No. 17-3403

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY,

Plaintiff - Appellant,

V.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-CV-06344
The Honorable Judge John Robert Blakey

OPENING BRIEF OF APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT
FOR ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY

Appellate Court No: 17-3403
Short Caption: *Orchard Hill Building Company d/b/a Gallagher & Henry*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
Orchard Hill Building Company d/b/a Gallagher & Henry.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Texas Public Policy Foundation; Huck Bouma, PC.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: *s/Theodore Hadzi-Antich* Date: February 2, 2018

Attorneys Printed Name: Theodore Hadzi-Antich

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT
FOR ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY

Appellate Court No: 17-3403
Short Caption: *Orchard Hill Building Company d/b/a Gallagher & Henry*

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N/A

iv) List any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: *s/David E. Zajicek* Date: February 2, 2018

Attorneys Printed Name: David E. Zajicek

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ___ No X

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JURISDICTIONAL STATEMENT

I. The District Court's Jurisdiction

This lawsuit challenges a finding (the "jurisdictional determination") made by the United States Army Corps of Engineers (the "Corps") that certain land (the "Warmke Parcel") owned by Appellant, Orchard Hill Building Company dba Gallagher & Henry ("Gallagher & Henry"), contains 13 acres of wetlands subject to regulation under the Clean Water Act ("CWA"). The challenged jurisdictional determination was made on July, 19, 2013, and Gallagher & Henry filed its original complaint in the United States District Court for the Northern District of Illinois on July 21, 2015 (Dkt 1).

The District Court had jurisdiction over the subject matter of this action pursuant to 5 U.S.C. §§ 702, 704, and 706 (providing for judicial review of final agency action under the APA); 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary and proper relief"); and 28 U.S.C. § 2202 (authorizing injunctive relief). Venue was proper in the Northern District of Illinois under 28 U.S.C. § 1931(e)(2) because the Warmke Parcel is located in Tinley Park, Cook County, Illinois.

II. This Court's Jurisdiction

On September 19, 2017, the District Court issued a final order (Dkt 67), SHORT APPX ("S.APPX") 0001-28, and judgment (Dkt 68), S.APPX 0029, denying Gallagher & Henry's Motion for Summary Judgment and Granting the Corps' Motion for Summary Judgment. Gallagher & Henry filed a timely Notice of Appeal on October 4, 2017. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because it is an appeal from a final decision of the District Court that disposed of all claims in the case.

STATEMENT OF THE ISSUES PRESENTED

Issue No 1: Did the lower court err in sustaining the Corps' jurisdictional determination based upon an administrative record that does not contain site-specific, substantial evidence that the 13 acres at issue on the Warmke Parcel have a significant physical, chemical, and biological nexus with a navigable water?

Issue No 2: Did the lower court err in sustaining the Corps' decision that the 13 acres are not covered by the categorical exemption from CWA jurisdiction for prior converted cropland on the ground that the 13 acres had been "abandoned" by Appellant, even though the Corps' regulations do not provide for an "abandonment" exception to the categorical exemption for prior converted cropland?

STATEMENT OF THE CASE

I. Legal Background

This case arises from the Corps' actions asserting CWA jurisdiction over private property located approximately 11 miles from the nearest navigable water. Gallagher & Henry challenges the Corps' assertion of jurisdiction because the administrative record does not support the Corps' significant nexus finding. In addition, the property at issue is prior converted cropland and is therefore categorically excluded from CWA jurisdiction under the Corps' own regulations.

A. The Clean Water Act and the Significant Nexus Test

The CWA prohibits discharging any "pollutant" into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" are defined in the CWA as "waters of the United States." 33 U.S.C. § 1362(7). Although the phrase "waters of the United States" is not defined in the statute, the Corps' regulations define "waters of the United States" to include wetlands adjacent to tributaries of traditional navigable waters. 33 C.F.R. § 328.3(a)(1), (5) (1994).[1] The 13 acres at issue here are adjacent to Midlothian Creek, which is a tributary of the Little Calumet River, a traditional navigable water. AR 003; APPX 0003.

[1] This is the text of the applicable Corps regulation, which went into effect on August 25, 1993, and was codified in the Code of Federal Regulations in 1994. *See* APPX 0255*; see also,* 58 Fed. Reg. 45036, APPX 0264. The version of the regulations appearing in certain legal references, including Westlaw,

In *Rapanos v. United States*, the Supreme Court reviewed the Corps' regulatory definition of "waters of the United States" as it applied to wetlands adjacent to tributaries of navigable waters. 547 U.S. 715 (2006). As the Seventh Circuit noted in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert denied*, *Gerke Excavating, Inc. v. United States*, 128 S.Ct. 45 (2007), no majority opinion emerged in *Rapanos.* A plurality opinion of four Justices, authored by Justice

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reflects regulatory changes that the Corps attempted to make on August 28, 2015, in connection with a joint effort with the Environmental Protection Agency to revise the definition of the term "waters of the United States" (the "2015 WOTUS Rule"). That attempt has been the subject of substantial judicial and regulatory activity. First, several parties challenged the 2015 WOTUS Rule in United States District Courts and Courts of Appeal throughout the nation. On October 19, 2015, the Sixth Circuit stayed the effective date of the 2015 WOTUS Rule. *See In Re EPA*, 803 F.3d 804, 809 (6th Cir. 2015) ("The Clean Water Rule is hereby STAYED nationwide, pending further order of the court."). On January 22, 2018, the United States Supreme Court held that jurisdiction over the litigation was held exclusively by district courts. *See National Association of Manufacturers v. Department of* Defense, Case No. 16-299 (Slip Opinion, January 22, 2018). Meanwhile, the United States District Court for the District of North Dakota enjoined the rule by issuing a preliminary injunction. *North Dakota v. U.S.* EPA, 127 F.Supp.3d 1047, 1060 (D. ND. 2015).

Second, on the regulatory front, in February 2017, the then-new Administration in Washington, D.C., issued an executive order directing the Corps and the Environmental Protection Agency to propose a rule rescinding or revising the 2015 WOTUS Rule. *See* Exec. Order No. 13778, 82 Fed. Reg. 12497. On July 27, 2017, the agencies proposed a joint rule recodifying the pre-2015 regulatory definition of "waters of the United States" (i.e., the one codified in 1994) and rescinding the 2015 WOTUS Rule. *See* 82 Fed Reg. 34899, 34901-34902 (July 27, 2017). Then, in November of 2017, the agencies proposed a rule changing the effective date of the 2015 WOTUS Rule from August 29, 2015 to "two years from the date of final action in the . . . proposal." 82 Fed Reg 55542-55544 (November 22, 2017). The purpose of the proposal was to allow time for the Administration to finalize the proposed rescission of the 2015 WOTUS Rule.

The complex judicial and regulatory history of the 2015 WOTUS rule is explained in detail by the Supreme Court in *National Association of Manufacturers*. The status of the 2015 WOTUS rule is arguably fluid in light of the Court's opinion.

The 1994 version was in effect at all times during the administrative proceedings described herein and at the time the instant litigation was filed by the Plaintiff in the lower court. Accordingly, the 1994 rule constitutes the law governing this case. *See Landgraf v. USI Film Products,* 511 U.S. 244, 272, (1994) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.") (internal quotation marks and citation omitted). The language of the 2015 WOTUS Rule does not require retroactive effect. Accordingly, all subsequent citations to the Corps' regulatory definition of the term "waters of the United States" set forth in this Appellant's Opening Brief refer to the 1994 version of the Code of Federal Regulations. *See* APPX 0255.

Scalia, held that, notwithstanding the Corps' regulations, the term "waters of the United States" referred to "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters. Justice Scalia opined that wetlands fell within the scope of the CWA only when the Corps could show: "first, that the adjacent channel contains a 'water of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)"; and second, that the wetland has "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742.

In a concurring opinion, Justice Kennedy wrote that the Corps' jurisdiction over wetlands adjacent to tributaries "depends upon the existence of a significant nexus between the wetlands in question and the navigable waters in the traditional sense" and that there could be no categorical inclusion of wetlands merely because they were adjacent to tributaries. *Id.* at 779. For a nexus to be "significant" in this context, the wetlands adjacent to tributaries must "either alone or in combination with similarly situated lands in the region, significantly affect the physical, chemical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. In *Gerke*, the Seventh Circuit adopted Justice Kennedy's approach to federal CWA jurisdiction over wetlands adjacent to tributaries, observing that such an approach was the most narrow ground upon which a majority of the Court could agree. 464 F.3d at 725.

B. The Prior Converted Cropland Exemption in the Corps' Regulations

The Corps' regulations contain an exemption from CWA regulation for "prior converted cropland." The regulatory exemption reads, in full, as follows: "Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for purposes of the Clean Water Act, the

final authority regarding Clean Water Act jurisdiction remains with EPA." 33 U.S.C. 328.3(a)(8) (1994).[2] APPX 0255. Although the term "prior converted cropland" is not specifically defined in the Corps' regulations, it is defined in regulations of the Department of Agriculture as follows: "Prior-converted cropland is a converted wetland where the conversion [to agricultural production] occurred prior to December 23, 1985." *See* Definition of the term "Wetland Determination" in 7 C.F.R. 12.2(8).[3] APPX 0256.

In the preamble to the Federal Register notice in which the Corps promulgated the prior converted cropland exemption, the Corps stated that it would defer to a provision in the Department of Agriculture's regulations providing that the prior converted cropland exemption can be lost if farming operations are abandoned for five years and wetland characteristics return to the land. *See* 58 FR 45034. But the Corps did not include an abandonment exclusion into the actual text of the prior converted cropland regulatory exemption. *See* 33 U.S.C. 328.3(a)(8) (1994).

II. Factual Background

From 1991 through 1994, the 100-acre Warmke Parcel was purchased in phases by Gallagher & Henry for the purpose of constructing a residential development, with all purchases completed by 1995. AR 065; APPX 0065. At the time of purchase, the Warmke Parcel had been farmed continuously for more than a decade. AR 013; APPX 0013. The 13 acres over which the Corps asserts jurisdiction are located in the western portion of the Warmke Parcel. AR 036; APPX 0036.

The Warmke Parcel is surrounded on all four sides by other residential developments. AR 061; APPX 0061. The nearest navigable water is the Little Calumet River, located approximately

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[2] *See* footnote 1.

[3] The term is hyphenated in the Department of Agriculture regulations as "Prior-converted cropland." The Corps' regulations do not include a hyphen.

11 miles away. AR 062, 065; APPX 0062, 0065. *See District Court Proceedings*, Pltf's SOF ¶ 3, APPX 0281; Def's Res. to Pltf's SOF ¶ 3, APPX 0283. Between the 13 acres and the Little Calumet River, there is a system of natural and man-made erosion ruts, storm pipes, drainage swales, three storm water retention basins, and almost the entire length of Midlothian Creek, a nonnavigable tributary of the Little Calumet River. AR 052, 062, 065, 087; APPX 0052, 0062, 0065, 0087. The discharge from the outfall of the Warmke Parcel stormwater retention system into Midlothian Creek is "intermittent." AR 019, 253, 380; APPX 0019, 0219, 0247. Midlothian Creek itself has "ephemeral flow." AR 379; APPX 0246. Thus, there is no continuous surface water connection between the 13 acres and the Little Calumet River. AR 019, 253, 379; APPX 0019, 0219, 0246. *See District Court Proceedings*, Def's Res. to Pltf's SOF ¶¶ 2, 23, APPX 0284-85, 0286-87; Def's SOF ¶¶ 9, 24, APPX 0289, 0290; Pltf's Res. to Def's SOF ¶¶ 9, 24, APPX 0292-93, 0294.

In 1995, Gallagher & Henry received permits to build a two-phase, unified residential development on the Warmke Parcel, which was approved by the Village of Tinley Park to share a common storm water system, utility lines, and roads to be developed by Gallagher & Henry. AR 066; APPX 0066. *See generally, Orchard Hill Bldg. Co. v. United States Army Corps of Engineers*, No. 15-CV-06344, 2017 WL 4150728, at *1 (N.D. Ill. Sept. 19, 2017), S.APPX 0001-3. Pursuant to an Annexation Agreement with the Village, the south 25 acres of the property (Phase I) was approved for 168 townhomes, while the north 61 acres of the property (Phase II) was approved for 169 single family lots. AR 065; APPX 0065. There is no dispute that, at the time it was purchased by Gallagher & Henry, the Warmke Parcel was "prior converted cropland." AR 013; APPX 0013.

Starting in 1995, Gallagher & Henry made substantial modifications to the property to

prepare for housing construction. These modifications included stripping top soil, leveling the property, installing clay building pads, and constructing a storm-water retention system to serve the entire 100-acre Warmke Parcel. AR 065-66; APPX 0065-66.

Over the next seven years, Gallagher & Henry constructed 132 homes in Phase I on the Warmke Parcel at a pace of 16.5 homes per year. AR 066-67; APPX 0066-67. Due to a combination of technical construction requirements, market conditions, and a building permit requirement that the construction be completed in two separate phases, construction on the 13 acres at issue in this case was not scheduled to begin until 2005. *Id.*

At some point after the commencement of construction, drainage tiles on the property were affected by the construction activities, thereby altering drainage in a relatively small area and causing rainwater to pool in approximately 13 acres of the Phase II portion of the Warmke Parcel. AR 284-85; APPX 0241-42. In turn, this caused wetland vegetation to appear on the 13 acres. *See e.g.*, AR 285, 452, 538, 547, 555, 630; APPX 0242, 0248, 0249, 0250, 0251, 0252.

Gallagher & Henry was on target to begin construction on the 13 acres as scheduled when the Corps designated the 13 acres as jurisdictional wetlands under the CWA, making further construction activity illegal without a CWA permit from the Corps. AR 014, 049, 067; APPX 0014, 0049, 0067.[4]

III. Administrative Background

A. Corps' Administrative Process for Making Jurisdictional Determinations

Regulations promulgated by the Corps authorize a District Engineer to make a jurisdictional determination as to whether an area is a water of the United States and thus within

[4] " . . . Phase II has been stymied by the Corps' three CWA Jurisdictional Determinations. This has adversely impacted the approved Preliminary Plan for the single family subdivision including access roads, internal road circulation, utilities and, at least 50% of the 169 lot neighborhood [Phase II]." AR 066-67; APPX 0066-67.

the Corps' regulatory jurisdiction pursuant to the CWA. 33 C.F.R. §§ 320.1(a)(6), 325.9; APPX 0257-58. Once a jurisdictional determination has been made by a District Engineer, the Corps regulations provide for a single level of administrative appeal to the Division Engineer. *Id.* § 331.10; APPX 0260.

If the Division Engineer determines that an appeal is without merit, his letter to the applicant confirming that the appeal is without merit adopts the District Engineer's initial decision and becomes the Corps' final agency action. *Id.* § 331.10(a); APPX 0260. If, however, the Division Engineer determines that the appeal has merit, he may remand the matter to the District Engineer with instructions to correct procedural errors or to "reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record." *Id.* § 331.9(b); APPX 0259. In the case of remand, the District Engineer's subsequent decision, made pursuant to the remand from the Division Engineer, becomes the Corps' final agency action. *Id.* § 331.10(b); APPX 0260.

B. Administrative Proceedings

On January 17, 2006, Gallagher & Henry sought a jurisdictional determination from the Corps regarding the 13 acres. AR 049; APPX 0049. At the time of the first jurisdictional determination, the Corps' practice was to assume that any wetland adjacent to a nonnavigable tributary of a navigable water was a jurisdictional wetland. *Rapanos*, 547 U.S. at 728. Accordingly, without further investigation or analysis, the Corps concluded on November 17, 2006, that, because the Warmke Parcel was adjacent to Midlothian Creek, a nonnavigable tributary of the navigable Little Calumet River, the 13 acres were a jurisdictional wetland. AR 049; APPX 0049.

Gallagher & Henry appealed (the "First JD Appeal") to the appropriate administrative appeals office in the Corps' division headquarters. AR 050; APPX 0050. While the First JD Appeal was pending, the United States Supreme Court issued its opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which rejected the Corps' practice of assuming that adjacency to a tributary alone is sufficient to establish jurisdiction. *Id*. Accordingly, the Corps' Division Engineer overseeing Gallagher & Henry's appeal remanded the case to the District Engineer to issue a new jurisdictional determination based on the framework created by *Rapanos*. *Id*.

Before making the second jurisdictional determination, the Corps visited the Warmke Parcel on March 24, 2010. During that site visit, the Corps' staff observed "intermittent" flow from the stormwater retention system into adjacent Midlothian Creek, a nonnavigable tributary of the Little Calumet River. AR 253; APPX 0219. No measurements of flow from the outfall to the creek were made and no samples were taken to analyze the contents of the flow. AR 251-54; APPX 0217-220.

Based in large measure upon that site visit, on October 6, 2010, the District Engineer issued a second jurisdictional determination that the 13 acres were jurisdictional wetlands (the "Second JD"). AR 050; APPX 0050. Applying the language of Justice Kennedy's concurrence in *Rapanos*, the District Engineer concluded that the 13 acres had a "significant nexus" to the little Calumet River. AR 359-61; APPX 0243-45. Gallagher & Henry administratively appealed that decision on January 21, 2011. AR 221-22; APPX 0167-68. The appeal was denied on June 21, 2011. AR 050; APPX 0050.

On July 7, 2011, Gallagher & Henry asked the Corps to reverse and reevaluate the Second JD based on the decision in *New Hope Power Company v. United States Army Corps of Engineers*, 2010 WL 383499 (S.D. Fla. September 29, 2010), which clarified that prior converted cropland

meets the CWA regulatory exemption, even if it is converted to non-farming use. AR 005, APPX 0005, AR 050, APPX 0050. The District Engineer agreed to reconsider the jurisdictional determination "and provided a new [jurisdictional determination] for the Warmke Parcel" based on an "amended . . . administrative record." AR 049-50, APPX 0049-50.

On March 26, 2012, the District Engineer issued a third jurisdictional determination for the 13 acres (the "Third JD"). *Id*. Without providing additional site specific evidence, and based on the amended administrative record, the Third JD found that the 13 acres had a "significant nexus" to the Little Calumet River, and were thus subject to Corps' Jurisdiction. AR 014; APPX 0014. The Third JD also found that the 13 acres were not exempt from CWA jurisdiction as a prior converted cropland because construction had not been completed within five years and wetland vegetation had appeared on the construction site, thereby eliminating the 13 acres from the prior converted cropland exemption because they had been "abandoned." AR 013; APPX 0013.

On May 24, 2012, Gallagher & Henry administratively appealed that determination to the Division Engineer (the "Third JD Appeal") on two grounds: (1) that the administrative record was insufficient to show a significant nexus between the 13 acres and the Little Calumet River, and (2) that the 13 acres were exempt from CWA regulation as prior converted cropland (the Third JD Appeal). AR 049; APPX 0049. In response to the Third JD Appeal, representatives of the Corps visited the Warmke Parcel on September 12, 2012, and conducted a meeting with representatives of Gallagher & Henry at the site and in Gallagher & Henry's offices. AR 055-57; APPX 0055-57. The representatives of the parties discussed their positions regarding the Third JD Appeal. *Id.* There is no evidence in the record that any flow from the stormwater retention system outfall to Midlothian Creek was observed, and no evidence that any samples were taken during the site visit. *Id.*

Thereafter, on May 9, 2013, the Division Engineer rejected Gallagher & Henry's prior converted cropland argument (AR 049; APPX 0049) but found that the Corps had failed to adequately establish the significant nexus finding necessary to justify its claim that the 13 acres were jurisdictional wetlands. AR 048-49; APPX 0048-49. Accordingly, the Division Engineer remanded the matter to the District Engineer with instructions "to include sufficient documentation to support its decision" regarding significant nexus and "to follow procedures set forth in the 2008 *Rapanos* Guidance." AR 053-54; APPX 0053-54; *See Orchard Hill*, 2017 WL 4150728, at *3. S.APPX 0008.

On remand, the District Engineer did not visit the 13 acres, failed to collect any site-specific evidence, and continued to rely primarily on the observations made during the site visit of March 24, 2010. AR 027; APPX 0027 (*See* D. "Review Performed for Site Evaluation (Check All that Apply).") As shown on AR 027, no reliance was made on any observations during the second site visit conducted on May 24, 2012.

Instead of gathering additional site-specific information to support the significant nexus finding, on July 19, 2013, the Corps entered a final approved jurisdictional determination that included a new 11-page document. AR 036-46; APPX 0036-46. The 11-page document contained studies from as far afield as the Netherlands, suggesting that wetlands, in general, can provide animal habitat, flood control benefits, and pollution filtration—all things that were already claimed in the prior jurisdictional determination that had been rejected by the Division Engineer during the Third JD Appeal and before the remand to the District Engineer. AR 048, 087; APPX 0048, 0087.

On June 21, 2015. Gallagher & Henry filed suit in district court on the grounds that (1) the administrative record did not support the Corps' finding of a significant nexus between the 13-acres and the Little Calumet River, and (2) the 13 acres were exempt from CWA regulation as

prior converted cropland.

The parties filed cross motions for summary judgment on those issues. The district court granted summary judgment for the Corps on September 19, 2017, and Gallagher & Henry appealed.

SUMMARY OF THE ARGUMENT

Justice Kennedy devised the significant nexus test in *Rapanos* because of his concern that the Corps' efforts to expand its jurisdiction over wetlands with little impact on "navigable waters" exceeded the authority delegated to the Corps by Congress in the CWA. Accordingly, Kennedy opined that a wetland adjacent to a navigable water is categorically jurisdictional, while a wetland adjacent to a nonnavigable tributary is not jurisdictional unless the Corps develops an administrative record that contains "substantial evidence" that the wetland, either alone or in combination with similarly situated lands, has a significant physical, chemical, and biological nexus with a navigable water. Because each wetland differs in terms of size, shape, topography, and hydrology, the significant nexus finding for wetlands adjacent to nonnavigable tributaries must be made on a case-by-case basis.

Here, the 13 acres are adjacent to Midlothian Creek, which is a nonnavigable tributary of the Little Calumet River, the nearest navigable water located approximately 11 miles downstream. Between the 13 acres and Midlothian Creek are numerous natural ditches, man-made pipes, stormwater retention ponds, and other drainage systems, while Midlothian Creek itself has "ephemeral flow." AR 019, 253, 379; APPX 0019, 0219, 0246.

Despite approximately seven years of administrative proceedings, the major site-specific, evidentiary basis for the Corps' significant nexus finding for the 13 acres is a single observation made on March 24, 2010, of "intermittent" flow from the Warmke Parcel's stormwater retention

system into Midlothian Creek. AR 027, 036-46; APPX 0027, 0036-46. That observation was made by the Corps without an effort to determine the quality, quantity, or frequency of flow. AR 027, 0379; APPX 0027, 0256. With regard to similarly situated lands, the administrative record lists other wetlands in the general area, including the size of each wetland, with no description or other information that would allow one to determine the extent to which any of those listed wetlands perform any particular wetland functions in terms of the physical, chemical, or biological impacts on the Little Calumet River. AR 020-22; APPX 0020-22. Given the limited site-specific data, the Division Engineer determined on final administrative appeal that the Corps' significant nexus finding was not supported by the administrative record and remanded the matter to the District Engineer to provide an opportunity for better justification of the significant nexus finding. AR 053-54; APPX 0053-54.

Instead of gathering additional site-specific data, the Corps' District Engineer compiled paper studies discussing the functions and benefits of wetlands in the environment generally, summarizing those studies in an 11-page supplement to the Third JD. AR 036-46; APPX 0036-46. The 11-page supplement constituted the sole additional basis for the Corps' final jurisdictional determination leading to the instant lawsuit.

The lower court in the instant case concluded that it was bound to accept the conclusions of the Corps' District Engineer because agencies are entitled to deference. But Justice Kennedy specifically rejected that level of deference in *Rapanos*, and instead required that the Corps produce site-specific, substantial evidence in the administrative record to support a significant nexus finding. Because the administrative record does not provide site-specific, substantial evidence supporting the Corps' finding that the 13 acres, either alone or in combination with similarly situated lands, have a significant physical, chemical, and biological nexus with the Little

Calumet River, the final jurisdictional determination is not supported by the administrative record under Justice Kennedy's test.

But even if the record did support the Corps' significant nexus finding, the lower court's opinion is in error because the 13 acres at issue are "prior converted croplands," which are categorically exempt from the Clean Water Act under the Corps' regulations. There is no dispute that the entire Warmke Parcel, including the 13-acres, was a prior converted cropland when Gallagher & Henry began construction in 1995 and, therefore, was exempt at that time from Clean Water Act jurisdiction. The Corps takes the position, however, that because farming ceased on the property and wetland vegetation started growing during construction of the residential development, the 13 acres were "abandoned" and therefore lost the prior converted cropland exemption. The Corps' position is without merit because the applicable regulation does not contain any abandonment exception. Accordingly, although the lower court deferred to the Corps' position on this issue also, no deference was appropriate.

ARGUMENT

I. STANDARD OF REVIEW

A. De novo review is appropriate for both the significant nexus and the prior converted cropland issues

Summary judgement orders of district courts involving issues of law are reviewed de novo. *See Ludwig v. C & A Wallcoverings, Inc.*, 960 F.2d 40, 42 (7th Cir. 1992) ("We review the district court's entry of summary judgment de novo."); *Matter of Wade*, 969 F.2d 241, 245 (7th Cir. 1992) ("Because this is a legal question, our review is *de novo.*"). *See also, JBLU, Inc. v. United States*, 813 F.3d 1377, 1380 (Fed. Cir. 2016) (appellate court must review trial court's grant of summary judgment "for correctness as a matter of law, deciding de novo the proper interpretation of the governing statute and regulations").

With regard to the significant nexus issue, whether the Corps complied with Justice Kennedy's significant nexus test in issuing the challenged jurisdictional determination is a "question of law," and must be reviewed de novo. *See Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 289–90 (4th Cir. 2011) ("*Precon I*"). ("We therefore treat compliance with Justice Kennedy's "significant nexus" test as a question of law, as we do any question of statutory interpretation, and review for compliance de novo.").

With regard to the prior converted cropland issue, the extent to which a regulatory exemption to CWA jurisdiction applies in a particular case is also a question of law, especially where, as here, the face of the regulation is inconsistent with the Corps' assertion of jurisdiction. *See Great Nw., Inc. v. U.S. Army Corps of Engineers,* No. 4:09-CV-0029-RRB, 2010 WL 9499071, at *1-2 (D. Alaska July 20, 2010) (explaining duty of courts to independently determine whether regulatory exclusion to CWA jurisdiction applies, where face of regulation is inconsistent with the Corps' assertion of jurisdiction). *Great Nw.* is reproduced in APPX 0309-0310.

Although de novo review is appropriate for both the significant nexus and prior converted cropland issues, the precise standard of review differs for each issue.

B. The substantial evidence standard of review applies to the significant nexus issue

Under the APA's "substantial evidence" test, 5 U.S.C. § 706(2)(E), courts "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence." Citing the APA's substantial evidence standard of review, Justice Kennedy opined that a reviewing court must use the substantial evidence standard in determining on a case by case basis whether a wetland adjacent to a nonnavigable tributary has a significant physical, chemical and biological nexus with a navigable water. "[A] reviewing court must identify *substantial evidence* supporting the Corps' claims [of jurisdiction under the CWA], see 5 U.S.C. § 706(2)(E)."

Rapanos, 547 U.S. at 786 (emphasis added.) In turn, citing Justice Kennedy's concurring opinion in *Rapanos*, the Seventh Circuit adopted Kennedy's ruling that the substantial evidence standard applies to review of the Corps' jurisdictional determinations regarding wetlands adjacent to tributaries. *Gerke*, 464 F.3d at 725 ("When . . . wetlands' effects on water quality are speculative or *insubstantial*, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'") (emphasis added)).

The substantial evidence test requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *see Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 906 (7th Cir. 1990). The substantial evidence test may not be converted into a rubber stamp for agency decisions. *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). The test "requires meaningful review" of the entire record. *Id.*; *see Mayes v. Massanari,* 276 F.3d 453, 459 (9th Cir. 2001). Because *Gerke* adopted Justice Kennedy's substantial evidence standard, that standard applies to this Court's review of whether the Corps correctly determined that the 13 acres are jurisdictional wetlands. *See* 464 F.3d at 725.

With regard to deference to be afforded to the Corps' determination of significant nexus, Justice Kennedy addressed that issue also in *Rapanos*. "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." 547 U.S. at 779-80. Thus, Justice Kennedy adopted the substantial evidence standard of review specifically to limit a court's deference to the Corps' assertion of jurisdiction over wetlands adjacent to nonnavigable tributaries unless the administrative record supported a finding of significant nexus on a case-by-case basis. "[T]he

Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries." *Id.* at 782.; *see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001) (*Chevron* deference not appropriate for jurisdictional determination under the CWA involving application of the Migratory Bird Rule).

C. The "arbitrary and capricious/not in accordance with law" standard of review applies to the prior converted cropland issue

Under 5 U.S.C. § 706(2)(A), courts "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See F.C.C. v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 513-14 (2009). In reviewing under this standard, a court must determine whether the administrative agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). "[A]n agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies." *Id; see also Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 856 (7th Cir. 2009); *Smith v. Office of Civilian Health and Medical Program of Uniformed Services*, 97 F.3d 950, 955 (7th Cir. 1996).

With regard to an agency's interpretation of its own regulations, the weight of authority is that "if a regulation is clear on its face, no deference is given to the promulgating agency's interpretation, as we should interpret the regulation in accordance with its clear meaning." *Viraj Grp. v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007); *see also Christensen v. Harris County*,

529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). Doing otherwise would allow the agency, "under the guise of interpreting a regulation, to create de facto a new regulation." *Id.* at 588. *See also Minnick v. C.I.R.*, 796 F.3d 1156, 1159 (9th Cir. 2015) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *ExxonMobil Pipeline Co. v. United States Dep't of Transportation*, 867 F.3d 564, 574 (5th Cir. 2017) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 312 (3d Cir. 2014) (same); *Northshore Min. Co. v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013) (same); *Zhou Hua Zhu v. U.S. Atty. Gen.*, 703 F.3d 1303, 1309 (11th Cir. 2013) (same).[5] Accordingly, to the extent that the prior converted cropland exclusion is not ambiguous on its face, no deference is warranted to the Corps' interpretation of the scope of the exclusion.

II. THE RECORD IN THIS CASE IS INSUFFICIENT TO SUPPORT THE CORPS' SIGNIFIGANT NEXUS FINDING

The basic facts regarding significant nexus are not in dispute. The nearest navigable water to the Warmke Parcel, the Little Calumet River, is approximately 11 miles away. AR 065; APPX 0065. *See District Court Proceedings* Def's Res. to Pltf's SOF ¶ 3; APPX 0283. There is no continuous surface connection between the 13 acres on the Warmke Parcel and the Little Calumet River because a surface connection is only possible intermittently during high flows when water from the 13 acres travels across the surface of the Warmke Parcel, through a series of natural and man-made ditches and gulleys, then through 6,000 feet of underground pipes and three open water retention basins, and down an intermittent, non-navigable, ephemeral stream, Midlothian Creek,

[5] *See also Great Nw.* at *1-2 (D. Alaska July 20, 2010) (explaining duty of courts to independently determine whether, as a matter of law, regulatory exclusion to CWA jurisdiction applies, especially where the face of the regulation at issue is inconsistent with the Corps' assertion of jurisdiction). APPX 0309-0310.

for 11 miles before reaching the Little Calumet River. AR 019, 065, 253, 379; APPX 0019, 0065, 0219, 0246. *See District Court* Proceedings, Def's Res. to Pltf's SOF ¶ 2, 23, APPX 0282-83, 0286-87; Def's SOF ¶ 24, APPX 0290.

While the Corps makes a series of conclusory statements regarding the impact that the 13 acres *could* have on the Little Calumet River, the evidentiary bases in the record for those conclusions are slim and fall into three categories. First, with regard to physical nexus, the Corps relies on a single observation made on March 24, 2010, of an indeterminate amount of flow from the 13 acres through culverts, ditches, pipes, and retention ponds associated with the storm water retention system. AR 027; APPX 0027. Ultimately, some flows from the stormwater retention system discharge intermittently through an outfall into Midlothian Creek, a nonnavigable tributary of the Little Claumet River. AR 019, 253, 379; APPX 0019, 0219, 0246. The Corps did not make any measurement of the intermittent flow, and did not describe the flow rate, duration, frequency, or content. *Id*. That single on-site observation is complemented by the 11-page supplement prepared by the District Engineer after administrative remand from the Division Engineer in connection with the Third JD Appeal. The 11-page supplement summarizes the flood control functions of wetlands set forth in general studies of wetlands as far afield from the Warmke Parcel as Ohio and the Netherlands. AR 036-46; APPX 0036-46. Importantly, the Corps concedes that the 13 acres could have different flow control attributes than those discussed in the 11-page supplement. AR 037-39; APPX 0037-39.

Second, with regard to chemical nexus, the Corps relies on exactly the same one-time flow observation. *See* AR 027; APPX 0027. Once again, that observation is complemented by the same 11-page supplement of unrelated wetlands located in different watersheds. AR 036-46; APPX 0036-46. The Corps is left to speculate that the way those other wetlands function with regard to

chemical control and capture could possibly be similar to the way in which the 13 acres function at the Warmke Parcel. AR 040-42; APPX 0040-42.

Third, with regard to biological nexus, the Corps asserts that the 13 acres affect the biological integrity of the Little Calumet River, noting unremarkably that certain species of fish and wildlife utilize Midlothian Creek and the River for a portion of their life cycles. AR 042-43; APPX 0042-43. But the Corps does not address in a meaningful way how the 13 acres may affect species either in Midlothian Creek or in the Little Calumet River. The biological information in the record states that some individual species have been seen at the 13 acres and that some of the same species have been seen at the Little Calumet River. AR 043; APPX 0043. But the Corps does not connect the dots between the species at the 13 acres and those at the River. Indeed, the language used by the Corps when discussing biological nexus appears to be intentionally vague. "Within Midlothian Creek bullfrogs, greenfrogs, northern water snakes and snagging turtles are *likely* to be found. Fish species that *may* be found here are minnows, carp, [and others]." AR 042-43; APPX 0042-43 (emphasis added). It is only when one reviews the record regarding the Little Calumet River itself that the terms "likely" and "may" are substituted by "are" found in the River. *Id*.

With regard to similarly situated lands, the only information in the administrative record is a list of other wetlands in the general area, including the size of each wetland, with no description or other information that would allow one to determine the extent to which any of those listed wetlands perform any particular wetland functions in terms of the physical, chemical, or biological impacts on the Little Calumet River. AR 020-22; APPX 0020-22. The list does not describe any flows from those wetlands to Midlothian Creek, or the extent to which they may filter any substance, or the extent to which they may have any biological impacts on downstream waters.

Notwithstanding this dearth of information, the Corps undertook to calculate the flood benefits of the identified "similarly situated" lands when combined with those of the 13 acres, while acknowledging that lack of site-specific information for either the 13 acres or the lands identified as "similarly situated" necessarily resulted in "rough estimates." AR 039; APPX 0039.

In sum, the Corps has produced an administrative record showing that a hypothetical wetland in the area, *if* it performed certain physical, chemical, and biological functions in the environment of Midlothian Creek and the Little Calumet River, could possibly have a physical, chemical, and biological significant nexus with the Little Calumet River, when considered along with similarly situated lands in the area that themselves could possibly impact the River. The lower court accepted the Corps' conclusions because it believed it was bound to defer to "scientific and technical determinations" made by the Corps. *Orchard Hill*, 2017 WL 4150728, at *6; S.APPX 0015. But the Kennedy standard does not allow courts to provide such a wide degree of deference. The Corps' record must provide site specific, substantial evidence to support the significant nexus finding. It does not.[6]

A. The Supreme Court's decision in *Rapanos* places meaningful limitations on the Corps' discretion in issuing Jurisdictional Determinations

[6] An assertion of Clean Water Act jurisdiction by the Corps is no trivial matter. Once an area is designated as a jurisdictional wetland falling under the Clean Water Act, something as innocuous as moving dirt around on the property can be punished by fines as high as $75,000 per day. *Sackett v. E.P.A.*, 566 U.S. 120, 123 (2012). Should a property owner attempt to avoid these fines by seeking a permit from the Corps, the permitting process can take years and cost hundreds of thousands of dollars. *Rapanos*, 547 U.S. at 721. ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.") Moreover, there is no guarantee that the permit will be granted. *Id.* ("In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot."). Accordingly, a jurisdictional determination by the Corps is a significant burden, if not an outright barrier, on the right to develop one's property in any meaningful way. Importantly, the Plaintiff offered a declaration by one of its partners that the 13 acres renders the remaining undeveloped portions of the Warmke Parcel (approximately 65 acres) essentially unmarketable. *See District Court Proceedings,* Declaration of John Gallagher, Paragraph 21, APPX 0379-80.

The guiding star of Clean Water Act wetlands jurisprudence is the Supreme Court's decision in *Rapanos.* The Seventh Circuit has adopted Justice Kennedy's concurring opinion in *Rapanos* as controlling precedent on issues involving wetlands adjacent to tributaries of navigable waters, as is the case here. *See Gerke*, 464 F.3d at 725. Kennedy created the significant nexus test as an antidote to the Corps' sharp past practices that triggered the *Rapanos* decision.

The Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). "[P]ollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, ... rock, sand, [and] cellar dirt," § 1362(6). The act defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7). The term "waters of the United States," however, is itself not defined in the Clean Water Act. It is defined in the Corps' regulations to include wetlands that are adjacent to tributaries of navigable waters. *See* 33 C.F.R. § 328.3(a)(5); APPX 0255.

Over the years, the Corps has regularly tested the outer limits of its authority to regulate "waters of the United States." By the time the Supreme Court decided *Rapanos* in 2006, the Court lamented the fact that the Corps had argued that the term included "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." 547 U.S. at 722. The Court observed that the Corps had at various times held that its jurisdiction extended to "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." *Id.*

Ten years before *Rapanos* was decided, the Supreme Court recognized that the Corps had some leeway in interpreting the Clean Water Act to apply to wetlands that directly abutted navigable waters. In *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court

acknowledged that "the Corps must necessarily choose some point at which water ends and land begins" and that this is often "no easy task." *Id.* at 132. The transition from "water to solid ground is not necessarily or even typically an abrupt one." *Id.* Rather, "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." *Id.* Given this inherent line-drawing problem, the Court upheld the Corps' interpretation of the "waters of the United States" to include wetlands that "*actually abut[ted]* on" traditional navigable waters. *Id.* at 135 (emphasis added).

By 2006, however, the Corps had argued in several cases that a wetland was jurisdictional if it was merely "adjacent" to a navigable water, taking the position that adjacency included situations in which a "single molecule" of rain water landing on an area might end up in a navigable water, or if the area fell within the 100-year floodplain of a navigable water, or abutted a tributary of a navigable water. *Rapanos*, 547 U.S. at 728-29 (J. Scalia, for the plurality). As the *Rapanos* Court noted, this effectively expanded the term "waters of the United States" to cover "the entire land area of the United States." *Id*. at 722. In *Rapanos*, the Court looked at this "land is waters" approach to the Clean Water Act and tried to put an end to the Corps' efforts to expand its jurisdiction so broadly.[7]

The facts in *Rapanos* were remarkably similar to those presented here. The Corps had asserted jurisdiction over two separate sets of wetlands. One wetland was approximately 11 miles from the nearest navigable water and was connected to that navigable water by a drainage ditch discharging into a nonnavigable tributary. *Rapanos*, 547 U.S. 729. The other wetland was only a

[7] In *Rapanos,* the plurality questioned whether such broad interpretations of the CWA would be constitutional. *See* 547 U.S. 730, 738. Justice Kennedy acknowledged the Commerce Clause concerns triggered by an overly expansive reading of "waters of the United States." *Id*. at 776-77.

mile away from Lake Huron (a navigable water) and could reach the Lake through a man-made drainage ditch that emptied into a nonnavigable tributary which then emptied into the Lake. The Corps based its jurisdictional determinations on these hydrological connections, along with an expert report stating that the wetlands "were providing habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation." *Id*. at 783–84.

Five justices of the Court, including Justice Kennedy, rejected this approach, agreeing that that the high regulatory risks of the Clean Water Act to property owners required more meaningful limitations on the discretion of the Corps. Four of those justices subscribed to an opinion written by Justice Scalia, which would have limited the Corps' jurisdiction to "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between waters and wetlands, are adjacent to such waters and covered by the CWA." *Rapanos*, 547 U.S. 742. Justice Kennedy's concurring opinion took a different path.

B. Under Justice Kennedy's "significant nexus" test, there must be site specific, substantial evidence showing that the 13-acre wetlands on the Warmke Parcel have a significant physical, chemical, and biological nexus with the Little Calumet River

Justice Kennedy articulated the significant nexus test as follows:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

547 U.S. at 780. Justice Kennedy made a sharp distinction between wetlands adjacent to *navigable* waters and wetlands adjacent to nonnavigable tributaries. "When the Corps seeks to regulate wetlands that are adjacent to *navigable-in-fact waters* it may rely on adjacency to establish

jurisdiction." 547 U.S. at 782. (emphasis added.). But with regard to wetlands adjacent to nonnavigable tributaries, Justice Kennedy set forth a more stringent test. "[T]he Corps must establish a significant nexus on a *case-by-case basis* when seeking to regulate wetlands based on *adjacency to nonnavigable tributaries*." *Id.* (emphasis added).[8] Such a showing requires more than a "mere hydrologic connection," but rather must establish "some measure of the significance of the connection for downstream water quality." 547 U.S. at 784. As indicated, the 13 acres are adjacent to Midlothian Creek, which is a nonnavigable tributary of the Little Calumet River. AR 019, 253, 379; APPX 0019, 0219, 0246.

In adopting the significant nexus test, Justice Kennedy expressly rejected the hyper-deferential standard adopted by the dissent in *Rapanos* and mirrored by the lower court in this case. Specifically, Kennedy criticized the dissent's position that the Corps need only conclude that the wetlands were adjacent to a nonnavigable tributary of a navigable water and that, therefore, there was a theoretical possibly of some hydrologic connection. 547 U.S. at 783–84, 788. "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." 547 U.S. at 779-80. Regarding the quantum of evidence required to sustain jurisdiction over nonnavigable tributaries, Justice Kennedy stated that "a reviewing court must identify *substantial evidence* supporting the Corps' claims, see 5 U.S.C. 706(2)(E)." (Emphasis added). In *Gerke,* the Seventh Circuit adopted not only the significant nexus test but also the substantial evidence standard of review for factual findings made by the Corps. "When . . . wetlands' effects on water quality are

[8] The significant nexus test arose out of Justice Kennedy's concern that the Corps was exceeding its authority because its expansive view of the term "waters of the United States" negated the term "navigable waters," which limits federal jurisdiction under the CWA. *See Rapanos*, 547 U.S. at 778-80.

speculative *or insubstantial*, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" 464 F.3d at 725 (emphasis added).

Despite Kennedy's objections to the Corps' categorical inclusion of wetlands adjacent to nonnavigable tributaries without site-specific, substantial evidence of significant nexus, the Corps has continued to assert jurisdiction over such wetlands without providing the requisite substantial evidence, and courts have called the Corps to task on this issue. In *Precon I*, 633 F.3d 278, the Corps asserted federal jurisdiction over wetlands adjacent to a 2,500-foot manmade ditch with seasonal flows that joined another, longer perennial drainage ditch that traveled approximately 3,000 feet before connecting to a second perennial tributary that flowed to a navigable water—the Northwest River—approximately three to four miles downstream. 633 F.3d at 282. As in *Rapanos*, the Corps never measured actual flow rates from the alleged wetlands into the alleged tributary, or collected any other site specific evidence, but instead relied on conclusory statements about general wetland benefits. 633 F.3d at 294. The Fourth Circuit held that this cursory evidence was not enough to justify federal jurisdiction.[9]

Further, the *Precon I* court noted that evidence of the flow of an adjacent tributary, standing alone, would not establish a significant nexus, stating that "there is no documentation in the record that would allow us to review [the Corps'] assertion that the functions that these wetlands perform

[9] The *Precon I* court remanded the case ultimately to the Corps of Engineers with instructions to develop site-specific evidence if it wished to assert jurisdiction over the wetlands. On remand, the Corps provided such evidence sufficient to satisfy the court that jurisdiction could be asserted by the Corps. *See Precon Dev. Corp. v. United States Army Corps of Engineers*, 603 Fed. Appx. 149 (2015) (*Precon II*.) Among other things, the Corps supplemented the record with additional site visits where flow was observed and photographed, expert reports regarding the flood and pollution benefits of the specific property at issue, additional aerial photographs, evidence of recent flooding at adjacent properties, flow measurements both up and downstream from the property at issue, and evidence of pollution issues in the adjacent tributaries and river, thereby connecting the dots between the wetlands at issue and the nearest navigable-in-fact water. *Id*. at 152-55. Here, the Corps has not connected the dots because it has not developed such site-specific evidence.

are 'significant' for the Northwest River." 633 F.3d at 295. According to the court, the lack of evidence showing a significant impact of the wetlands on a navigable-in-fact water was troublesome in light of the fact the case involved "wetlands adjacent to two man-made ditches, flowing at varying and largely unknown rates toward [a navigable] river five to ten miles away." *Id.* The court went on to observe, "Justice Kennedy created the significant nexus test specifically because he was disturbed by the assertion of jurisdiction over wetlands situated along a ditch many miles from any 'navigable-in-fact water,' carrying 'only insubstantial flow toward it.'" *Id.* (citing Kennedy, J, concurring in judgment).

More recently in *Hawkes Co. v. United States Army Corps of Engineers,* No. CV 13-107 ADM/TNL, 2017 WL 359170, at *2 (D. Minn. Jan. 24, 2017) the Federal District Court in Minnesota rejected similar claims by the Corps. A copy of the unreported case is reproduced in APPX 0311-22. In that case, property owners challenged a significant nexus finding that was based on the fact that their property abutted a stream that drained into a navigable water. *Id*. The evidence relied on by the Corps was nearly identical to that presented here. *Id*. at 11. The Corps cited studies setting forth the functions that are "generally performed by wetlands, such as reducing downstream flooding by providing floodwater storage, and reducing downstream pollution by retaining excess nutrients and sediments…including their role in transporting nutrients and chemicals to downstream waters." *Id*. at 3. And the jurisdictional determination also described characteristics of the river at issue, including its "history of frequent flooding," and its listed status with the Minnesota Pollution Control Agency "as impaired for aquatic life and aquatic consumption due to turbidity, as well as mercury and PCB in fish tissue." *Id*. However, as in this case, the Corps' claims were based on studies of wetlands generally and not on site-specific evidence. The Corps did not present evidence regarding flow rates or discharges of pollution from

the property at issue. The court stated that "a reviewing court must identify substantial evidence supporting the Corps' claims of jurisdiction," *id.* at 2, and found that the record did not support the Corps' significant nexus finding by site-specific evidence. *Id*. at 11. In *Hawkes*, as in the instant case, the Corps' Division Engineer determined on administrative appeal that the administrative record underlying the jurisdictional determination lacked sufficient site-specific data and evidence to support a finding of significant nexus. *Id*. There, as here, on administrative remand the District Engineer did not supplement the record with the requisite site-specific data before issuing the final jurisdictional determination. *Id.* Under those circumstances, the *Hawkes* court determined that, if any deference was appropriate, that deference should be given to the expert judgment of the Division Engineer and not to the conclusions of the District Engineer who "failed to supplement the administrative record with additional site-specific evidence and information that the Review Officer found to be necessary." *Id.* So too, here, to the extent that any deference is to be given to the Corps, it should be given to the expert judgment of the Division Engineer, who rejected the significant nexus finding during the Third JD Appeal. AR 048-049, 053-54; APPX 0048-49, 0053-54. *See* Section II. B., *supra*.

As explained below, the Corps' findings in the instant case follow the same pattern thrice rejected now in *Rapanos*, *Precon I*, and *Hawkes*. This Court should likewise reject the Corps attempt to establish jurisdiction here without site specific, "substantial evidence," as required by Justice Kennedy in *Rapanos*. *See* 547 U.S. at 786. As set forth in more detail below, a one-time eyeball observation of an intermittent flow from the stormwater outfall into the ephemeral Midlothian Creek, coupled with observations of certain species on the Warmke Parcel and the Little Calumet River, cannot sustain a finding of a significant physical, chemical and biological

nexus between the 13 acres and the Little Calumet River under the substantial evidence test, which requires more than a "scintilla" of evidence to support a finding. *See Perales*, 402 U.S. at 401.[10]

C. The Lower Court unreasonably deferred to the Corps' judgment, despite the fact that the record did not contain the requisite site-specific, substantial evidence of a significant nexus

The lower court in this case began its evaluation of significant nexus by noting that "agency decisions are entitled to significant judicial deference, particularly when they involve scientific and technical determinations within that agency's field of expertise" *Orchard Hill,* 2017 WL 4150728, at *6. *See* S.APPX 0015. Because of this deference, the lower court accepted the Corps' conclusions regarding the impacts of the 13-acres without meaningfully discussing the evidence upon which the Corps' conclusions relied. *Id*. Had the district court more closely examined the record underlying the conclusions of the Corps it would have recognized that, as a matter of law, the record lacked the requisite site-specific, substantial evidence to support a significant nexus finding.

1. The Corps produced inadequate site specific evidence of a physical impact on the Little Calumet River to sustain a significant nexus finding

The lower court held that "the wetlands on the Warmke Parcel significantly affect the physical integrity of the Little Calumet River because they considerably reduce peak flows, thereby helping prevent flooding downstream surrounding the River." *Orchard Hill*, 2017 WL 4150728, at *7. *See* S.APPX 0016. This finding was based primarily on *ipse dixit* from the Corps. According to the Corps, rainwater landing on the 13 acres could conceivably travel through erosion

[10] Even under the arguably looser "arbitrary and capricious/not in accordance with law" test, the Corps' significant nexus finding cannot stand. *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Marsh*, 490 U.S. 360, 378 (1989) (Courts must perform "searching and careful" review of the administrative record to determine whether agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

caused ruts into a storm water retention pond, which could overflow into another storm water retention pond, travel through two additional retention basins, pass through another 6,000 feet of storm pipe and end up in an intermittent, nonnavigable stream (Midlothian Creek). AR 052, 065, 087; APPX 0052, 0065, 0087. If the stream were actually flowing at the time, the hypothetical drop of water from the property could then travel 11 miles down the stream into the Little Calumet River, which is a navigable water. AR 065; APPX 0065. Because taller grass allegedly filters more pollutants, retains more water, and provides more habitat for aquatic creatures than residential homes, the Corps claims that any alteration of the newly grown vegetation on Gallagher & Henry's property could impact the Little Calumet River in violation of the CWA. AR 036-46; APPX 0036-46.

A careful reading of the administrative record shows that the Corps presented no evidence of actual flow measurements from the 13 acres through the Warmke Parcel Storm Water Retention System and on to Midlothian Creek. AR 027; APPX 0027. The portion of the record cited for the Corps' claims regarding flood control relies on studies and broad statements pertaining to wetlands in general, not the 13 acres, which the Corps concedes could have different qualities. AR 036-46; APPX 0036-46. *See District Court Proceedings*, Pltf's Res. to Def's SOF ¶¶ 26-42. APPX 0295-301. The effects of the 13 acres on any flooding at or near the Little Calumet River are thus speculative, contrary to Justice Kennedy's instruction in *Rapanos*. 547 U.S. at 780 (When "wetlands' effects on water quality are speculative or insubstantial, they fall outside" of CWA jurisdiction). A similar lack of evidence was sufficient to invalidate the significant nexus finding in *Precon I*, discussed *supra*. Accordingly, the one-time eyeball observation of intermittent flow from the outfall of the stormwater retention system into Midlothian Creek, a stream with

"ephemeral flow" cannot qualify as "substantial evidence" of a significant physical nexus between the 13 acres and the Little Calumet River. *See Rapanos,* 547 U.S. at 786.[11]

2. The Corps produced no site specific evidence of a chemical impact on the Little Calumet River

The lower court also concluded that the wetlands on the Warmke Parcel have a "significant chemical impact on the traditionally navigable Little Calumet River because they filter, slow, and retain pollutants that would otherwise flow to the River"—particularly nitrogen. *Orchard Hill*, 2017 WL 4150728, at *7. *See* S.APPX 0017. But, again, the court was accepting the Corps' speculations as evidence. In fact, the Corps never measured the amount of nitrogen or any other pollutant at the 13 acres, or at the outflow from the Warmke Parcel Stormwater Retention System into Midlothian Creek. *See* AR 036-46; APPX 0036-46. A careful review of the record shows that the Corps did not measure or establish how often overflow water from the stormwater retention system outfall goes into Midlothian Creek—an important factor given that flows from the site to the creek are not continuous. AR 036-46; APPX 0036-46. Nor did the Corps deny the lack of flow measurement in the briefing below. Indeed, only one eyeball observation was made of flows from the Warmke Parcel Stormwater Retention System into Midlothian Creek, on March 24, 2010. AR 027, 379, APPX 0027, 0246; *See generally, District Court Proceedings,* Def's SOF ¶ 9, APPX 0289; Pltf's Res. to Def's SOF ¶ 9; APPX 0292-93. Instead of measuring flow, the Corps points to studies of unrelated wetlands in Ohio and the Netherlands and hypothesizes that the 13 acres could be similar in the way they may impact flow. AR 036-46; APPX 0036-46. But as the courts

[11] As indicated in footnote 10, neither can the eyeball observation pass muster under the arguably looser arbitrary and capricious test because the Corps' explanation in support of its significant physical nexus finding (the one-time observation of intermittent flow) is belied by the fact that it failed to gather evidence regarding frequency, duration or quality of flow. *See Motor Vehicle Mfrs. Ass'n* 463 U.S. at 43 (agency decision is arbitrary and capricious if agency's explanation is not supported by evidence before the agency).

in *Rapanos*, *Precon I*, and *Hawkes* noted, this sort of speculation is not sufficient to establish a significant nexus. And it certainly does not qualify as "substantial evidence." *See Rapanos,* 547 U.S. at 786.[12]

3. The Corps produced little site specific evidence of a biological impact on the Little Calumet River

The lower court likewise concluded that "numerous species of fish and wildlife utilize the Warmke Parcel, Midlothian Creek, and the Little Calumet River for different phases of their lifecycle. Thus, disturbing wetlands on the Warmke Parcel would affect wildlife in the navigable Little Calumet River by removing a portion of their upstream habitat." *Orchard Hill*, 2017 WL 4150728, at *7; S.APPX 0018. Once again, the court was deferring to the Corps' speculative statements in the record, which were made without substantial evidence based on site-specific investigation. One searches the record in vain to find site specific evidence that is sufficient to support the Corps' finding of "significant" biological nexus.

The Corps claims (without citation) that "[n]umerous species of fish and wildlife, such as birds, salamanders, and turtles, utilize the Creek and the River for a portion of their life cycle" and that disturbing the 13 acres "would affect the fish and other types of wildlife in the River, by removing a portion of their upstream habitat." *Id*. But other than noting that some individual species have been observed at or near the 13 acres, the Corps presents no evidence that maintaining the 13 acres in the current state contributes (let alone contributes significantly) to the biological integrity of the Little Calumet River, which is located approximately 11 miles away. AR 036-46; APPX 0036-46. Mere sighting of a species is not sufficient to establish that a property provides

[12] As set forth in footnotes 10-11, supra, neither can it be sustained under the "arbitrary and capricious" standard. *Motor Vehicle Mfrs. Ass'n* 463 U.S. at 43 (agency decision is arbitrary and capricious if agency's explanation is not supported by evidence before the agency).

significant habitat for that species. *See United States v. Hallmark Const. Co.*, 30 F.Supp.2d 1033, 1042 (N.D. Ill. 1998).[13]

4. The Corps produced no site-specific evidence that the 13 acres are similarly situated with the other wetlands in the area

The Corps asserts that wetlands in the Midlothian Creek watershed, along with the 13 acres, are "similarly situated" for the purpose of determining a significant nexus under Rapanos. *See District Court Proceedings*, Def's SOF ¶ 26; APPX 0295. The assertion is false. "Similarly situated" is a term of art coined by Justice Kennedy with regard to CWA jurisdiction and subsequently applied by lower courts and the Corps. Among other things, to be similarly situated, wetlands must at a minimum be "adjacent to the same tributary." *See USEPA's Army Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2008) at 8, a copy of which is attached at APPX 0274. But AR 020-022, upon which the Corps relies for its assertion that other sites are "similarly situated," is merely a list of wetlands in the general area. *See* APPX 0020-22. The list does not describe the wetlands, or their distance to the 13 acres, Midlothian Creek, or the Little Calumet River. Indeed, AR 020-022 does not even provide information supporting the conclusory statement that the 165 wetlands are "adjacent" to Midlothian Creek. Nor does the Corps provide site-specific evidence of the relative contributions, if any, of those wetlands on the physical, chemical, or biological integrity of the Little Calumet River. This also is contrary to Justice Kennedy's insistence that significant nexus can only be shown by site-specific information constituting "substantial evidence" of

[13] For the reasons set forth in footnotes 10-12, supra, the biological evidence does not even pass muster under the arguably looser arbitrary and capricious standard of review.

significant nexus between wetlands adjacent to a nonnavigable tributary. *See Rapanos,* 547 U.S. at 782, 786.[14]

Thus, the record does not properly identify similarly situated wetlands that, in combination with the 13 acres, have any impact on the Little Calumet River, let alone a significant nexus with the River.[15]

III. EVEN IF THE ADMINISTRATIVE RECORD SUPPORTS THE CORPS' SIGNIFICANT NEXUS FINDING, THE 13 ACRES ARE EXEMPT FROM THE CLEAN WATER ACT BECAUSE THEY ARE PRIOR CONVERTED CROPLAND

Prior converted croplands are categorically excluded from the definition of "waters of the United States" and are therefore beyond the jurisdiction of the CWA. *See* 33 C.F.R. § 328.3(b)(2) (1994). The exclusion continues to apply even when the prior converted cropland undergoes a change of use. *See New Hope Power Company v. Corps of Engineers*, 746 F.Supp.2d 1272, 1282 (S.D. FL 2010) ("if [prior converted cropland] wetland has been converted to another use... that area will no longer come under the Corps' regulatory jurisdiction"); *United States v. Hallmark Const. Co.*, 30 F.Supp.2d 1033, 1040 (N.D. Ill. 1998) (prior converted cropland switched to nonagricultural use retained exemption).

There is no dispute that, at least as of 1995, the 13 acres "would likely be considered" prior converted cropland. AR 013; APPX 0013. *See generally, District Court Proceedings,* Def's Res. to Pltf's SOF ¶¶ 11-13; APPX 0302-03. The disagreement between the parties, and the issue before this Court, is whether that exemption was forfeited. The Corps argues that the exemption

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[14] As set forth in footnotes 10-13, even under the "arbitrary and capricious" standard, the evidence simply does not support the finding of significant nexus. *Motor Vehicle Mfrs. Ass'n* 463 U.S. at 43 (agency decision is arbitrary and capricious if agency's explanation is not supported by evidence before the agency).

[15] Excerpts from the transcript of the hearing on the cross motions for summary judgement during the presentation of counsel for Gallagher & Henry regarding the significant nexus issue are set forth in S.APPX 31-36.

was forfeited because hydric vegetation appeared on the 13 acres at a time when those acres had not been farmed for at least five years and were therefore "abandoned." AR 013-14; APPX 0013-14. But as explained below, the concept of "abandonment" is a stranger to the text of the prior converted cropland rule, and therefore is not enforceable.

A. Prior Converted Cropland is categorically exempt from Clean Water Act jurisdiction

The Corps' sole basis for claiming that the prior converted cropland exemption was lost through abandonment is a Federal Register entry from 1993, which states that the Corps would use SCS/NRCS (part of the Department of Agriculture) criteria promulgated under the Food Security Act to determine on a case-by-case basis whether the exemption had been forfeited by abandonment. *See* 58 Fed. Reg. at 45,034; APPX 0263.

Although the prior converted cropland exemption itself was included in the Corps' regulations in 1993, the abandonment exception to the exemption was not and, to this day, the Corps' regulations do not address abandonment, or for that matter any other criteria by which the prior converted cropland exemption could be forfeited. The text of the Corps' regulatory provision reads, in its entirety, "**Waters of the United States do not include prior converted cropland**. **Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.**" 33 C.F.R. § 328.3(a)(8) (1994) (emphasis added). APPX 0255. There is no exception in the regulatory text other than in connection with jurisdictional determinations made by EPA. In the instant case, EPA has never made any jurisdictional determination with regard to whether the 13 acres are, or are not, covered by the prior converted cropland exemption. Nor has the Corps ever asked EPA to make any such determination.

The omission of exceptions to the prior converted cropland exemption was intentional. The original proposed rule published by the Corps in 1992 contained a provision that the term "prior converted cropland" is to be defined with reference to a publication of the Soil Conservation Service ("SCS"), a predecessor of the National Resources Conservation Service ("NRCS").[16] The publication was known as the "National Food Security Manual, Second Ed." ("NFSAM"). 58 Fed. Reg. at 45033; APPX 0261-63. That manual described prior converted cropland generally and exceptions, including abandonment. Several commenters on the proposed rule pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by SCS and "they argued that reference to the NFSAM in the proposed rule was not legally adequate." *Id.* In response to these comments and other concerns raised during notice and comment, the Corps did not include a reference to the manual or the abandonment exception in the final rule. *See Id*. Thus, the Corps deliberately promulgated the text of the regulation with a categorical exemption for prior converted wetlands, without any reference to any exception to that exemption.

B. Statements appearing only in a Federal Register preamble are not controlling over the conflicting language of the regulation

Generally, as a matter of law, language contained only in a preamble to a federal regulation is not an enforceable part of that regulation. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (The "dividing point between [legally binding] regulations and [nonbinding] general statements of policy is publication in the Code of Federal Regulations."). This restriction is eminently sensible because the regulatory text of a proposed regulation is subject to the procedural safeguards of the notice and comment requirements but the preamble to a final rule is not. The Corps' inclusion of an "abandonment" exception in the preamble to the final rule directly contradicts the regulatory text and cannot be viewed as merely an interpretation of that

[16] SCS was and NRCS is an agency within the United States Department of Agriculture.

text. Even if for argument's sake one were to categorize the preamble statement as interpretive, the Supreme Court recently explained, "[t]he absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1204, 191 L.Ed. 2d 186 (2015).

In *Brock*, 796 F.2d 533, 539, the D.C. Circuit held that guidelines set forth in a regulatory preamble that were intentionally not included in the actual regulations do not have the force of law. *Id*. The court found that the agency's effort to use such guidelines as binding on the regulated community was improper because they had been included in an earlier proposed rule but deliberately excluded from the text of the final rule for practical reasons. *Id*. To treat the non-published guidelines as law, the court noted, "rendered this considered distinction useless." *Id*.

Here, as in *Brock,* the record establishes that the Corps intentionally did not include an abandonment exception, or any other exception, in 33 C.F.R. § 328.3(a)(8) (1994). *See* 58 Fed. Reg. at 45033. Accordingly, any notion of "abandonment" does not have the force of law, and therefore cannot be enforced, under the Corps' regulations. *See Eisai, Inc. v. United States Food & Drug Admin*., 134 F.Supp.3d 384, 396 (D.D.C. 2015) ("the preamble is not …binding."). *See also U.S. v. L. E. Myers,* 2007 WL 1703922 *17 N.D. Ill. June 13, 2007 (statements made in a preamble generally are not binding on private parties); APPX 0335. Consequently, the lower court's decision that the prior converted cropland exemption applies in the instant case is "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also F.C.C. v. Fox Tele. Stations, Inc.*, 556 U.S. at 536.

In the court below, the Corps relied on an unreported decision that assumed, without analysis, that the 1993 Preamble created an abandonment exception to the Corps' prior converted cropland exemption. *See Huntress v. United States Department of Justice*, 2013 WL 2297076 (W.D. N. Y. May 24, 2013), a copy of which is included in APPX 0337-48. The lower court relied heavily on *Huntress. See Orchard Hill,* S.APPX 21-22.

The *Huntress* court stated that the abandonment concept has "all the hallmarks of a rule." WL 2297076 at *13; APPX 0346. But as set forth in the cases cited above, the abandonment concept does not have one of the most important hallmarks of a rule, namely, it is not published in the Federal Register. Moreover, the plaintiffs in *Huntress* did not make, and the *Huntress* court did not address, the argument that prior converted cropland is categorically excluded from Clean Water Act jurisdiction based on the plain language of the Corps' own regulations. *See U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (A prior decision is not binding precedent on a point not raised in briefs or arguments nor discussed in the court's opinion.). The lower court ignored this jurisprudential concept.

If the Corps wishes to adopt a regulation that explicitly provides for an abandonment exception to the categorical exclusion for prior converted croplands, it is free to do so at any time, provided it engages in notice and comment rulemaking as required by the APA. *See New Hope,* 746 F. Supp. 2d at 1282 (The Corps cannot change the criteria under which the prior converted cropland exemption applies without first going through notice and comment rulemaking.).

For a similar reason, the unreported case of *United States v. Cam,* No. 3:05-cr-141 (D. Or. April 6, 2005), on which the government also relied in the district court proceedings, fails to provide this Court a persuasive reason to ignore that categorical exemption for prior converted cropland. *Cam* addressed an issue dealing with subject matter jurisdiction where the plaintiff

sought to withdraw a guilty plea in a criminal prosecution. All else in *Cam* is dicta. *Cam* is not available on Westlaw. A copy of the case is included in APPX 0349-77. In its opinion, the lower court did not rely on *Cam.*

But the court below did rely on *U.S. v. Righter*, 2010 WL 2640189 *8 fn 4 (M.D. PA., June 30, 2010), which contains one sentence and a footnote addressing the prior converted cropland issue. The sentence reads as follows: "Generally, if the agricultural use of prior converted cropland ceases for five consecutive years, the land in question qualifies as abandoned." *Id.* at 2. The footnote simply cites the Corps' Federal Register preamble. *Id.* at fn 4. Although the lower court cites *Righter*, it does not elaborate and provides no further analysis applying *Righter* to the facts presented or the arguments made in this case. *See Orchard Hill,* S.APPX 0022-23.

This Court is not bound to follow wrongly decided, out-of circuit, unpublished opinions that do not address the key issue raised by Gallagher & Henry. *See United States v. Glaser*, 14 F. 3d 1213, 1216 (7th Cir. 1994).

C. The Corps' interpretation cannot be saved by *Auer* deference because it contradicts the text of the regulation

On a related note, the Corps will likely argue to this Court that the Corps' decision to apply restrictions set forth only in the 1993 Preamble to the prior converted cropland rule should be allowed because the Corps' interpretations of its own rules are entitled to *Auer* deference. Such an argument would be meritless, for two reasons.

First, *Auer* deference only applies when the rule at issue is ambiguous. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (deferring to agency's position when the language of the regulation is plain, "would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."); *see also JBLU, Inc. v. United States*, 813 F.3d 1377, 1380 (Fed. Cir. 2016) (quoting *Christensen*, 529 U.S. at 588) (if "regulation is clear on its face, no deference

is given to the promulgating agency's interpretation" and court must "interpret the regulation in accordance with its unambiguous meaning.")

In the present case, the regulation at issue is unambiguous on its face: "Waters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8) (1994). APPX 0255. The Corps did not argue in the court below that the regulation or any of its terms are ambiguous. Put plainly, the Corps sought in the preamble to add a new and contradictory requirement that *some* prior converted croplands—*i.e.*, croplands not farmed for 5 consecutive years—are included as "waters of the United States" and not excluded as prior converted croplands. That is not an interpretation of a vague regulation, it is using the "guise of interpreting a regulation, to create de facto a new regulation." *Christensen*, 529 U.S. at 588.[17]

In the case of *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001), the court struck down a similar attempt by the Federal Election Commission ("FEC") to use *Auer* to read exceptions into a plainly exclusionary procedural regulation. In that case, the regulation at issue provided that any investigation by the FEC "shall not be made public by the Commission or by any person without the written consent of the person ... with respect to whom such investigation is made." *Id*. The FEC argued that under *Auer* it could read minor situational exceptions into that rule. *Id*. The court disagreed, noting that "[n]either the statute nor the regulation provide any exceptions to this rule." *Id*. And deference could not create one. *Id.* Similarly, here, the prior converted cropland rule contains no exceptions, and the Corps may not rely on deference to create one.

[17] An agency "interpretation" is deemed a new and different rule if it will "effect a change in existing law or policy," or "affect individual rights and obligations." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). There is no question that excluding a whole class of prior converted croplands (i.e., those deemed "abandoned") from the universal and categorical exemption contained in 33 C.F.R. § 328.3(a)(8) (1994) meets both of those criteria.

Second, even if *Auer* did apply in this case, it could not save the Corps' contradictory interpretation of the rule. Even under *Auer*, the court is not required to accept interpretations that are "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The prior converted cropland rule unequivocally asserts that *all* prior converted cropland is exempt from the Clean Water Act. By asserting that *some* prior converted croplands—*i.e.* those that are "abandoned"—are not exempt from the Clean Water Act, the Corps contradicts the plain language of the regulation. This Court is not required to accept logical contradictions in the name of deference.[18] *Auer*, 519 U.S. at 461. As this Court noted in *Horn Farms v. Johans*, 397 F.3d 472, 476 (7th Cir. 2005), only interpretations of language "expressed in regulations" merit deference to the agency implementing those regulations.[19]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

[18] The second sentence of 33 C.F.R. § 328.3(a)(8) (1994) does not change the analysis. It provides that, with regard to jurisdiction under the Clean Water Act, EPA's determinations trump those of any other agency. EPA has never made any determination regarding whether the prior converted cropland exemption applies to the 13 acres; nor has the Corps ever asked EPA to make any such determination. Thus, the second sentence of the regulation does not apply to the facts of the instant case. Accordingly, the unambiguous categorical exemption for prior converted cropland does not provide courts with an opportunity to give *Auer* deference to a Corps interpretation which is at odds with the text of its own regulation.

[19] Excerpts from the hearing on the cross motions for summary judgment during the presentation of counsel for the Corps regarding the prior converted cropland issue are set forth in S.APPX 37-41.

DATED: February 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, I electronically filed the foregoing Opening Brief of Appellant, the Short Appendix attached hereto and the Appendix filed herewith with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Theodore Hadzi-Antich
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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for the Plaintiff-Appellant, Orchard Hill Building Company d/b/a Gallagher & Henry, hereby certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) as supplemented by Circuit Rule 32(b) because it has been prepared in Times New Roman, a proportionally spaced font. The undersigned further certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as supplemented by Circuit Rule 32(b) because it contains 13,772 words according to the count of Microsoft Word.

Dated: February 2, 2018

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CIRCUIT RULE 30(D) CERTIFICATION

The undersigned, counsel for Appellant Orchard Hill Building Company d/b/a Gallagher & Henry, hereby certifies that the Opening Brief of Appellant includes all materials required by Circuit Rule 30(a), in the Short Appendix attached hereto, and Circuit Rule 30(b) in the Appendix filed herewith, and there are no materials required within the scope of Circuit Rule 30(b).

s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

No. 17-3403

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY,

Plaintiff - Appellant,

V.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-CV-06344
The Honorable Judge John Robert Blakey

SHORT APPENDIX TO OPENING BRIEF OF APPELLANT*

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* Collectively, all materials required by Circuit Rule 30(a), (b) are included in this Short Appendix and the separate Appendix submitted herewith.

SHORT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORCHARD HILL BUILDING COMPANY,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

Case No. 15-cv-06344

Judge John Robert Blakey

MEMORANDUM OPINION AND ORDER

This case is before the Court on cross motions for summary judgment. For the reasons explained below, the Court denies Plaintiff's motion for summary judgment [40] and grants Defendant's motion [55]. The Court also denies Plaintiff's motion to strike [32].

I. FACTUAL BACKGROUND

Orchard Hill Building Company, d.b.a. Gallagher & Henry ("G&H"), acquired title to a 100-acre parcel of property (referred to as the "Warmke Parcel") in 1995 for the purpose of developing residential housing. Soon thereafter, the Village of Tinley Park executed an annexation agreement and passed a zoning ordinance allowing G&H to develop the entire Warmke Parcel. Record [30] at 65.

The Warmke Parcel was divided into three sections. Twenty-five acres on the southern portion of the property were to be developed as a 168-unit townhome neighborhood. Sixty-one acres on the northern portion were to be developed as a

169-unit single-family neighborhood. The remaining section, situated between the townhome community to the south and the single-family community to the north, was designed to function as a storm water detention area to serve the two neighborhoods. The water detention area was to be constructed concurrent with the development of the townhomes on the southern portion of the property. *Id.*

The entire development was scheduled to take place in two phases. *Id.* at 66. The townhomes, storm water detention area, and sewer and water infrastructure necessary to serve both neighborhoods were to be constructed during Phase I. After Phase I was developed and the townhomes substantially sold, Phase II was scheduled to commence, during which the 169 single-family homes were scheduled to be built. *Id.*

G&H began Phase I construction in early 1996, and the first sales of townhomes took place in 1997. From 1998 until 2005, 132 townhomes were built and sold at a rate of 16.5 per year. *Id.* The development plan was on target to begin construction of the Phase II single-family homes as scheduled, but the plan abruptly halted on November 17, 2006, when the United States Army Corps of Engineers designated approximately 13 acres of the undeveloped property as "wetlands" and asserted jurisdiction to regulate them.[1] *Id.* at 67.

The wetlands in question are on the northern portion of the property, the section designated for Phase II development. They drain south through a ditch into

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

an open water detention pond and then east into another open pond. From there, they flow north via storm sewer pipe into a third open water pond, and then into Midlothian Creek, a stream that flows directly to the Little Calumet River, a traditional navigable water. Record [30] at 16, 19, 24. The wetlands had been converted to farming operations prior to December 23, 1985, but farming stopped in 1996 and has not resumed. Wetland conditions returned sometime thereafter. *Id.* at 14.

II. RELEVANT STATUTORY AND REGULATORY PROVISIONS

A. The Clean Water Act

The Corps asserted jurisdiction pursuant to the Clean Water Act ("CWA"), which prohibits discharging any "pollutant" into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" are defined in the CWA as "waters of the United States." 33 U.S.C. § 1362(7). Although the phrase "waters of the United States" is not defined in the statute, it is defined in the regulations promulgated by the Corps pursuant to the CWA.

The Corps' regulations define "waters of the United States" in seven categories: (1) traditional navigable waters; (2) interstate waters; (3) other waters, the use, degradation, or destruction of which could affect interstate commerce; (4) impoundments of jurisdictional waters; (5) tributaries of waters identified in (1) through (4); (6) the territorial seas; and (7) wetlands adjacent to waters identified in (1) through (6). 33 C.F.R. § 328.3(a)(1)-(7) (1987).

In *Rapanos v. United States*, the Supreme Court reviewed this regulatory definition of waters of the United States as it applied to wetlands. 547 U.S. 715 (2006). In a plurality opinion authored by Justice Scalia, the Court adopted the "relatively permanent" standard, holding that "waters of the United States" includes "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters. As the Seventh Circuit noted *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), however, the Court could not agree on the scope of federal authority over wetlands. Justice Scalia believed that wetlands fell within the scope of the CWA only when the Army Corps of Engineers could show: "first, that the adjacent channel contains a 'water of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins. 547 U.S. at 742. Justice Kennedy, in a concurring opinion, wrote that the Corps' jurisdiction over wetlands "depends upon the existence of a significant nexus between the wetlands in question and the navigable waters in the tradition sense." *Id.* at 779. For a nexus to be "significant" in this context, the wetlands must "either alone or in combination with similarly situated lands in the region significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. In *Gerke*, the Seventh Circuit adopted Justice Kennedy's more narrow approach to federal authority. As a result, this Court follows suit.

B. Prior Converted Cropland Exemption

Corps regulations contain various exemptions to the CWA's prohibition on discharges into waters of the United States based upon the nature or use of the land. Specifically, Corps regulations specify that "prior converted cropland" is not a water of the United States and therefore the CWA discharge prohibitions do not apply to such land. 33 C.F.R. § 328.3(a)(8). Upon the adoption of this regulation, the Corps clarified that "prior converted cropland" refers to wetlands that were manipulated for farming purposes before December 23, 1985. The exemption does not apply to areas where farming has been abandoned for five consecutive years and where wetland characteristics have returned. 58 Fed. Reg. 45008, 45034 (Aug. 25, 1993).

III. PROCEDURAL BACKGROUND

Regulations promulgated by the Corps authorize a District Engineer to make a jurisdictional determination as to whether an area is a water of the United States and thus within the Corps' regulatory jurisdiction pursuant to the CWA. 33 C.F.R. §§ 320.1(a)(6), 325.9. Once a jurisdictional determination has been made by a District Engineer, there is a single level of administrative appeal to the Division Engineer. *Id.* § 331.3(a)(1). The appeal is initiated when an affected party submits a Request for Appeal, but the administrative appeal "is limited to the information contained in the administrative record by the date of the NAP [Notification of Appeal Process]." *Id.* §§ 331.6(a), 331.7(f). The NAP is a fact sheet that accompanies the jurisdictional determination and that explains the administrative appeal

process. Neither party to the appeal may present new information, but either party may "interpret, clarify or explain issues and information contained in the record." *Id.* § 331.7(f).

If the Division Engineer determines that an appeal is without merit, his letter, which advises the applicant that the appeal is without merit and confirms the District Engineer's initial decision, becomes the final Corps decision. *Id.* § 331.10(a). If, however, the Division Engineer determines that the appeal has merit, he may remand the matter to the District Engineer with instructions to correct procedural errors or to "reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record." *Id.* § 331.9(b). In the case of remand, the District Engineer's decision, made pursuant to the remand from the Division Engineer, becomes the final Corps decision is *Id.* § 331.10(b).

A. First Jurisdictional Determination

In this case, the Chicago District Engineer issued an initial jurisdictional determination on November 17, 2006, concluding that approximately 13 acres of wetlands on the Warmke Parcel are "waters of the United States" subject to regulation under the CWA. Record [30-5] at 19. Significant to the District Engineer's decision was the fact that the identified wetlands drain via a storm sewer pipe "to Midlothian Creek which is a tributary to the Little Calumet River, a navigable water." *Id.* G&H administratively appealed that decision to the Division Engineer, arguing that the November 2006 jurisdictional determination failed to

apply *Rapanos*. The Division Engineer agreed and remanded the jurisdictional determination to the District Engineer with instructions to reconsider its decision in light of *Rapanos*. *Id.* at 1-2.

B. Second Jurisdictional Determination

The District Engineer issued a second approved jurisdictional determination in October 2010, applying *Rapanos* and concluding that jurisdictional waters encompass the Warmke Property because there is a significant nexus to the navigable Little Calumet River. Record [30-3] at 3-4. The District Engineer's decision was based upon a finding that the wetlands in question drained into Midlothian Creek, establishing a "physical hydrologic connection" to the navigable Little Calumet River. *Id.* at 3. This "significant nexus" enables "pollutants, floodwaters, nutrients and organic carbon to transport from the onsite wetland to the navigable water," significantly affecting "the chemical, physical and biological integrity of the Little Calumet River, a traditional navigable water." *Id.* G&H filed a second administrative appeal in January 2011, arguing that the District Engineer erred in finding a significant nexus and in concluding that the property was not exempt as prior converted cropland. Record [30-2] at 75-77. The Division Engineer determined that the second administrative appeal was without merit in June 2011. *Id.* at 67-74.

C. Third Jurisdictional Determination and Final Remand

In July 2011, G&H asked the Corps to reconsider its previous appeal decision because of the 1993 prior converted cropland designation excluding the parcel from

CWA jurisdiction. *Id.* at 27-32. The Corps agreed to reconsider the decision and the District Engineer issued a third jurisdictional determination on March 26, 2012, affirming the prior decision. Record [30-1] at 75-77. Although the District Engineer recognized that the property had previously been used for agricultural activities, she determined that those activities had ceased by the fall of 1996, that the "wetland areas have not been farmed for 15 consecutive years and wetland conditions have returned." *Id.* at 76. G&H filed a third administrative appeal to the Division Engineer on May 24, 2012, arguing that the District Engineer's significant nexus determination was not supported by sufficient evidence. *Id.* at 64-73. The Division Engineer issued its review of the appeal on May 9, 2013, concluding that the appeal had merit "because the District [Engineer] failed to provide the requisite explanation for its significant nexus determination." *Id.* at 48. The Division Engineer remanded the appeal to the District Engineer with instructions "to include sufficient documentation to support its decision" and "to follow procedures set forth in the 2008 *Rapanos* Guidance." *Id.* at 48, 52.

Upon remand the District Engineer issued a new jurisdictional determination on July 19, 2013, again concluding that there is a significant nexus to the Little Calumet River, a traditional navigable water, placing the property within the protection of the CWA. *Id.* at 11. The District Engineer concluded that the relevant wetlands "drain via surface and subsurface connection to Midlothian creek, a perennial stream tributary to the navigable Little Calumet River," significantly affecting—alone and in combination with other wetlands in the area—the chemical,

physical and biological integrity of the river. Record [30-1] at 11. The District Engineer determined that this impact constitutes a significant nexus under *Rapanos*. In reaching this decision, the District Engineer provided additional "significant nexus documentation" in an eleven-page document titled "Warmke Site Wetland Functions and Benefits to Downstream Waters." Record [30-1] at 11, 36-46. This document had not previously been included in the administrative record.[2] *Id.* The July 19, 2013 jurisdictional determination constituted the final agency decision. 33 C.F.R. § 331.10(b).

D. Current Proceedings

G&H brought suit in this Court challenging the Corps' jurisdictional determination over its property. Here, G&H claims that the Corps failed to follow its own regulations, disregarded the explicit instructions of the Division Engineer, and violated the Administrative Procedure Act when it "supplemented the record by adding 11 pages discussing approximately 30 extra-record studies, and concluding, based almost entirely on those studies, that a significant nexus existed between the 13 acres and the Little Calumet River." Plaintiff's Memorandum in Support of Summary Judgment [40] at 3. G&H also argues that the jurisdictional determination is invalid, even if there is a sufficient nexus, because the property falls within the prior converted cropland exception to the CWA. G&H claims that the jurisdictional determination subjects it to the risk of severe civil and criminal sanctions if it continues its development activities, rendering the entire

[2] G&H has moved to strike this document, *see* Doc. 32. The Court addresses the motion below.

undeveloped portion of the Warmke Parcel (consisting of approximately 65 acres) essentially unmarketable. *Id.* at 9. The parties filed cross motions for summary judgment, [40], [55], which the Court considers below.

IV. APPLICABLE LEGAL STANDARDS

A court should grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists, this Court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party, here, each party with respect to the other's motion. *See CTL ex rel. Trebatoski v. Ashland School District*, 743 F.3d 524, 528 (7th Cir. 2014).

This Court's review of a final agency decision by the United States Army Corps of Engineers is governed by the Administrative Procedure Act ("APA"). This Court may reverse the Corps' decision under limited circumstances, such as where the decision is arbitrary and capricious or otherwise not in accordance with the law. 5 U.S.C. § 706(2). The standard does not mean no review at all, but that the Corps' decision will "be accorded a high degree of deference." *Mt. Sinai Hospital Medical Center v. Shalala*, 196 F.3d 703, 708 (7th Cir. 1999). The Court's review presumes

the validity of agency actions so long as they satisfy minimum standards of rationality in light of the administrative record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment…. The court is not empowered to substitute its judgment for that of the agency.")

When judicial review involves determining the meaning of an agency regulation, the agency's interpretation of its own regulation is entitled to significant deference, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413 (1945). If the agency's interpretation is not plainly erroneous or inconsistent with the regulation, that interpretation bears "controlling weight." *Id.* The agency is entitled to judicial deference even if its interpretation is advanced in a legal brief. *Chase Bank USA v. McCoy*, 562 U.S. 195, 208 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent with the regulation.") (internal quotations omitted). The reviewing court need not agree with the agency's interpretation and must defer if that interpretation is reasonable. *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.").

V. DISCUSSION

A. The Administrative Record and Supplemental Information

Before turning to the merits of the parties' motions for summary judgment, the Court considers G&H's motion to strike eleven pages from the administrative record. *See* [32]. G&H argues that when the District Engineer relied upon eleven pages of studies that were not included in the administrative record at the time of the Notification of Appeal Process, the Corps violated: (1) its own regulations on administrative appeals; (2) the Division's remand order; and (3) the APA.

1. The Corps' Regulations

G&H maintains that regulations promulgated by the Corps require that "the decision of the district on remand shall be based solely on the existing administrative record." [40] at 30. Because the District included additional information in the record on remand, G&H argues that it violated its own regulations. The Corps disagrees, arguing that "if the division engineer remands the decision to the district engineer, the district engineer may further analyze and evaluate whatever issues are identified in the remand order…." [57] at 32. According to the Corps, "[t]his is precisely what happened here." *Id.* at 31.

An administrative appeal "is limited to the information contained in the administrative record" as of the date of the Notification of Appeal Process. 33 C.F.R. § 331.7(f). Once the administrative appeal is decided, however, the Division Engineer may instruct the District Engineer on remand to reconsider the decision where any part of it "was not supported by accurate or sufficient information, or

analysis, in the administrative record." *Id.* § 331.9(b). The Division Engineer may also instruct the District Engineer "to further analyze or evaluate specific issues." *Id.* § 331.10(b).

Given that the regulations specifically allow the Division Engineer to require the District Engineer to provide further analysis, it is reasonable to conclude that the limitation on supplementing the administrative record applies only to the Division Engineer on appeal and is not applicable to the District Engineer upon remand. Therefore, the Corps' interpretation of its regulations is reasonable and is entitled to this Court's deference. *See Chase Bank USA v. McCoy*, 562 U.S. 195, 208 (2011).

2. The Remand Order

G&H argues next that the supplemental information violated the explicit instructions of the Division Engineer in his remand order. The remand stated that "[t]he AR [administrative record] is limited to information contained in the record by March 29, 2012." [30-1] at 50. This statement, however, refers to the record reviewed during the administrative appeal itself. The plain context of the statement concerns the "information received during this appeal review and its disposition." *Id.* This reference constitutes a clear statement regarding the information the Division Engineer had considered during his review of the appeal, not an instruction prohibiting the District Engineer from supplementing the record during his further analysis upon remand.

This understanding remains consistent with the Corps' interpretation of the process required by its own regulations: the Division Engineer may not go beyond the administrative record when reviewing the District Engineer's decision on appeal, but it may instruct the District Engineer to provide further analysis on remand. That is exactly what occurred in this instance.

3. The Administrative Procedure Act

Finally, G&H argues that including the supplemental information was inconsistent with the APA. Judicial review of a final agency decision under the APA is based upon consideration of "the whole record or those parts of it cited by a party…." 5 U.S.C. § 706. The "whole record" consists of the record that was "before the agency" at the time of the final agency decision at issue. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The Corps' final agency decision here is "the district engineer's decision made pursuant to the division engineer's remand of the appealed action." 33 C.F.R. § 331.10(b). Here, that means the July 2013 jurisdictional determination issued by the District Engineer pursuant to the May 2013 remand from the Division Engineer. The supplemental information in dispute here was included in the administrative record and provided part of the basis for the July 2013 reviewable final agency decision, consistent with the APA.

For all of these reasons, the Court rejects G&H's arguments concerning the propriety of the eleven-page document and denies G&H's motion to strike.

B. Significant Nexus

Having determined that the eleven-page document is properly part of the record on review, this Court turns to the merits of the case. At least in this Circuit, establishing CWA jurisdiction under *Rapanos* requires showing the "existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." 547 U.S. 715, 779 (2006) (Kennedy, J., concurring). A significant nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* Conversely, no significant nexus exists (and consequently no jurisdiction may be established under the CWA) if the wetlands in question have only a "speculative or insubstantial" impact on traditional navigable waters. *Id.*

As previously noted, agency decisions are entitled to significant judicial deference, particularly when they involve scientific and technical determinations within that agency's field of expertise. *See Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015). This case involves such determinations. The Corps' empirical scientific findings conclude that the thirteen acres of wetlands on the Warmke Parcel significantly affect the physical, chemical, and biological integrity of the Little Calumet River, and thus establish the requisite significant nexus to that traditional navigable water. *See* [30-1] at 11-46. Based upon the findings identified below, this conclusion is a reasonable one, it is neither speculative nor insubstantial, and it is entitled to the deference of this Court. Therefore, the Corps has established a

significant nexus between the Warmke Parcel and the Little Calumet River sufficient to assert jurisdiction under the CWA.

1. Physical Impact

The Corps' findings conclude that the wetlands on the Warmke Parcel do significantly affect the physical integrity of the Little Calumet River because they considerably reduce peak flows, thereby helping prevent flooding downstream surrounding the River. The wetlands and dense vegetation on the Warmke Parcel provide "stormwater storage." *Id.* at 23. This water storage "function helps reduce the frequency and extent of downstream flooding and reduces downstream bank erosion and sedimentation in Midlothian Creek and the Little Calumet River." *Id.*

Concerns already exist concerning flooding problems in the Midlothian Creek watershed, particularly given the expectation of extensive urban development over the next decade and the corresponding increase of impervious surfaces. *Id.* at 38. Midlothian Creek is a major source of floodwaters to the navigable Little Calumet River, where flooding annually causes millions of dollars of damage. *Id.* The area has been identified by the Metropolitan Water Reclamation District of Greater Chicago as a priority for new flood-control projects because "[h]undreds of structures and multiple roadways in this watershed are threatened by flood waters on an annual basis." *Id.* The Corps itself is close to completing a $270 million flood control project on the Little Calumet River just over the Illinois border in Lake County, Indiana. *Id.*

In reaching its conclusion about the physical impact of the Warmke Parcel wetlands on the Little Calumet River, the Corps considered the "size, topography, roughness of the wetland surface, and location in the watershed." *Id.* Out of 165 wetlands in the watershed, the Warmke Parcel contains the fourth largest emergent wetland, which makes it one of the largest "flood storage and velocity reduction contributions to downstream waters." *Id.* Furthermore, the Corps noted that dense vegetation on the site and the slope of the topography increase the residence time of stormwater and reduces "the likelihood of flood and erosion damage downstream by detaining and slowly releasing storm flows." *Id.* at 39.

2. Chemical Impact

The Corps also determined that the wetlands on the Warmke Parcel have a significant chemical impact on the traditionally navigable Little Calumet River because they filter, slow, and retain pollutants that would otherwise flow to the River. *Id.* at 40. Of particular concern here is the wetlands' capacity to reduce nitrogen pollution, which "has been associated with lower quality stream habitats in northeastern Illinois, including Midlothian Creek." *Id.* Wetlands have been identified as effective filters with the potential to remove seventy-seven percent of onsite nitrogen. *Id.* at 41. The Corps estimates that without the aggregated wetlands in the watershed, twenty-seven to fifty-one percent more nitrogen would "enter and adversely affect Midlothian Creek, which in turn would pollute the navigable Little Calumet River." *Id.* The Warmke Parcel has been identified as

particularly crucial to the water quality of navigable waters because there are no other wetlands located between it and the Midlothian Creek.

3. Biological Impact

Finally, the Corps concluded that the wetlands significantly affect the biological integrity of traditionally navigable waters because the aggregation of wetlands in the Midlothian Creek watershed "has a significant effect on wildlife within the watershed and wildlife located downstream in the Little Calumet River." *Id.* at 42. This conclusion is based upon the finding that numerous species of fish and wildlife utilize the Warmke Parcel, Midlothian Creek, and the Little Calumet River for different phases of their lifecycle. Thus, disturbing wetlands on the Warmke Parcel would affect wildlife in the navigable Little Calumet River by removing a portion of their upstream habitat. *Id.* at 43.

Because the Warmke Parcel wetlands "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" the Corps' "significant nexus" determination and attendant assertion of jurisdiction were reasonable.

C. Prior Converted Cropland Exemption

G&H also argues that its property does not fall within the regulatory jurisdiction of the CWA—even if a significant nexus is established under *Rapanos*—because it is exempted as prior converted cropland.

The Corps does not dispute that the property in question was "converted from wetland to agricultural use before December 23, 1985, and for that reason would likely be considered PC [prior converted] cropland…." Record [30-1] at 13. But the Corps determined that the prior converted cropland exemption does not apply where agricultural activities have been abandoned, as they were here. *Id.* G&H argues that the abandonment limitation does not apply; it also argues that agricultural activities were not abandoned for purposes of this limitation.

1. Regulatory Overview

An understanding of the development of regulatory overlap between different agencies is necessary to understand the arguments surrounding the prior converted cropland issue. Three federal agencies regulate wetlands: (1) the Corps; (2) the Environmental Protection Agency ("EPA"); and (3) the National Resources Conservation Service ("NRCS"), formerly known as the Soil Conservation Service ("SCS") and part of the United States Department of Agriculture ("USDA"). The Corps determines whether particular property contains regulatory wetlands under the CWA and issues permits allowing permittees to discharge dredged or fill materials into such property. 33 C.F.R. §320.1(a)(6). The EPA aids the Corps by providing criteria to evaluate permit applications and has joint authority with the Corps to enforce the CWA. 33 U.S.C. § 1344(b). Finally, the NRCS has authority to determine whether wetlands exist on a given property for the purpose of federal agricultural financial benefits under the "Swampbuster" provisions of the Food Security Act. 16 U.S.C. § 3821.

The Food Security Act's Swampbuster program was adopted to discourage farmers from converting wetlands into farming operations. It does so by denying eligibility for federal farm program benefits when wetlands are used for farming. 16 U.S.C. § 3821(a). Exempt from such penalties, however, are "prior converted croplands"—wetlands that were converted to agricultural use prior to December 23, 1985. 16 U.S.C. §3822; 7 C.F.R. § 12.2(a)(8). The NRCS regulations limited the prior converted cropland exemption, however, by incorporating an abandonment provision. Under this limitation, prior converted cropland loses its exemption if abandoned. The regulations define abandonment as "the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or farmed-wetland pasture." 7 C.F.R. § 12.33(c).

Because of differing standards among the three agencies, farmers often found it difficult to comply with all three sets of regulations. Thus in 1993, in an effort to provide consistency between the three agencies, the Corps and EPA jointly adopted a rule implementing the NRCS's prior converted cropland exemption for purposes of the CWA. 33 C.F.R. § 328.3(b)(2). This general regulation, however, contained no specific reference to the relevant abandonment limitation recognized by the NRCS, and the Corps and EPA never expressly published the abandonment limitation within the Code of Federal Regulations. Nevertheless, the Corps and EPA did explain in the Federal Register itself that they will "use the [NRCS] provisions on 'abandonment,' thereby ensuring that PC [prior converted] cropland that is abandoned within the meaning of those provisions and which exhibit wetlands

characteristics will be considered wetlands subject to [CWA] regulation." 58 Fed. Reg. 45008, 45034 (Aug. 25, 1993). The purpose of this regulatory decision was to provide uniformity between the agencies and "a mechanism for 'recapturing' into [CWA] jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned." *Id.* The definition of abandonment for purposes of the CWA is, therefore, specifically contained within the definition set forth by the NRCS.

In *Huntress v. U.S. Dep't of Justice*, No. 12-CV-1146S, 2013 WL 2297076, at *10 (W.D.N.Y. May 24, 2013), the court was asked to determine, among other issues, whether the CWA's exemption of "prior-converted croplands" included the abandonment provision. The court held that it did:

> Lands that qualify as prior-converted croplands, or wetlands converted to farming prior to December 23, 1985, are categorically excluded from the definition of "waters of the United States" and are therefore beyond the jurisdiction of the CWA. 40 C.F.R. § 230.3(s), 33 C.F.R. § 328.3(a)(8); see 7 C.F.R. § 12.2. . . . But the implementing regulations also provide that such a designation can be lost if the land is not used for farming purposes for five consecutive years. As explained in the relevant Federal Register preamble, the EPA and Corps excluded prior-converted croplands "to ensure consistency in the way various federal agencies are regulating wetlands." 58 Fed.Reg. 45008, 45034 (August 25, 1993). In this vein, the agencies used the abandonment provisions set out by the Soil Conservation Service—an arm of the United States Department of Agriculture ("USDA") that is now called the National Resources Conservation Service—and applied them to the CWA. Id. Specifically, the Register provides:
>
> > The Corps and EPA will use the S[oil] C[onservation] S[ervice] provisions on "abandonment," thereby ensuring that P[rior] C[onverted] cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation.... In particular, P[rior]

> C[onverted] cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

Huntress, 2013 WL 2297076, at *10 (quoting 58 Fed.Reg. 45008, 45034 (August 25, 1993)). The court concluded that "under both the National Resources Conservation Service's and the EPA's regulations, when land has been abandoned for a continuous five-year period, . . . it loses any prior exemption from the CWA that it may have once had." *Id.* at *11.

Although not binding, this Court finds that the reasoning in *Huntress* is sound, and therefore agrees that the regulations must be read within context. Here, properly reading the preamble and the regulation together, the regulatory language confirms that the prior converted cropland exemption may be lost if agricultural activities are abandoned. Indeed, Plaintiff could provide no contrary authority to support its argument that the CWA incorporated the Food Security Act's prior converted cropland exemption but without any abandonment provision. Besides *Huntress*, the only other case to consider the issue came out the same way. *See United States v. Righter*, No. 1:08-CV-0670, 2010 WL 2640189, at *2 & n.4. (M.D. Pa. June 30, 2010) (defining "prior converted cropland" to include the abandonment provision because, according to "agency rule, '[t]he Corps and EPA will use the SCS provisions on 'abandonment,'" citing the preamble). Accordingly, the Court rejects

G&H's argument that under the CWA, prior converted cropland, once designated, may not lose that designation through abandonment.

2. Abandonment Analysis

The record here establishes that the specific thirteen-acre portion of the Warmke Parcel in question has not been farmed since 1996, and that wetland conditions have returned. Record [30-1] at 90. Indeed, there is no evidence that agricultural activities continued on that property after that date. As a result, the abandonment requirement is satisfied. 7 C.F.R. § 12.33(c). G&H argues, however, that the prior converted cropland in question is not abandoned because "major portions of the Warmke Parcel continue to be farmed." [40] at 20. Specifically, G&H argues that abandonment has not occurred because farming elsewhere on the one-hundred-acre parcel (where the Corps has never attempted to assert jurisdiction) preserves the prior converted cropland status of the thirteen acres of wetlands. This Court disagrees.

The abandonment rule is directed toward wetlands individually. It does not consider or effect activities on adjacent property. The documented purpose for adopting the abandonment rule was to bring within CWA jurisdiction prior converted croplands "that revert back to wetlands where the PC cropland has been abandoned." 58 Fed. Reg. 45008, 45034 (Aug. 25, 1993). Such is the case here. The Corps has not attempted to argue abandonment or assert jurisdiction over other portions of the property that continue to be farmed. Instead, it asserts jurisdiction only over a thirteen-acre portion of the property where farming activities have

ceased for considerably more than five years and where wetland conditions have returned.

3. Artificial Wetlands and Conversion under 7 C.F.R. § 12.5(b)(1)

G&H makes two other arguments in opposition to federal jurisdiction. First, G&H argues that the Corps' assertion of jurisdiction is improper because the thirteen acres are "artificial wetlands" under 7 C.F.R. § 12.2(a). An "artificial wetland" is a "wetland that is temporarily or incidentally created as a result of adjacent development activity"; unlike true wetlands, artificial wetlands do not lose their prior converted cropland status even if farming is abandoned. *Id.* §§ 12.2(a), 12.5(b)(1)(vii). G&H argues its property is an artificial wetland because the wetland conditions on the thirteen acres were caused solely by a damaged drainage tile associated with construction on the property, which caused water pooling at the site. [40] at 21.

G&H also argues that the Swampbuster abandonment provision does not apply if the property has been converted to "a purpose that does not make the production of an agricultural commodity possible, such as . . . building and road construction. . . ." [40] at 20; 7 C.F.R. § 12.5(b)(1)(iv). This conversion provision applies to the property here, G&H argues, because it "was converted to a purpose inconsistent with the production of an agricultural commodity when it was graded and clay was compacted for housing construction," making farming impossible. [40] at 20-21.

As a threshold matter, the Corps responds that G&H waived this latter argument about the exemptions in §§ 12.5(b)(1) by failing to raise it in any of its administrative appeals. It is well established, however, that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Although G&H may not have raised this particular argument during its administrative proceedings, it repeatedly argued that the property did not lose its prior converted cropland status. Therefore, G&H did not waive any arguments in support of that claim, including the § 12.5(b)(1) exemption claims. Accordingly, this Court will address the merits of G&H's arguments.

First, the structure of § 12.5(b) indicates that the prior converted cropland exemption is distinct from the artificial wetland and building conversion provisions. G&H treats all three provisions as applicable to the Corps' ability to exert jurisdiction over its property, but fails to note that the three provisions are substantively and structurally distinct. Each is one of seven independent limitations concerning when a person "shall not be determined ineligible for [farm] program benefits" under the Food Security Act. When it adopted the prior converted cropland exemption and the related abandonment provisions in 1993, the Corps did not adopt the artificial wetland and building conversion provisions. In fact, those provisions were the result of later amendments made in 1996; fully three years after the Corps adopted the NRCS definitions. As such, it does not follow

automatically that because in one instance the Corps adopted NRCS's prior converted cropland exclusion that it, therefore, adopted lock-step inclusion of all future provisions subsequently issued by the NRCS relating to how farmland might be used without losing farm program benefits. G&H treats these separate provisions as synonymous with the prior converted cropland provisions, but they are not synonymous.

Second, even if the artificial wetland and building conversion provisions were relevant to G&H's prior converted cropland abandonment issue, the applicability of both of those provisions must be based upon a predicate determination by NRCS. No such determination, however, occurred here. The NRCS never issued a determination that the thirteen acres are artificial wetlands or that they had been converted for a building purpose that made farming impossible. In response, G&H simply maintains that the necessity of a prior determination from NRCS, as the text requires, is "nonsensical" because NRCS only makes such findings for farmers in consideration of farm subsidies, not residential developers such as G&H. Doc. 61 at 14-15. But this plain language interpretation of the regulation is only "nonsensical" because G&H seeks to misapply these provisions in the context of the CWA, which never adopted or incorporated them.

G&H's statutory construction arguments are internally inconsistent. On the one hand, G&H argues that if the Corps elected to adopt provisions from the Food Security Act, it must adopt them in their entirety for all time (i.e., if you adopt the Prior Converted Cropland exemption, you must also adopt the subsequent artificial

wetlands and building and construction exemptions). On the other hand, it is also arguing that, even though the CWA incorporates the artificial wetlands and building and construction exemptions, it does not incorporate the specific prerequisites for those exemptions (e.g., the express foundational determinations by the NRCS). G&H cannot have it both ways.

Fundamentally, simply because the EPA adopted one exemption from the Food Security Act does not mean that all exemptions apply. Indeed, as the court in *Huntress* noted, "the regulations implementing the CWA recognize this and caution that, although the EPA fashioned a rule identical to that of the USDA, the EPA retains 'ultimate statutory responsibility for determining the scope of CWA jurisdiction.'" *Huntress*, 2013 WL 2297076, at *12 (quoting 58 Fed.Reg. 45008–01, 45033); *see also*, 33 C.F.R. § 328.3(a)(8) ("[F]or the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.").

Thus, based upon the reasons discussed above, the thirteen acres of wetlands on the Warmke Parcel do not qualify for the prior converted cropland exemption. Furthermore, the artificial wetlands and building conversion exemptions outlined in 7 C.F.R. § 12.5(b)(1) do not apply here because those exemptions are not relevant to jurisdictional determinations under the CWA.

CONCLUSION

For the reasons stated herein, this Court denies Plaintiff's motion to strike [32], denies Plaintiff's motion for summary judgment [40], and grants Defendant's

cross motion for summary judgment [55]. The Clerk is directed to enter judgment in favor of Defendant and against Plaintiff.

Dated: September 19, 2017

ENTERED:

John Robert Blakey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Orchard Hill Building Company,

Plaintiff(s),

v.

United States Corps of Engineers,

Defendant(s).

Case No. 15 CV 6344
Judge John Robert Blakey

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) United States Army Corps of Engineers
and against plaintiff(s) Orchard Hill Building Company

.

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge John Robert Blakey on a motion.

Date: 9/19/2017

Thomas G. Bruton, Clerk of Court

G. Lewis , Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORCHARD HILL BUILDING COMPANY d/b/a GALLAGHER & HENRY,	)	Docket No. 15 C 06344
Plaintiff,	)	Chicago, Illinois
v.	)	September 13, 2017
UNITED STATES ARMY CORPS OF ENGINEERS,	)	9:45 a.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE JOHN ROBERT BLAKEY

APPEARANCES:

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MR. HADZI-ANTICH: Based on the structure -- I will say that we're not aware of any cases that have decided this issue other than *Huntress*. *Huntress* decided the issue after it was argued, but *Huntress* didn't address the structural argument at all. And *Huntress*, of course, is not precedent as an unpublished opinion outside of the Seventh Circuit.

But the argument is, in this setting, the structure of the Swampbuster provisions. And if they're in, then they should be in as a whole and not by piecemeal.

THE COURT: Okay. I think you wanted to address some factual issues, Counsel.

MR. HADZI-ANTICH: I do, your Honor.

Switching over to the significant nexus finding, just concentrating on the actual fact, let's first look -- excuse me. Let's first look at the physical nexus.

Before the remand, there were two data points that supported the physical nexus finding. First, the Corps visited the site on March 24th, 2010, and it made an eyeball observation that there was flow from the stormwater retention system into Midlothian Creek, the non-navigable tributary. And that flow was notated in the record as being an intermittent flow. That's set forth in AR 19 and 23.

Those were the only two site-specific factual bases to support the physical nexus finding. The appellate officer looking at that said that's not enough. This isn't enough to

show a significant nexus between the 13 acres through Midlothian Creek and on into the Little Calumet River 13 miles away. You got to do better. You got to explain your significant nexus position better.

So after the remand, what do the 11 pages add? Well, that's set forth on pages 37 to 39, part of the 11 pages of the administrative record. What did the 11 pages add to the site-specific information? Zero.

The 11 pages were general studies of how wetlands generally function in the environment, not how these 13 acres function to control flow, and therefore, on the physical nexus issue, to control flooding in the Little Calumet River.

What about chemical nexus? Well, what's the basis before remand? Exactly the same two data points, eyeball observation of flow, and a notation that the flow was intermittent.

The conclusion made by the Court at the time was, Well, because there is some flow that we saw on one particular day, we said it was an intermittent flow even though we don't know whether it's intermittent 'cause we never went back to see if it keeps on flowing.

On that basis, we're going to say that the 13 acres located a mile away from that discharge point somehow captured chemicals and that those chemicals are filtered in those 13 acres. And then the flow has fewer chemicals than the

13 acres because of the function of filtration of the 13 acres, and that protects Midlothian Creek 11 miles downstream from chemical contamination.

So the appellate division officer looked at it and said that's not enough to show a site-specific significant nexus based on substantial evidence. So he sent it back to the district. And what did the district add in the 11 pages? Well, it added zero to the chemical nexus, zero site-specific information. And that's set forth at Administrative Record 39 to 42.

And then finally what about biological nexus? Well, before the remand, here's what the record shows. It's on page AR 19. There's some species of wildlife that were noticed at the 13 acres, and there were some species of wildlife that were noticed in the Midlothian Creek 11 miles away.

Therefore, the Corps concluded there's a significant biological nexus between the 13 acres and -- I'm sorry, the Little Calumet River 11 miles away. Appellate officer looked at it and he says, well, that doesn't show me a significant biological nexus between the 13 acres and the nearest navigable water. You got to do better than that. You got to explain your situation better.

And so what did the 11 pages add? Well, it did add something to the biological nexus discussion, and here's what it added. I'm going to quote from pages 42 to 43 of the

administrative record, part of the 11 pages. "Within Midlothian Creek, bullfrogs, northern water snakes and certain turtles are likely to be found. Fish species that may be found here are minnows, carp," et cetera, closed quote.

So the language in the supplement speaks to possibilities and not actualities regarding Midlothian Creek, the intermediary between the 13 acres and the Little Calumet River. The Corps didn't even bother to go back and visit Midlothian Creek to actually eyeball species that may be there, either wildlife or aquatic.

And so that's the extent of the additional information. It's speculative, and Justice Kennedy said that speculation is not enough. They should have at least gone back and seen what biological wildlife and aquatic species actually inhabit Midlothian Creek, and that didn't happen.

But under Kennedy's test, it's not sufficient to simply end the analysis with the relationship between the 13 acres and the Little Calumet River. You've also got to consider similarly situated sites combined in the aggregate, do they have a significant nexus with the Little Calumet River?

And here, before the remand, the Corps came up with a list of 165 areas near the 13 acres which it took from the National Wetlands Inventory. That list is on pages AR 20 to 22, and it compromises about 460 acres of wetlands, give or take.

Some of these wetlands are as small as less than two-tenths of one acre, and some of them are as large as 50 acres. But it's only a list, 1 through 65. There's no information of whether any of these wetlands actually flow into Midlothian Creek. There's no information as to the extent, if any, to which these wetlands filter chemicals from Midlothian Creek. And there's no information of any wildlife or aquatic species at these wetlands.

It's only a list, and the appellate officer looked at this and said that's not enough. How are these similarly situated sites? I don't even have enough information to determine if there's a significant nexus based on the 13 acres with the Little Calumet River. How am I gonna know that these are similarly situated to the 13 acres when you've got two data points with regard to the 13 acres themself?

So what did the 11-page supplement add to the knowledge base on similarly situated sites? Well, the same general descriptions of how wetlands function in the environment, and some of these are based on studies as far afield as the Netherlands.

Plus, it's really interesting that the 11 pages actually detract from the original pre-remand jurisdictional determination, and that's set forth really in graphic detail on AR page 39. And it says, The 13 acres, along with other wetlands located near the headwaters of Midlothian Creek, 165

sites, tend to have less functional benefits to flooding than wetlands located further downstream. Less functional benefits to flooding than wetlands located downstream.

So it takes away from the Corps' own efforts to establish a physical nexus with regard to the flow control characteristics of these wetlands and the wetlands that it identifies as similarly situated in order to control flooding in the Little Calumet River.

And there's another aspect to the same page AR 39, and in it, the Corps acknowledges that any calculations in that 11-page supplement -- and there are some calculations with regard to the potential of the 13 acres and the similarly situated sites -- to regulate nitrogen contamination into Midlothian Creek.

And the Court acknowledges in these 11 pages that any calculations in that document are rough estimates, and they're not based on data from either the 13 acres or other sites that were assumed to be similarly situated. So no matter how you slice and dice actual evidence in the record, the Corps has failed to connect the dots between the 13 acres similarly situated sites through Midlothian Creek and on into the Little Calumet River.

Now, the government argues -- and one of your questions earlier on is the extent to which deference should be given to the final decision of the district court, the district

categorical exemption, and the only question is whether it's abandoned and made the argument that the preamble's not binding. Well, it is generally true that language in a federal registered notice is not binding. The case law is right. That's the general rule.

But we're not talking about generalities here. We're talking about a specific context. And this specific context, this particular preamble language has actually been looked at by other courts including in this district and been given weight.

Huntress looked at the exact question that's raised and came to clear -- clearly well-reasoned -- I mean, came to a clear decision, which I submit is well-reasoned, that said that even though it's not in the CFR itself, this language in the preamble that explains what prior converted cropland means, when read together with the CFR language, is a binding rule. And there's no reason to depart from that analysis.

THE COURT: Your position is, however, that there's no binding authority on me regarding whether or not the preamble is an effective incorporation, if you will.

MR. DERTKE: There's no binding authority, that's correct. *Huntress* clearly is not binding on this Court. The only -- the case -- the only case that either side I think is aware of that's from this district or this circuit is *Hallmark*, and I think *Hallmark* certainly supports our argument.

It's not binding because this particular question wasn't present. But in *Hallmark*, the Court -- the Court there did look at the preamble language to distinguish between these two regulatory concepts of converted and farmed wetland. And the Court in *Hallmark* used the Federal Register preamble language to interpret what those terms mean.

That's what's happening here. The preamble language is being used to interpret what prior converted cropland means. And the way that it interprets it is by saying prior converted cropland. It's not just abandonment. There's a lot in the preamble about what's prior converted cropland, what does it mean, the date, the 1985 cutoff date.

All that stuff is in the preamble. And so counsel's argument would ignore all that stuff and just have the regulation without any of the additional interpretation. But the one that's really relevant here is --

THE COURT: Well, is it really -- is the preamble really an interpretation? 'Cause we look at a lot of things to interpret language. We always put language in context. Sometimes if there's ambiguities, look at legislative history, do other things.

But if -- are you really interpreting the actual reg, which is the operative legal text, or are you amending it with something that's non-legal text?

MR. DERTKE: Well, I think either way it comes out in

the Corps' favor. But I mean, I think the particular portion of it that we're talking about, the abandonment, that's what the *Huntress* Court said was it's not just interpreting, it actually has to be read together, that it's -- I don't think the *Huntress* Court said amending. But the Court said when you read the CFR language plus this part of the preamble together, that's a binding -- a binding rule binding on the Court, binding on the agency as well as on the public.

If you don't go that far and you just say, well, it's really interpretive, I think the same result applies because it's, again, the agencies who -- agency whose rule it is is saying in the preamble this is how we interpret what prior converted cropland is. It can be abandoned, and here are the situations where it can be abandoned.

THE COURT: So the interpretation of bringing in an abandonment concept rather than amending it or adding to it with non-legal text, that's your position, right?

MR. DERTKE: Well, I think our first argument is *Huntress* was right, that it really is -- it has -- it's read together. It's not just interpreting. It really is -- again, *Huntress* didn't say that.

THE COURT: You can see, though, the preamble, though, is not subject to the same rigors as general regulations in the CFR which have certain properties which make them regulations as opposed to a law review article, right?

MR. DERTKE: Absolutely. And I agree it's certainly no dispute that putting language in the actual CFR is typically the key dividing point. But the language that counsel quoted from the DC Circuit, it's generally. It's not a bright-line rule. And it's not -- just because something's not in the CFR doesn't necessarily mean it's not a binding regulation. And binding goes both ways, binding on the public as well as --

THE COURT: How can it be a regulation if it's not a regulation? I can see how something might interpret a regulation. There's a lot of things that put other language in context.

But how can it be a regulation if it's not regulatory and it's gone through the process that a regulation has to go through? It's not an easy process by any means, right?

MR. DERTKE: Well, but in this case, it actually did. It went through the same process. The only thing that was missing was actually codifying it in the separate Code of Federal Regulations.

It'd be different if this were, say, a guidance letter that the agency put out on its website and people can look at it or not, but that's not what happened here. This was the preamble to the promulgation. And granted, it wasn't in the part of the promulgation where we said this is what we're writing in the CFR.

But again, the case law -- and you know, I think

Huntress does a good job of analyzing that -- says that's not necessarily the end of the story. That is typically the dividing line, but not necessarily. You have to look at the agency's intent and other factors.

And here, I think I agree with the *Huntress* Court, and I encourage this Court to follow *Huntress*' analysis that the intent actually was the opposite of what plaintiff was saying, that the agency's intent was to be bound by this abandonment concept and not just to say prior converted cropland now and forever. That's really the upshot. That's really the result of what happens here.

THE COURT: So based on that reading of that authority and any other authority, you let me -- if you want to direct me to it as well, you're saying that the preamble is given special status that is not necessarily on par with the CFR text itself, but something above non-legal operative text?

MR. DERTKE: This particular part. I'm not saying the whole preamble, but yeah, this particular part.

THE COURT: And any authority other than *Huntress* for that?

MR. DERTKE: *Huntress* is the only one that's directly on point. The other cases are situations where Courts have applied that, where -- for instance, the *U.S. v. Cam* case. It's not binding because of the way it was decided and it's out of circuit, but the defense that was proffered in *Cam* was

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LISA H. BREITER *December 10, 2017*
LISA H. BREITER, CSR, RMR, CRR
Official Court Reporter