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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TIN CUP, LLC, an Alaska limited liability company,

No. 4:16-cv-00016-TMB

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

**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* Env’tl. 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 than 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

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