FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIN CUP, LLC, an Alaska limited liability company, *Plaintiff-Appellant*, v. UNITED STATES ARMY CORPS OF ENGINEERS, *Defendant-Appellee*.	No. 17-35889 D.C. No. 4:16-cv-00016-TMB OPINION

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

Argued and Submitted June 13, 2018
Anchorage, Alaska

Filed September 21, 2018

Before: Sidney R. Thomas, Chief Judge, and
Consuelo M. Callahan and Carlos T. Bea,
Circuit Judges.

Opinion by Chief Judge Thomas;
Concurrence by Judge Bea

SUMMARY*

Environmental Law

The panel affirmed the district court's summary judgment in favor of the U.S. Army Corps of Engineers in a lawsuit that sought to set aside the Corps' decision for an excavation permit; and held that language in a 1993 appropriations act did not require the Corps to continue to use a 1987 guidance manual for delineating wetlands under the Clean Water Act.

The Clean Water Act prohibits "the discharge of any pollutant" without an appropriate permit; this prohibition applies to "the waters of the United States;" and the term "pollutant" includes dredged and fill material. 33 U.S.C. §§ 1311(a), 1362(7), and 1362(6), (12). In 1987, the Corps issued a guidance document concerning the wetland delineation process. The 1993 Budget Act directed that the Corps continue to use the 1987 Manual.

The Corps issued plaintiff a permit that would allow it to discharge gravel fill into 118 acres of wetlands, but included mitigation conditions that plaintiff found onerous. Plaintiff argued that the 1992 and 1993 Budget Acts required the Corps to continue to use the 1987 Manual and its definition of a growing season, without considering a 2007 Alaska Supplement.

The panel held that it would only conclude that an appropriations act made permanent changes in substantive law if Congress was clear about its

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

intentions. The panel further held that, absent a clear statement of futurity, a provision in an appropriations act is only in force for the fiscal year of the appropriation. The panel concluded that plaintiff had not shown a clear statement from Congress that the 1993 Budget Act enacted a mandatory, permanent change in substantive law.

Judge Bea concurred in the majority's ultimate conclusion that the district court did not err in granting summary judgment to the Corps, but he wrote separately because he would hold that the 1993 Budget Act contained sufficient words of futurity to bind the Corps after the 1993 fiscal year.

COUNSEL

Jeffrey W. McCoy (argued), Damien M. Schiff, and James S. Burling, Pacific Legal Foundation, Sacramento, California, for Plaintiff-Appellant.

John D. Gunter II (argued), Michael T. Gray, and Amanda S. Berman, Trial Attorneys; Eric Grant, Deputy Assistant Attorney General; Jeffrey H. Wood, Acting Assistant Attorney General; Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.; for Defendant-Appellee.

OPINION

THOMAS, Chief Judge:

In this case, we consider what should be considered the growing season in Alaska's permafrost and, specifically, whether language in a 1993 appropriations act requires the U.S. Army Corps of Engineers (the "Corps") to continue to use a 1987

guidance manual for delineating wetlands under the Clean Water Act. We conclude that it does not, and we affirm the district court.

I

A

The Clean Water Act (the "Act") prohibits "the discharge of any pollutant" without an appropriate permit. 33 U.S.C. § 1311(a). This prohibition applies to "the waters of the United States," 33 U.S.C. § 1362(7), and the term "pollutant" includes dredged and fill material, such as gravel or sand, 33 U.S.C. §§ (6), (12). In the period relevant to this case, regulations defined "waters of the United States" to include wetlands that are adjacent to other covered waters. 33 C.F.R. § 328.3(a)(7). The Act allows the Corps to issue permits for discharging dredged or fill material into waters of the United States. 33 U.S.C. § 1344(a).

In 1987, the Corps issued a guidance document "to provide users with guidelines and methods to determine whether an area is a wetland for purposes of" the Act. U.S. Army Corps of Eng'rs, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987) (the "1987 Manual") at 1. The 1987 Manual directs that the wetland delineation process be guided by three criteria: hydrophytic vegetation, hydric soils, and wetland hydrology. Under the 1987 Manual, satisfaction of the wetland hydrology criterion generally requires the presence of a "growing season," defined as a season in which soil temperature at 19.7 inches below the surface is above 5°C. In 1989, the Corps joined other federal agencies in adopting a new manual to supersede the 1987 Manual. Fed.

Interagency Comm. for Wetland Delineation, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Jan. 1989) (the "1989 Manual"). The 1989 Manual employed less stringent methods for delineating methods wetlands than the 1987 Manual.

In response to complaints from business groups and legislators, Congress limited the use of the 1989 Manual in the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (Aug. 17, 1991) (the "1992 Budget Act"). The 1992 Budget Act prohibited the use of funds to delineate wetlands under the 1989 Manual "or any subsequent manual not adopted in accordance with the requirements for notice and public comment of the rulemaking process of the Administrative Procedure Act." 105 Stat. at 518. The 1992 Budget Act also required the Corps to use the 1987 Manual to delineate any wetlands in ongoing enforcement actions or permit application reviews. *Id.*

The following year, Congress enacted the Energy and Water Development Appropriations Act of 1993, Pub. L. 102-377, 106 Stat. 1315 (Oct. 2, 1992) (the "1993 Budget Act"). The 1993 Budget Act stated in pertinent part:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
>
> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987

> Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.

106 Stat. at 1324.[1]

At the same time that Congress mandated continued use of the 1987 Manual, Congress appropriated money to the U.S. Environmental Protection Agency ("EPA") to contract with the National Academy of Sciences to analyze federal wetlands regulation. *See* Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. 102-389, 106 Stat. 1571 (Oct. 6, 1992); H.R. Rep. No. 102-710, at 51 (1992); H.R. Conf. Rep. No. 102-902 at 41. The ensuing report, published in 1995, recommended a number of changes to the Corps' wetlands delineation process. *See* Nat'l Research Council., Comm. on Characterization of Wetlands, *Wetlands: Characteristics & Boundaries* (1995) at 3. One suggestion was that the 1987 Manual's approach to "growing season" should either be abandoned altogether or replaced by region-specific criteria for wetland delineation. *Id.* at 102. In response, the Corps issued a series of regional "supplements" to the 1987 Manual. These supplements provide region-specific criteria for wetland delineation. To date, the Corps has issued ten such supplements covering the entire United States.

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[1] Following the parties' form, we refer to these two paragraphs as the "first paragraph" and the "second paragraph," respectively.

The Corps published its regional supplement for Alaska in 2007. U.S. Army Corps of Eng'rs, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)* (Sept. 2007) (the "Alaska Supplement"). Most relevant to this lawsuit, the Alaska Supplement used a different indicator for determining the presence of a growing season than used in the 1987 Manual. Rather than focusing on soil temperature, the Alaska Supplement's definition focuses on "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground." Alaska Supplement at 48.

B

Tin Cup, LLC ("Tin Cup") owns a 455-acre parcel in North Pole, Alaska, which it holds for its parent company, Flowline Alaska. Flowline Alaska seeks to use the parcel for the temporary storage of pipe and other manufactured material. The project will require the excavation and laying down of gravel material, which is a regulated "pollutant" under the Clean Water Act. *See* 33 U.S.C. § 1362(6).

In 2004, Tin Cup obtained a permit from the Corps for the relocation project. Tin Cup proceeded to clear approximately 130 acres from the site, but by 2008, the company had not commenced gravel extraction or fill placement. Thus, in 2008, Tin Cup submitted a new permit application. The Corps examined the extent of wetlands on the site and issued a new jurisdictional determination in November 2010, concluding that wetlands were present on 351 acres of Tin Cup's 455-acre site, including about 200 acres of permafrost.

In December 2010, Tin Cup administratively appealed the Corps' jurisdictional determination. Tin Cup argued that the site's permafrost cannot qualify as wetlands under the 1987 Manual. Tin Cup argued that, under the 1987 Manual, an area can only be considered a wetland if it has a growing season, and that the 1987 Manual defines a growing season as the season in which soil temperature at 19.7 inches belowground level is at or above 5°C. Tin Cup claimed that the "discontinuous permafrost" on its property did not reach that temperature, and thus that there was no growing season.

In August 2011, the Corps review officer rejected Tin Cup's permafrost argument. The officer ruled in his appeal decision that the Alaska Supplement "recognizes the existence of permafrost and the need to rely instead upon locally or regionally developed methods to determine growing season dates . . . as well as by direct observation of vegetation." Under the Alaska Supplement, the officer noted, "soil temperature at 19.7 inches below the surface is essentially irrelevant to determining the growing season in Alaska."

In October 2012, the Corps issued Tin Cup an initial proffered permit. The permit would allow Tin Cup to discharge gravel fill into 118 acres of wetlands (out of the 165 acres that Tin Cup had applied to fill). However, the permit included mitigation conditions that Tin Cup found onerous. Tin Cup lodged further administrative appeals, which were unsuccessful. The Corps proffered in November 2013 a final permit to Tin Cup, subject to the same mitigation conditions, and it affirmed that permit in March 2015.

In May 2016, Tin Cup initiated the present lawsuit, seeking to set aside the Corps' permitting decision. On its motion for summary judgment, Tin Cup argued that the 1992 and 1993 Budget Acts continue to require that the Corps use the 1987 Manual and its definition of a growing season, without considering the Alaska Supplement. The district court granted summary judgment to the Corps, holding that most of the language in the 1992 and 1993 Budget Acts was limited to the use of funds appropriated in those statutes. Tin Cup appeals that order.

II

We review the district court's grant of summary judgment de novo. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005). We agree with the district court that the 1993 Budget Act does not require the Corps to continue to use the 1987 Manual's guidelines to delineate wetlands, and we affirm.

A

While appropriations acts are "Acts of Congress" that can change substantive law, we interpret them somewhat differently than other statutes. An appropriation of funds is generally not permanent or available continuously without an express provision. 31 U.S.C. § 1301(c). The same rule applies to provisions of appropriations acts altering substantive law. Such provisions "are generally only 'in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law.'" *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 n.19 (9th Cir. 2005) (quoting *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991)). This

principle dates to the Supreme Court's opinion in *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841), in which Justice Story stated:

> It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.

Id. at 445. There is thus "a very strong presumption" that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill was passed. *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992).

To rebut this presumption, a party must point to "a clear statement of 'futurity,' such as 'hereafter.'" *Nat. Res. Def. Council*, 421 F.3d at 806 n.19; *see also United States v. Vulte*, 233 U.S. 509, 514 (1914) (holding that appropriations acts did not permanently change substantive law because they did not contain "words of prospective intention"). We will only conclude that an appropriations act has made a permanent change to substantive law if Congress is clear about its intentions. Absent a clear statement of futurity, a provision in an appropriations act is only in force for the fiscal year of the appropriation.

B

The provision at issue in the 1993 Budget Act does not contain a clear statement of futurity. It is

significant that the provision does not contain the word "hereafter." "Hereafter" is the most common word of futurity. Government Accountability Office, *Principles of Federal Appropriations Law* (4th ed. 2016 rev.) at 2-86. Congress used "hereafter" throughout the 1993 Budget Act to identify the continuing availability of certain appropriations, *see* 106 Stat. at 1325, 1330–32, 1338, 1339, 1342–43, and continuing prohibitions on certain types of spending, *see* 106 Stat. at 1331, 1343. When Congress uses particular language in one part of a statute and omits it elsewhere, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *San Francisco v. U.S. Dep't of Transp.*, 796 F.3d 993, 999 (9th Cir. 2015) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Even if the provision's second paragraph constituted a command that the Corps use the 1987 Manual, the absence of "hereafter" suggests that Congress did not intend the provision to bind the Corps indefinitely.

Tin Cup argues that the words "will" and "until" in the provision's second paragraph are words of futurity. No authority exists holding that those words in an appropriations bill, absent more, indicate futurity. Nonetheless, Tin Cup argues that if "will" and "until" were *not* construed as words of futurity, then the second paragraph would be superfluous. If Congress only meant to mandate the use of the 1987 Manual in fiscal year 1993, Tin Cup argues, then its aim was accomplished by the first paragraph alone. That paragraph prohibited any funds from being used in fiscal year 1993 to delineate wetlands in accordance with the 1989 Manual, and the 1987 Manual was the only available alternative.

These two paragraphs reasonably can be interpreted as complementary statements. The first paragraph is a command about what the Corps could not do during fiscal year 1993, and the second paragraph is a description of what Congress expected it to do instead. Indeed, the first paragraph uses the mandatory term "shall," while the second paragraph uses the word "will." The Supreme Court has distinguished descriptive "will" statements from mandatory "shall" statements. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (concluding that a statute's requirement that an agency "shall" act in accordance with a land use plan was a mandatory statement, but that a statement in the land use plan about what the agency "will" do was not "a binding commitment"). The 1993 Budget Act's statement that the Corps "will continue to use" the 1987 Manual, 106 Stat. at 1324, should be viewed in these terms. The provision recorded Congress's understanding of the Corps' intention to delineate wetlands using the 1987 Manual. It does not bind the Corps to using the 1987 Manual. Had Congress intended to bind the Corps, it would have used the word "shall." This interpretation comports with the "well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (collecting cases).

This distinction between "shall" and "will" statements is consistent with other provisions of the 1993 Budget Act. Congress seemed to use "will" statements to describe the consequences of mandatory commands. In one provision, Congress "directed" the

Corps to continue an ongoing feasibility study and then stated that the study "will consider the agricultural benefits of using both traditional and nontraditional methods . . ." 106 Stat. at 1316. In another provision, Congress stated that funds "shall be available" for infrastructure studies and then stated that those funds "will be administered by" the Department of Energy. 106 Stat. at 1334. The Corps' interpretation of the provision at issue—that "shall" connotes a mandatory obligation and "will" connotes a description of what Congress expected to happen—is a reasonable reading of the statute. It cannot be said that the language of the statute "admits of no other reasonable interpretation" than the interpretation that Tin Cup has proffered. *Minis*, 40 U.S. at 445.

Tin Cup urges us to conclude that the structure of the paragraphs in the 1993 Budget Act implies that the second paragraph contains a clear statement of futurity. Tin Cup observes that the 1987 Manual provision appears as a separate paragraph from the preceding provision on appropriations for fiscal year 1993, and it argues that this suggests that the two provisions are independent. Thus, Tin Cup argues, the first paragraph applies to fiscal year 1993 and the second paragraph enacts an unrelated permanent change in the law.

More relevant for discerning futurity is the relationship between the contents of the two paragraphs. *See* GAO, *Principles of Federal Appropriations Law* at 2-90 (stating that when a "provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence . . . The closer the relationship, the less likely it is the provision will be

viewed as permanent"). The two paragraphs here bear a close relationship: they both concern the manual to be used in making wetlands delineation. This weighs strongly in favor of viewing the second paragraph as a descriptive clarification of the first, rather than as an independent provision establishing permanent law. The fact of a paragraph break does not on its own imply that the second paragraph was meant to be independent of the first paragraph.

Tin Cup observes that elsewhere in the 1993 Budget Act, Congress did not use a paragraph break when restricting uses of funds appropriated in fiscal year 1993. *See, e.g.*, 106 Stat. at 1323–24. It argues that this suggests that a paragraph break was used intentionally to set apart the second paragraph as an independent provision. However, the structure of these provisions bolster's the Corps's interpretation of the 1987 Manual provision. In each of the examples that Tin Cup cites, the second provision was clearly mandatory: it used the word "shall" to set a limitation on how an appropriation in the first provision was to be used. *See* 106 Stat. at 1323–24. In the paragraphs at issue in this case, the fact that Congress did not string together the two provisions and did not use the words "Provided" or "Provided further" further suggests that the second paragraph was not mandatory and was instead a description of the consequences of the mandate in the first paragraph. Tin Cup has not shown a clear statement from Congress that the second paragraph in the 1993 Budget Act enacted a mandatory, permanent change in substantive law.

III

Given that we require a clear statement of futurity in order to give permanent effect to a provision of an appropriations act, we need not delve into legislative history to explain the 1993 Budget Act's provisions. *See Bldg. & Constr. Trades Dep't, AFL-CIO*, 961 F.2d at 274 (observing that "legislative history can only help to explain a statute; it cannot reconstruct it"). Given the strong presumption against appropriations acts enacting permanent changes in substantive law, the absence of a clear statement of futurity in the 1993 Budget Act is dispositive. The 1993 Budget Act prohibited the Corps from using the 1987 Manual during fiscal year 1993, and Congress included a second paragraph to explain what it expected the Corps to do instead.

AFFIRMED.

BEA, Circuit Judge, concurring in judgment:

I agree with the majority's ultimate conclusion that the district court did not err in granting summary judgment to the Army Corps of Engineers (the "Corps"). However, because I think that the 1993 Budget Act contained sufficient words of futurity to bind the Corps after the 1993 fiscal year, I write separately.

I

A

As discussed by the majority, the Corps makes determinations regarding what is a "wetland" within the meaning of the Clean Water Act ("CWA") and its implementing regulations. The first such manual was

published in 1987 (the "1987 Manual"). The 1987 Manual identified three key elements that define the presence of wetlands: (1) the presence of vegetation adapted to saturated soil ("vegetation"); (2) the presence soil that is permanently or seasonally saturated by water ("hydric soil"); and (3) appropriate hydrologic conditions, such as the saturation of soil during the growing season ("hydrology"). Importantly for this case, an appendix to the 1987 Manual instructs that the "growing season" can be identified as the days that the soil at a depth of 19.7 inches reaches a temperature above 5 degrees Celsius.

In 1989, the Corps released a new version of the wetlands manual (the "1989 Manual"). However, in appropriations acts passed in both 1992 and 1993, Congress sought to prevent the Corps from using the 1989 Manual to make wetlands determinations.

In the 1992 Act, Pub. L. No. 102-104, 105 Stat. 510 (1991) (the "1992 Budget Act"), Congress prohibited the use of funds appropriated by the bill to delineate wetlands under the 1989 Manual or any subsequent manual "not adopted in accordance with the requirements for notice and public comment." Title I, 105 Stat. at 518. The 1992 Budget Act also required the Corps to use the 1987 Manual to delineate any wetlands in any ongoing enforcement actions or permit application reviews. *Id.* These provisions effectively required the Corps to abandon the 1989 Manual and revert to the 1987 Manual during the 1992–1993 fiscal year.

Because the 1992 Budget Act was an appropriation bill, it was necessary to revisit the issue of the wetlands Manual during the 1993 appropriations process. The 1993 Budget Act again

prohibited the Corps from using any funds to implement the 1989 Manual or any subsequent manual "adopted without notice and public comment." Title I, 106 Stat. at 1324. However, the 1993 Budget Act included an additional provision which stated that "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324.

The 1993 Budget Act also appropriated funds for the National Research Council ("NRC") to make recommendations to EPA and Congress regarding future wetlands regulation. H.R. Rep. No. 102-710, at 51. In 1995, the NRC recommended a number of changes to the wetlands delineation process. *See Nat'l Research Council, Comm. on Characterization of Wetlands, Wetlands: Characteristics & Boundaries* (1995) (National Research Council Report). Among those changes, the NRC recommended that the Corps should either abandon its focus on "growing seasons" or that wetland determinations should become more regionally focused.

In response, the EPA has issued a number of "regional supplements" to the 1987 Manual. In 2007, after public notice and comment, the Corps published its regional supplement for Alaska (the "Alaska Supplement"), which provides specific guidance regarding the identification of wetlands in Alaska.

B

Tin Cup, LLC owns a 455-acre parcel of land near North Pole, Alaska. Tin Cup seeks to build a pipe fabrication and storage facility on the parcel. The relocation project will entail the placement of a gravel

pad, as well as the construction of several buildings and a railroad spur. Thus, the project will require the excavation and laying down of gravel material, which is a regulated "pollutant" under the Clean Water Act. *See* 33 U.S.C. § 1362(6).

The Corps examined the extent of wetlands on the site and issued a jurisdictional determination, concluding that wetlands were present on 351 acres of Tin Cup's 455-acre site. The Corps' wetlands determination included about 200 acres of permafrost, which it found qualified as a wetland using the Alaska Supplement. The Corps issued Tin Cup a permit for the project, but the permit included special conditions requiring Tin Cup to, among other things, construct a "reclaimed pond and riparian fringe" of between 6 and 24 acres total in size and a 250-foot-wide buffer around the riparian fringe totaling at least 23 acres.

Tin Cup objected to the Corps' jurisdictional determination, arguing that the permafrost was not a "wetland." Tin Cup argued that because the permafrost's ground temperature at a depth of 19.7 inches never rises above 5 degrees Celsius, the permafrost areas have no "growing season" within the meaning of the 1987 Manual and thus were not wetlands. After a series of regulatory proceedings and appeals, including two administrative appeals under the APA, the Corps' jurisdictional determination and conditions remained unchanged.

Dissatisfied with that result, Tin Cup filed the instant lawsuit in the District of Alaska, seeking review of the Corps' permit pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706. The parties filed cross-motions for summary judgment. The district court

granted The Corps' motion for summary judgment and denied Tin Cup's motion for summary judgment. Tin Cup appealed the district court's summary judgment order to this court. We review the district court's order granting summary judgment de novo. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005).

II

As the majority correctly states, the first key issue we are called upon to decide is whether the 1993 Budget Act requires the Corps to use the 1987 Manual until it adopts a new manual via notice and comment. We have held that "[a]s a general rule of thumb, appropriations acts are in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991). "To rebut this presumption takes a clear statement of 'futurity,' such as 'hereafter.'" *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 (9th Cir. 2005). Ultimately, "[t]he question is one of legislative intent." *Evans*, 952 F.2d at 304.

The relevant portion of the 1993 Budget Act contains two provisions. In the first paragraph, Congress prohibited the Corps from using any funds appropriated by the 1993 Budget Act to implement the 1989 version of the Corps' wetlands manual or any subsequent manual "adopted without notice and public comment." Title I, 106 Stat. at 1324. Next, the 1993 Budget Act includes a provision that states that "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324.

In my view, the plain language of the 1993 Budget Act demonstrates Congress's clear intent that the Corps continue using the 1987 Manual beyond the 1993–1994 fiscal year. The relevant provision contains two indications of futurity. First, the Act provides that the Corps "will continue" to use the 1987 Manual. The word "will" is a word of futurity. *See* Merriam-Webster Dictionary 603 (Home and Office Ed., 1995) (defining "will" to mean "used as an auxiliary verb to express . . . simple futurity").

Second, the Act tells the Corps how long it must continue to use the 1987 Manual: "until" it adopts a new manual. Congress has explicitly recognized the word "until" as a word of futurity in the context of appropriations bills. *See* H.R. Rep. No. 88-1040, at 55 (1963) (the "most common technique" to make funds "available for longer than a one-year period" is to add the words "'to remain available until expended'"). The combination of "will" and "until" in the 1993 Budget Act demonstrate Congress's clear intent for the Act to bind the Corps beyond the 1993–1994 fiscal year.

The majority's primary response on this point is the note that the 1993 Budget Act does not use the word "hereafter." The majority argues that, "hereafter" is the most common word of futurity in appropriations bills, that Congress used "hereafter" elsewhere in the 1993 Budget Act, and that the absence of "hereafter" in this provision demonstrates that Congress did not intend to express futurity.

This argument is unpersuasive. The majority cites the Government Accountability Office's ("GAO") "Red Book" on the interpretation of appropriations bills for the proposition that "hereafter" is the most common word of futurity. *See* Government

Accountability Office, *Principles of Federal Appropriations Law* (4th ed. 2016 rev.) at 2-86. But the Red Book itself recognizes that "hereafter" is not the only word of futurity and that, consistent with past congressional use, "until" can also be used to express futurity in certain contexts. *See id.* at 2-26. We have previously recognized the expertise of the GAO in this area and have relied on the Red Book in interpreting appropriations bills. *See, e.g. Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 767 F.3d 912, 923 (9th Cir. 2014). The majority provides no basis to rely on that expertise selectively.

The majority is, of course, correct that Congress used the word "hereafter" in other portions of the 1993 Budget Act when expressing futurity. But the fact that Congress used one word of futurity in some contexts and another word of futurity in another context is hardly remarkable. This is particularly true when both the GAO and Congress itself have recognized that there are other ways, including the use of the word "until," to express futurity clearly.

Next, the majority contends the Corps is not bound by the second paragraph of the 1993 Budget Act because the paragraph is a description of what the Corps will do, not a command. The majority bases this argument on the use of the word "will" instead of the word "shall." The majority argues that by using the word "will," Congress intended to describe what the Corps had already stated it would do if it could not use the 1989 Manual (namely, use the 1987 Manual) and

did not intend to *command* the Corps to take that course of action.[1]

But the word "will" can be a command and is often indistinguishable from the word "shall." *See* Black's Law Dictionary 1771 (Revised 4th Ed. 1968) (defining "will" as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must'"). The context of the provisions does not provide a reason to deviate from this plain meaning. In fact, Congress's use of "furthermore" to start the second paragraph, immediately following a paragraph that contained a command, demonstrates that Congress understood

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[1] The majority cites *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004) for the proposition that "will" is not necessarily binding. But *Norton* is distinguishable. In *Norton*, the Bureau of Land Management ("BLM") was required to create land management plans for certain parcels of federal land. *Id.* at 58–61. One of the land management plans stated that the BLM "will" conduct a monitoring program. *Id.* When the BLM did not conduct a monitoring program, environmental plaintiffs sued, arguing that the BLM was bound to fulfill its commitments under the land management plan. *Id.* The district court dismissed the claims, but the Tenth Circuit reversed. *Id.* The Supreme Court reversed the Tenth Circuit, holding that the use of the word "will" in the land management plans did not create a binding commitment on the part of the BLM. *Id.* at 67–72.

Norton is distinguishable from this case for at least two reasons. First, it did not concern the interpretation of an appropriations bill, but rather the interpretation of words in a BLM land management plan. Second, *Norton* involved a unilateral commitment by the BLM. *Norton* did not consider whether "will" was a "command," because there was no one to command. The question was whether "will" created a binding commitment, not whether it was being used to command a specific course of action by another party.

the second paragraph to contain a second, additional *command*.

Additionally, if the majority is correct, then the second paragraph is likely superfluous, running afoul of the canon that statutes should be construed so as to give effect to all of their provisions. *See Corley v. United States*, 556 U.S. 303, 129 (2009); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). If all Congress meant to achieve through the 1993 Budget Act was to bar the Corps from using funds to enforce the 1989 Manual for the coming fiscal year (which is what the majority and the Corps contend), it could have stopped writing after the first paragraph. Congress had no need to describe in a nonbinding fashion what the Corps would do as a result of its command.

In short, "will" and "until" are words of futurity that express Congress's intent for the 1993 Budget Act to bind the Corps beyond the 1993–1994 fiscal year. Thus, the much stronger reading of the 1993 Budget Act is that Congress was commanding the Corps to continue its use of the 1987 Manual until it adopted a new wetlands manual. As a result, I would hold that the Corps was required to apply the 1987 Manual to Tin Cup's case.

III

Nonetheless, I would still hold that the district court did not err in granting the Corps' summary judgment on Tin Cup's claims. Although the 1993 Budget Act continues to bind the Corps, the 1993 Budget Act does not preclude the Corps from applying the Alaska Supplement because language from the

1987 Manual itself allows the Corps to amend and supplement the 1987 Manual and the Alaska Supplement is consistent with that language.

The 1987 Manual identifies three factors that should be evaluated in making wetlands determinations: vegetation, hydric soil, and hydrology (the "Three Factors"). The 1987 Manual requires that, for the hydrology element to be satisfied, the regulator must "establish that a wetland area is periodically inundated or has saturated soils during the growing season."

An appendix to the original 1987 Manual defined "growing season" in terms of the days on which soil temperatures were higher than 5 degrees Celsius at a depth of 19.7 inches. But the 1987 Manual acknowledged that hydrology was "often the least exact" of the Three Factors and allowed regulators to approximate the growing season based on "frost free days" or establish hydrology through direct observation of conditions on the ground, such as inundation or soil saturation, sediment deposits, drainage patterns, or certain characteristics of vegetation.

In light of these inexact standards, the Corps argues that the language of the 1987 Manual clearly contemplates regional supplements like the Alaska Supplement, which can alter some of the finer points of wetlands identification based on regional factors. Indeed, the 1987 Manual provides that the methods for analyzing the Three Factors can be altered, as

"site-specific conditions may require modification of field procedures."[2]

The 1987 Manual explicitly acknowledges that "certain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual." The 1987 Manual goes on to state that "such wetland areas may warrant additional research to refine methods for their delineation."

Relying on this language, the Corps has made alterations to the method for identifying hydrology and the "growing season" for nearly three decades, including before the 1993 Budget Act was passed. In 1992, before the 1993 Budget Act was passed, the Corps issued guidance stating that, although the soil temperature factor noted in the appendix of the 1987 Manual was the "primary" definition of growing season, "local means of determining growing season may be more appropriate and can be used." *See* U.S. Army Corps of Engineers, "Clarification and Interpretation of the 1987 Manual" (Mar. 6, 1992).

The Alaska Supplement—including its definition of the "growing season," which is at issue here—is nothing more than formal guidance regarding the "local means" that were permitted under the 1987 Manual and its subsequent guidance documents. Given that the Corps was already allowed to use such

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[2] Tin Cup argues that these statements relate to certain known "problem areas" and that permafrost was not one such "problem area." However, Tin Cup's argument is undercut by subsequent Corps guidance, which specifically stated that the list of "problem areas" was nonexclusive and the 1987 Manual's statements regarding flexibility were meant to be broader than the list of "problem areas."

"local means" at the time Congress passed the 1993 Budget Act, the 1993 Budget Act cannot be read to prohibit use of the Alaska Supplement.

Tin Cup does not meaningfully dispute that the Corps has at least some ability to supplement or amend the 1987 Manual. Instead, Tin Cup's only argument is that the Alaska Supplement is not a "true" supplement because it disregards the soil temperature factor in determining the growing season. In Tin Cup's view, because the Alaska Supplement does not consider ground temperature in determining the growing season, it contradicts the 1987 Manual and cannot be a "supplement" to that Manual.

This argument is not persuasive for at least two reasons. First, soil temperature was not even the exclusive method of determining growing season and hydrology under the original 1987 Manual. As discussed above, the Manual allowed regulators to "approximate" the growing season based on frost free days or establish hydrology without reference to a "growing season" through direct observation of conditions on the ground, such as inundation or soil saturation, sediment deposits, drainage patterns, or certain characteristics of vegetation. As a result, declining to use soil temperature as part of the hydrology analysis would have been permissible under the original 1987 Manual, given certain circumstances.

Additionally, the 1987 Manual as it existed and was used at the time of the 1993 Budget Act clearly permitted regulators to disregard soil temperature in favor of "local means" of determining a growing season. *See* U.S. Army Corps of Engineers,

"Clarification and Interpretation of the 1987 Manual" (Mar. 6, 1992). The Alaska Supplement represents the Corps' attempt to define just such "local means" for making wetlands determinations in Alaska. Thus, there is no basis to conclude that soil temperature must always be considered when making a wetlands determination and that any method that does not consider soil temperature contradicts the 1987 Manual.[3]

Consequently, although Tin Cup is correct that the Corps is required to use the 1987 Manual, I would hold that the Alaska Supplement is a proper supplement that is authorized by the 1987 Manual itself. As a result, I would conclude that the district court did not err when it rejected Tin Cup's argument that the Corps should be barred from using the Alaska Supplement.

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[3] Tin Cup argues that there must be some limits on the Corps' ability to amend the 1987 Manual or else the 1993 Budget Act would be rendered meaningless. This may be true, but the 1987 Manual itself provides those outer bounds. For instance, the Manual states that, although wetlands determinations are flexible and subject to local considerations, "the basic approach" of using the Three Factors of vegetation, hydric soils, and hydrology "should not be altered."

Thus, if the Corps attempted to adopt a regional supplement that applied only two of the Three Factors, Tin Cup's argument would have more force. Similarly, if the Corps attempted to adopt a regional supplement that replaced the Three Factors with other factors, that action might exceed the Corps' authority. But in this case, the Corps' Alaska Supplement retains the Three Factor evaluation. The Alaska Supplement merely provides different, region-specific methods for identifying the Three Factors in Alaska's unique environment.

Appendix B-1

Filed Sept. 26, 2017

IN THE 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.	Case No. 4:16-cv-00016-TMB ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on the parties' cross motions for summary judgment at docket 15 and docket 22, respectively. Defendant U.S. Army Corps of Engineers ("Corps") issued Plaintiff Tin Cup, LLC ("Tin Cup") a permit pursuant to Section 404 of the Clean Water Act ("CWA") allowing Tin Cup to discharge fill material on 118 acres of wetlands in order to construct a pipe fabrication facility in North Pole, Alaska. Special conditions in the permit also require that Tin Cup convert its gravel extraction site into a reclamation pond and leave undisturbed approximately forty-seven acres of wetlands on the property. Believing these special conditions to be too onerous, Tin Cup now challenges the Corps' determination that permafrost on the property that Tin Cup wishes to develop are wetlands requiring federal authorization under the CWA before Tin Cup

can fill them.[1] Tin Cup argues that the Corps improperly relied on an Alaska-specific regional supplement to the Corps' 1987 Wetlands Delineation Manual in violation of the Administrative Procedure Act ("APA"). Tin Cup contends that this alleged violation requires setting aside the Corps' wetlands determination with respect to Tin Cup's development permit. The Corps asserts that it properly relied on the Alaska Supplement in delineating wetlands on Tin Cup's property. Neither party has requested oral argument, nor would the Court's decision be aided by it. For the reasons that follow, Tin Cup's Motion for Summary Judgment at docket 15 is **DENIED**, and the Corps' Motion for Summary Judgment at docket 22 is **GRANTED**.

II. BACKGROUND

A. Parties

Tin Cup is a subsidiary of Flowline Alaska ("Flowline"), a Fairbanks-based company specializing in heavy construction and fabrication of large pipe and steel structures used in the North Slope oil fields.[2]

The U.S. Army Corps of Engineers, is one of two federal agencies, along with the Environmental Protection Agency ("EPA"), tasked with implementing the CWA.[3] The CWA makes it unlawful to discharge dredged and fill material into the waters of the United

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[1] Dkt. 15 at 9; Dkt. 22 at 6.

[2] Dkt. 15 at 19.

[3] Dkt. 15 at 1–2; Dkt. 22 at 6.

States except in accordance with a permitting regime jointly administered by the Corps and the EPA.[4]

B. Statutory and Regulatory Background

The CWA protects waters of the United States from the discharge of pollutants, including dredged fill material, into "navigable waters."[5] There has been considerable litigation over what qualifies as "navigable waters" or "waters of the United States" subject to Corps and EPA regulation under the CWA.[6] "The Corps has issued regulations defining the term 'waters of the United States' to include most wetlands adjacent to waters of the United States that are not themselves wetlands."[7] The parties have done a thorough job discussing how the Corps' authority to regulate the discharge of pollutants onto wetlands has evolved over the years through regulation and litigation.[8] Rather than repeat that recitation here, the Court will instead focus on two documents

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[4] *Fairbanks North Star Borough v. U.S. Army Corps of Eng'r*, 543 F.3d 586, 589 (9th Cir. 2008) (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985)); 33 U.S.C. §§ 1311(a), 1344(a).

[5] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 162 (2001); 33 U.S.C. § 1344(a).

[6] *See e.g. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding regulations defining "waters of the United States" as encompassing wetlands adjacent to traditional navigable waters); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion proposing different tests for what constitute "waters of the United States").

[7] *Fairbanks North Star Borough*, 543 F.3d at 589 (internal citations omitted).

[8] *See* Dkt. 15 at 8–19; Dkt. 22 at 6–14.

promulgated by the Corps which guide wetlands delineation determinations in Alaska.

1. 1987 Wetlands Delineation Manual

Wetlands are defined in regulation as "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."[9] In 1987, the Corps promulgated a Wetlands Delineation Manual ("1987 Manual")[10] with the purpose of providing "users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the CWA."[11] The 1987 Manual identifies three guiding criteria in delineating wetlands: hydrology, soil, and vegetation.[12] However, the 1987 Manual also observes:

> Certain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual. Examples include prairie potholes during drought years and seasonal wetlands that may lack hydrophytic vegetation during the dry season . . . . However, such wetland areas may warrant

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9 33 C.F.R. § 328.3(c)(4).

10 *See* Dkt. 15-1.

11 Dkt. 15 at 11; Dkt. 15-1 at 13; Dkt. 22 at 10–11.

12 Dkt. 15-1 at 18; Dkt. 15 at 11; Dkt. 22 at 11.

additional research to refine methods for their delineation.[13]

2. 1989 Wetlands Delineation Manual and NRC Study

The Corps promulgated another Wetlands Delineation Manual in 1989, however, the 1989 Manual was subject to substantial criticism and legislative opposition,[14] and ultimately the Corps mandated the continued use of the 1987 Manual. After rejecting the 1989 Manual, Congress tasked the National Research Council ("NRC") with studying the scientific basis for the characterization of wetlands.[15] The NRC issued a report in 1995 that "recommended a number of changes to the Corps' wetlands delineation process."[16] In particular the NRC observed:

> [i]mprovements in the scientific understanding of wetlands since 1987 and refinement of regulatory practice through experience over almost a decade of intensive wetland regulation suggest that a new federal delineation manual should be prepared for common use by all federal agencies involved in the regulation of wetlands. This new manual should draw freely from the strengths of each of the

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[13] Dkt. 15-1 at 17.

[14] Congress included riders to two Appropriations bills for fiscal years 1992 and 1993 prohibiting the Corps from using the 1989 Manual. *See infra* Part IV.A.

[15] Dkt. 16-1 at 15.

[16] Dkt. 15 at 17.

> existing manuals, but would not be identical to any of the present manuals. The new manual should incorporate some changes in present practice and some solutions to past problems of regulatory practice, as well as an increased emphasis on regionalization within a framework of national standards.[17]

3. Alaska Supplement to the 1987 Manual

Taking its cue from the NRC report, in 2006, the Corps began to promulgate regional supplements designed for use with the 1987 Manual.[18] The regional supplements were developed by working groups comprised of wetlands experts from the federal, state, and local level.[19] Between 2007 and 2012, the Corps issued ten supplements covering all regions of the United States.[20] The Corps promulgated an Alaska-specific supplement[21] to the 1987 Manual in September 2007 as part of "nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation

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[17] Dkt. 16-1 at 25.

[18] Dkt. 22 at 11.

[19] *See, e.g.* Dkt. 15-2 at 11–13.

[20] Dkt. 22 at 11–12; *see also* Actual or anticipated release dates for Regional Supplements (as of 13 Jan. 2012), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/supp_sched2012.pdf (last visited Sep. 11, 2017).

[21] *See* Dkt. 15-2. 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. ("Alaska Supplement").

practices."[22] The Corps observed that "[r]egional differences in climate, geology, soils, hydrology, plant and animal communities, and other factors are important to the identification and functioning of wetlands. These differences cannot be considered adequately in a single national manual."[23] The Alaska Supplement was subject to public notice, comment, review by the Corps' National Advisory Team for Wetland Delineation, as well as independent peer review prior to finalization and publication.[24]

Most relevant to this lawsuit, the Alaska Supplement takes a different approach to determining the "growing season" as it pertains to wetland hydrology as a delineation criteria identified in the 1987 Manual.[25] Whereas the 1987 Manual calculates growing season based on soil temperature or as approximated by air temperature and frost free days,[26] the Alaska Supplement advises that observation of vegetation activity is the preferred approach for determining the growing season because the 1987 Manual's approach "is often impractical in Alaska due to the scarcity of meteorological stations

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[22] Dkt. 15-2 at 14; *see also* AR Tab 2 at COE000011.

[23] Dkt. 15-2 at 14.

[24] Dkt. 15-2 at 12; Dkt. 16-2 at 2; Dkt. 16-3 at 2.

[25] Dkt. 15-2 at 15.

[26] *See* Dkt. 15-1 at 41. ("The 1987 Manual (see glossary, Appendix A) defines 'growing season' as the portion of the year when soil temperature (measured 20 inches below the surface) is above biological zero (5° C or 41° F). This period 'can be approximated by the number of frost-free days.' Estimated starting and ending dates for the growing season are based on 28° F air temperature thresholds at a frequency of 5 years in 10."); *see also id.* at 109.

and differences in elevation, aspect, and other conditions between project sites and the locations of existing weather stations."[27] Accordingly, the Corps determined that "direct observation of vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground," is the preferred method to determine growing season dates in Alaska.[28]

C. Procedural History

Tin Cup owns a 455-acre parcel of land in North Pole, Alaska,[29] which it holds for its parent company, Flowline.[30] The parcel is located approximately two and a half miles south of the Chena River,[31] near the Tanana River,[32] and directly abuts the Drainage Channel B watershed.[33] The parcel contains approximately 352 acres of a larger 2,500 acre wetland that extends off site to the south and east.[34] Native vegetation on the subject wetlands include Shrub-Scrub, Black Spruce Closed Forest, Alaska Birch/Shrub Birch, Grasslike and Dwarf Shrub, and

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[27] Dkt. 15-2 at 60–61.

[28] *Id.* at 61.

[29] The subject property is located within Sections 26, 27, 34, and 35, T. 1 S., R. 1 E., Fairbanks Meridian. AR Tab 2 at COE000007.

[30] Dkt. 15 at 19; Dkt. 22 at 14.

[31] AR COE000265. The Corps determined that the subject wetlands share a significant nexus with the Chena River. AR Tab 20 at COE000144.

[32] *See* AR Tab 10 at COE 000084; AR Tab 70 at COE000570.

[33] AR Tab 2 at COE00016.

[34] AR Tab 30 at COE000265.

Alaska Birch/Calamagrostis.[35] The Corps determined that the wetlands on the property are adjacent to the Channel B watershed and sustain a significant nexus with the Chena River based on hydrological and ecological connections.[36]

Flowline wishes to relocate from its current leased Fairbanks facilities to the parcel owned by Tin Cup. The proposed relocation project involves the "placement of a gravel pad, as well as the construction of several buildings and a railroad spur."[37] Because the project requires both excavation and the use of gravel fill material on wetlands, the Corps determined that the project requires a Section 404 permit under the CWA.[38]

In 2003, Tin Cup applied to the Corps for a Section 404 permit to discharge fill on the proposed relocation site in support of the pipe fabrication and storage facility. The Corps issued a permit in May 2004 allowing Tin Cup to place 1,000,000 cubic yards of fill into approximately 165 acres of wetlands.[39] Flowline ultimately decided to delay the relocation project and did not utilize the permit issued by the Corps to Tin Cup prior to its expiration.[40]

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[35] AR Tab 67 at COE000529.

[36] *Id.* at COE000527–60. "The significant nexus stems from the hydrologic and ecological connections between the subject wetlands and the Chena River." *Id.* at COE000527.

[37] Dkt. 15 at 19.

[38] AR Tab 67 at COE000527; AR Tab 91 at COE000711.

[39] AR Tab 92 at COE000717.

[40] *Id.*

Tin Cup applied for a new permit in May 2008. Although Tin Cup's second application was similar to its 2003 application, the Corps requested an updated wetland delineation to "determine the extent of the impacts associated with the new application."[41] In September 2009, Tin Cup's agent[42] submitted a preliminary wetland delineation for the Tin Cup property.[43] Although Tin Cup's agent acknowledged the "presence of wetland areas across the entire tract," Tin Cup opined that the wetlands did not meet the requirements for adjacency and were therefore "not subject to Clean Water jurisdiction."[44] The Corps and Tin Cup exchanged additional letters, requests for information, responses, and conducted field investigations in an effort to determine whether the wetlands on Tin Cup's property had a significant nexus to the adjacent wetlands and traditional navigable waters.[45] In November 2010, the Corps issued a Jurisdictional Determination letter, which concluded that Tin Cup's property "contains waters of the United States (U.S.), including wetlands, under the Corps of Engineers' regulatory jurisdiction."[46] Accordingly, the Corps informed Tin Cup that a 404 permit was required if Tin Cup wished to place

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[41] *Id.*

[42] Tin Cup was represented by Travis/Peterson Environmental Consulting, Inc. throughout the permitting process.

[43] AR Tab 114 at COE000860–1031.

[44] *Id.* at COE000883.

[45] AR Tab 92 at COE000717–18.

[46] AR Tab 91 at COE000711.

dredged or fill material into the wetlands on its property.[47]

Tin Cup administratively appealed the Corps' jurisdictional determination on seven grounds,[48] one of which was that the permafrost on the proposed relocation site did not meet the 1987 Manual's definition of a "growing season," and therefore could not satisfy the hydrology requirement of wetlands over which the Corps has jurisdiction.[49] Although the Corps' review officer ultimately remanded the jurisdictional determination to the Alaska District, he rejected Tin Cup's permafrost argument as meritless, concluding that "[t]he Corps' 2007 Alaska Regional Supplement to the 1987 Manual recognizes local and regionally developed methods to determine growing seasons, which were appropriately applied in this case in lieu of the 1987 Manual's criteria."[50]

On October 22, 2012, the Corps issued an Initial Proffered Permit allowing Tin Cup to discharge "1,000,000 cubic yards of gravel fill into 118 acres of jurisdictional wetlands to create a gravel pad to support facilities for pipe manufacturing, coating, and storage."[51] The permit contained four special conditions requiring Tin Cup to: (1) mark the boundaries of the construction areas;[52] (2) complete clearing, excavation, and fill activities in a manner

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[47] *Id.*

[48] AR Tab 89 at COE000653–709.

[49] *Id.* at COE000659.

[50] AR Tab 87 at COE000635.

[51] AR Tab 30 at COE000249–50.

[52] *Id.* at COE000251, 275.

mitigating impacts to breeding migratory birds;[53] (3) convert the on-site gravel source into an 18-acre reclamation pond[54] and riparian fringe to compensate for resource losses from the development project;[55] and (4) create a 250-foot wide buffer area around the reclamation pond and wetland fringe to prevent further degradation to fish and wildlife habitat and maintain the function and integrity of wetlands adjacent to the permitted area.[56] Special condition four would have the effect of permanently protecting forty-seven acres of the 455-acre parcel from future development.[57]

Believing the special conditions in the proffered permit to be too onerous, Tin Cup again objected to the permit on multiple grounds, including that the Corps impermissibly used the Alaska Supplement to assert jurisdiction over permafrost on the parcel.[58] In November 2013, the Corps rejected Tin Cup's objections[59] and issued a final permit to Tin Cup

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[53] *Id.*

[54] The reclaimed pond would both accommodate excess runoff from the gravel pad during spring snowmelt, *Id.* at COE000262–63, as well as convert the project's gravel source area into a functioning pond and wetland area to be preserved in perpetuity. *Id.* at COE000272.

[55] *Id.* at COE000275–76.

[56] *Id.* at COE000276.

[57] *Id.* at COE000251, 264, 275–76.

[58] Dkt. 15 at 21.

[59] AR Tab 20 at COE000185–96.

containing the same four special conditions from the initial proffered permit.[60]

In January 2014, Tin Cup submitted a Request for Appeal (RFA) of the final permit, renewing numerous objections to the Corps' permitting decision.[61] In March 2015, the Corps' Office of Administrative Appeals rejected all five accepted reasons for appeal raised by Tin Cup, including the argument that the Corps impermissibly relied on the Alaska Supplement in delineating wetlands.[62] Following the denial of its appeal, Tin Cup initiated the present lawsuit. Tin Cup's sole challenge is to the Corps' use of the Alaska Supplement in delineating wetlands.

III. LEGAL STANDARD

In the District of Alaska, appeals of agency decisions under the APA are reviewed on cross-motions for summary judgment.[63] "Procedurally, summary judgment is appropriate for resolving a challenge to a federal agency's administrative decision when review is based primarily upon the administrative record."[64] When a court's review is based upon the administrative record, there are no material facts in dispute and the court does not

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[60] *Id.* at COE000144–96.

[61] AR Tab 13 at COE00099–101.

[62] AR Tab 2 at COE 000004–05; AR Tab 3 at COE000026–28.

[63] *See* D. Ak. L.R. 16.3.

[64] *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 996 (D. Ariz. 2011) (citing *Ecology Ctr., Inc. v, Austin,* 430 F.3d 1057, 1062 (9th Cir. 2005))

perform any fact finding.[65] "Thus the court does not use the standard summary judgment analysis for determining whether a genuine issue of material fact exists, and instead uses summary judgment as a mechanism for deciding whether, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did."[66]

The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[67] Under the APA, a court may only invalidate a final agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[68]

IV. DISCUSSION

This lawsuit requires the court to determine whether the Corps properly relied on the Alaska Supplement to the 1987 Wetlands Delineation Manual in determining that the Tin Cup parcel contains wetlands which require a 404 permit under the CWA prior to Tin Cup's discharge of fill material. "Tin Cup contends that the Corps' assertion of jurisdiction over some 200 acres of permafrost on Tin Cup's property is not in accordance with law, and therefore should be set aside under the

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[65] *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985).

[66] *Salazar*, 804 F. Supp. 2d at 996 (citing *Occidental*, 753 F.2d at 769–70).

[67] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

[68] 5 U.S.C. § 706(2)(A).

Administrative Procedure Act, 5 U.S.C. § 706(2)(A)."[69] Tin Cup claims that the Corps is bound by the national wetland delineation standards contained in the 1987 Manual and cannot rely on the standards from the Alaska Supplement.[70] Specifically, Tin Cup argues that: (1) language from enacted 1992 and 1993 Energy and Water Appropriations legislation requires the Corps to use the 1987 Manual;[71] (2) that the Corps impermissibly used the Alaska Supplement's "growing season" standard in asserting jurisdiction over wetlands on Tin Cup's property;[72] and (3) that the Alaska Supplement's standard for determining the growing season cannot be reconciled with the 1987 Manual.[73]

In its cross-motion for summary judgment, the Corps asserts that: (1) the language from 1992 and 1993 appropriations bills is no longer operative;[74] (2) that even if the language from these bills were operative, it does not bar the Corps from issuing regional supplements;[75] and (3) even if the Corps improperly relied on the Alaska Supplement in determining that certain areas of Tin Cup's property are wetlands, that the Court should nonetheless uphold the decision because the Corps' permit

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[69] Dkt. 15 at 8.

[70] Dkt. 23 at 14.

[71] Dkt. 15 at 23–26.

[72] *Id.* at 26–27.

[73] *Id.* at 27–29.

[74] Dkt. 22 at 19–24.

[75] *Id.* at 24–28.

determination was sound.[76] The Court first addresses the relevant provisions contained in the Energy and Water Appropriations Acts from 1992 and 1993.

A. The 1992 and 1993 Energy and Water Appropriations riders do not preclude the Corps from using the Alaska Supplement to delineate wetlands.

Tin Cup asserts that Congress limited the Corps' discretion in how the agency delineates wetlands via language included in 1992 and 1993 appropriations legislation.[77] The Corps contends that the decades-old appropriations bills do not prohibit the Corps from relying on regional supplements to the 1987 Manual because neither rider contains the requisite "words of futurity" expressing congressional intent for the text to apply permanently.[78]

The parties' differing interpretations of the riders included in the 1992 and 1993 appropriations legislation presents an issue of statutory construction. In cases involving statutory construction, courts start with the statutory text and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.[79] Under the well-established two-step test from *Chevron*:

> When a court reviews an agency's construction of the statute which it

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[76] *Id.* at 28–30.

[77] Dkt. 15 at 12–17.

[78] Dkt. 22 at 19–24.

[79] *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citations omitted).

> administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[80]

With these standards in mind, the Court evaluates the relevant provision from the 1992 Energy and Water Development Appropriations Act,[81] which provides:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 (1989 Manual) or any subsequent manual not adopted in accordance with the requirements for notice

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[80] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

[81] Pub. L. 102–104, Aug. 17, 1991, 105 Stat 510.

> and public comment of the rule-making process of the Administrative Procedure Act.[82]

Similarly, the relevant provision from the 1993 Energy and Water Development Appropriations Act[83] provides:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
>
> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.[84]

1. The restrictive language prohibiting the Corps from using the 1989 Manual applies to funding from the respective appropriations legislation only.

The Court concludes that the operative language from both the 1992 and 1993 Energy and Water Appropriations bills which prohibit the Corps from delineating wetlands under the 1989 Manual applies only to "the funds in this Act." The statutory language

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[82] *Id.*

[83] Pub. L. 102–377, Oct. 2, 1992, 106 Stat. 1315.

[84] *Id.*

clearly limits the applicability of the riders to the funds appropriated in the 1992 and 1993 appropriations bills respectively.[85]

2. The ambiguous provision from 1993 Energy and Water Appropriations Act does not contain words of futurity or a clear statement of congressional intent required to find permanence.

Tin Cup, however, points to the addition of a sentence in the 1993 Energy and Water Appropriations Act which provides: "Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted," to argue that Congress intended to make the Corps' use of the 1987 Manual permanent.[86] Tin Cup asserts that this language is independent of any specific appropriation made in the 1993 Appropriations Act.[87]

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[85] Indeed, had Congress intended to make the limitation permanent, it would have been unnecessary to include the nearly identical limiting language in consecutive appropriations bills. *See Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 227 (1st Cir. 2003) ("After all, if Congress annually reenacts a provision, common sense suggests—and courts are free to presume—that Congress did not consider the language as creating permanent law.") (citing *United States v. Vulte*, 233 U.S. 509, 514 (1914)); see also GAO Principles of Federal Appropriations Law (4th ed. 2016 rev.) at 2–89 ("Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent.").

[86] Dkt. 15 at 17 (emphasis added).

[87] Dkt. 23 at 10.

The Corps takes the position that the additional sentence in 1993 bill does not overcome the strong presumption that language in appropriations legislation only applies for one fiscal year.[88] Additionally, the Corps contends that this provision must be read in the context of the sentence preceding it, and that the language does not evince Congress' clear intent to require the Corps use of the 1987 Manual indefinitely.[89] Tin Cup responds that the fact the language appears as a separate paragraph suggests that it is not constrained by the preceding paragraph's limitation to funds appropriated in the 1993 Act.[90] Additionally, Tin Cup asserts that because the additional sentence is a general provision and not appropriations-specific, it can be construed as having permanent application even in the absence of clear words of futurity.[91]

The Court concludes that it is not clear from the plain text of the 1993 Energy and Water Appropriations rider whether Congress intended this provision mandating the use of the 1987 Manual to apply beyond the 1993 Appropriations Act. Generally speaking, Congress is not presumed in annual appropriations bills to enact language having permanent application to future appropriations unless Congress expressly indicates its intention to make such provisions permanent.[92] The Court of

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[88] Dkt. 22 at 23.

[89] *Id.* at 22–23.

[90] Dkt. 23 at 7.

[91] *Id.* at 8.

[92] *Minis v. United States*, 40 U.S. 423, 445 (1841) ("It would be somewhat unusual, to find engrafted upon an act making special

Appeals for the Ninth Circuit has recognized "appropriations acts are generally only in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law."[93] Courts in other circuits have reached the same conclusion when addressing the permanence of riders attached to appropriations legislation.[94]

To rebut the strong presumption that appropriations riders do not create a permanent change in substantive law typically requires that Congress include "words of futurity."[95] "The most common word of futurity is 'hereafter' and provisions using this term have often been construed as permanent."[96] "If words of futurity indicate permanence, it follows that a proviso or general

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and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.").

[93] *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 n.19 (9th Cir. 2005) (quoting *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991)).

[94] *See e.g., Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992) ("While appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not, and when they do, the change is only intended for one fiscal year.") (internal citations omitted).

[95] *See Nat. Res. Def. Counci*l, 421 F.3d at 806 n.19 (citing *Atl. Fish Spotters Ass'n*, 321 F.3d at 224–25 (1st Cir. 2003)); *Martin*, 961 F.2d at 273–74.

[96] GAO Principles of Federal Appropriations Law (4th ed. 2016 rev.) at 2-86.

provision that does not contain words of futurity will generally not be construed as permanent."[97]

Although the additional sentence included in the 1993 Energy and Water Appropriations Act presents a closer question than the provisions prohibiting the expenditure of funds through the use of the 1989 Manual, the Court is unpersuaded that the additional text constitutes words of futurity sufficient to establish congressional intent to make the language permanent.[98] Because Congress has not clearly expressed its intention that this provision be permanent, the Court concludes that the Corps' interpretation[99] that this language is no longer operative is not unreasonable.[100]

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[97] *Id.* at 2-89.

[98] *Atl. Fish Spotters Ass'*n, 321 F.3d at 224 ("Congress cannot rebut the presumption against permanence by sounding an uncertain trumpet.").

[99] Tin Cup contends the Corps interpretation of the 1993 Energy and Water Appropriations Act is entitled to no deference because "[i]t is implausible that Congress intended the Corps to 'administer' the 1993 Budget Act." Dkt. 15 at 25. It is plausible, however, that Congress intended the Corps to administer statutory language directly related to its regulation of wetlands. If Tin Cup's proposition were taken to its logical conclusion, than no federal agency would be entitled to any deference in interpreting legislative riders contained in Appropriations legislation. Tin Cup's argument that the Corps' interpretation is entitled to no deference is without merit.

[100] *See Atl. Fish Spotters Ass'n*, 321 F.3d at 224 ("Thus, the presumption against permanence in appropriation bills can be overcome if Congress clearly expresses its intention to create permanent law or if the nature of the provision would make any other interpretation unreasonable.").

This conclusion is bolstered by the guidance provided by the GAO Principles of Federal Appropriations Law:

> The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriated language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence . . . . The closer the relationship, the less likely it is the provision will be viewed as permanent.[101]

Here, the relationship of the provision to both the 1993 Energy and Water Appropriations Act, and to the preceding language regarding the Corps' use of wetlands delineations manuals is undeniably close. Issues of Corps funding are in the regular jurisdiction of Energy and Water appropriations process,[102] and the presence of this sentence immediately after language restricting the use of funds for implementation of the 1989 Manual highlights the

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[101] GAO Principles at 2-90.

[102] Army Corps Civil Works funding is within the regular jurisdiction of Energy and Water Appropriations legislation. See U.S. House of Representatives Committee on Appropriations, Energy and Water Subcommittee Jurisdiction *available at* https://appropriations.house.gov/about/jurisdiction/energywater.htm (listing Army Corps of Engineers – Civil); U.S. Senate Committee on Appropriations, Energy and Water Development Subcommittee Jurisdiction *available at* https://www.appropriations.senate.gov/subcommittees/energy-and-water-development (listing Corps of Engineers–Civil).

direct relationship, which makes it less likely the provision will be viewed as permanent.[103]

3. Congress knows what language to use to make provisions included in appropriations legislation permanent.

"[W]hen Congress wants to make explicit that a certain provision is to apply beyond the fiscal year to which the appropriation act applies, it knows how to do so."[104] As the Corps points out, in the very same 1993 Energy and Water Appropriations Act, Congress included language barring the Bureau of Reclamation from using funds for specific reclamations projects. In doing so, Congress used the word "hereafter" and explicitly indicated its intent to make the prohibition permanent by stating that it applied to "subsequent Energy and Water Development Appropriations Acts."[105] In contrast, there is no such clear statement manifesting congressional intent that the Corps' use of the 1987 Manual extend permanently or indefinitely beyond fiscal year 1993. Accordingly, the Court rejects Tin Cup's argument that the provisions in the 1992 and 1993 Energy and Water Development Appropriations Acts prohibit the Corps from adopting the Alaska Supplement used in its wetlands delineation with respect to Tin Cup's application.

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[103] GAO Principles at 2-90.

[104] *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002).

[105] 106 Stat. at 1330.

B. On the whole, the Alaska Supplement is not contradictory to the 1987 Manual.

Tin Cup argues that the regional supplements are "not even true supplements, for in many instances they contradict the 1987 Manual which they purport to supplement."[106] But this argument is unpersuasive. The 1987 Manual itself observes that certain wetland types will not always meet all of the wetland criteria defined in the 1987 Manual, and that "such wetland areas may warrant additional research to refine methods for their delineation."[107] Thus, the very language of the 1987 Manual lays the foundation for the regional supplements and their refinement of wetland delineation methods in non-traditional environments. Taking its cue from the 1987 Manual's language and the 1995 NRC study, the Alaska Supplement's stated intent is to "bring the [1987] Manual up to date with current knowledge and practice in the region and not to change the way wetlands are defined and identified. The procedures given in the [1987] Manual, in combination with wetland indicators and guidance provided in this supplement, can be used to identify wetlands for a number of purposes . . . ."[108] Even though there are five discrete areas in which the Alaska Supplement takes precedent over the 1987 Manual,[109] the Alaska Supplement makes clear that it is designed to be used in conjunction with the 1987 Manual. The Court

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106 Dkt. 15 at 24.

107 Dkt. 15-1 at 17.

108 Dkt. 15-2 at 14.

109 *See id.* at 15.

concludes that what Tin Cup characterizes as contradictions between the 1987 Manual and the Alaska Supplement do not frustrate the framework of the 1987 Manual, but instead refine the 1987 Manual to reflect the benefit of nearly two decades advancement in wetlands research and science.

Also without merit is Tin Cup's argument that the Corps' position in this lawsuit inconsistent with the agency's prior position with respect to the 1987 Manual.[110] Tin Cup accuses the Corps of engaging in an opportunistic, litigation-driven switch as regards to the applicability of the 1987 Manual.[111] The Court disagrees with Tin Cup's characterization of the Corps' position. Tin Cup quotes a 2008 decision from the Ninth Circuit, in which the Court states "[t]o identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual."[112] Although the Ninth Circuit issued its opinion in *Fairbanks North Star Borough* in 2008, as Tin Cup should be well aware,[113] the Plaintiff in that case filed suit in August 2006, over a year before the Corps had promulgated the final Alaska Supplement. Accordingly, the Corps could not have used a regional supplement that did not yet exist to delineate wetlands in that case, and the Court declines to construe the quoted language from *Fairbanks North Star Borough* regarding the Corps use of the 1987

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110 Dkt. 23 at 9.

111 *Id.*

112 *See Fairbanks North Star Borough*, 543 F.3d at 590.

113 The same attorneys that represented the Fairbanks North Star Borough represent Tin Cup in the present lawsuit.

Manual to represent a changed position for litigation in this case.

C. Tin Cup's argument implies the invalidity of all regional supplements to the 1987 manual.

In arguing that the Corps' reliance on the Alaska Supplement is contrary to the appropriations bills passed by Congress in 1992 and 1993, Tin Cup's argument necessarily implies that the nine other regional supplements promulgated by the Corps are also invalid. The Corps began promulgating regional supplements to the 1987 Manual in 2006. These regional supplements have been utilized to guide wetlands delineations all over the country. Yet, after over a decade of use, in what the court can only guess is hundreds, if not thousands, of wetlands delineations, Tin Cup can point to no case where any of the ten regional supplements has been found to be invalid based on the provisions from the 1992 or 1993 Energy and Water Appropriations Acts by another court. This Court similarly declines Tin Cup's invitation to invalidate the Alaska Supplement on these grounds.

V. CONCLUSION

Based on the Administrative Record before the Court, the Court concludes that the Corps' use of the Alaska Supplement in conjunction with the the 1987 Manual to delineate wetlands on the Tin Cup parcel was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, Tin Cup's Motion for Summary Judgment at docket 15 is **DENIED** and the Army Corps Motion for Summary Judgment at docket 22 is

GRANTED. Additionally, Plaintiff's Motion for Judicial Notice at docket 18 is **GRANTED**.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 26th day of September, 2017.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

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 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

[1] 2011 Administrative Record (AR) page 62. For clarity, the District provided tile 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.

[2] 2011 AR pages 4-60.

[3] 2014 AR pages 499-512.

significant nexus with the Chena River, a water more readily understood as 'navigable.'"[4]

Upon completion of their permit evaluation. tt1e 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

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[4] 2014 AR pages 290-348.

[5] 2014 AR pages 115-146.

[6] 2014 AR pages 97-114.

[7] 2014 AR pages 10-50.

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 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

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[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.

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.

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

[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.

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." 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]

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[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.

[12] Appellant's 7 January 2014 RFA, pages 13-14.

[13] Appellant's 7 January 2014 RFA, page 16.

[14] 2011 AR page 10.

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.

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[15] 2011 AR page 10.

[16] 2014 AR page 509.

[17] Appellant's 7 January 2014 RFA, page 16.

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 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

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[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 Corps of Engineer Research and Development Center, Page 1.

[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 Corps of Engineer Research and Development Center, Pages 1-2.

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]

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[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

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]

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

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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.

[26] 2014 AR pages 56 and 58.

[27] This is illustrated in the District's AR on 2014 AR page 345.

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

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[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.

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 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

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[31] 2014 AR page 55.

[32] 2014 AR page 326.

[33] 2014 AR page 326.

[34] 2014 AR page 55.

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

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[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.

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]

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

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[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.

[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.

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

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[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.

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 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 permafrost 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

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[45] 2014 AR pages 55-56, and 328.

[46] 2014 AR pages 55, 57, and 323-324.

[47] 2014 AR pages 314-316, 321-322, and 324-326.

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

[48] 2014 AR pages 55, 323-324, and 326.

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 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

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[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).

[51] Grumbles, Benjamin H. and John Paul Woodley, Jr., 2007, 20118, 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.

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

[52] 2014 AR pages 43, 46, 48, and 58.

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 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."[53]
>
> "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."[54]

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

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[53] 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.

[54] 2014 AR page 292.

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.

6. CONCLUSION. For the reasons staled 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

s/ Jeffrey L. Milhorn
JEFFREY L. MILHORN, P.E.
Brigadier General, USA
Commanding

Department of the Army

Permit Evaluation and Decision Document

APPLICANT: Mr. Richard Schok, Tin Cup, LLC

APPLICATION NO.: POA-2003-1422

WATERWAY: Channel B

This document constitutes my Environmental Assessment, Public Interest Review, Section 404(b)(1) Guidelines Review and Compliance Determination, and Statement of Findings for the proposed work.

1.0 Authority

This permit action is being taken under authority delegated to the District Engineer by 33 CFR 325.8, pursuant to:

☐ Section 10 of the Rivers and Harbors Act of 1899

☒ Section 404 of the Clean Water Act

☐ Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972

2.0 Proposed Project

Tin Cup, LLC proposes to discharge approximately 1,000,000 cubic yards (cy) of gravel fill in up to 118.0 acres of jurisdictional wetlands to create a gravel pad that would support facilities for pipe manufacturing, coating, and storage. In addition, 24 acres of wetlands would be mechanically cleared for gravel extraction and 1 acre of wetlands would be temporarily filled for the construction of a 1,500-foot long gravel access road connecting the gravel source area and the gravel pad. Several buildings and a railroad spur would be constructed upon the gravel

pad, which would be 213.4 acres total (118.0 acres wetland and 95.4 acres upland).

2.1 Project Description from Public Notice:

The applicant would place approximately 1,000,000 cubic yards (cy) of gravel fill into 118 acres of jurisdictional wetlands to create a gravel pad that would support facilities for the manufacture and storage of large-diameter pipe. In addition, 24 acres of wetlands would be mechanically cleared for gravel extraction and 1 acre of wetlands would be temporarily filled for the construction of a 1,500-foot long gravel access road connecting the gravel source area and the gravel pad. Several buildings and a railroad spur would be constructed upon the gravel pad. The applicant is a holding company for Flowline Alaska, Inc., which provides pipe fabrication and storage services to oil and gas companies, the Alaska Department of Transportation and Public Facilities and others.

Although the project plans remain essentially unchanged from 2008, the proposed activity would result in the permanent placement of fill into 118 acres of wetland rather than 165 acres as originally proposed because the total amount of wetland at the site had been overestimated in 2008. The 2009 wetland delineation, demonstrated that the extent of wetland within the proposed project area is 143 acres; the proposed project would permanently fill 118 acres for construction of a fill pad, temporarily fill 24 acres for gravel excavation and temporarily fill 1 acre for the gravel source area access road.

2.1.1 Applicant's Avoidance and Minimization Information:

The applicant proposes the following measures to avoid and minimize impacts to waters of the United States including wetlands from activities involving discharges of dredged or fill material:

a. Avoidance: Although much of the project would occur in a previously cleared upland (95.4 acres), the project is unable to avoid placing fill in 143 acres of wetland (118 acres for the gravel pad, 1 acre for the temporary access road and 24 acres for the gravel source area) due to the broad expanse of wetland on site.

b. Minimization: During the processing for the 2004 permit, the applicant reduced the proposed gravel pad by 80 acres. The area that would no longer be used for this part of the gravel pad is jurisdictional wetland. The current proposal retains this reduction in the project design and the associated reduction in wetland impact.

All fill would be placed on geotextile sheeting or equivalent material to prevent excessive settling and minimize thaw of the underlying frost. During fill placement, silt fences or hay bales would be placed at the edges of the buffer zones to prevent sedimentation in adjacent wetlands. In addition, the applicant proposed 25-foot wide vegetated buffers surrounding the fill pad; these buffers would be mainly comprised of wetland and would not be directly disturbed by the proposed activity.

2.1.2 Applicant's Proposed Compensatory Mitigation:

The applicant proposes to establish a pond with emergent wetland fringe after completing gravel extraction by following the April 29, 2004 Gravel Source Reclamation Plan that was submitted to the District in 2008. The reclamation area would be approximately 24 acres and would contain a pond (18 acres) and fringe wetland (6 acres). Overburden and topsoil stockpiled during gravel extraction would be placed in the pond and the adjacent wetland fringe area to be created as part of the reclamation. The wetland fringe would include the pond shoreline, which would be graded at a 20 to 1 (horizontal to vertical) slope. The reclamation plan includes establishing a 250-foot wide buffer area situated around the west, north and east sides of the reclamation area; this buffer area would be comprised of wetland that would not be directly disturbed by the proposed activity. In addition, the 1,500-foot access road would be removed after gravel extraction is complete.

2.1.3 Project Changes Subsequent to Public Notice:

The development plan was slightly revised to avoid encroachment upon the dedicated section-line easement between Sections 34 and 35 and between Section 26 and 27. This shift would not affect overall wetland impacts and minimally affect indirect impacts from surface flows during project operation.

2.2 Location

The project site 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.; near North Pole, Alaska. The site is between the Old Richardson Highway and Bradway Road approximately 1.5 miles east of the intersection of Dennis Road and the Old Richardson Highway.

2.3 Scope of Analysis:

The scope of analysis for this action includes the impacts, alternatives, and project benefits resulting from the regulated activities identified above.

2.3.1 National Environmental Policy Act (NEPA)

2.3.1.1 Factors

2.3.1.1.1 Whether or not the regulated activity comprises "merely a link" in a corridor type project:

The project is not a corridor type project.

2.3.1.1.2 Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity: The 95.4 acres of upland proposed for construction are immediately adjacent to the wide expanse of wetlands in the project area.

2.3.1.1.3 The extent to which the entire project will be within the Corps jurisdiction: Approximately 60 percent of the project site contains waters of the U.S. and is thereby within the U.S. Army Corps of Engineers (Corps) jurisdiction.

2.3.1.1.4 The extent of cumulative Federal control and responsibility: The extent of cumulative Federal control and responsibility only

encompasses those portions of the project area that are within Corps jurisdiction.

2.3.1.2 Determined Scope for NEPA:

☒ Only within the footprint of the regulated activity within the delineated water.

☐ Over entire property.

☐ Other

The scope for NEPA will be constrained to those portions of the project area that contain waters of the U.S. and are thereby within Corps jurisdiction.

2.3.2 National Historic Preservation Act (NHPA):

2.3.2.1 Tests:

Activities outside the waters of the United States are included because ALL of the following tests are satisfied:

1) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;

2) Such activity must be integrally related to the work or structures to be authorized within waters of the United States (or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program); and

3) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

2.3.2.2 Determined Scope for NHPA: The NHPA scope covers the entire project area.

2.3.3 Determined Scope (Action Area) for Endangered Species Act (ESA). [Action area means all areas to be affected directly or indirectly by the Federal action and not merely the area that falls directly under our regulatory jurisdiction. The determined scope for ESA is the Action Area, which may be larger than the scope for NEPA, Section 404 and Section 10. See CDD Guide for additional information.] N/A There are no endangered species within the project area.

2.4 Purpose and Need

2.4.1 Applicant's stated purpose and need:

The applicant's stated purpose is to consolidate existing pipe manufacturing facilities in five locations for more efficient and economical operations.

2.4.2 Basic project purpose and water dependency [40 CFR 230.10(a)(3)]:

The basic purpose of the project is the construction of a pipe manufacturing facility. The project is not water dependent, and would occur within a special aquatic site, jurisdictional wetlands; therefore, pursuant to 40 CFR 230.10(a)(3), practicable alternatives not involving wetlands are presumed to be available, and these alternatives are presumed to have less adverse impact on the aquatic ecosystem.

2.4.3 Overall project purpose [40 CFR 230.10(a)(2) and 2009 HQ SOP page 15]: The overall project purpose is to construct a pipe manufacturing facility within the Fairbanks/North Pole vicinity.

2.4.4 Changes to project purpose and need, as determined by the Corps. [33 CFR 325 App. B paragraph 9b(4): There are no changes to the project purpose and need.

2.5 Site description; existing conditions: The site is within the alluvial plain stretching between the Tanana and Chena Rivers. The alluvial plain is a relatively flat area about 23 miles long and 8 miles wide that is bounded by the Tanana River on the south, Moose Creek Dam on the east and the bases of bedrock hills on the north and west near the Chena River. As with most of the alluvial plain, the site is nearly flat, but slopes gently from south to north at approximately 0.1 percent.

The 2009 wetland delineation demonstrated that most of the Tin Cup site is wetland, except for the 95.4 acres of upland in the southwestern part of the site and the 8.6 acres of upland in the eastern part of the site (TPECI 2009). Although the delineation excluded the 40 acres in the southeastern part of the site, the District determined that this area is wetland. Thus, of the 455 acres at the site, the total amount of wetland is 351 acres.

The wetland delineation report identifies five plant communities within the on-site wetland as follows: Shrub-Scrub, Black Spruce Closed Forest, Alaska Birch/Shrub Birch, Grasslike and Dwarf Shrub and Alaska Birch/Calamagrostis. The Grasslike and Dwarf Shrub community comprises the 27-acre area that was cleared of vegetation in 2007. These communities support near-surface saturation and/or very shallow inundation; none support any substantial amount of open water.

The on-site wetland is part of a very large (approximately 2,500 acres within the sub-watershed) wetland that extends mainly east and south of the site. The wetland is generally unencumbered by roads, houses or other structures, but is constrained by the Richardson Highway on the south and Bradway Road on the north.

The southwestern 95.4 acres of the site was cleared of vegetation and lightly graded over 20 years ago. As a result, several parallel spoil berms ('windrows') were created; the berms are about 75 feet wide and elevated approximately 3 feet above the surrounding ground. This area has been left fallow, but is mowed regularly to prevent re-growth of shrubs and trees. The 8.6-acre upland in the eastern part of the site also appears to have been cleared and graded over 20 years ago.

3.0 <u>Alternatives Considered</u> [33 CFR 320.4(b)(4), 40 CFR 230.10]

3.1 No Action

Under the No Action Alternative, the project would not be permitted, constructed or operated. The No Action alternative would allow the site to persist undeveloped. The applicant would not meet its objective to construct a pipe manufacturing and storage facility.

3.2 Other project designs

No other project designs were considered as no other designs would meet the project purpose. The applicant reduced the proposed gravel pad by 80 acres during the processing for the 2004 permit, which minimized the total wetland impact by the same amount (the 80 acres is entirely wetland). The current

proposal retains this reduction in the project design and the associated reduction in wetland impact. Constraining the project footprint to the 95.4-acre upland in the southeastern part of the site would not allow the project to meet its objectives and therefore is not a practicable alternative.

3.3 Other sites: According to a letter sent by the applicant and received August 26, 2008, other sites considered were dismissed as not practicable. The criteria used to locate the proposed project were as follows: a) service by the Alaska Railroad, b) proximity to a major highway, c) relatively flat, d) large enough for adequate storage and safe operation, e) lack of contamination from petroleum or other toxins, f) limited geographic extent of wetlands. No other tracts that were available are of a suitable size, location and accessibility. We concur with the applicant's position that there are no practicable alternatives to the selected site.

3.4 Least Environmentally Damaging Practicable Alternative (LEDPA)

The applicant's preferred alternative results in the least amount of impacts to waters of the U.S. compared to the other practicable alternatives, and is the LEDPA.

As outlined above, the project would minimize impacts to waters of the U.S. by constraining construction activities to 213.4 acres of a 455-acre contiguous area owned by the applicant, locating the proposed project upon a site that is 40 percent cleared and disturbed uplands, and locating the remainder of the project upon wetlands of no more than moderate functional value.

4.0 Public Involvement

We received a complete application for the project on May 22, 2008 and a slightly revised application on May 23, 2012. A public notice describing the project was issued and posted on the Corps website on May 25, 2012. The 15-day public notice was extended to a 30-day period and expired on June 25, 2012.

4.1 Comments Received

Comment submissions were received by federal, state and local agencies, organizations, and individuals. Within these submissions, substantive comments were identified and responded to by the Corps. The comments identified during the public notice period fell into five subject categories described as follows:

- Impacts to surface drainage/flooding
- Impacts to water quality
- Impacts to wildlife
- Limited discussion of alternatives analysis
- Limited compensatory mitigation

4.1.1 Federal Agencies

4.1.1.1 U.S. Environmental Protection Agency (EPA): In their June 25, 2012 letter, the EPA commented that the proposal fails to follow the 404(b)(1) Guidelines because it does not clearly demonstrate that there is no practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem. This assertion applies to the entire project including the proposal to extract gravel on site. They also assert that it is difficult to comprehend the need for 213.4-acre gravel

pad when existing facilities currently operate on 42 acres, especially in light of the stated project purpose which is to consolidate operations. A less damaging practicable alternative could include reducing the fill pad, perhaps by confining the placement of fill material into the 95.4-acre upland, phasing construction over time, and/or obtaining gravel from an existing nearby source. EPA recommends that the Corps require compensatory mitigation that would comply with the Final Mitigation Rule (40 CFR 332) and compensate for functional losses from conversion of 24 acres of wetlands to a reclaimed pond in addition to the permanent loss of 118 acres of wetlands. Unless additional information is provided that would allay EPA's concerns, EPA recommends permit denial.

4.1.1.2 U.S. Fish and Wildlife Service (USFWS): In their June 22, 2012 letter, the USFWS expressed concerns about the proposed loss of wetlands and their associated functions including water storage, groundwater recharge, pollutant sequestration, and wildlife habitat. They indicate that the project would further cumulative impacts to these functions in a sub-basin that is undergoing development and likely to experience the "runoff issues" that currently occur in South Fairbanks, the most heavily developed sub-basin in the region. USFWS is concerned about the size of the project and that the need for the project is speculative. They recommend constructing the project in phases with the intent of conserving wetlands, preparing and adhering to a drainage plan to retain runoff on-site or include 50-foot wide vegetated buffers around the site perimeter, constructing the project outside the May 1–July 15 bird nesting window, compensating for unavoidable impacts to wetlands by wetland preservation at a 1.5:1 and/or 2:1

ratio, following the proposed reclamation plan with the additional conditions: i) restore work pads around the excavated area and ii) accomplish reclamation of any part of the gravel source area within 2 growing seasons after abandonment, staking or flagging construction boundaries, maintaining natural drainage patterns and stabilizing all disturbed, stockpile and fill areas to prevent erosion.

4.1.1.3 National Marine Fisheries Service (NMFS): No comments were received.

4.1.1.4 U.S. Coast Guard (USCG): No comments were received.

4.1.2 Federally Recognized Tribes: No comments were received.

4.1.3 State Agencies

4.1.3.1 Alaska Department of Fish and Game – Division of Habitat (ADF&G): No comments were received.

4.1.3.2 Alaska Department of Natural Resources (ADNR): No comments were received.

4.1.3.3 ADNR, Office of History and Archaeology (OHA): No comments were received.

4.1.3.4 Alaska Department of Environmental Conservation (ADEC): On July 3, 2012 we received a copy of the Certificate of Reasonable Assurance for the project that was dated June 29, 2012.

4.1.3.5 Other State Agencies: No comments were received.

4.1.4 Local Agencies: In their June 15, 2012 letter, the Fairbanks North Star Borough (FNSB) Department of Community Planning stated that the

FNSB Comprehensive Plan Use Map shows the project area as Perimeter Area, Urban Area and Light Industrial. The project would be allowed under the current zoning, which is General Use-1. In addition, a Floodplain Permit would not be required because the area is within Flood Zone X. The FNSB letter expresses concern about how the proposed project would affect surface water drainage in the project vicinity. The FNSB claims that the gravel pads and other features proposed would "disrupt existing surface water drainage patterns" and may thereby exacerbate the potential for flooding. The FNSB is particularly concerned about the potential for flooding impacts on their property within Section 36, T.1S. R.1E., Fairbanks Meridian, which is just southeast and slightly up-gradient of the project site. FNSB requests that Tin Cup, LLC be required to provide a detailed drainage plan demonstrating how the project would be designed to minimize flooding impacts to properties in the project vicinity.

4.1.5 Organizations: No comments were received from any private organizations.

4.1.6 Individuals: Mr. Miles Trampush, who owns property just north of the proposed project, visited the Fairbanks Field Office on June 1, 2012 to voice his comments directly. He expressed concern about the project's potential for interfering with his ability to access the Richardson Highway from his property along Rozak Road.

4.1.7 Public Meeting: N/A

4.1.8 Public Hearing: NIA

4.1.9 Site visit ☒ was/☐ was not conducted: Greg Mazer, project manager for the Corps Fairbanks

Regulatory Field Office, visited the site on September 10, 2010 to assess environmental conditions.

4.2 Other Issues Identified by the Corps: None.

4.3 Evaluation and Consideration of Comments.

On July 23, 2012, the applicant submitted responses to comments generated during the public comment period and determined to be substantive in the District letter sent to the agent and applicant on July 2, 2012. The applicant's letter maintains that neither creating a drainage plan nor expanding the planned 25-foot buffer around the gravel pad is necessary due to the limited surface runoff presently and the capacity of the proposed gravel pad to allow infiltration post-construction. The letter asserts that the planned pond reclamation would serve as appropriate compensatory mitigation for the expected impacts, that the work pads around the excavation area would be removed and recontoured, and that the reclamation would be accomplished within two growing seasons after a specific portion of the pit is no longer in use. No compensatory mitigation was required in the original permit for this project, which was issued April 15, 2004 and expired March 31, 2007.

The response letter added new information clarifying that there is a need for the proposed project; the applicant states that there are numerous clients with upcoming needs for different projects that would require their services over the next 5 to 15 years. The project site was chosen after a 10-year search and was determined to have a relatively large proportion of uplands in 1992. The on-site gravel source is financially preferable to obtaining gravel off-site and

would minimize fuel consumption and traffic impacts associated with fill material transport. The letter declares that phasing construction would not be practical "due to the high cost of mobilization and demobilization of equipment and the length of time required after fill is placed before construction can begin (approximately 2 years)."

4.3.1 Issues/comments forwarded to the applicant. ☐ NA ☒ Yes. Date: July 2, 2012

4.3.2 Applicant replied/provided views. ☐ NA ☒ Yes.

4.3.3 Comments not discussed further in this document as they are outside the Corps' purview: None.

4.3.4 Consideration of comments within Corps' purview: Although the Corps concurs with the EPA that a less damaging alternative would be for the applicant to constrain construction to the 95.4-acre upland, the applicant has provided information demonstrating that such a constraint would not allow the project to meet its objectives and therefore is not a practicable alternative. The proposed project, in contrast, is sufficiently large to meet the applicant's need for providing storage of large-diameter pipe and conducting pipe joining and other operations in a safe manner. Furthermore, the applicant reduced the proposed gravel pad by 80 acres during the processing for the 2004 permit, which minimized the total wetland impact by the same amount (the 80 acres is entirely wetland). The current proposal retains this reduction in the project design and the associated reduction in wetland impact.

The Corps concurs with USFWS and FNSB that the proposed project could alter drainage patterns and exacerbate flooding in the vicinity. However, it is unclear to what extent the project would cause such changes. Furthermore, the vast majority of runoff generated on-site would be directed to the wetland buffer areas to be retained around the perimeter of the fill pad. The establishment of this buffer area would be a special condition of the permit, if issued. In addition, some runoff from the proposed gravel pad would likely lead to the proposed gravel source area/reclaimed pond during spring snowmelt and other moderately large runoff events. The pond, which would be approximately 18 acres and surrounded by side-slopes that would rise 2-3 feet above the pond's ordinary high water, would likely accommodate most of the excess runoff from the site during very large runoff events. Runoff and water circulation is further discussed in Section 5.1.2 below.

The Corps concurs with both EPA and USFWS that the applicant must add a few measures to their pond reclamation plan and submit a compensatory mitigation plan that would comply with the Final Mitigation Rule (40 CFR 332). The compensatory mitigation plan that would be required as a special condition of the permit, if issued, must include the measures to which the applicant agreed in his July 23, 2012 response letter as well as a few others such as permanently preserving the 250-foot buffer area around the gravel source area/pond reclamation site.

5.0 Analysis of Beneficial and Detrimental Impacts to the Environment and the Public Interest, and Factual Determinations for Discharges of Dredged or Fill Material [33 CFR 320.4(a-r), 33 CFR 325 App B, and 40 CFR 230.11 and 230.20 - 230.77]

5.1 Factors

5.1.1 Physical substrate determinations 230.11(a) and Substrate 230.20

The site is situated on an undeveloped portion of the alluvial plain between the Tanana and Chena Rivers. The gradient is nearly flat, sloping to the north and northwest at approximately 0.5 percent.

The online Web Soil Survey (NRCS 2009) indicates that four soil map units are found at the site: North Pole–Noonku complex, Liscum–Noonku complex, and Eielson fine sandy loam. The North Pole–Noonku complex, a partially hydric soil where 90 percent of the unit is composed of hydric soil, occupies approximately 57.5 percent of the site. The Liscum–Noonku complex, a fully hydric soil, comprises approximately 27 percent of the site. The Eielson fine sandy loam, a partially hydric soil where only 20 percent of the unit is composed of hydric soil, occupies 11.5 percent of the site. The Piledriver–Eielson coplex, a partially hydric soil where only 5 percent of the unit is composed of hydric soil, occupies 4 percent of the site.

The Soil Survey of Greater Fairbanks Area, Alaska (NRCS 2005) and the NRCS Web Soil Survey (NRCS 2009) state that the North Pole–Noonku soil is a poorly to very poorly drained soil that was formed in alluvial flats and sloughs; it contains muck or silt

loam in the upper part of the profile with fine sandy loam, stratified sand or very gravelly sand in the lower part of the profile (profile extends from soil surface to 5 feet below ground surface). The Liscum–Noonku complex is a very poorly drained soil that was formed in alluvial flats and sloughs; it contains muck or silt loam in the upper part of the profile with fine sandy loam, stratified sand or stratified silt loam in the lower part of the profile. The Eielson fine sandy loam is a moderately well drained soil that was formed in floodplains; it contains very fine sandy loam in the upper part of the profile and stratified silt loam to fine sand in the lower part of the profile. The Piledriver–Eielson Complex is a somewhat poorly drained soil that was formed in floodplains; it contains mostly fine sandy loam over sand and gravel.

Construction and operation activities for the proposed project would cause impacts to the physical substrate through a) earth-moving activities resulting in substrate removal and deposition as well as some erosion and sedimentation, b) potential equipment oil and fuel spill/leaks that could result in contamination, and c) vehicular activity resulting in some erosion, sedimentation and contamination.

The applicant would excavate gravel in the subsurface layers down to approximately 60 feet below ground surface in the northeastern part of the site, which is predominantly underlain by the Piledriver–Eielson complex. The excavated gravel would serve as the source of gravel for the fill pad and would thereby eliminate the need to import fill material from off site. All fill would be placed on geotextile sheeting or equivalent material to prevent

excessive settling and minimize thaw of the underlying frost.

The potential effects upon project area substrates would comply with the 404(b)(1) Guidelines with appropriate conditions. The permit, if issued, would be conditioned to require the applicant to implement appropriate best management practices (BMPs) such as silt fences and fabric logs to minimize erosion and sedimentation and prevent degradation of water quality during construction. Other BMPs to minimize erosion and sedimentation may be required by the Alaska Department of Environmental Conservation (ADEC) Certificate of Reasonable Assurance and/or the Storm Water Pollution Prevention Plan (SWPPP) to be prepared, submitted and followed in accordance with Alaska Pollutant Discharge Elimination System (APDES) regulations.

5.1.2 Water circulation, fluctuation and salinity determinations 230.11(b), Current patterns and water circulation 230.23, and Salinity gradients 230.25:

Surface drainage that resulted from flooding by the Tanana and Chena Rivers has been precluded entirely by the Chena River Flood Control Program. However, natural drainage pathways within the wetlands on-site are mostly unobstructed because of the limited direct disturbance; they are well vegetated with native trees and shrubs. Most surface water entering the wetlands is removed via evapotranspiration, but a small portion enters the aquifer via infiltration. It is presumed that salinity levels are very low.

Circulation and fluctuation of surface water would be affected by the proposed construction. Creation of impervious surfaces would generate increased storm water runoff and obstruct and/or re-route natural runoff. The large fill pad proposed could exacerbate the frequency, magnitude and duration of the widespread ponding that occurs every spring and during some large storm events in summer.

The vast majority of runoff generated on-site would be directed to the wetland buffer areas to be retained around the perimeter of the fill pad. Although no retention/detention pond system has been proposed, some runoff from the proposed gravel pad would lead to the proposed gravel source area/reclaimed pond during spring snowmelt and other moderately large runoff events. The pond, which would be approximately 18 acres and surrounded by side-slopes that would rise 2-3 feet above the pond's ordinary high water, would likely accommodate most of the excess runoff from the site during very large runoff events.

The water quality volume calculated via the ADEC Storm Water Guide (2009) protocol is 27.5 acre-feet using a precipitation amount of 1.8 inches, which is equivalent to the runoff expected during typical spring snowmelt. The typical spring snowmelt value was derived from the average end-of-season (April 1) snowpack of 18 inches and a water equivalency of 10 percent (Western Regional Climate Center 2012; ADEC 2009). The water quality volume approximates the storage capacity needed to reduce the annual, post-development total suspended solids loadings by 80 percent.

The potential effects to water circulation and fluctuation would comply with the 404(b)(1) Guidelines with the inclusion of appropriate conditions. The permit, if issued, would be conditioned to require the applicant to direct surface runoff to the proposed gravel source area/reclaimed pond to the extent practicable.

5.1.3 Suspended particulate/turbidity determinations 230.11(c) and 230.21:

Although there is little available information in the project vicinity, it has been observed that levels of suspended solids and turbidity in nearby waters (e.g., Channel B) are fairly low throughout most of the year except perhaps during break-up and very large rainfall events. The wetland area within the project site comprises a relatively small proportion of wetland area within the Channel B sub-watershed and thereby has only a minor effect on suspended particulates and turbidity in Channel B.

Construction activities for the project could contribute suspended particulates to adjoining jurisdictional wetlands from direct deposition or runoff conveyance. Activities during construction such as earthmoving, discharge of fill, extrusion of fugitive dust, equipment oil and fuel spills or leaks, and vehicular activity, could initiate the contribution of suspended particulates.

BMPs to be required by the SWPPP would likely include establishing erosion control features around the perimeter of the construction site. Movement of sediment off-site would likely be minimal and readily prevented by BMPs.

The potential effects to suspended particulates and turbidity would comply with the 404(b)(1) Guidelines with the inclusion of appropriate conditions. The permit, if issued, would be conditioned to require the applicant to install perimeter controls such as silt fence and stabilize disturbed areas, stockpile areas, and fill areas in order to prevent sedimentation and erosion. Requirements of the Certificate of Reasonable Assurance and the SWPPP would also likely require that erosion and sedimentation be minimized during construction.

5.1.4 Water 230.22 (nutrients, chemical content, dissolved gas, pH, temperature), water quality 320.4(a), and 320.4(d):

Although there is little available information in the project vicinity, it is presumed that surface and nearsurface (within the rhizosphere) water quality at the project site is good. The site is currently undeveloped, and not known to possess excessive levels of nutrients or toxins, excessively low pH, or non-normal soil or water temperatures given the landscape position and soil type. The wetland area proposed for permanent fill comprises 2.1 percent of the wetland area within the Channel B subwatershed and thereby has only a minor effect on its water quality; the total project area proposed for fill comprises 2.3 percent of the total sub-watershed area.

The project site wetland sustains a subsurface hydrologic connection to Channel B through infiltration and conveyance of infiltrated water through the aquifer. Ground water flows at relatively rapid rates to the northwest through the project vicinity (Nelson 1978; USGS 1999). Thus, the on-site wetland supports baseflow in Channel B and

contributes to the maintenance of physical and chemical aspects of water quality including temperature, nutrients, metals, and bacteria.

As discussed above, project construction activities could affect water quality through contribution of sediment, nutrients and contaminants to surface waters during large runoff events. However, the effect would likely be minimized by BMPs to minimize erosion and sedimentation, and filtration by vegetated wetlands adjacent to the site that would remain undeveloped.

Construction's effect on subsurface flow is uncertain. The volume of subsurface flow may decrease due to more surface water removal by evaporation and runoff. However, replacement of vegetation and organic soil with an approximately 2-foot deep layer of gravel fill would likely be insufficient to deter degradation of existing frost layers and thereby cause an increase in subsurface flow.

ADEC has issued a 401 Water Quality Certificate of Reasonable Assurance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Clean Water Act. This is considered conclusive with respect to water quality considerations [33 CFR 320.4(d)].

The potential effects to water quality would comply with the 404(b)(1) Guidelines with the inclusion of appropriate conditions, and would not be contrary to the public interest. The permit, if issued, would be conditioned to require the applicant to implement appropriate BMPs that would prevent petroleum contamination, minimize erosion and

sedimentation and prevent degradation of water quality during construction and operation.

5.1.5 Flood hazards 320.4(a)(1), floodplain values 320.4(a)(1), Normal water fluctuations 230.24, wetlands as storage for storm and flood waters 320.4(b)(2)(v)):

Flooding in the project vicinity is likely occasional and limited due to the protection from overbank flooding from the Chena and Tanana Rivers provided by the Chena River Flood Control Project. In addition, the widespread wetlands in the vicinity possess water storage capacity sufficient to accommodate ponding that occurs during most break-up and high rainfall events. The project site's wetland area provides water storage and thereby reduces flooding downstream.

The flood hazard and water fluctuations may increase slightly and wetland hydrologic storage may decrease slightly as a result of the proposed impervious surfaces and the permanent removal of 118 acres of wetlands. The effect would further compromise, albeit slightly, the water storage capacity of the Channel B sub-watershed, which has a large portion (at least 20 percent) of its area covered by impervious surfaces and thereby has somewhat compromised water storage capacity. However, the effect would be minimized by the on-site areas that would remain undeveloped including the 25-foot wide buffer as well as the proposed pond reclamation area, which would likely accommodate most of the excess runoff during very large runoff events. These buffer areas would be required by special condition of the permit, if issued.

The potential effects to flood hazards, floodplain values, normal water fluctuations, and wetland hydrologic storage would be minimal, would comply with the 404(b)(1) Guidelines, and would not be contrary to the public interest.

5.1.6 Floodplain management (functions, degradation of floodplain values and functions Executive Order (EO) 11988, practicable alternatives) 320.4(l):

Executive Order 11988, Floodplain Management establishes federal policies for the protection of floodplains and floodways. The intention of the regulation is to avoid, to the extent practicable, adverse impacts to floodplains; minimize the impact of floods to human safety, health, and welfare; and avoid supporting land use development incompatible with natural and beneficial floodplain values. The Federal Emergency Management Agency's (FEMA's) Flood Insurance Rate Maps (FIRMs) are not available for the project area.

The potential effects to floodplains would be negligible, and would not be contrary to the public interest.

5.1.7 Wetlands shielding other areas from wave action, erosion, or storm damage (320.4(b)(2)(iv)):

The wetland area present at the project site functions to suppress erosion and damage from wind or runoff associated with large storm events. Wave action is not a factor that needs to be assessed because the site does not contain any large water bodies.

The project would replace the wetland area with a large gravel pad and thereby would reduce the

ability to shield other areas in the vicinity from erosion or storm damage. However, potential environmental harm from erosion and storm damage would be minimized by the retention of vegetated wetland buffers and the reclaimed pond.

The potential effects upon erosion and storm damage would be minimal and would not be contrary to the public interest.

5.1.8 Shore erosion and accretion 320.4(a)(1):

This factor is not applicable because the project would have no features that would extend into marine waters, rivers or streams.

5.1.9 Wetlands as ground water recharge areas 320.4(b)(2)(vi):

The on-site wetland is underlain by seasonal frost and thereby contributes to groundwater recharge each summer. As stated above, the project site wetland sustains a subsurface hydrologic connection to Channel B through infiltration and conveyance of infiltrated water through the aquifer. The project site wetland comprises a relatively small proportion of wetland area within the Channel B sub-watershed and thereby has only a minor effect on ground water recharge.

The potential effects to wetlands as ground water recharge areas would be negligible, and would not be contrary to the public interest.

5.1.10 Wetlands as maintaining baseflows for aquatic resources 320.4(b)((2)(vi)):

The project site wetland sustains surface and subsurface hydrologic connections to Channel B. In so doing, the wetland helps to maintain baseflows in

Channel B as well as the Chena River. The wetland in the project site is a relatively small proportion of wetland area within the Channel B sub-watershed and thereby has only a minor effect on baseflow maintenance.

The potential effects to baseflows for aquatic resources would be negligible, and would not be contrary to the public interest.

5.1.11 Proposed disposal site determinations [230.11(f)(2)] (Mixing zone, in light of the depth of water at the disposal site; current velocity, direction, and variability at the disposal site; degree of turbulence; water column stratification; discharge vessel speed and direction; rate of discharge; dredged material characteristics; number of discharges per unit of time; and any other relevant factors affecting rates and patterns of mixing):

This factor is not applicable because the project would require discharge of fill into wetlands, but not into water bodies.

5.1.12 Special aquatic sites (Sanctuaries and refuges 230.40, Wetlands 230.41, Mudflats 230.42, Vegetated shallows 230.43, Coral reefs 230.44, Riffle and pool complexes 230.45), wetlands 320.4(a)(1), and 320.4(b)(1) and (2)

The Tin Cup property contains approximately 352 acres of an approximately 2,500-acre wetland that extends off site to the east and south. This is the largest contiguous wetland in the sub-watershed, which supports approximately 5,610 acres of wetland. The on-site wetland area is a Flats wetland according to the hydrogeomorphic classification system (Brinson

1993) and a mix of palustrine saturated broadleaf deciduous and evergreen needleleaf shrub-scrub (PSS1/4B) with some palustrine emergent saturated (PEM1B) communities according to the Cowardin classification system (Cowardin et al. 1979).

The proposed construction would permanently eliminate 118 acres of wetland and thereby reduce performance of wetland functions in the project vicinity. The decreased functionality would entail decreases in hydrologic storage, baseflow support, sediment retention, nutrient removal, support of native plant diversity and provision of wildlife habitat.

The potential effects to special aquatic sites would comply with the 404(b)(1) Guidelines with the inclusion of appropriate and practicable conditions, and would not be contrary to the public interest. The permit, if issued, would be conditioned to require BMPs to reduce off-site impacts to wetlands and other waters during construction. The permit would also be conditioned to require enhancement of the wetland to be converted to a reclaimed pond, preserve in perpetuity the 23 acres to the west, north and east of the reclaimed pond, and restore the wetland to be temporarily disturbed by the temporary road that would access the pond. These conditions would serve to compensate for the impacts to waters of the U.S. that would occur from the proposed project.

5.1.13 Fish, crustaceans, mollusks, and other aquatic organisms in the food web 230.31 and aquatic ecosystem and organism determinations 230.11(e):

The Chena River, which is approximately 2.5 miles north of the northern part of the site, provides excellent spawning and rearing habitat for arctic grayling and also serves as spawning and rearing habitat for Chinook and chum salmon (ADF&G 2012). Arctic grayling are known to use Channel B for foraging, refuge and rearing. Many other species of fish occur in the Chena River including round whitefish, northern pike, longnose sucker, slimy sculpin, Alaska blackfish and arctic lamprey (Ihlenfeldt 2006).

The project site wetland sustains surface and subsurface hydrologic connections to Channel B and the Chana River. The wetland thereby affects fish and other aquatic organisms through baseflow support and maintenance of physical and chemical aspects of water quality including temperature, nutrients, metals, and bacteria. However, the project site wetland comprises a relatively small proportion of wetland area within the Channel C sub-watershed and thereby has only a minor effect on fish and other aquatic organisms.

The proposed project would cause slight impacts to fish, crustaceans, and other aquatic organisms through the removal of wetland area and consequential reduction in wetland function within the sub-watershed. Construction activities would also create a potential source of pollution that could affect water quality in Channel B and the Chena River, which would compromise habitat quality for fish and

other aquatic organisms. However, the proposed wetland buffer and reclaimed pond would reduce outflows and associated pollutants from the site.

The potential effects to fish, crustaceans, mollusks, and other aquatic organisms in the food web and aquatic ecosystem would comply with the 404(b)(1) Guidelines with the inclusion of appropriate and practicable conditions. The permit, if issued, would be conditioned to require the applicant to implement appropriate BMPs that would prevent degradation of water quality during construction by minimizing erosion and sedimentation.

5.1.14 Essential fish habitat:

The Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act of 1996, requires all Federal agencies to consult with the National Marine Fisheries Service (NMFS) on all actions, or proposed actions, permitted, funded, or undertaken by the agency, that may adversely affect Essential Fish Habitat (EFH). No EFH species are known to use the project area, therefore this factor is not applicable.

5.1.15 Wildlife 230.32, fish and wildlife values 320.4(a)(1), also fish and wildlife at 320.4(c):

This section addresses animal species that are not protected under the Endangered Species Act (ESA) or the Bald and Golden Eagle Protection Act. The Migratory Bird Treaty Act (MBTA) is a federal law addressing wildlife conservation and development. The USFWS, NMFS, and ADF&G share management authority. The wetland in the project site is a relatively small proportion of wetland area within the

Channel C sub-watershed and thereby has only a minor effect on fish and wildlife.

Fish: As stated above, the Chena River, down-gradient of the project area, provides excellent spawning and rearing habitat for arctic grayling and also serves as spawning and rearing habitat for Chinook and chum salmon (ADF&G 2012). Many other species of fish occur in the Chena River including round whitefish, northern pike, longnose sucker, slimy sculpin, Alaska blackfish and arctic lamprey (Ihlenfeldt 2006). Although it is unlikely that salmon utilize Channel B, both mature and immature arctic grayling have been observed in Channel B on several occasions.

Mammals: Mammals that likely occur in various portions of the project vicinity include moose, snowshoe hare, red squirrel, beaver, muskrat, red fox, coyote, ermine and meadow vole.

Birds: The species likely to use the site include resident species such as common raven, black-capped chickadee and willow ptarmigan as well as migratory species such as alder flycatcher, Wilson's warbler and solitary sandpiper. A few raptors such as great horned owls and sharp-shinned hawks may frequent the site as well.

Amphibians: The site likely supports foraging and breeding habitat for wood frogs, the only amphibian species in interior Alaska. Wood frogs are listed as a species of concern by the ADF&G.

The proposed project would cause slight impacts to water quality in Channel B and the Chena River that could negatively affect fish, eliminate low to moderate quality wildlife habitat entailing 118 acres

of mainly scrub-shrub wetland, and artificially create edge habitat, which generally increases risk of predation, storm damage, pathogens and colonization by non-native invasive plant species.

The potential effects to fish and wildlife would comply with the 404(b)(1) Guidelines with appropriate conditions, and would not be contrary to the public interest. The permit, if issued, would be conditioned to require the applicant to conduct clearing, excavation and fill activities in potentially suitable nesting habitats prior to May 1 or after July 15 to avoid impacts to breeding migratory birds. The permit condition that would require in-lieu fee mitigation entailing preservation of moderate to high quality wetlands in the region would also serve to compensate impacts to fish and wildlife.

5.1.16 Threatened and endangered species 230.30:

☒ There are no T/E species and no critical habitat present within the action area. This factor is not applicable because there are no threatened or endangered species and no critical habitat within the action area.

5.1.17 Contaminant determinations

There is no evidence of existing soil or near-surface ground water contamination within the project study area. The proposed project has limited potential to become a source of contamination from leaked or spilled petrochemicals, metals and/or other materials that may be used during project construction or operation.

The potential effects of contaminants from the project would comply with the 404(b)(1) Guidelines with the inclusion of appropriate and practicable conditions. The permit, if issued, would be conditioned to require the applicant to implement appropriate BMPs that would prevent minimize erosion and sedimentation and prevent degradation of water quality during construction and operation. Furthermore, the permit would be conditioned to require establishment of the wetland buffers and the reclamation pond, which would serve to trap sediment and other contaminants that may lead from the fill pad.

5.1.18 Water supply and conservation, Municipal and private water supplies

A temporary water supply may be required during construction of the gravel storage yard for dust control. Water for dust control would be provided by water truck.

Temporary water use during construction would have negligible temporary impacts to the local water supply, as the short-term use of these sources would not result in permanent changes to water supply.

The potential effects to water supply and conservation and local water supplies would be negligible, would comply with the 404(b)(1) Guidelines, and would not be contrary to the public interest.

5.1.19 Recreational and commercial fisheries

This factor is not applicable because there are no recreational or commercial fisheries that occur within the project vicinity.

5.1.20 Subsistence

Subsistence uses are not identified in the project vicinity. Therefore, under the present subsistence designation, this factor is not applicable.

5.1.21 Water-related recreation, recreation:

There are no water-related recreation activities within the project area. No other types of recreation occur at the site except occasional off-road vehicle travel (4-wheelers and snow-machines) and walking as evidenced by the few section line trails present.

The project would eliminate the occasional off-road recreation with an industrial facility.

The potential effects to recreation would be negligible, and would not be contrary to the public interest.

5.1.22 Aesthetics:

The site imparts aesthetic value to its immediate surroundings due to its natural, relatively undisturbed conditions. However, because the site is not readily accessible or viewed, this value is likely underappreciated.

Project construction would diminish the aesthetics of the immediate vicinity. The aesthetic impact of project construction would be no more than minimal because the site is set back approximately 0.25 mile from the Richardson Highway, though would be less than 200 feet north of the Old Richardson Highway, the nearest main thoroughfare. Moreover, the site is zoned to allow industrial use as would occur with the proposed project.

The potential effects to aesthetics would be minimal, would comply with the 404(b)(1) Guidelines, and would not be contrary to the public interest.

5.1.23 Wild and Scenic Rivers, National Wilderness Areas, National Seashores, National Parks, estuarine and marine sanctuaries, Parks, national and historic monuments, national seashores, wilderness areas, research sites, and similar preserves:

This factor is not applicable because there are no Wild and Scenic Rivers, National Wilderness Areas, National Seashores, National Parks, estuarine and marine sanctuaries 320.4(e), and for marine sanctuaries also 320.4(i), parks, national and historic monuments, national seashores, wilderness areas, research sites, or similar preserves within the project area.

5.1.24 Energy needs and energy conservation and development:

Energy consumption would occur during project construction and operation due to equipment operation. Energy use for this type of construction is anticipated to be normal. Fuel (primarily diesel) would be consumed at the site by vehicles and construction equipment needed for construction. Electrical power derived from the existing grid would be connected to the buildings to be constructed on site.

Energy would be conserved to some extent by the extraction of gravel to be used for the proposed fill pad. As discussed above, this action would conserve energy that otherwise be expended to import fill material.

The potential effects to energy needs, conservation, and development would be negligible and would not be contrary to the public interest.

5.1.25 Noise:

Existing noise in the project vicinity is typically at very low levels, well below the EPA Protective Noise Levels for outdoor noise in residential areas, which is 55 dBA over periods of time such as 8 or 24 hours (EPA 2012).

Project construction would require the use of heavy machinery that may produce noise above 80 dBA. All project workers exposed to noise levels above 80 dBA should be provided with personal protective equipment for hearing (i.e. earplugs and/or earmuffs). All noise-producing equipment and vehicles using internal combustion engines should be equipped with mufflers, air-inlet silencers where appropriate, and shrouds, shields, or other noise reducing features in good operating condition to meet or exceed original factory specifications. The use of noise-producing signals, including horns, whistles, alarms, and bells, should be for safety warning purposes only. Construction activities would be heard by nearby residents, but at dBA levels generally within EPA guidelines.

The potential effects to noise would be minimal, and would not be contrary to the public interest.

5.1.26 Navigation:

This factor not applicable because there would be no impacts to navigable waters.

5.1.27 Effects on limits of the territorial sea:

This factor does not apply because the Proposed Project would have no features that extend into marine waters and affect the limits of the territorial sea.

5.1.28 Activities affecting coastal zones:

This factor does not apply because the Proposed Project is not within a formally designated coastal zone.

5.1.29 Safety, also safety of impoundment structures:

The project should have minimal effects on safety assuming all applicable safety regulations would be followed during construction. The proposed project would not result in an impoundment structure.

The potential effects to safety would be negligible and would not be contrary to public interest.

5.1.30 Historic properties (Section 301(5) National Historic Preservation Act) 320.4(a)(1) and 320.4(e):

The proposed project ☐ will/☒ will not have any effect on any sites listed, or eligible for listing, in the National Register of Historic Places, or otherwise of national, state, or local significance based on a recent search of the Alaska Heritage Resources Survey database.

The potential effects to historic properties would be negligible and would not be contrary to the public interest.

5.1.31 Land use:

The use of the land would be changed from vacant land to a light industrial facility. The site is located outside any incorporated city and within the FNSB. The project would be constructed within properties owned by the applicant. The proposed activity is not prohibited by zoning, and would not require a permit from FNSB.

The potential effects to land use in the area would be beneficial, and would not be contrary to the public interest.

5.1.32 Conservation:

Land within the properties to be used for the project outside the fill pad would remain undeveloped. The proposed reclamation pond and its 250-foot wide buffer, which would total approximately 47 acres, would be permanently protected with a deed restriction.

The potential effects to conservation would be negligible, and would not be contrary to the public interest.

5.1.33 Economics (employment, tax revenues, community cohesion, community services, property values):

Employment: An incremental increase in employment would occur during project construction.

Tax Revenues/Property Values: Tax revenues may slightly increase as a result of the project due to an increase in the assessed value of the project site. However, this increase may be offset to some degree by a slight decrease or stasis in the assessed values of

the adjoining parcels amenable to residential development.

Community Cohesion: Not applicable.

Community Services: The project would be located in the North Star Fire Service Area, and the Alaska State Troopers would handle public safety concerns.

The potential effects to economics would be beneficial, and would not be contrary to the public interest.

5.1.34 Prime and unique farmland:

This factor is not applicable because there is no prime or unique farmland in the project vicinity.

5.1.35 Food and fiber production:

This factor is not applicable because food and fiber production does not occur in the project vicinity.

5.1.36 Mineral needs:

Gravel fill to be used for project construction would be acquired on site and would thereby have no effect on the supply or demand of gravel within the Fairbanks/North Pole area.

The potential effects to mineral needs would be negligible, and would not be contrary to the public interest.

5.1.37 Considerations of property ownership:

The project would be constructed within properties owned by the applicant. Lands adjacent to the project area are primarily private lands, but include a 640-acre property owned by FNSB; these lands are utilized likely to be developed over time for residential and industrial uses. Adjacent landowners

were furnished with a copy of the DA public notice and provided the opportunity to comment on the proposed project; none of these landowners submitted comments.

The potential effects to property ownership would be negligible, and would not be contrary to the public interest.

5.1.38 General environmental concerns, also environmental benefits:

Concerns: The project would cause impacts to soil, water quality, ground water recharge, wetland function, native plant diversity and wildlife habitat. The project would also contribute slightly to air pollution including the generation of PM2.5, a fine particulate linked to health hazards such as heart disease, lung cancer, reduced lung capacity, and is often at levels in the Fairbanks area that exceed standards set by the Environmental Protection Agency. Lighting needed for construction would further contribute to light pollution in the project vicinity.

Benefits: Unavoidable impacts to 118 acres of wetlands would be compensated by permittee-responsible mitigation sufficient to permanently protect 47 acres of on-site wetland; 24 acres of this area would be used as a gravel source and subsequently reclaimed (enhanced) to create a functioning pond and wetland fringe.

The potential effects to environmental concerns other than those that were addressed in earlier sections of the document would be negligible, and would not be contrary to the public interest.

5.1.39 Other federal, state, or local requirements:

The following is a list of federal, state, and local permitting requirements for the proposed project:

- Corps: Section 404 of the Clean Water Act
- ADEC: Section 401 Water Quality Certification
- ADEC SWPPP and Construction General Permit (CGP)

5.1.40 Needs and welfare of the people:

The needs and welfare of the people would be supported by the construction of the proposed project with minimal adverse effects upon the environment. Thus, the project would have a beneficial effect upon this factor.

The potential effects needs and welfare of the people would likely be beneficial, would comply with the 404(b)(1) Guidelines and would not be contrary to the public interest.

5.1.41 Other Factors Considered: None

5.2 Secondary and Cumulative Impacts.

The geographic area considered for these analyses includes the Channel C sub-watershed, which is within hydrologic unit code (HUC) 1904050607, Lower Chena River.

5.2.1 Secondary Impacts: Secondary or indirect impacts are caused by a specific action and take place later in time or are further removed in distance, but are still reasonably foreseeable (40 CFR 1508.8). Such impacts may only occur during operation of the proposed project.

Operations at the proposed project would cause secondary impacts for fish and wildlife. However, these secondary impacts are not anticipated to be significant.

Fish and Wildlife

The proposed project would eliminate 118 acres of low to moderate quality wildlife habitat within an approximately 2,500-acre wetland, which is one of the few large undeveloped areas an the alluvial plain underlying Fairbanks and North Pole. The project would thereby reduce the geographic extent of intact habitat in an urbanizing area, further reducing its carrying capacity for indigenous wildlife. The edge habitat created would increase the risk of predation for many species, storm damage to areas immediately adjacent that would remain undeveloped, and colonization by non-native invasive plant species, which generally limit habitat value for native wildlife. In addition, the project would augment indirect artificial disturbances such as increased human traffic, artificial lighting, noise and dust, which would additional consequences for wildlife in the project vicinity. Moreover, the project would slightly reduce baseflow and create a source of pollutants that could harm fish in downstream waters.

The effect of these impacts would be minimized by the proposed buffer around the fill pad, the reclamation pond/wetland and the buffer surrounding the reclamation pond/wetland. Approximately 195 acres of the 455-acre property containing the proposed project would remain undeveloped, albeit unprotected by deed restriction or any other measure. This area, which comprises most of the eastern part of the property, is contiguous with the approximately 2,500-

acre wetland that extends off-property. The buffers, reclamation pond/wetland and approximately 195-acre undeveloped area would serve to retain migration/dispersal corridors and absorb the indirect impacts of project operation as well as minimize outflows and associated pollutants from the site, minimizing harm to downstream fish populations.

5.2.2 Cumulative Impacts: Federal regulations implementing NEPA (40 CFR 1508.7) define a cumulative effect as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.

Past and present actions that have affected this geographic area include logging and land-clearing; residential, commercial and industrial development; flood control through construction of the Tanana River Levee and Drainage Channel B; fuel spills, leaks and consumption; fire suppression; recreation including use of off-road vehicles; artificial lighting; noise creation; and other human activity. These actions have resulted in substantial losses to wetland quantity, quality and function, degradation of fish and wildlife habitat, increase in water fluctuations, alteration of natural surface flow patterns, and degradation of water quality for both surface and ground waters.

Reasonably foreseeable future actions include more vegetation clearing, more residential, commercial and industrial development; continued

maintenance of Channel B; increased fuel consumption; continued fire suppression; increased recreation including use of off-road vehicles; increased artificial lighting; increased noise; and increased human activity. Most of these actions may be attributed to growth in the population of Fairbanks and the surrounding area. Below is a table based on the 2010 census showing that population growth in the Fairbanks area has been fairly steady, and nearly exponential in North Pole. Although the Fairbanks population is projected to decrease in the next few years, the North Pole population is projected to increase substantially (CLRsearch.com 2010).

Table 1. Fairbanks and North Pole Population Growth Population Statistics

2010 Population Growth and Population Statistics	Fairbanks, AK	North Pole, AK	Alaska
Total Population	31,153	2,310	703,726
Square Miles	1,103.7	4.46	571,951.26
Population Density	28.2	518.5	1.2
Population Change Since 1990	3.21%	95.10%	27.84%

Population Change Since 2000	3.07%	47.13%	12.25%
Forecasted Population Change by 2014	-5.24%	11.56%	7.27%

In context with the overall impacts from past, present, and reasonably foreseeable future actions, the overall environmental impact from this project would not be significantly adverse. Although the project would have a negative effects on wetlands, fish and wildlife values, water fluctuations and flow patterns and water quality, these effects would be minimal relative to the existing conditions in the sub-watershed and would be mitigated by appropriate measures.

The proposed project would eliminate 118 acres of jurisdictional wetland, which is approximately 2.1 percent of the wetland area in the Channel B sub-watershed, which totals 5,610 acres. Wetlands currently comprise 60.5 percent of the sub-watershed, which is 9,270 acres in total area. Upon project completion, wetlands would comprise 59.2 percent of the sub-watershed, a decrease of 1.3 percentage points. The type of wetland that would be lost as a result of the project, scrub-shrub with some emergent communities containing seasonal and shallow inundation, is not of high value and is fairly common in the sub-watershed and the Fairbanks/North Pole vicinity. Compensatory mitigation would be required

to preserve and enhance on-site wetlands to offset the permanent losses proposed by the project.

Within the sub-watershed, the increased impervious surface created by the project would cause a slight increase in water fluctuations and would further concentrate surface flow. The project would increase impervious surface by approximately 2.3 percentage points within the Channel B sub-watershed, which currently has a large portion (approximately 20 to 25 percent) of its area covered by impervious surfaces. Increased impervious surface would further obstruct surface storage and infiltration in the sub-watershed, generating slightly more runoff and ponding. However, the proposed wetland buffers and reclamation pond/wetland would likely constrain alterations to water fluctuations and flow patterns to the project site, and minimize such alterations off site.

The project would slightly degrade water quality in the sub-watershed through the suspension of particulates and their associated pollutants, potential contamination from leaked or spilled chemicals and removal of wetland area. Replacement of the on-site wetland with a largely unvegetated and mostly impervious surface would reduce overall capacity of the sub-watershed to maintain the quality of both surface and ground waters through sedimentation, water storage, dissolution, adsorption, denitrification and decomposition. The proposed wetland buffers and reclamation pond/wetland would mitigate degradation of water quality.

5.3 Mitigation Discussion.

5.3.1 Avoidance: Avoidance measures to address potential adverse impacts of the discharge on the

aquatic ecosystem are discussed in Sections 2.1.1 and 2.1.2. These measures in combination with minimization measures, would reasonably, practicably and sufficiently avoid impacts to wetlands.

5.3.2 Minimization: Measures taken to minimize adverse impacts of the discharge on the aquatic ecosystem are discussed in Sections 2.1.1 and 2.1.2. These measures in combination with the special conditions listed in section 5.5 would reasonably, practicably and sufficiently minimize the potential for discharge to the aquatic ecosystem.

5.3.3 Compensatory Mitigation Determination: Although the applicant has avoided and minimized to the extent practicable, compensatory mitigation is required to offset the unavoidable impacts to aquatic resources. It should be noted that no compensatory mitigation was required for this project under the Department of the Army permit that was issued April 5, 2004 and expired March 31, 2007.

5.3.3.1 Is compensatory mitigation required? ☒ yes ☐ no

The requirement for compensatory mitigation is based on the unavoidable adverse impacts that remain after all appropriate and practicable minimization has occurred. The compensatory mitigation proposed includes reclamation of the proposed gravel source area into a 24-acre pond/wetland and the permanent preservation of both this area and the 23-acre (250 foot wide) buffer around it consisting of undisturbed wetlands. If the permit is issued, the applicant would be required to submit a compensatory mitigation plan that describes the

means by which the proposed gravel source area would be reclaimed (converted) into a functioning pond/wetland area. The permit would also be conditioned to require proof that the reclaimed pond/wetland and buffer is preserved in perpetuity.

5.3.3.2 Is the impact in the service area of an approved mitigation bank? ☐ yes ☒ no

Does the mitigation bank have the appropriate number and resource type of credits available? ☐ yes ☐ no ☒ n/a

5.3.3.3 Is the impact in the service area of an approved in-lieu fee program? ☒ yes ☐ no

Does the in-lieu fee program have the appropriate number and resource type of credits available? ☐ yes ☐ no ☒ n/a

5.3.3.4 Check the selected compensatory mitigation option(s):

☐ mitigation bank credits

☐ in-lieu fee program credits

☐ permittee-responsible mitigation under a watershed approach

☒ permittee-responsible mitigation, on-site and in-kind

☐ permittee-responsible mitigation, off-site and out-of-kind

5.3.3.5 Mitigation Summary: As discussed in Section 2.1.2, the applicant has designed the project to avoid and minimize impacts to waters of the U.S. to the extent practicable. As discussed in Section 2.1.3,

unavoidable impacts would be compensated via on-site permittee-responsible mitigation.

5.3.3.6 Other Mitigative Actions (e.g. voluntary actions that exceed compensatory mitigation as needed to offset resource impacts): None

5.4 Public Interest Review General Criteria:

5.4.1 The relative extent of the public and private need for the proposed structure or work:

The applicant demonstrated the need to consolidate and expand its existing facilities, which are currently situated in four separate locations in Fairbanks and comprise a total of approximately 45 acres. The proposed project would allow Flowline Alaska, Inc. (Flowline) to establish a much larger, single facility for manufacture and storage of large-diameter pipe. As stated above, Tin Cup, LLC is a holding company for Flowline. Thus, the proposed project would allow Flowline to more safely conduct its operations and greatly expand its operations. Because Flowline is the only major pipe fabrication and storage company in Alaska, the project greatly augment the capability within the state to construct large pipeline projects.

The applicant stated that they have confidential information regarding the ensuing need to support one or more large pipeline projects in the near future. These projections are based on existing contracts and projects to which the applicant is the sole source of materials in the region. Several prospective pipeline projects have been in various stages of planning for several years; many or most of these projects would require fabrication and storage of large diameter pipe

that would traverse hundreds of miles across the state.

5.4.2 The practicability of using reasonable alternative locations and/or methods to accomplish the objective of the proposed structure or work:

☒ There are no unresolved conflicts as to resource use.

☐ There are unresolved conflicts as to resource use. One or more of the alternative locations and methods described above are reasonable or practicable to accomplish the objectives of the proposed structure or work but are not being accepted by the applicant.

☐ There are unresolved conflicts as to resource use; however there are no practicable reasonable alternative locations and methods to accomplish the objective of the purposed work.

The Corps has determined that the applicant's preferred alternative is the least environmentally damaging practicable alternative, as explained in Section 3.0. There are no reasonable or practicable alternative methods and/or locations that would accomplish the purpose of the proposed action and be less environmentally damaging than the applicant's preferred alternative.

5.4.3 The extent and permanence of the beneficial and/or detrimental effects that the proposed structures or work may have on the public and private uses which the area is suited:

The potential detrimental effect of the project would be the permanent loss of 118 acres of wetlands, as well as impacts to fish and wildlife values, and water quality. It is anticipated that the project would

result in minimal adverse impacts to aquatic resources if the project is implemented with the special conditions noted below (see Section 6.4).

The applicant would eventually benefit economically from the development of the property as it would allow expansion of its operations and a safer environment in which to conduct its operations. The project would benefit the community by providing the means to increase employment as well as support large pipeline projects that would assist oil and gas development and/or highway construction and maintenance.

5.5 Special Conditions and Rationale for Inclusion

5.5.1 The following conditions were included in the ADEC Certificate of Reasonable Assurance:

1. Reasonable precautions and controls must be used to prevent incidental and accidental discharge of petroleum products or other hazardous substances. Fuel storage and handling activities for equipment must be sited and conducted so there is no petroleum contamination of the ground, surface runoff or water bodies.

2. During construction, spill response equipment and supplies such as sorbent pads shall be available and used immediately to contain and cleanup oil, fuel, hydraulic fluid, antifreeze, or other pollutant spills. Any spill amount must be reported in accordance with Discharge Notification and Reporting Requirements (AS 46.03755 and 18 AAC75 Article 3). Most importantly, the applicant must contact by telephone the DEC Area Response Team for Central Alaska at (907)269-3063 during work hours or 1-800-478-9300

after hours. Also, the applicant must contact by telephone the National Response Center at 1-800424-8802. Report all spills.

3. Excavated or fill material, including overburden, shall be placed so that it is stable, meaning after placement the material does not show signs of excessive erosion. Indicators of excess erosion include: gullying, head cutting, caving, block slippage, material sloughing, etc. Material shall not leach harmful or toxic substances into streams or wetlands. If there is erosion from the overburden piles, silt fence must be installed to limit the extent of sediment runoff. The silt fence or similar structure shall be installed on a line parallel to and within 5 feet of the toe of slope for the overburden and spoils within all wetland areas containing standing water connected to a water body or where the toe of slope is within 25 feet of a water body. The structure shall remain in place until the fill has been fully stabilized, contained in another manner, or used for reclamation of the mine site.

4. Stockpiled organic material shall be spread over the contoured gravel excavation workings to promote natural plant growth. The goal of this condition is to promote the natural succession of vegetation that is representative of the area. Acceptable indicators that this process is occurring would be a reasonable presence, density, and distribution of pioneer species of plants typical to the area. The goal is to achieve a 40% live plant cover of the reclaimed area within two complete growing seasons.

5. If pit dewatering is to occur during material extraction, methods shall be implemented to filter or

settle out suspended sediments from wastewater resulting from dewatering activities, prior to its direct or indirect discharge into any natural body of water. Prior to dewatering, contact DEC (John Greuey, 907-269-8117), for the possible necessity of obtaining a DEC Excavation Dewatering Permit (#: 2009DB0003). Permit requirement is related to volume of discharge.

6. Settling ponds shall not be located in a flowing stream. If a settling pond is located where it is likely to flood, and is needed for mining during the next year, it shall be protected from erosion by a berm or another method. Settling ponds shall not be located where a stream channel is going to be reestablished unless the fines are removed or protected from erosion.

7. Runoff discharged to surface water (including wetlands) from a construction site disturbing one or more acres must be covered under Alaska's General Permit for Storm Water Discharges from Large and Small Construction Activities in Alaska (AKR100000). This permit requires a Storm Water Pollution Prevention Plan (SWPPP). For projects that disturb more than five acres, this SWPPP must also be submitted to DEC (William Ashton, 907-269-6283) prior to construction.

ADEC's Certification for this project expires on June 29, 2017. In accordance with 33 U.S.C. 1341(d), all conditions of ADEC's Certification are incorporated as part of the DA permit. Therefore, they are not listed as special conditions.

5.5.2 The following special conditions will be included in the DA permit, if issued, to ensure the project is not contrary to the public interest

[33 CFR 320.4(r)], and to ensure the project complies with the 404(b)(1) Guidelines [40 CFR 230.10(d)], or at the permittee's request.

1. The boundaries of all construction areas must be staked or flagged prior to construction to prevent inadvertent encroachment outside the necessary area. No heavy equipment or work (e.g. filling, mining, etc.) is permitted in waters outside of the project area.

Rationale: Avoids unnecessary impacts to the aquatic environment and assures that wetlands not authorized to be filled will remain in their natural state [33 CFR 320.4(a)(1), 320.4(b)(1) and (2), 320.4(d) and 320.4(r)(1)].

2. Clearing, excavation and fill activities In potentially suitable nesting habitats should be conducted prior to May 1 or after July 15 to avoid impacts to breeding migratory birds. If this is not possible, other measures to avoid impacts to breeding migratory birds should be initiated. For example, the area for the next year's work could be cleared of vegetation after July 15 the year before. This would render the area unsuitable for breeding birds prior to their arrival the next spring.

Rationale: Protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources in accordance with the Fish and Wildlife Coordination Act [33 CFR 320.3 and 33 CFR 320.4].

3. A compensatory mitigation plan adhering to the requirements in 33 CFR 332 and the Alaska District Regulatory Guidance Letter No. 09-01 shall be submitted to and approved by the Alaska District of the U.S. Army Corps of Engineers, Regulatory

Division (Alaska District) before commencing any work in waters of the U.S. including wetlands. The plan, which shall be based on the April 29, 2004 Gravel Source Reclamation Plan that was submitted to the Alaska District in 2008, shall describe the methods for establishing, monitoring and maintaining the reclaimed pond and riparian fringe after completing the proposed gravel extraction. The ordinary high water mark (shoreline) of the pond will contain an area that is no greater than 18 acres, and the adjacent riparian fringe will be at least 6 acres. Slopes along at least 80 to 90 percent of the shoreline shall be graded at an average of 20 to 1 (horizontal to vertical) or shallower and extend at least 60 feet waterward and at least 40 feet landward of the shoreline (≥100 feet total). Slopes along the remaining shoreline shall be graded at an average of 30 to 1 or shallower and extend at least 90 feet waterward and at least 60 feet landward of the shoreline (≥150 feet total). Although no portion of the pond bottom or riparian fringe shall be steeper than 1:1, the pond area with slopes that average 20:1 or shallower and the entirety of the riparian fringe shall be graded to include irregular topography including sharp changes in elevation.

Topsoil excavated during gravel excavation must be stockpiled separately from other overburden and distributed over the pond area with slopes 20:1 or shallower and the entirety of the riparian fringe. Topsoil shall include cleared vegetation, organic soil horizons and the uppermost 3 to 6 inches of mineral soil. Other overburden shall include the remaining substrate excavated but not utilized as fill.

Rationale: Compensate for resource losses important to the human and aquatic environment. [33 CFR 320.4(b) and (r), 33 CFR 332.3 (a)(1) and (b)(3)n, 33 CFR PART 325 Appendix A (B) and 40 CFR 230.41].

4. The reclaimed pond, riparian fringe and the 250-foot wide buffer area situated around the west, north and east sides of the reclamation pond/wetland fringe shall be permanently protected as a natural area with a deed restriction. This buffer area shall be at least 23 acres and shall remain free of permanent and temporary impacts associated with construction or operation of the proposed project. The deed restriction must be recorded at the Fairbanks District of the Alaska Department of Natural Resources Recorder's Office prior to initiating construction of the development. Proof of the establishment of the Deed Restriction shall be provided to the Alaska District within 60 days from permit issuance.

Rationale: Prevent degradation of waters of the U.S., and fish and wildlife habitat; maintain function and integrity of wetlands adjacent to the permitted area. Assure legal recordation of the permit to put a subsequent purchaser or owner of property on notice of permit conditions. [33 CFR 320.4(a)(1), 320.4(c), 320.4(r)(2) and 332.3, 40 CFR Part 230.74, 33 CFR PART 325 Appendix A (B)].

6.0 <u>Compliance with Other Federal, State, or Local Laws</u>

6.1 State 401 Water Quality Certification: Certification was issued on June 29, 2012. Pursuant to 33 CFR PART 320.4(d), the certification of compliance with applicable effluent limitations and

water quality standards required under the provisions of Section 401 of the Clean Water Act are considered conclusive with respect to water quality considerations unless the Regional Administrator, U.S. Environmental Protection Agency, advises of other water quality aspects to be taken into consideration.

6.2 Other state and/or local authorizations (if issued):

6.3 EO 12898, Environmental Justice (EO 12898): In accordance with Title III of the Civil Rights Act of 1964 and Executive Order 12898, it has been determined that the project would not directly or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin nor would it have a disproportionate effect on minority or low-income communities.

6.4 EO 13175, Consultation with Indian Tribes, Alaska Natives, and Native Hawaiians.

☒ This action will have no known substantial direct effect on one or more Indian tribes.

6.5 EO 11988, Floodplain Management.

☒ Not in a floodplain.

6.6 EO 13112, Invasive Species. ☒ There were no invasive species issues involved.

6.7 EO 13212 and 13302, Energy Supply and Availability.

☒ The project was not one that will increase the production, transmission, or conservation of energy, or strengthen pipeline safety.

6.8 Corps Wetland Policy. [General policies for evaluating permit applications (§ 320.4.b, Effects on Wetlands)]. Based on the public interest review herein, the beneficial effects of the project outweigh the damages to the wetland resource.

6.9 Other authorizations. None

6.10 Significant Issues of Overriding National Importance 33 CFR 320.4(j)(2)

☒ NA

☐ National Security

☐ National Energy Needs

☐ Navigation

☐ National Economic Development

☐ Water Quality

☐ Preservation of Special Aquatic Areas with Significant Interstate Importance

☐ Other

7.0 <u>Statement of Findings</u>

7.1 Public Interest Review

7.1.1 Public Interest Factors Summary: All public interest factors have been reviewed as summarized here. Both cumulative and secondary impacts on the public interest were considered. Information relevant to the decision is found at the reference location for each factor below.

+ Beneficial effect				
	0 Negligible effect			
		- Adverse effect		
			M Neutral as result of mitigative action	
+	0	-	M	
☐	☒	☐	☐	Conservation (Part 5.1.32).
☒	☐	☐	☐	Economics (Part 5.1.33).
☐	☒	☐	☐	Aesthetics (Part 5.1.22).
☐	☒	☐	☐	General environmental concerns (Part 5.1.38).
☐	☐	☐	☒	Wetlands (Part 5.1.12).
☐	☒	☐	☐	Historic properties (Part 5.1.30).
☐	☐	☐	☒	Fish and wildlife values (Part 5.1.15)
☐	☒	☐	☐	Flood hazards (Part 5.1.5).
☐	☒	☐	☐	Floodplain values (Part 5.1.5).
☐	☒	☐	☐	Land use (Part 5.1.31).
☐	☒	☐	☐	Navigation (Part 5.1.26).
☐	☒	☐	☐	Shore erosion and accretion (Part 5.1.8).
☐	☒	☐	☐	Recreation (Part 5.1.21).

☐	☒	☐	☐	Water supply and conservation (Part 5.1.18).
☐	☐	☐	☒	Water quality (Part 5.1.4).
☐	☒	☐	☐	Energy needs (Part 5.1.24).
☐	☒	☐	☐	Safety (Part 5.1.29).
☐	☒	☐	☐	Food and fiber production (Part 5.1.35).
☐	☒	☐	☐	Mineral needs (Part 5.1.36).
☐	☒	☐	☐	Considerations of property ownership (Part 5.1.37).
☒	☐	☐	☐	Needs and welfare of the people (Part 5.1.40).

7.1.2 Public Interest Determination: I find that issuance of a Department of the Army permit, as prescribed by regulations published in 33 CFR 320 to 330:

☒ Is not contrary to the public interest. ☐ Is contrary to the public interest.

7.2 Evaluation of Compliance with 404(b)(1) Guidelines.

7.2.1 Alternatives Test (40 CFR 230.10(a)).

7.2.1.1 Based on the discussion in 3.0, are there available, practicable alternatives having less adverse impact on the aquatic ecosystem and without other significant adverse environmental consequences that do not involve discharges into "waters of the U.S." or at other locations within these waters? No

7.2.1.2 Based on 3.0 if the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no practicable alternative sites available? Yes

7.2.2 Special Restrictions (40 CFR 230.10(b)). Will the discharge:

7.2.2.1 Violate state water quality standards? No

7.2.2.2 Violate toxic effluent standards [under Section 307] of the Clean Water Act? No

7.2.2.3 Jeopardize endangered or threatened species or their critical habitat? No

7.2.2.4 Violate standards set by the Department of Commerce to protect marine sanctuaries? No

7.2.3 Other restrictions (40 CFR 230.10(c)): Would the discharge contribute to significant degradation of "waters of the U.S." through adverse impacts to:

7.2.3.1 Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and/or special aquatic sites? No

7.2.3.2 Life stages of aquatic life and/or wildlife? No

7.2.3.3 Diversity, productivity, and stability of the aquatic life and other wildlife? Or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? No

7.2.3.4 Recreational, aesthetic, and/or economic values? No

7.2.4 Actions to minimize potential adverse impacts [mitigation](40 CFR 230.10(d))? Would all appropriate and practicable steps [40 CFR 230.70-77] be taken to minimize adverse impacts of the discharge on the aquatic ecosystem? Yes

7.3 Findings of Compliance or Non-compliance with the 404(b)(1) Guidelines (40 CFR 230.12):

The discharge complies with the guidelines, with the inclusion of the appropriate and practicable conditions listed above to minimize pollution or adverse effects to the affected ecosystem.

7.4 Requests for public hearing;

☒ No requests for a public hearing were received.

☐ I have reviewed and evaluated the requests for a public hearing. There is sufficient information available to evaluate the proposed project; therefore, the requests for a public hearing are denied.

☐ A public hearing was held on _____. (See 4.1.8).

7.5 Section 176(c) of the Clean Air Act General Conformity Rule Review: The proposed project has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined the activities proposed under this permit would not exceed *de minimis* levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR PART 93.153. This no-effect determination has been coordinated with the U.S. Environmental Protection Agency and the Alaska Department of Environmental Conservation. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably

controlled by the Corps. For these reasons, a conformity determination is not required for this individual permit.

7.6 Finding of No Significant Impact (FONSI) (40 CFR 1508.13): Having reviewed the information provided by the applicant, all interested parties and the assessment of environmental impacts contained in Part II of this document, I find that this permit action would not have a significant impact on the quality of the human environment. Therefore, an Environmental Impact Statement would not be required.

Prepared and Approved by:	s/ Greg Mazer Greg Mazer Project Manager Regulatory Branch	10/19/12 Date
Reviewed by:	s/ Ben Soiseth Ben Soiseth Fairbanks Field Office Supervisor Regulatory Branch	10/19/12 Date