), Southwestern Division

Appellant/Applicant: Tin Cup, LLC

Regulatory Authority: Section 404, Clean Water Act (Section 404)

Date Request for Appeal Received: 10 January 2014

Proffered Permit Appeal Conference: 15 July 2014

1. **ACCEPTED REASONS FOR APPEAL.** The U.S. Army Corps of Engineers, Pacific Ocean Division (Division) accepted the following reasons for appeal (RFA) submitted by Tin Cup, LLC (Appellant) on 10 January 2014.

1.1 The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not solely rely on the *1987 Corps of Engineers Wetland Delineation Manual*, the only congressionally authorized document for identifying wetlands in the field.

1.2 The subject wetlands are independent of, and separated from wetlands found in Channel B. Therefore, the District omitted material fact when it determined that the subject wetlands were continuous with those found in Channel B.

1.3 Flow measurements within Channel B, regional topography, and the presence of permafrost demonstrate there is no surface or subsurface connection between the subject wetlands and Channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were connected (adjacent) to Channel B.

1.4 "The contribution from the entire Channel B watershed is less than one percent of total flow in the [Chena River] and is insignificant." Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Channel B, in combination with similarly situated wetlands (including the subject wetland), had a significant nexus with the Chena River, the nearest downstream traditionally navigable water.

1.5 The District lacked, "...sufficient guidance, policy, and regulation to conduct and publish significant nexus findings." Therefore, the District was arbitrary and

capricious when it concluded Channel B and its adjacent wetlands (including the subject wetlands) had a significant nexus with the Chena River.

2. SUMMARY OF APPEAL DECISION. Tin Cup, LLC. (Appellant) is appealing jurisdiction issues related to a U.S. Army Corps of Engineers, Alaska District (District) proffered permit for the Appellant's property near North Pole, Alaska. The Appellant submitted five main reasons for appeal in which they contend that the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrectly applied law, regulation, or officially promulgated policy; omitted material fact; and was arbitrary and capricious when it concluded the wetlands on the Appellant's property were waters of the United States (U.S.). For reasons detailed in this document, these reasons for appeal do not have merit.

3. BACKGROUND INFORMATION. The Appellant's property is located between the Old Richardson Highway and Bradway Road approximately 1.5 miles east of the intersection of Dennis Road and the Old Richardson Highway near North Pole, Alaska. More specifically, the Appellant's property is located within Sections 26, 27, 34 and 35, T. 1 S., R. 1 E., Fairbanks Meridian, USGS Quad Maps Fairbanks (D-1) SW and Fairbanks (D-2) SE,; Latitude 64.7958° N., Longitude 147.4966° W.

The timeline for history of events is as follows. A detailed description of the events is provided below.

- 8 November 2010: District issued AJD.
- 29 December 2010: Appellant appealed AJD.
- 18 August 2011: Division Commander found AJD appeal to have partial merit and AJD remanded to District.
- 13 April 2012: District finalized AJD appeal remand response.
- 22 October 2012: District issued initial proffered permit.
- 13 December 2012: Appellant objected to initial proffered permit.
- 14 November 2013: District proffered permit.
- 7 January 2014: Appellant appealed proffered permit.
- 16 January 2014: Division Commander accepted Proffered permit request for appeal.

The District issued an approved jurisdictional determination (AJD) dated 8 November 2010, which concluded that the Appellant's property contained, "...waters of the [U.S.], including wetlands, under the [U.S. Army] Corps of Engineers' regulatory jurisdiction." The letter further stated that the subject wetland was, "...adjacent to the Tanana River, a traditional navigable water [TNW], due to its reasonably close proximity and separation from the water only by berms."[1] The Appellant appealed the AJD via

[1] 2011 Administrative Record (AR) page 62. For clarity, the District provided the AR to the Appellant and the Review Officer in two parts. The first part, the portion of the AR associated with the 2010 appeal of the AJD associated with this proffered permit, is referred to as the 2011 AR. The second part, associated with the current appeal of the proffered permit, is referred to as the 2014 AR.

letter dated 29 December 2010.[2] The appeal was found to have partial merit and the AJD was remanded to the District on 18 August 2011 for further evaluation, documentation, and reconsideration.[3] The District responded to the remand via letter to the Appellant dated 13 April 2012, in which the District reaffirmed that the subject wetland was a water of the U.S. However, the reconsidered AJD now indicated the subject wetland, "...extends off site and is adjacent to Channel B, a relatively permanent water [RPW]," and has "...a significant nexus with the Chena River, a water more readily understood as 'navigable.'"[4]

Upon completion of their permit evaluation, the District provided an initial proffered permit to the Appellant via letter dated 22 October 2012 authorizing the permanent fill of 142 acres of wetlands and temporary fill of 1 acre of wetlands associated with the construction of a pipe storage and fabrication facility for the purpose of industrial development[5] The Appellant responded via letter dated 13 December 2012, objecting to all the special conditions of the initial proffered permit due to the Appellant's assertion that the Corps lacked jurisdiction over the subject wetland.[6] In response, the District reconsidered their decision, and then proffered the permit (without changing any of the special conditions) to the Appellant for reconsideration via letter dated 14 November 2013. The proffered permit included a revised AJD that indicated the subject wetland was now determined to, "...directly abut Channel B, a RPW," and was, "...jurisdictional based on both its significant nexus with the Chena River...and its directly abutting a [RPW]."[7]

The Appellant declined the proffered permit and submitted a Request for Appeal (RFA) to the Division, dated 7 January 2014. The RFA was received by the Division on 10 January 2014. The Appellant was informed, by letter dated 16 January 2014, that the RFA was accepted.

4. INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION.
33 Code of Federal Regulations (CFR) § 331.3(a)(2) states that, upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the Appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the

[2] 2011 AR pages 4-60.
[3] 2014 AR pages 499-512.
[4] 2014 AR pages 290-348.
[5] 2014 AR pages 115-146.
[6] 2014 AR pages 97-114.
[7] 2014 AR pages 10-50.

District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

4.1 The District provided a copy of their AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. That date for the AJD is 8 November 2010 which includes 2011 AR pages 62-653.[8] For the proffered permit associated with this appeal, that date is 14 November 2013 which includes 2014 AR pages 9-515.

4.2 An appeal conference was held on 15 July 2014. The conference followed the agenda provided to the District and the Appellant by the RO via e-mail on 8 July 2014. During the appeal conference, the District clarified the location of a document in their AR, identified a typographical error in a document in their AR, and stated that they inadvertently omitted several items from the copies of the AR provided to the RO and the Appellant. These items were as follows:

4.2.1 The District clarified that the memorandum for record (MFR) referenced on 2011 AR page 83 is that found on 2011 AR pages 67-81 and that the reference to field work on 7 July 2010 in the letter on 2011 AR page 62 was a typographical error as the correct date was 2 July 2010. These documents were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision.

4.2.2 The District indicated they inadvertently omitted from the copies of the AR provided to the RO and the Appellant the spreadsheet attached to the email found on 2014 AR page 260, the "enclosed sheets" referenced in the public notice found on 2014 AR page 234, and a copy of the U.S. Environmental Protection Agency's (EPA) request to extend the public notice referenced in the email found on 2014 AR page 216. The District provided these documents to the RO and the Appellant via e-mail dated 21 July 2014.[9] These documents were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision, but inadvertently omitted from the copies of the District's AR provided to the RO and the Appellant due to an error.

[8] The 2011 portion of the District's AR provided to the RO and the Appellant originally contained 382 pages. However, during the course of the appeal process it was discovered that the District inadvertently omitted 271 pages of the 2011 AR. These pages, which comprise 2011 AR pages 383-653, were later provided to the RO and the Appellant. This is discussed further in Section 4.3 of this decision document below.

[9] In a follow up email dated 22 July 2014, the District noted that the "enclosed sheets" associated with the public notice found on 2014 AR page 234 did not have the same date (two of the sheets were dated 23 May 2012, while two others were dated 22 May 2008). The District clarified that the two pages dated 2008 were included in the 2012 public notice as they were unchanged since their submittal in 2008.

4.3 During the appeal conference, the Appellant asserted that the copy of the AR the District provided for this appeal was incomplete as it only included information since 2009 and not since 2003 when the original action associated with this Department of the Army permit number (POA-2003-1422) began. The District responded that the first permit associated with this project number expired thereby ending that action, and that the AR provided for this appeal was a copy of the record prepared in response to a newer action that began in 2009 for the same property as that of the expired permit. After the appeal conference, it was discovered that the action being appealed did not begin in 2009, but in 2008 with the Appellant's permit request (as the previous permit had expired). So while the District's response was conceptually correct, it was determined that the District inadvertently omitted approximately 271 pages between 2008 and 2009 from their AR. These pages were provided to the RO and the Appellant on 16 January 2015 and were numbered as 2011 AR pages 383-653. These pages were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision, but inadvertently omitted from the copies of the District's AR provided to the RO and the Appellant due to an error.

4.4 On 3 October 2014, the RO forwarded a draft MFR summarizing the appeal conference topics to the Appellant and the District for review and comment. In an e-mail dated 8 October 2014, the Appellant provided comments regarding sections 1 and 4.b. of the draft MFR. In an e-mail dated 10 October 2014, the District indicated they did not have any comments on the draft MFR. The Appellant's comments were incorporated into a final MFR, which was provided to the Appellant and the District by the RO on 22 October 2014.

5. Evaluation of the Appellant's Reasons for Appeal.

5.1 Appeal Reason 1: The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not solely rely on the *1987 Corps of Engineers Wetland Delineation Manual*, the only congressionally authorized document for identifying wetlands in the field.

5.1.1 Finding: This reason for appeal does not have merit.

5.1.2 Discussion: In their RFA, the Appellant asserted that the District's use of the definition of the growing season in the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region*[10] (Regional Supplement) was in error because the Appellant believed the *1987 Corps of Engineers Wetlands Delineation Manual*[11] (1987 Manual) was, "...the only congressionally authorized document the Alaska District [was] permitted to use to identify wetlands in the field."

[10] U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center.
[11] Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

Therefore, the Appellant believes, as stated in their RFA, that the District, "...exceeded its authority under Section 404 by adopting and using wetland delineation procedures [associated with the Regional Supplement] that supersede those of the congressionally authorized 1987 Manual,"[12] and that, "...all delineations performed using the Alaska Supplement are invalid."[13]

This reason for appeal, as noted by the Appellant during the appeal conference, was partially raised in the 2010 appeal of the AJD associated with this declined proffered permit (the subject of this appeal).[14] In their 2010 RFA, the Appellant stated in their fourth reason for appeal that the District should be forced to follow the growing season definition in the 1987 Manual (and not in the Regional Supplement) and that it was, "...pure speculation by the Corps that the ground temperature rises above 5°C at 20 inches below the ground surface in a permafrost area for a significant portion of the growing season."[15] Regarding this reason for appeal, the 2010 appeal decision document stated that the Regional Supplement, which was applicable to the region, recognized the need to rely, "...upon locally or regionally developed methods to determine the growing season dates...," rather than using the soil temperature criteria in the 1987 Manual.[16] Consequently, the decision document stated that the soil temperature near 20 inches below the ground surface was irrelevant to determining growing season in Alaska and concluded that this reason for appeal did not have merit.

The Appellant's assertion that the District erred when it used the Regional Supplement instead of the 1987 Manual exclusively, is unique to the current appeal. The issue presented by the Appellant's RFA is the District's adoption, for all the District's delineations and not just the action being appealed, of the portions of the Regional Supplement that supersede the 1987 Manual.[17] This assertion is addressed in the following discussion.

The Corps began requiring that districts use the 1987 Manual to identify and delineate wetlands potentially subject to regulation under Section 404 on 27 August 1991.[18] In September 2007, the Corps finalized the Regional Supplement as part of a, "...nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation practices."[19] The Regional Supplement was designed to be used with the 1987 Manual (or a subsequent version), but takes

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[12] Appellant's 7 January 2014 RFA, pages 13-14.
[13] Appellant's 7 January 2014 RFA, page 16.
[14] 2011 AR page 10.
[15] 2011 AR page 10.
[16] 2014 AR page 509.
[17] Appellant's 7 January 2014 RFA, page 16.
[18] "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.
[19] U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center. Page 1.

precedence over the 1987 Manual where differences occur[20] such as with the definition of the growing season in this case.

The Appellant's assertion that the District erred when it used the Regional Supplement instead of the 1987 Manual exclusively for all the District's delineations is invalid because an appeal must be associated with a specific Corps action and reasons for appeal are limited to, for example, a district's application of regulation, guidance, or policy specific to that action. Because the Regional Supplement was a valid nationally promulgated supplement to the Manual, the District's responsibility in this case was to follow existing regulation, guidance, and policy (including the Regional Supplement in its appropriate context) as it evaluated the Appellant's action. The District's use of Regional Supplement data forms in their AR provided evidence that the District utilized the Regional Supplement as part of its evaluation of this action as required by regulation, guidance, and policy in existence at the time of their evaluation.[21] Therefore, this reason for appeal does not have merit.

5.1.3 Action: No action necessary.

5.2 Appeal Reason 2: The subject wetlands are independent of, and separated from wetlands found in Channel B. Therefore, the District omitted material fact when it determined that the subject wetlands were continuous with those found in Channel B.[22]

5.2.1 Finding: This reason for appeal does not have merit.

5.2.2 Discussion: In their RFA, the Appellant stated that the subject wetlands were separated from those within Channel B by a man-made berm.[23] Additionally, the Appellant asserted that the District's wording in their AR established that the wetlands within Channel B differed from those north of the Channel by topographic position as well as wetland type.[24] Therefore, the Appellant believes the District's AR lacks proof that the subject wetlands are continuous with those found within Channel B.[25]

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[20] U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center. Pages 1-2.

[21] 2014 AR pages 72-81.

[22] This reason for appeal previously read, "The subject wetlands are independent of, separated from, and do not have a surface hydrologic connection with wetlands found in channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were continuous with those found in Channel B." At issue in this reason for appeal is whether the wetlands on the Appellant's property are continuous with those found in Channel B (are they all the same wetland). The "law, regulation, or policy" as well as the surface hydrologic connection previously referenced in this reason for appeal relates to whether the wetlands on the Appellant's property are adjacent to channel B, a concept discussed in reason for appeal three in this decision document. Therefore, the reason for appeal was changed to reference "omission of material fact" to more accurately reflect the items the appellant asserted act to fragment the wetland in question and the surface hydrologic connection was removed from this reason for appeal and will be discussed as part of reason for appeal three below.

[23] Appellant's 7 January 2014 RFA, pages 11-12.

[24] Appellant's 7 January 2014 RFA, pages 12-13.

[25] Appellant's 7 January 2014 RFA, page 11.

In their AR, the District stated that the wetland on the Appellant's property was part of a larger, 3,200 acre, un-fragmented wetland that includes most of the Appellant's property and a large portion of the area between Badger Road and the Richardson Highway near North Pole, Alaska.[26] The District clarified during the 15 July 2014 appeal conference that approximately 2,500 acres of this wetland lays within the Channel B watershed.[27] The wetland was described in the District's AR as including a mosaic of stunted black spruce forest, deciduous tall and low shrub communities, as well as emergent herbaceous and dwarf shrub-dominated communities.[28] Furthermore, the District stated that field investigations conducted in May and June 2013, revealed that a small arm of the southeast portion of the large wetland extended across a narrow, low lying portion of the berm connecting the large wetland with the wetland swale within the upper portion of Channel B.[29] Therefore, the District concluded, as part of the revised AJD that accompanied the 14 November 2013 proffered permit, that the large wetland area north of the berm, which includes a portion of the Appellant's property, was continuous with the wetland within Channel B.[30]

While the District concluded that the wetland was continuous, the District used language in their AR that seemed to imply that the different geographic portions of this continuous wetland were actually independent wetlands. For example, the District stated, "Thus, the hydraulic gradient [...] is causing subsurface flow to lead south from the wetland north of the berm to the wetland swale in Channel B during spring and early summer," and, "...without the berm [...], the wetland area north of the berm and the wetland swale would be more broadly contiguous." However, following these references in the AR, the District clarified the word choice when they indicated that while they previously thought that, "...these two wetland areas were completely separated on the ground surface by the berm," the additional investigations conducted in May and June of 2013 revealed that the wetlands were connected and therefore, "...no longer considered separate."[31]

Finally, to be truly continuous (the same), the area between the subject wetland and those within Channel B must be absent from any barriers. The District identified multiple barriers in the area which included the previously mentioned berm as well as roads, residential developments, and upland areas.[32] However, with the exception of the berm, the District's AR demonstrated that all the barriers were located between the wetland itself and the downstream portion of Channel B and did not fragment the wetland (i.e. they were not located between the portion of the wetland on the subject property and the portion within the upstream portion of Channel B).[33] As previously stated, the District's AR indicated the berm was previously thought to completely

[26] 2014 AR pages 56 and 58.
[27] This is illustrated in the District's AR on 2014 AR page 345.
[28] 2014 AR page 58.
[29] This is illustrated in the District's AR on 2014 AR page 46.
[30] 2014 AR pages 58 and 63-66.
[31] 2014 AR page 55.
[32] 2014 AR page 326.
[33] 2014 AR page 326.

separate the wetland into two portions. However, field work revealed that the berm did not completely separate the wetland.[34] Therefore, based on the discussion above, the District's AR supports that the subject wetland is continuous with those within Channel B. Consequently, this reason for appeal does not have merit.

5.2.3 Action: No action necessary.

5.3 Appeal Reason 3: Flow measurements within Channel B, regional topography, and the presence of permafrost demonstrate there is no surface or subsurface connection between the subject wetlands and Channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were connected (adjacent) to Channel B.

5.3.1 Finding: This reason for appeal does not have merit.

5.3.2 Discussion: In their RFA, the Appellant asserted that because the regional topography slopes to the northwest away from the site, it was impossible for surface flow to travel southeast (upgradient) towards the headwaters of Channel B.[35] Additionally, the Appellant asserted that data obtained from flow measurements at various locations along Channel B demonstrated that the area wetlands lacked a subsurface connection to Channel B.[36] Furthermore, the Appellant asserted that rainfall data showed that evaporation is greater than precipitation for the region and that any water that infiltrates below the surface would be lost to the permafrost that is found within 80-90% of the region.[37] By arguing that the subject wetlands lack a connection (either surface or subsurface) to Channel B, the Appellant is essentially arguing that the subject wetlands are not adjacent to Channel B.

Adjacency is defined in regulation as, "...bordering, contiguous, or neighboring," and that "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[38] Revised *Rapanos* guidance issued by the Corps in 2008 further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.[39]

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[34] 2014 AR page 55.
[35] Appellant's 7 January 2014 RFA, page 6.
[36] Appellant's 7 January 2014 RFA, pages 7-8.
[37] Appellant's 7 January 2014 RFA, page 18.
[38] 33 CFR § 328.3(c).
[39] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* and *Carabell* v. *United States,* p. 5-6.

The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook)[40] establishes standard operating procedures for conducting, and documentation practices to support an AJD. Documentation practices required by the Guidebook for wetlands adjacent to, but not directly abutting RPWs that flow directly or indirectly into TNWs specifically require a district to document that the wetland meets at least one of the three *Rapanos* criteria described above. Documentation practices by the Guidebook required for wetlands directly abutting RPWs that flow directly or indirectly into TNWs do not require discussion relative to the three *Rapanos* criteria, but documentation that the wetland directly abuts the RPW with the Guidebook referring to this geographic orientation as a continuous surface connection.

As discussed in reason for appeal two above, the District showed in its AR that the wetland on the Appellant's property was part of a larger wetland that extended into the upper portion of Channel B. The District further stated in a MFR and its revised AJD that accompanied the 14 November 2013 proffered permit that this wetland extends to where the RPW portion Channel B begins and therefore concluded that the wetland is adjacent to, and directly abutting an RPW (Channel B).[41] As a result, the District's AR satisfied the Guidebook requirements to document that the wetland is adjacent to Channel B.

While not necessary in this case, the District also indicated in its AR that the larger wetland satisfied all three *Rapanos* guidance criteria for being adjacent to Channel B.[42] The District documented that the wetland was separated by a berm/barrier (the 40-foot wide spoil berm) from, as well maintained an ecological connection with Channel B.[43] Additionally, the District documented that the wetland maintained an unbroken shallow subsurface connection with Channel B.[44] This shallow subsurface connection was a main portion of the Appellant's assertions associated with this reason for appeal.

The District's rationale associated with the shallow subsurface hydrologic connection was based on a connection established vertically through infiltration from the wetland into the underlying, shallow aquifer, and then laterally from the fast moving aquifer into Channel B.[45] In their AR, the District stated that some precipitation remains available for infiltration into the aquifer as only 60 to 70 percent is removed by "actual" evapotranspiration (which the District distinguished from "potential" evapotranspiration which exceeds precipitation).[46] The District also acknowledged that the majority of the region was mapped as having soils with seasonal frost, but that discontinuous

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[40] *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook.* June 1, 2007. The Guidebook is found at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx.
[41] 2014 AR pages 43, 48 and 63-66.
[42] 2014 AR pages 43, 46, and 48.
[43] 2014 AR pages 46, 54-56, 305, and 325-326.
[44] 2014 AR page 46.
[45] 2014 AR pages 55-56, and 328.
[46] 2014 AR pages 55, 57, and 323-324.

permafrost and permafrost were also present.[47] The District believed this did not prevent infiltration into the aquifer as water perched above seasonal frost would reach the aquifer once the frost thawed, or water above perfmafrost could reach the aquifer by either moving laterally around the permafrost or vertically through thaw zones within the permafrost. Once in the aquifer, the District stated a small portion would move southeast into the upper reaches of Channel B due to the hydraulic gradient produced by the elevation difference (the District stated Channel B was approximately one foot below the ground surface of the wetland area to the north). However, the majority of the infiltration would be carried within the fast moving aquifer along the predominant topographic gradient to the northwest towards the downstream portions of Channel B.[48] Therefore, while this documentation was unnecessary, the District's AR addresses the Appellant's assertions associated with this reason for appeal and supports their conclusion that the subject wetlands were adjacent to Channel B via a shallow, subsurface connection.

Based on the above discussion, while the District's AR contains unnecessary discussion relative to the three *Rapanos* guidance adjacency criteria, it does satisfy the Guidebook's requirements for documentation that the wetland is adjacent to Channel B. Therefore, this reason for appeal does not have merit.

5.3.3 Action: No action necessary.

5.4 Appeal Reason 4: "The contribution from the entire Channel B watershed is less than one percent of total flow in the [Chena River] and is insignificant." Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Channel B, in combination with similarly situated wetlands (including the subject wetland), had a significant nexus with the Chena River, the nearest downstream traditionally navigable water.

5.4.1 Finding: This reason for appeal does not have merit.

5.4.2 Discussion: In their RFA, the Appellant asserted that the volume of discharge from Channel B into the Chena River is insignificant as it is so small relative to the overall volume of flow in the Chena River. Consequently, the Appellant believes Channel B lacks a significant nexus with the Chena River.[49]

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,[50] the EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permitting actions, and other relevant actions were consistent with the *Rapanos* decision and supported by the AR. The two agencies issued joint revised *Rapanos* guidance on 2 December 2008, in

[47] 2014 AR pages 314-316, 321-322, and 324-326.
[48] 2014 AR pages 55, 323-324, and 326.
[49] Appellant's 7 January 2014 RFA, page 6.
[50] Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

response to public comments received and the agencies' experience in implementing the *Rapanos* decision.[51]

The *Rapanos* guidance requires the application of two new standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over a water body that is not a TNW if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs.

The second standard requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW. Consequently, the agencies may assert jurisdiction over wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary if the RPW and its adjacent wetlands are determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW.

As discussed in reasons for appeal two and three above, the District's AR established that the subject wetland was part of a larger wetland that extended into Channel B, then northwest within the Channel to the point where the Channel became an RPW. Therefore, the District concluded that the wetland was adjacent to (and abutting) an RPW.[52] As such, this satisfied the first standard of the *Rapanos* guidance described above and regulatory jurisdiction is recognized over the wetland without the legal obligation to make a case-by-case significant nexus analysis.

It should be noted that while not required in this circumstance, the District's AR included a lengthy significant nexus analysis that was part of the District's basis of jurisdiction associated with the 22 October 2012 initial proffered permit. The District recognized during the appeal conference that the analysis was no longer required, but chose not to omit it due to the extensive time and resources invested in it. Nevertheless, the District's significant nexus analysis is immaterial as it was not required. Consequently, the Appellant's assertion that Channel B lacks a significant nexus with the Chena River is also immaterial because, as previously mentioned, jurisdiction is recognized in this circumstance without the legal obligation to make a

[51] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008.
[52] 2014 AR pages 43, 46, 48, and 58.

case-by-case significant nexus analysis. Therefore, this reason for appeal does not have merit.

5.4.2 Action: No action necessary.

5.5 Appeal Reason 5: The District lacked, "...sufficient guidance, policy, and regulation to conduct and publish significant nexus findings." Therefore, the District was arbitrary and capricious when it concluded Channel B and its adjacent wetlands (including the subject wetlands) had a significant nexus with the Chena River.

5.5.1 Finding: This reason for appeal does not have merit.

5.5.2 Discussion: In their RFA, the Appellant stated that the District lacked sufficient, "...guidance, policy, and regulation to conduct and publish significant nexus findings." The assertion was based on hand written comments on an internal (District) staff action summary dated 24 February 2012, that stated:

> "Kevin, give me your analysis."[54]
> "Sir: This version includes [Hydrology and Hydraulic Engineer (H&H)] comments. Greg has done a great job and I agree with his conclusions. Biggest issue is that what constitutes a 'significant nexus' is a judicial creation that is not defined and ultimately can only be decided by the courts. OC has reviewed and found it legally sufficient. Kevin."[55]

During the appeal conference, the District stated that the response was provided by Mr. Kevin Morgan, the former District Regulatory Division Chief. The District stated that because Mr. Morgan is now retired, they are unable to definitively explain the comment. Regardless, the sufficiency of regulation, guidance, and policy available to a district is beyond the scope of the appeal process, because an appeal is associated with a specific Corps action and reasons for appeal are limited to, for example, a district's application of regulation, guidance, or policy specific to that action. Furthermore, as discussed in reason for appeal four above, while included in the District's AR, a significant nexus analysis was not required in this case. Therefore, the sufficiency of regulation, guidance, or policy relative to a significant nexus analysis is immaterial. Consequently, this reason for appeal does not have merit.

5.5.3 Action: No action necessary.

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[54] It should be noted that the RFA attributed this comment to LTC James Stone. However, the source of this comment is not entirely clear as it encompassed the spaces allotted for both the district and deputy district commanders and the signature associated with it is not legible. It is clear, however, that the comment originated from either the commander or deputy commander as the response included the word, "Sir." Due to this uncertainty, the quote here differs from that in the RFA as it did not include an originator.
[55] 2014 AR page 292.

6. **CONCLUSION.** For the reasons stated above, I have determined the reasons for appeal do not have merit. The final Corps decision in this case is the Alaska District Engineer's proffered permit. This concludes the administrative appeal process relative to this action.

2 MAR 15
Date

JEFFREY L. MILHORN, P.E.
Brigadier General, USA
Commanding