
No. 15-35906

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

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

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Universal Welding & Fabrication, Inc., states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

(a) The statutory basis for the subject matter jurisdiction of the district court is provided by 28 U.S.C. § 1331 (federal question), 5 U.S.C. §§ 702, 704 (judicial review of federal agency action), and 5 U.S.C. § 703 (authorizing declaratory and injunctive relief in suits seeking review of federal agency action).

(b) This appeal is from a judgment of the United States District Court for the District of Alaska resolving the sole claim for relief advanced by Appellant Universal Welding against Appellees United States Army Corps of Engineers, *et al.* Excerpts of Record, Volume 1 [ER] 1-2. Therefore, the judgment is final. *See* Fed. R. Civ. Proc. 54(b). The statutory basis for the jurisdiction of this Court is provided by 28 U.S.C. § 1291.

(c) The date of entry of the judgment appealed from is October 1, 2015. 1 ER 1-2. The date of the filing of the notice of appeal is November 19, 2015. 2 ER 24-25. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether 14 acres of low-functioning wetlands found on Appellant Universal Welding's property are subject to the regulatory authority of Appellees United States Army Corps of Engineers, *et al.*, under the Clean Water Act, 33 U.S.C. §§ 1251-1388, and pertinent implementing regulation, *see* 33 C.F.R. § 328.3(a) (2014). The Corps contends that Universal Welding's wetlands are subject to the agency's control because they are "adjacent" to a "tributary" (Drainage Channel C) of a traditional navigable water, *see id.* § 328.3(a)(1), (5), (7). In contrast, Universal Welding contends that its wetlands are adjacent to other wetlands, and therefore are excluded from regulation. *See id.* § 328.3(a)(7) (asserting jurisdiction over "[w]etlands adjacent to waters (other than waters that are themselves wetlands)").

This issue is the heart of Universal Welding's action against the Corps. *See* 2 ER 43-45 (Compl. ¶¶ 47-59); 2 ER 34-42 (Pl.'s Mot. & Mem. Summ. J. at 8-16). It also was the principal focus of the district court's decision on summary judgment. *See* 1 ER 15-23. The standard of review of the district court's grant of summary judgment in this action, brought

under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, is de novo. *E.g., Ak. Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions pertinent to this appeal are set forth in the addendum to this brief.

STATEMENT OF THE CASE

The Clean Water Act grants to Appellees United States Army Corps of Engineers, *et al.*, the authority (along with the United States Environmental Protection Agency) to regulate the discharge of dredged and fill material into the “waters of the United States.” *See* 33 U.S.C. §§ 1344(a), 1362(7). By administrative rule, the Corps has extended this authority to various types of waters, *e.g.*, lakes, streams, waters, ponds, and wetlands. *See generally* 33 C.F.R. § 328.3(a)(1)-(6) (2014).¹ Included

¹ In 2015, the Corps and EPA substantially amended their regulations interpreting “waters of the United States.” *See* 80 Fed. Reg. 37,054 (June 29, 2015). Among other things, the amendments—which postdate the challenged Corps permitting decision—eliminate the limitation on adjacent wetlands jurisdiction, 33 C.F.R. § 328.3(a)(7) (2014), *see* 80 Fed. Reg. at 37,104-05, which is the subject of this appeal. The amendments, however, have been stayed pending judicial review. *In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015). Below, the district court held that, even without the stay, the amendments would have no effect on this case. *See* 1 ER 6-7 n.22. *See also* 2 ER 33 n.12 (Corps Summ. J. Br. at 22 n.12). Accordingly, (continued...)

among these waters are most—but not all—wetlands that are “adjacent” to other regulated waters. *Id.* § 328.3(a)(7). This case concerns the limits of the Corps’ “adjacency” jurisdiction.

**A. Universal Welding and Fabrication
Is a Sub-Contractor, Based in North
Pole, Alaska, Which Wishes To Expand
Its Operations to a Neighboring Site**

Appellant Universal Welding is an Alaska corporation based in the City of North Pole, 1 ER 4, within the Fairbanks North Star Borough. The company fabricates steel buildings, as well as miscellaneous materials such as catwalks, platforms, stairs, and ladders. 1 ER 4. It also provides pipeline supports, tanks, and oil well drilling for the oil and gas industry. 2 ER 119. Universal Welding currently does business on two parcels—totaling about nine acres—within the North Pole’s Quinnell Subdivision. 2 ER 112. The company also owns an adjoining vacant parcel, about 20 acres in size. *Id.* See 2 ER 228 (subdivision map depicting the parcel as Quinnell Lot 3).

¹ (...continued)

all of this brief’s citations to Title 33 of the Code of Federal Regulations are to that Title’s 2014 edition, which contains the regulatory provisions pertinent to this appeal.

Immediately west of Universal Welding's three lots are four parcels, *see* 2 ER 228 (depicted as Quinnell Lot 2, TL-416, 2698 Hurst Road, and 2700 Hurst Road), much of the land of which has been cleared. 2 ER 187-188. Of these four parcels, Quinnell Lots 2, TL-416, and 2698 Hurst Road, adjoin Peridot Street, *see* 2 ER 228, a public road, 2 ER 189-190. Quinnell Lot 2, as well as 2698 Hurst Road, are developed.² *See* 2 ER 225-226 (aerial photographs). Immediately west of Peridot Street is another development,³ and then a large wetland. This wetland continues for over a mile to Channel C, 2 ER 148, a flood control channel constructed by the Corps, 2 ER 139. Channel C flows into the Chena Slough, which flows into the Chena River. 2 ER 139-140. Channel C is approximately 1.6 miles west of Universal Welding's property.⁴ 2 ER 148.

Because of increased business, 2 ER 117, Universal Welding wants to expand operations to its Quinnell Lot 3 parcel ("site" or "property"). This property would serve as a staging area to lay down raw steel and

² A Google Earth search based on addresses in the record, 2 ER 228, reveals that these developments are The Church at North Pole and Little Richard's Family Diner.

³ According to Google Earth, the development is called the Hummingbird Espresso/Screaming Weasel Gift Shop.

⁴ The general topographic orientation of the area can be found at 2 ER 94.

finished modules prior to their delivery. 2 ER 128; 2 ER 127. The site's planned development—entailing the putting down of a gravel bed—will affect approximately 14 acres of wetlands. 2 ER 52. These wetlands are already substantially degraded. *See* 2 ER 113 (Corps memo to file) (noting that the site's wetlands are in a “degraded condition” and “low functioning”). Indeed, in the Corps' estimation, (i) the site “wetland's opportunity to store water and control flooding is limited,” (ii) the “wetland's opportunity to retain sediment and remove nutrients is limited,” (iii) the “wetland's provision of fish and wildlife habitat is of moderately low importance,” and (iv), although the wetland “performs 7 of the 10 functions considered,” it does so “at low or low to moderate levels.” 2 ER 114-116. *See also* 2 ER 121 (letter from U.S. Fish & Wildlife Service to Corps) (noting that the site's wetlands “were disturbed over 20 years ago” and that the site does not provide habitat for any endangered or threatened species); 2 ER 120 (letter from Universal Welding's consultant to the Corps) (“[T]he entire lot has been historically cleared.”).

B. The Corps' Clean Water Act Permitting Authority Is Limited to "Waters of the United States," as Interpreted by Regulation and Case Law

An essential element of the Corps' regulatory authority over a site is the presence of "waters of the United States." *See* 33 U.S.C. § 1344(a) (granting regulatory authority over "navigable waters"); *id.* § 1362(7) (defining "navigable waters" to include "the waters of the United States"). The Corps' interpretation of that phrase has been, to put it mildly, rather controversial. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) ("[B]ased on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . ."); *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (An "immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.").

Notwithstanding this controversy, the basic framework for testing the scope of the Corps' jurisdiction in this case comprises a fairly straightforward two-part analysis. First, does the Corps' regulation give the agency control over the site? Second, does this regulatory assertion of authority fall within the delegation granted by the Act, as interpreted by case law? If the answer to *either* of these questions is "no," then the Corps lacks jurisdiction.

With respect to the first question, the Corps has interpreted "waters of the United States" to apply to various types of aquatic features. For example, the Corps considers navigable-in-fact waters to be regulable. *See* 33 C.F.R. § 328.3(a)(1). Similarly, the Corps asserts authority over all tributaries to such waters. *See id.* § 328.3(a)(5). Relevant here, the Corps also claims jurisdiction over certain types of wetlands.⁵ *See id.* § 328.3(a)(7). Specifically, the Corps asserts control over wetlands that are "adjacent" to other regulable waters. *Id.* Generally, a water is adjacent to another water if the one borders the other, or is contiguous to or is

⁵ The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b).

neighboring the other. *Id.* § 328.3(c) (“The term adjacent means bordering, contiguous, or neighboring.”). Wetlands that are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” *Id.*

Critically for this case, the foregoing “adjacent wetlands” jurisdiction—*i.e.*, control based on a wetland’s adjacency to another regulated water—is subject to an important limitation. When a wetland is adjacent to a second, otherwise regulable *wetland*, the Corps will *not* assert jurisdiction over the first wetland by virtue of its adjacency to the second. *Id.* § 328.3(a)(7) (asserting jurisdiction over “[w]etlands adjacent to waters (other than waters that are themselves wetlands)”). In such a case, the Corps has permitting authority over the first wetland if, but only if, the first wetland is jurisdictional for reasons unrelated to its adjacency to another jurisdictional wetland. Put another way, if an essential element for jurisdiction over the first wetland is adjacency to a regulable wetland, then the first wetland cannot be considered a water of the United

States, and the Corps' regulation provides the agency no authority to control it.⁶

But even if the Corps' regulation otherwise authorizes agency control, such regulation may still be impermissible. Over the last two decades, the Supreme Court has interpreted the Clean Water Act more narrowly than the Corps' regulation. For example, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the High Court held that the Clean Water Act cannot be interpreted to cover "isolated ponds." *Id.* at 171. *See* 2 ER 132 n.18 (Corps administrative appeal decision) ("Subsequent to the Supreme Court's holding in *Solid Waste Agency . . .*, the Corps may not be able to assert jurisdiction over isolated wetlands that lack a significant nexus to traditionally navigable waters."). In the consolidated cases of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, 547 U.S. 715 (2006), the Supreme Court, in a split decision, further limited the Clean Water Act's reach, in particular with respect to wetlands.

⁶ The Corps does regulate certain types of wetlands on grounds other than adjacency. *See, e.g.*, 33 C.F.R. § 328.3(a)(2) (asserting jurisdiction over all "interstate wetlands"). The agency has never asserted any such alternative basis for jurisdiction over Universal Welding's site. *See* 2 ER 59 (Corps final permitting decision); 2 ER 180 (approved jurisdictional determination).

A four-justice plurality opinion, authored by Justice Scalia, set forth a two-part test for determining whether a wetland is jurisdictional. First, the wetland must have a “continuous surface connection” to another jurisdictional water. *Id.* at 742 (plurality opinion). Second, the connection must be such as to “mak[e] it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Id.* See also *id.* at 755 (jurisdictional wetlands must have a “physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States”).

Justice Kennedy authored an opinion concurring only in the judgment. In contrast to the plurality, Justice Kennedy’s *Rapanos* concurrence approaches the jurisdictional question under the rubric of “significant nexus”: a wetland is jurisdictional if it bears a significant nexus to a traditional navigable waterway. See *id.* at 779 (Kennedy, J., concurring in the judgment). A significant nexus is present if the wetland, either by itself or in combination with similarly situated wetlands in the same region, significantly affects the physical, biological, and chemical integrity of the downstream traditional navigable waterway. See *id.* at 780. In contrast, if the wetland has only an insignificant effect on the downstream traditional navigable waterway, it is not jurisdictional. See

id. In this Circuit, Clean Water Act jurisdiction can be proved under either *Rapanos* test. See *Northern California River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2010).

The Corps has issued a guidance document, jointly with EPA, interpreting and applying the *Rapanos* tests in conjunction with the agencies' existing regulations. 2 ER 211-223 (Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008)). The Guidance provides, among other things, that a wetland is "adjacent" to another jurisdictional water—and therefore itself jurisdictional under the regulations' adjacency jurisdiction—if at least one of the following three criteria is satisfied: (i) an unbroken surface or shallow subsurface connection exists between the waters; (ii) the waters are physically separated by man-made dikes, barriers, and the like; or (iii) the waters are reasonably close, supporting an inference of ecological interconnection. 2 ER 215-216.

C. Universal Welding Attempts To Obtain a Permit on Reasonable Terms from the Corps

In January, 2010, Universal Welding applied to the Corps for a jurisdictional determination as to whether its site contains any features

subject to Clean Water Act jurisdiction.⁷ 2 ER 204-210. In March, 2010, the Corps issued an approved jurisdictional determination,⁸ concluding that the site contains wetlands, and that these wetlands are jurisdictional because they are adjacent to Channel C. 2 ER 198-203. The Corps initially based its adjacency determination on its conclusion that the site's wetlands should be lumped together with the wetland on the other side of Peridot Street, such that the ensuing "combined" wetland would directly abut Channel C. 2 ER 191; 2 ER 195.

Following objection from Universal Welding, 2 ER 186, the Corps changed its rationale. No longer asserting that the site's wetlands should be considered part of the wetland on the other side of Peridot Street, *see* 2 ER 148 (Corps significant nexus finding) ("[T]he main barrier between the subject wetland and both Channel C and Chena Slough is Peridot Street."), the Corps now contended that the site's wetlands were adjacent to Channel C because of alleged subsurface water flow *from* the site *to*

⁷ Universal Welding previously had submitted an application for a Clean Water Act permit for the site. 2 ER 227 (April, 2008, permit application). The company did not pursue the application, and the Corps closed the file in July, 2008. 2 ER 224.

⁸ The Corps is authorized to issue a jurisdictional determination as to the scope of its permitting authority (if any) over a given site. 33 C.F.R. § 331.2.

Channel C, 2 ER 145 (Corps significant nexus finding), *by way of* the intervening wetland lying between Peridot Street and Channel C.⁹ *See* 2 ER 134 (Corps response to administrative appeal) (“[T]he primary hydrologic connection is a subsurface one.”); 2 ER 148 (Corps significant nexus finding) (asserting that the “large wetland area” “west of Peridot Street” contains a “nearly 5 mile long section in the central portion” from the street to Channel C constituting a “relatively continuous expanse of intact habitat”).

Universal Welding administratively appealed this jurisdictional determination on several grounds, among them that the site’s wetlands are not subject to the Corps’ adjacency jurisdiction because they are adjacent to other wetlands. *See* 2 ER 135. Although finding merit in some of Universal Welding’s contentions, the Corps’ appellate officer rejected Universal Welding’s adjacency argument. He did so in part by resuscitating the Corps’ original contention that the site’s wetlands should be considered, along with the wetlands on the other side of Peridot Street,

⁹ The Corps also asserted that the site was adjacent to Chena Slough, 2 ER 145-147. The Corps’ final permitting decision does not rely on that rationale, 2 ER 59-67, and so the agency is precluded from relying on it now, *see Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997).

to be a single wetland. *See* 2 ER 133 (Corps administrative appeal decision) (“Although Peridot Road crosses the wetland, it has not had the effect of changing a continuous wetland into two or more separate wetlands.”).

In July, 2011, following the Corps’ affirmance of jurisdiction over the site, Universal Welding submitted a permit application to the agency. 2 ER 129-130. In April, 2012, the Corps issued to Universal Welding an “initial proffered permit.” *See* 2 ER 110. *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). Among the permit’s conditions was Special Condition 5, which required Universal Welding to pay an in-lieu fee to The Conservation Fund as mitigation for the project’s impacts to the site’s “low functioning wetlands.” 2 ER 111. Universal Welding strongly objected to Special Condition 5. In its view, the demanded mitigation was excessive because (i) “the property was originally cleared in the early 1980s and re-cleared about 5 years ago,” thereby substantially compromising the site wetlands’ functions, (ii) the site is “surrounded by roads, businesses, and industrial operations within 1,000 feet . . . , which further degrades the functions of the wetland area,”

and (iii) The Conservation Fund's price per acre of \$5,000—amounting to a \$70,000 fee—exceeds the site's commercial value. 2 ER 109. In response to Universal Welding's objections, the Corps modified Special Condition 5 to allow Universal Welding to provide its own mitigation, but nevertheless retained the compensatory mitigation requirement of 14 acres.¹⁰ 2 ER 108. With this minor change, the Corps reissued the permit in June, 2012. *See* 2 ER 106.

D. The Corps' Appellate Officer Questions the Agency's Jurisdiction

The following month, Universal Welding administratively appealed the permit. *See* 2 ER 104-105. Again, the Corps' appellate officer agreed with several of Universal Welding's objections. *See* 2 ER 100 (Corps administrative appeal decision). Most important for this case, the Corps' appellate officer determined that the permit decision had failed adequately to explain why the regulatory limitation on wetlands adjacent to other wetlands did not preclude jurisdiction over Universal Welding's property. 2 ER 101-103. To that end, the appellate officer called the Corps' attention to a then-recent decision of the District of Alaska, *Great Northwest, Inc. v.*

¹⁰ The Corps had already lowered the compensation ratio to 1:1 from 1.5:1, on account of the degraded status of the site's wetlands. *See* 2 ER 107-108.

United States Army Corps of Engineers, No. 4:09-cv-0029-RRB, 2010 WL 9499372 (D. Alaska June 8, 2010), *reconsideration denied*, 2010 WL 9499071 (D. Alaska July 20, 2010), applying the adjacent wetlands limitation to property in the neighborhood of Universal Welding's site.

In *Great Northwest*, the Corps asserted Clean Water Act jurisdiction over wetlands, located about one-third of a mile from the navigable-in-fact Tanana River. *See* 2010 WL 9499372, at *1. The Corps argued that it had jurisdiction over Great Northwest's wetlands because they were adjacent to the Tanana. *See id.* at *4-*5. Great Northwest argued that its wetlands were subject to the jurisdictional exception for wetlands adjacent to other jurisdictional wetlands. Great Northwest explained that its property was separated from the Tanana by a railroad berm and a flood control levee, and therefore that its property was adjacent to the wetlands that lay between these features. *See id.* at *1, *5-*6. The district court ultimately agreed with Great Northwest, reasoning that so long as the relevant barriers actually separated the wetlands such that they were no longer "continuous" or "intact," the jurisdictional exception for wetlands adjacent to other wetlands would apply. *See id.* at *7-*9. The district court also

held that the exception would apply notwithstanding that the wetlands might otherwise be regulable under *Rapanos*. See 2010 WL 9499071, at *2.

The appellate officer for Universal Welding's appeal concluded that, given the close factual similarity between the property at issue in *Great Northwest* and Universal Welding's property, Universal Welding's permit should be remanded to allow the Corps to explain whether the *Great Northwest* decision precludes jurisdiction. 2 ER 103.

E. The Corps Reconsiders Its Jurisdictional Analysis, but Then Does an About-Face Following EPA's Intervention

Initially on remand, the Corps determined that Universal Welding's wetlands are *not* jurisdictional. The agency explained that these wetlands are "not continuous with the large wetland situated west of Peridot Street, which directly abuts Channel C and is clearly jurisdictional." 2 ER 99 (Corps initial remand determination). The Corps therefore concluded that, "despite the hydrologic connection to Channel C, the subject wetland is non-jurisdictional according to 33 CFR § 328.3(a)(7)." 2 ER 99.

Shortly after the Corps made this initial finding, EPA intervened to "elevate[] review" of the Corps' jurisdictional analysis. 2 ER 95. A few

months later, the Corps reversed course. Now it concluded that Universal Welding's wetlands *are* jurisdictional, notwithstanding the regulatory limitation on adjacent wetlands jurisdiction. The Corps explained that *Great Northwest* and the adjacent wetlands exception are inapplicable to Universal Welding's site for two reasons.

First, the Corps noted that, in *Great Northwest*, the subject wetlands were separated from other waters by two barriers (a railroad berm and flood levee), whereas Universal Welding's property is separated from other waters by only one barrier (Peridot Street).¹¹ 2 ER 69 (Corps final permitting decision). Second, in *Great Northwest* there was no assertion of a shallow subsurface connection, whereas here the Corps concluded that such a connection to the wetlands west of Peridot Street and to Channel C exists. 2 ER 69-70. Therefore, according to the Corps, Universal Welding's property is "adjacent" to the non-wetland Channel C, because of the existence of Peridot Street, as well as the presence of a shallow

¹¹ "[T]here is no official policy regarding the number of 'barriers' and adjacency." 2 ER 92 (email from EPA jurisdiction lead official to Corps' Alaska officials). The Corps, however, did not explain why it considered the distinction of two barriers versus one barrier to be significant. *Cf.* 2 ER 69 (Corps final permitting decision).

subsurface connection.¹² 2 ER 69-70, 83. The Corps accordingly reissued the permit, 2 ER 46, subject among other things to Special Condition 5, 2 ER 53.

F. The District Court Approves the Corps' About-Face

A few months after the re-issuance of the permit, Universal Welding filed this action under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The suit contended that the Corps' permit decision is illegal because the agency has no authority over Universal Welding's wetlands. These wetlands, it argued, are adjacent to other, jurisdictional wetlands. Because the Corps asserted no basis for jurisdiction other than adjacency, the site's wetlands are subject to the adjacent wetlands regulatory exception, 33 C.F.R. § 328.3(a)(7).

¹² The Corps also peremptorily asserted that adjacency was established by the site's "reasonable proximity" to Channel C. 2 ER 83 (Corps final permitting decision). But the agency provided no explanation for why that was so or how Universal Welding's case could then be distinguished from *Great Northwest*, in which, as the Corps itself acknowledged, jurisdiction was asserted based in part on the wetlands' "reasonably close proximity" to a jurisdictional water. *See* 2 ER 69. Consequently, the Corps cannot defend its decision here on the basis of "reasonable proximity." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and *articulate a satisfactory explanation* for its action including a 'rational connection between the facts found and the choice made.'") (emphasis added) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The district court disagreed. The court began its analysis by noting that the regulation’s parenthetical phrase, “other than waters that are themselves wetlands,” is ambiguous. 1 ER 17 n.87. Next, the court held that the Corps’ interpretation of that phrase—namely, excluding from jurisdiction those wetlands that are adjacent to other wetlands *and to no other jurisdictional feature*—is reasonable. 1 ER 17-18. Finally, the court concluded that Universal Welding’s wetlands are adjacent to Channel C through a shallow subsurface connection that flows beneath the intervening wetland lying between Channel C and Peridot Street. *See* 1 ER 19-20. In reaching that result, the court distinguished *Great Northwest* on the ground that the Corps there had not contended that Great Northwest’s wetlands were connected to the Tanana River by way of a shallow subsurface connection. 1 ER 22.

STANDARD OF REVIEW

A district court’s grant of summary judgment in an action brought under the Administrative Procedure Act is reviewed de novo, such that this Court directly reviews the agency action. *Ak. Wilderness League*, 788 F.3d at 1217. The Act requires that an agency decision be set aside if, among other things, it is arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The Court’s review under this standard inquires as to whether the agency has relied on impermissible or irrelevant factors, failed entirely to consider an important aspect of the problem, or provided a rationale for its decision-making that is unsupported by record evidence or is simply irrational. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). This review is “narrow,” *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009), but nevertheless “searching and careful,” such that the Court “may not automatically defer to an agency’s conclusions, even when those conclusions are scientific,” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

SUMMARY OF ARGUMENT

The Corps may not regulate a wetland simply because it is adjacent to another jurisdictional wetland. *See* 33 C.F.R. § 328.3(a)(7) (asserting jurisdiction over “[w]etlands adjacent to waters (other than waters that are themselves wetlands)”). Here, Universal Welding’s wetlands are separated from other wetlands by a public road, 2 ER 69 (Corps final permitting decision), as well as by other developed parcels, 2 ER 225-226 (aerial photos). Therefore, its wetlands are adjacent to the wetlands on

the other side of the road. 33 C.F.R. § 328.3(c) (“Wetlands separated from other waters of the United States by man-made dikes or barriers . . . are ‘adjacent wetlands.’”). These latter wetlands in turn are immediately adjacent to Channel C, a jurisdictional non-wetland water. Accordingly, these intervening wetlands are themselves jurisdictional. 2 ER 69 (Corps final permitting decision); 2 ER 99 (Corps initial remand decision). *See* 33 C.F.R. § 328.3(a)(7). The Corps has asserted no basis for jurisdiction over Universal Welding’s wetlands other than adjacency. 2 ER 59 (Corps final permitting decision). Therefore, Universal Welding’s wetlands are non-jurisdictional, because they are adjacent to other jurisdictional wetlands.

Assuming *arguendo* that the Corps is correct to interpret Section 328.3(a)(7)’s limitation on adjacency jurisdiction to apply only to wetlands adjacent to other wetlands and to no other jurisdictional feature—*i.e.*, “solely” adjacent wetlands—Universal Welding’s wetlands would remain outside the Corps’ authority. A wetland is still “solely” adjacent to another wetland even if water flows from the one wetland, through the other wetland, toward a non-wetland water. To hold otherwise would deprive the adjacent wetlands limitation of any meaningful effect. That is so because the limitation only becomes relevant when a wetland is adjacent

to another jurisdictional wetland. And for nearly all such wetlands, their jurisdictional status is a function of their connection *to a non-wetland jurisdictional water*. See *Rapanos*, 547 U.S. at 742 (plurality opinion) (wetland jurisdiction based on continuous flow from wetland to downstream waters); *id.* at 780 (Kennedy, J., concurring in the judgment) (wetland jurisdiction based on wetland's effects on downstream waters).

Here, the basis for the Corps' determination that Universal Welding's wetlands are adjacent to Channel C is the purported existence of subsurface connections *running through and beneath intervening and adjacent wetlands*. 2 ER 70-77, 83 (Corps final permitting decision). In these circumstances, it would be unreasonable (i) to allow the Corps to ignore the presence of the intervening wetland in order to evade the agency's own regulatory limitation on its jurisdiction and, at the same time, (ii) to allow the Corps to rely upon the same intervening wetland to establish adjacency to the non-wetland jurisdictional water.

ARGUMENT

I

UNIVERSAL WELDING'S WETLANDS FALL OUTSIDE THE CORPS' JURISDICTION BECAUSE THEY ARE ADJACENT TO OTHER JURISDICTIONAL WETLANDS

An essential element of the Corps' jurisdiction under the Clean Water Act is the presence of "waters of the United States." *See* 33 U.S.C. §§ 1344(a), 1362(7). By regulation, the Corps has defined the classes of waters which the agency considers to be jurisdictional. 33 C.F.R. § 328.3(a)(1)-(7). Here, the only basis articulated by the Corps for jurisdiction over Universal Welding's wetlands is the agency's adjacency jurisdiction. 2 ER 59 (jurisdictional determination form reflecting the Corps' finding that Universal Welding's wetlands are "adjacent to but not directly abutting [relatively permanent waters] that flow directly or indirectly into [traditional navigable waters]"). Hence, the Corps' permitting decision can be upheld only if the agency's adjacency jurisdiction properly extends to Universal Welding's wetlands. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011) ("It is well-established that an agency's action must be upheld, if at all, on

the basis articulated by the agency itself,' not post-hoc rationalizations.”) (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50).

The Corps’ jurisdiction does not so extend. The agency’s regulation provides that adjacency jurisdiction over wetlands does *not* include instances where jurisdiction would be based upon the subject wetland’s adjacency to another jurisdictional wetland. 33 C.F.R. § 328.3(a)(7). *See Great Northwest*, 2010 WL 9499372, at *2 (“The Corps has declined to assert jurisdiction over wetlands that are themselves adjacent to other jurisdictional wetlands.”); *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 674 n.5 (E.D.N.C. 2003) (“[T]he Corps’ regulations provide that wetlands adjacent to other wetlands are not waters of the United States.”). Peridot Street (as well as several developed parcels) separates Universal Welding’s wetlands from the wetlands immediately adjacent to Channel C. 2 ER 69 (Corps final permitting decision) (“[T]he Universal Welding wetland is separated from Channel C by . . . one linear, artificially created barrier (Peridot Street).”). *See* 2 ER 225-226 (aerial photos). Accordingly, Universal Welding’s wetlands are adjacent to the wetlands immediately adjacent to Channel C. *See* 33 C.F.R. 328.3(c) (wetlands separated from other wetlands by “man-made . . .

barriers” are “adjacent wetlands”); 1 ER 16 n.82 (Summ. J. Order at 14 n.82) (“The Corps has conceded, at least for purposes of this action, that Peridot Road is a man-made barrier under 33 C.F.R. § 328.3(c).”). These latter wetlands in turn are jurisdictional.¹³ 2 ER 99 (Corps memo for record) (“[T]he large wetland situated west of Peridot Street, which directly abuts Channel C . . . is clearly jurisdictional.”). *See* 33 C.F.R. § 328.3(a)(5), (7) (asserting jurisdiction over tributaries and wetlands adjacent to tributaries). Therefore, Universal Welding’s wetlands—as wetlands adjacent to other jurisdictional wetlands—cannot be regulated under the Corps’ adjacency jurisdiction.

II

**THAT UNIVERSAL WELDING’S
WETLANDS MAY BE ADJACENT TO
WATERS THAT ARE NOT THEMSELVES
WETLANDS DOES NOT MAKE THE WETLANDS
REGULABLE, BECAUSE THEIR ADJACENCY
TO ANY NON-WETLAND WATER IS STILL
DEPENDENT ON THEIR ADJACENCY TO
OTHER JURISDICTIONAL WETLANDS**

Even under the Corps’ preferred articulation of the adjacency limitation, which the district court accepted, *see* 1 ER 17-18, Universal

¹³ Universal Welding does not concede that Channel C is a jurisdictional water, but assumes that it is for the sake of argument for this action.

Welding's wetlands would remain non-jurisdictional. In the district court's and the Corps' estimation, Universal Welding's wetlands are jurisdictional—regardless of their adjacency to the intervening wetland between Peridot Street and Channel C—because they are also adjacent to Channel C. *See* 1 ER 19-22. In other words, the Corps contended and the district court accepted that the adjacent wetlands limitation is inapplicable because Universal Welding's wetlands are not “solely” adjacent to other wetlands. Instead, so the argument goes, they are adjacent to Channel C, as well as to the wetland that lies between Channel C and Universal Welding's site.

During the administrative process, the Corps defended this double-adjacency conclusion on two grounds. First, Universal Welding's wetlands are separated from Channel C by Peridot Street. 2 ER 69 (Corps final permitting decision). *Cf.* 2 ER 215 (*Rapanos* Guidance) (wetlands are adjacent if “they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like”). Second, Universal Welding's wetlands are connected to Channel C

by subsurface water flow.¹⁴ 2 ER 69-70, 76 (Corps final permitting decision). *Cf.* 2 ER 215 (*Rapanos* Guidance) (wetlands are adjacent if hydrologically or ecologically connected).

Even assuming that these connections exist, they cannot avoid the Corps' limitation on wetlands adjacency jurisdiction. It is simply not true that Universal Welding's wetlands are adjacent to Channel C on account of Peridot Street. Peridot Street does not separate Universal Welding's property from Channel C—it separates that property (as well as other parcels) from the *wetlands* that are west of the street. 2 ER 225-226 (aerial photos). Although one court has accepted the theory that two sets of wetlands can form a single complex or network of wetlands adjacent to a non-wetland water, *see N.C. Shellfish Growers Ass'n*, 278 F. Supp. 2d at 674 n.5, the Corps has expressly disclaimed reliance on that argument here. 2 ER 33A n.14 (Def. Summ. J. Br.) (“The Corps did not elect to analyze whether the wetlands on Universal Welding's property comprised part of a continuous wetland complex . . .”). The agency cannot backtrack now.

¹⁴ At an earlier stage of the administrative process, the Corps characterized the hydrological connection as an ecological one. 2 ER 148. Assuming that the Corps can still assert such a ground, *see supra* n.12, it is foreclosed for the same reasons discussed in the text at pp. 28-31.

Regardless, it would be unreasonable, in light of the Corps' own limitation on its adjacent wetlands jurisdiction, to deem a wetland to be adjacent to a non-wetland water by reason of subsurface flow *beneath an intervening and jurisdictional wetland*. Cf. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own ambiguous regulation is not controlling if it is "plainly erroneous or inconsistent with the regulation").¹⁵ For example, if the wetland between Channel C and Peridot Street were excavated and built into a large subdivision and shopping mall, with underground parking and the typical fixtures of development, Universal Welding's wetlands could no longer plausibly provide continuous

¹⁵ Over the last few Terms, several Supreme Court Justices have suggested that the principle of deference set forth in *Auer* and its progenitor *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be reconsidered. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1213 (Scalia, J., concurring in the judgment) ("I would . . . abandon[] *Auer* . . ."); *id.* at 1225 (Thomas, J., concurring in the judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) ("The opinion concurring in part and dissenting in part raises serious questions about the principle set forth in . . . *Seminole Rock* . . . and *Auer* It may be appropriate to reconsider that principle in an appropriate case."). Although this Court is bound by *Auer* and *Seminole Rock*, Universal Welding preserves the issue of these cases' validity for Supreme Court review.

shallow subsurface flow, or otherwise be meaningfully connected, to Channel C. *Cf.* 2 ER 76 (Corps final permitting decision) (“The water table is typically within 5 to 10 feet of the ground surface in the project vicinity . . .”). Thus, but for the intervening wetland between the site and Channel C, the Corps could not establish adjacency jurisdiction.¹⁶ To allow the Corps to avoid that outcome by ignoring the very feature which otherwise would trigger the adjacent wetlands limitation subverts that limitation. Hence, however characterized, the alleged connection between the site and Channel C cannot override the adjacent wetlands limitation.

¹⁶ It is true that this Court relied on a groundwater connection to conclude that a pond had a significant nexus with a nearby river. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007). But simply because a wetland has a significant nexus to a jurisdictional water does not mean that it is subject to the Corps’ regulatory jurisdiction. *See* 1 ER 22 (Summ. J. Order at 20) (“[T]he Corps may not circumvent the adjacent wetlands jurisdictional exception . . . by finding that a wetland otherwise adjacent only to a jurisdictional wetland has a significant nexus with a non-wetland jurisdictional water.”).

III

THE ADJACENT WETLANDS LIMITATION, REASONABLY INTERPRETED, WOULD ALLOW REGULATION OF WETLANDS THAT—UNLIKE UNIVERSAL WELDING’S— ARE IMMEDIATELY ADJACENT TO NON- WETLAND AS WELL AS WETLAND WATERS

Critically, Universal Welding does *not* advance the interpretation, rejected by the district court and mistakenly ascribed to Universal Welding, which would deny jurisdiction to a wetland *immediately* adjacent to a non-wetland water, simply because the wetland also happened to be immediately adjacent to a wetland. 1 ER 17-18. Instead, Universal Welding merely contends that, where a wetland is immediately adjacent *only* to other wetlands, the Corps cannot avoid its own limitation on adjacency jurisdiction by ignoring the immediately adjacent wetland and leapfrogging to a non-wetland water that is not immediately adjacent.

To adopt the Corps’ contrary view would deprive the adjacent wetlands limitation of most of its limiting effect. *Cf. Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005) (an agency interpretation that would render text superfluous is not entitled to deference). Below, the Corps argued that its interpretation would still have substantial application, because it would

preclude the regulation of one wetland adjacent to another, isolated wetland. *See* 2 ER 31 n.10 (Def. Summ. J. Br. at 19 n.10) (“The phrase ‘other than waters that are themselves wetlands’ was intended to preclude asserting [Clean Water Act] jurisdiction over wetlands that were simply adjacent to another wetland (such as an ‘isolated’ wetland, as opposed to a wetland adjacent to a tributary).”) (quoting 79 Fed. Reg. 22,188, 22,209 (Apr. 21, 2014)). *See also* 2 ER 32 (Def. Summ. J. Br. at 21) (“For instance, two isolated wetlands might be geographically near one another, but neither near any non-wetland ‘water of the United States.’”). But in these circumstances the adjacency limitation would serve no purpose, because the Corps lacks authority to regulate isolated wetlands in any event. *Solid Waste Agency*, 531 U.S. at 171. *See* 2 ER 132 n.18 (Corps administrative appeal decision) (“Subsequent to the Supreme Court’s holding in *Solid Waste Agency* . . . , the Corps may not be able to assert jurisdiction over isolated wetlands that lack a significant nexus to traditionally navigable waters.”).

Moreover, it is highly improbable that any wetland immediately adjacent to a jurisdictional wetland will not also be adjacent to another non-wetland water (and thus still be jurisdictional). *Cf. Rapanos*, 547 U.S.

at 742 (plurality op.); *id.* at 780 (Kennedy, J., concurring in the judgment). The features that would make the second wetland jurisdictional would also, in most cases, make the first wetland jurisdictional. For example, if Wetland A is deemed adjacent to a neighboring tributary because of subsurface flows, it would be fortuitous hydrogeology indeed if Wetland B, lying on the other side of Wetland A, did not also have a subsurface connection to the same tributary. *Cf.* 2 ER 75 (Corps final permitting decision) (contending that groundwater flows from a point 1.5 miles away from the site, “skirts the Universal Welding site and encompasses a portion of Channel C”); 2 ER 94A (email communication between Corps officials) (contending that the site’s wetlands are “hydrologically similar to most other wetlands in the sub-basin”).

Accordingly, Universal Welding’s reasonable interpretation of the Corps’ adjacency limitation, which would exclude jurisdiction over (i) wetlands that are adjacent to wetlands and no other feature, and (ii) wetlands that are adjacent to non-wetland features but only by virtue of their adjacency to other wetlands, is the better one.

CONCLUSION

The Corps has ample authority to regulate wetlands. But that authority is not boundless. Universal Welding's wetlands are adjacent to other jurisdictional wetlands. By the Corps' own regulatory limitation, these wetlands are beyond the agency's authority.

The judgment of the district court should be reversed.

DATED: August 23, 2016.

Respectfully submitted,

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

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DATED: August 23, 2016.

s/ Damien M. Schiff
Attorney for Plaintiff - Appellant

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant Universal Welding states that it is not aware of any pending related case.

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Damien M. Schiff
DAMIEN M. SCHIFF

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**PERTINENT STATUTORY
AND REGULATORY PROVISIONS**

33 U.S.C. § 1344(a)

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1362(7)

The term “navigable waters” means the waters of the United States, including the territorial seas.

33 C.F.R. § 328.3(a) (2014)

The term *waters of the United States* means

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

(2) All interstate waters including interstate wetlands;

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

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

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

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

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

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

(6) The territorial seas;

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

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

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