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

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INTRODUCTION AND SUMMARY

This case presents two issues. First, under Justice Kennedy's significant nexus test in *Rapanos v. U.S.*, 547 U.S. 715 (2006), did the Corps of Engineers (the "Corps") impermissibly deviate from Justice Kennedy's instructions when it found under the Clean Water Act ("the Act" or "CWA") that there was a "significant nexus" between the 13 acres on the Warmke Parcel and the nearest navigable water? Second, did the Corps impermissibly deviate from its own regulations by reading an "abandonment" exception into the categorical exclusion from CWA jurisdiction for "prior converted cropland?"

The facts upon which these questions turn are not in dispute. With regard to significant nexus, the 13 acres are located 11 miles away from the nearest navigable water, the Little Calumet River. In between are numerous natural and man-made diches, culverts, underground pipes, stormwater retention basins, a nonnavigable, ephemeral tributary known as Midlothian Creek, and other properties. The Corps did not measure the extent, content, or frequency of flow at or from the 13 acres. Based on a paper review made in its offices and without conducting on-site visits, the Corps determined that 165 other sites were similarly situated. The Corps failed to measure the impacts of the 13 acres and the 165 other sites on the flow, flooding, water quality, chemistry, or biology of the Little Calumet River. Notwithstanding its failure to gather and rely on site-specific data, the Corps found that the 13 acres together with the 165 other sites had a significant physical, chemical, and biological nexus with the Little Calumet River. The question before this Court is the extent to which site-specific evidence is necessary, as a matter of law, to establish federal jurisdiction over the 13 acres under Justice Kennedy's *Rapanos* test, which requires case-by-case jurisdictional determinations based upon substantial evidence. As set forth in Petitioner Gallagher

& Henry's opening brief, the Corps' efforts to establish jurisdiction fall far short of Justice Kennedy's controlling test.

With regard to the prior converted cropland rule, there is no dispute that, but for the purported abandonment exception, the 13 acres constitute prior converted cropland and, as such, are categorically exempt from the Corps' CWA jurisdiction. There is also no dispute that the abandonment exception appears nowhere in the text of the prior converted cropland rule. The question before this Court is whether, as a matter of law, the Corps may permissibly read an abandonment exception into the prior converted cropland exemption where it does not exist in the text of the rule. As set forth in Gallagher & Henry's opening brief, the answer is no.

In its response brief, the government argues that this Court must defer to the Corps' judgment on both legal issues. Such deference under the CWA has never been sanctioned by the Supreme Court. To the contrary, the Supreme Court has opined that the CWA invokes the outer limits of Congressional power under the Constitution and that, consequently, courts must carefully monitor federal agency implementation of the Act. Accordingly, the Corps' jurisdictional determination is not entitled to deference but must stand or fall depending on whether, as a matter of law, the Corps complied with Justice Kennedy's instructions in *Rapanos* and whether it impermissibly rewrote the prior converted cropland exemption without the benefit of notice and comment rulemaking.

ARGUMENT

I. THE CORPS DOES NOT HAVE JURISIDICTION UNDER THE CLEAN WATER ACT OVER THE 13 ACRES BECAUSE IT HAS FAILED TO ESTABLISH A SIGNIFICANT NEXUS BETWEEN THE 13 ACRES, SIMILARLY SITUATED LANDS, AND NAVIGABLE WATERS.

The CWA prohibits "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The act defines "navigable waters" as "the waters of the United

States, including the territorial seas." *Id.* at § 1362(7). In *U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), the Supreme Court approved expanding that language to apply to wetlands that are adjacent to navigable waters. In extending federal authority to some waters that are not navigable-in-fact, however, the Supreme Court cautioned that the CWA "invokes the outer limits of Congress' power" under the Constitution and, accordingly, deference to the Corps' assertion of jurisdiction is not appropriate unless there is a "clear indication that Congress intended that result." *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). The *SWANCC* court determined that no deference was owed to the Corps' interpretation because its broad assertion of CWA jurisdiction "alters the federal-state framework by permitting federal encroachment upon a traditional state power[,]" specifically "impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74.

Given the Corps' equally suspect broad assertion of jurisdiction in *Rapanos*, Justice Kennedy directed the Corps not to veer from his case-by-case approach without first promulgating "more specific regulations,"[1] 547 U.S. at 782, and he required the Corps to follow detailed instructions as to how it must make significant nexus determinations, *id* at 778-786. Given Justice Kennedy's directive and instructions, his controlling opinion in *Rapanos* does not provide room for deference to the Corps. *See Neal v. United States*, 516 U.S. 284, 290, 295 (1996) (deference inappropriate where agency action does not adhere to Supreme Court instructions).[2] *See also Indus. TurnAround Corp. v. N.L.R.B.*, 115 F.3d 248, 254 (4th Cir. 1997) (rejecting deference,

[1] As set forth in footnote 1 of Petitioner's opening brief, the Corps efforts to issue such regulations have been suspended in litigation and are not in effect.

[2] This case differs from *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), where the controlling Supreme Court precedent did not direct the Federal Communications Commission to interpret a provision of the Communications Act in a specific manner, as Justice Kennedy did in *Rapanos* when he provided detailed instructions to the Corps on how to establish significant nexus. Moreover, unlike the CWA, there was nothing constitutionally suspect in the Communications Act.

noting that, federal agencies are "required to abide by the law of this Circuit"). This is especially the case because Justice Kennedy's opinion explicitly echoes *SWANCC's* concern that the Corps' interpretation pushes constitutional boundaries. *See Rapanos*, 547 U.S. at 776 (citing "constitutional and federalism difficulties" in the jurisdictional reach of the Act). If there ever were a matter within the unique competence of an Article III court to determine, without deference to an administrative agency's view, this case presents one of them because it tests the outer limits of the Corps' constitutionally suspect power under the CWA. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation . . . is not entitled to deference when it goes beyond the meaning that the statute can bear.").

The facts on-the-ground illustrate the point. The Warmke Parcel, which contains the 13 acres at issue, sits 11 miles from the nearest navigable water[3], and is surrounded on all four sides by other residential developments. AR 061; APPX 0061. To the extent it bears any connection to a navigable water, it would be when rains are heavy enough to cause water from the 13 acres to travel through a series of erosion-caused ruts, man-made drainage ditches, several floodwater retention ponds, miles of underground pipes, and almost the entire length of Midlothian Creek, an ephemeral stream, which ultimately flows into the Little Calumet River. AR 052, 062, 065, 087; APPX 0052, 0062, 0065, 0087.

An examination of what *Rapanos* requires and what the Corps did at the 13 acres in an effort to establish significant nexus shows that the Corps' efforts fall far short of Kennedy's instructions. Justice Kennedy stated that, with regard to wetlands that are adjacent to nonnavigable waters, as is the case with the 13 acres, significant nexus findings may not be established solely on the basis that a wetland has some hydrological connection to a navigable water; rather

[3] 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.

jurisdictional determinations must "identify substantial evidence supporting the Corps' claims [of jurisdiction]." *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring). Here, the Corps hinges its hydrological nexus finding on a one-time, on-site observation of flow from the Warmke Parcel's stormwater retention outfall into Midlothian Creek, AR 27, 379, contending that Justice Kennedy's hydrological nexus test may be met without conducting any on-site studies to determine the frequency, duration, quantity, or nature of the flow, and without providing any study or measurement of the actual nutrient trapping capabilities of the 13 acres or the overall Warmke Parcel. Moreover, the Corps asks for this court's deference on the hydrological nexus issue without documenting the extent to which flows from the 13 acres pass through the Warmke Parcel's stormwater retention system and Midlothian Creek to actually reach the Little Calumet River located 11 miles downstream. See AR 036-46; APPX 0036-46.

As explained in the Petitioner's opening brief, this extreme level of deference was rejected by Justice Kennedy in *Rapanos* 547 U.S. at 779-80. There, the Corps had asserted jurisdiction over two separate sets of wetlands. The first wetland was at least 11 miles from the nearest navigable water and was connected to that navigable water by a drainage ditch and a nonnavigable tributary. *Rapanos*, 547 U.S. 729. The second wetland was only a mile away from Lake Huron (a navigable water), but like the first wetland, water from the second wetland could only 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 broadly concluding without site-specific evidence that the wetlands "were providing habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation." *Id*. at 783–84. Justice Kennedy rejected the Corps' approach noting that that such a level of deference "would permit federal regulation

whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778–79. The "deference owed to the Corps' interpretation of the statute" Justice Kennedy continued, "does not extend so far." *Id*.

A. The Corps Misstates the Standard of Review for Jurisdictional Determinations.

Under the Administrative Procedure Act, courts overturn agency actions affecting property rights if they are "arbitrary, capricious, an abuse of discretion, or otherwise *not in accordance with law*." 5 U.S.C. § 706(2)(A) (emphasis added). Because courts presume that agencies have a high level of scientific expertise in the subjects that they administer, this standard of review is highly deferential in reviewing scientific and technical findings of fact. *Western Fuels–Ill., Inc. v. ICC*, 878 F.2d 1025, 1030 (7th Cir. 1989) ("We give great deference to an agency's predictive judgments about areas that are within the agency's field of discretion and expertise.") But "interpretation of the laws is the proper and peculiar province of the courts." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1223 (2015) (Thomas, J. concurring) (quoting Alexander Hamilton, Federalist No. 78.); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

Indeed, courts are not only best suited to answer questions of law, but are required to do so under Article III. *Perez*, 135 S.Ct. at 1221("Article III judges cannot opt out of exercising their check...[of] the compatibility of agency actions with enabling statutes. In each case, the Judiciary is called upon to exercise its independent judgment and apply the law."); *see also Stern v. Marshall*, 564 U.S. 462, 483 (2011) (judicial power cannot be abandoned to or shared with the executive branch).

This is especially true when courts enforce the specific instructions of the Supreme Court regarding how the Corps must go about making jurisdictional determinations under the CWA. *See*

Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers, 633 F.3d 278, 289–90 (4th Cir. 2011) (*Precon I)* (treating the Corps' compliance with Justice Kennedy's significant nexus test as a question of law subject to de novo review); *see also, SWANCC*, 531 U.S. at 172 (constitutional problems with potential reach of CWA informs courts not to provide broad deference to the Corps' jurisdictional determinations).

To be sure, the legal determination of whether the 13 acres have a significant nexus with the Little Calumet River requires the evaluation of facts. For example, the rate of outflow from the property or the amount of flow necessary to flood adjacent properties are factual issues to be determined by the Corps. But there are no such facts in dispute. This case turns on *what* facts must be considered in a significant nexus analysis, as a matter of law. The dispute is not, for example, based on whether a particular flow rate or amount of pollution trapping at the 13 acres is sufficient to establish a significant nexus. The Corps never measured those things.

The government tries to deflect the Court's focus from the actual instructions of Justice Kennedy by citing *Zero Zone* for the proposition that the Corps is entitled to a "high degree of deference" on scientific and technical questions. But *Zero Zone* involves the Department of Energy's ("DOE's") efficiency standards, where there were no constitutional questions and where the court deferred to DOE on technical issues regarding commercial refrigeration equipment and testing procedures. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016). Here, Gallagher & Henry is not contesting the Corps' scientific or technical determinations but its failure to follow Justice Kennedy's instructions in the context of the Corps' constitutionally suspect powers under the CWA.

The Corps makes a general reference to two pages from *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc*., 419 U.S. 281, 285-86 (1974), for the proposition that courts apply the same level

of deference to an agency's legal and factual findings under the APA. Corps' Br. at 18. Conveniently, the Corps does not quote *Bowman*. The two pages cited contain boilerplate recitation of the APA standard of review, with an emphasis that factual findings are given a wide degree of deference. *See id.* at 285 (emphasis added) ("Although this inquiry *into the facts* is to be searching and careful, the ultimate standard of review is a narrow one."). But the issue here is not whether factual findings deserve deference. The issue is whether the Corps gathered the type of site-specific data required by Justice Kennedy to support its significant nexus conclusion. That issue deals precisely with whether the Corps' significant nexus finding is "not in accordance with law" under the APA. *See* 5 U.S.C. § 706(2)(A) (courts "hold unlawful and set aside agency action, findings, and conclusions found to be . . . *not in accordance with law*." (emphasis added). An administrative agency "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). *See also F.C.C. v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 513-14 (2009); *Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 856 (7th Cir. 2009). Accordingly, whether the Corps properly followed Justice Kennedy's instructions cannot be left to the discretion of the Corps.

B. Contrary to Justice Kennedy's test, the Corps failed to gather sufficient site-specific evidence supporting its conclusion of a significant nexus between the 13 Acres and Navigable Waters.

As explained in Gallagher & Henry's opening brief, the significant nexus test requires site specific evidence to determine on a "case-by-case basis" whether the wetlands will have a substantial physical, chemical, and biological impact on navigable waters. *See* Appellant's Op. Br. at 24-29. In its response brief, the government argues that the current record meets that standard based on the following four conclusions made by the Corps: 1) the 13 acres have a hydrological connection to the Little Calumet River; 2) they provide flood control benefits; 3) they

reduce nitrogen in the Little Calumet River; and 4) they provide habitat for species found in the River. Because these conclusions are not based on meaningful site-specific evidence, they do not satisfy Justice Kennedy's legal standard for significant nexus.

1) The fact that the 13 acres may have some minimal hydrological connection to the Little Calumet River is not dispositive.

The government's response brief makes a great deal of the fact that, on one occasion, the Corps' staff observed water flowing from the outfall of the stormwater retention system of the Warmke Parcel to the nonnavigable tributary Midlothian Creek. Corps' Br. at 20-22. But Justice Kennedy instructed the Corps that such "mere hydrological connection" is not sufficient to establish a significant nexus because it is necessary to examine both the "quantity and regularity of flow." *Rapanos*, 547 U.S. at 786.

Here, the Corps observed water moving from the 13 acres through underground pipes[4], several manmade and natural ditches and culverts, the storm water retention system, and finally into the Midlothian Creek. Nothing in the record indicates whether the flow at any of those steps was a torrent or a trickle, how often flows occur, or how often Midlothian Creek (which is an ephemeral stream) actually connects with the Little Calumet River.[5] Indeed, the only record evidence is that the Corps made one observation that some flow was visible on a particular day. As explained in Gallagher & Henry's opening brief, this minimum quantum of evidence has been rejected by courts. *See* Appellant's Op. Br. at 25-28.

The government's reply brief does not attempt to distinguish the facts of this case from those in *Rapanos* because the facts in *Rapanos* are virtually on all fours with the facts here, as set

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[4] The record does not indicate how the Corps could have observed water flowing in underground pipes.

[5] The flow from the outfall of the Warmke Parcel stormwater retention system into Midlothian Cree is "intermittent." AR 019, 253, 380; APPX 0019, 0219, 0247. Midlothian Creek itself has "ephemeral flow." AR 379; APPX 0246.

forth in detail in Gallagher & Henry's opening brief and summarized above. The Corps does, however, try to distinguish the facts in *Precon* by noting that after the remand in that case the Corps made additional site visits and issued a second jurisdictional determination that was upheld on appeal. *See Precon Dev. Corp., Inc. v. United States Army Corps of Engineers*, 603 Fed.Appx. 149 (4th Cir. 2015) (*Precon II*.) But the quantum of evidence produced by the Corps in *Precon II* far exceeds that produced here. After remand in *Precon* II, the Corps supplemented the record through documentation of multiple additional site visits where, among other things, flow was observed and photographed, expert reports were submitted regarding the flood and pollution retention benefits of the specific property at issue, additional aerial photographs were provided, evidence was gathered of recent flooding at adjacent properties, and flow measurements were taken both up and downstream from the property at issue. *Id*. at 152-55. Here, after remand the Corps returned to the site one time but the record does not show that the Corps gathered any on-site or near-site data during that visit. APPX 0049-50.[6] Indeed, there is no indication that during that second visit the Corps made an effort to determine whether there was any flow from the stormwater retention outfall into Midlothian Creek, although it could have readily ascertained during that visit whether there was any such flow on that day. The absence of any documentation regarding flow during that second visit is indicative of the Corps' lack of effort after the administrative remand to provide additional site-specific support for its significant nexus finding, even though the reviewing officer rejected the initial finding on administrative appeal. Surely no

[6] The Corps points to APPX 0049 as evidence of a second site visit, which Gallagher & Henry's opening brief acknowledges. But the record indicates only that the Corps staff had a meeting on site with Gallagher & Henry representatives to discuss the administrative appeal. That "site visit consisted of a tour to inspect the general character of the area." APPX 0050. There is no indication that flow was observed or that any measurement, sampling, or other data gathering occurred during that meeting.

deference should be given to the Corps' position that Justice Kennedy sanctioned such an approach when he instructed the Corps to establish "significant" nexus based on "substantial" evidence.

2) The Corps provides no site-specific evidence to support its argument that the 13 acres provide significant flood control benefits.

The Corps argues that the 13 acres have a significant impact on flooding. But the overwhelming majority of the "facts" the Corps relies on for its finding are broad statements about the hypothetical benefits of wetlands in general. *See* Corps' Br. at 23-25. To the extent actual flooding is discussed at all, the statements pertain to problems elsewhere in the watershed of the Mississippi or Little Calumet rivers. *See, e.g.*, *id.* at 24 ("The Corps is spending $270 million on a flood control project on the Little Calumet River"); *id.* (noting problems in the "Mississippi River, where several extreme floods have occurred in the past few decades.") Indeed, of the sixteen "facts" allegedly establishing that the Warmke Parcel provides significant flood mitigation, only four mention the Warmke Parcel at all. Corp's Br. at 24-25. And those statements provide little more than a generalized description of the property.[7]

The Corps does not provide evidence that the parcel itself impacts flooding. Instead, the Corps summarily concludes that the removal of 13 acres along with the "other wetlands in the watershed" could "increase peak stream flows in the creek by more than 13.5%." Corps' Br. at 25. That approach is inconsistent with Justice Kennedy's instructions because the Corps fails to establish that the "other wetlands in the watershed" are in fact "similarly situated." *See* 547 U.S. at 780. Providing deference to the Corps on this issue would render the "case-by-case" analysis

[7] For example, the Corps notes that the "Warmke wetlands are densely covered by tall, robust plants," have a "gentle slope," and are "located in the headwaters of the Midlothian Creek." Corp's Br. at 24-25. But even if these findings of fact are taken at face value, they do not establish a *significant* hydrological nexus between the 13 acres and the Little Calumet River based on flood prevention. They only set forth general observations made by the Corps without connecting the dots between the 13 acres and the Little Calumet River. Connecting the dots between a wetland and a navigable water is the *sine qua non* of Justice Kennedy's test.

mandated by *Rapanos* meaningless, and return us to the pre-*Rapanos* practice where the Corps assumed that any wetland within the watershed was automatically jurisdictional.

3) The Corps provides no site-specific evidence to support its argument that the 13 acres provide significant pollution mitigation.

The Corps claims that the Warmke wetlands have a significant impact on nitrogen levels in the Little Calumet River. But the record shows that the Corps' conclusions were based on little to no site-specific evidence. Again, the numbers are telling. Of the fourteen "facts" the government cites in its response brief, four pertain to the Warmke parcel. And even those four are generalized descriptions of the size and topography of the wetlands, their location, and the vegetation on the property. *See* Corps' Br. at 27.[8] The Corps concedes that it never tested any flows on or from the 13 acres or the stormwater retention system outflow for any pollutants, much less for nitrogen levels. Corps' Br. at 27.

From this evidence, the Corps concludes that removal of the "Warmke wetlands *and the other wetlands in the watershed*" could increase nitrogen pollution by 27-51%. Corp's Br. at 27. But as explained above, this sort of statistical aggregation based on conjecture is not consistent with Justice Kennedy's *Rapanos* test and would make meaningless his instruction that decisions must be made on the basis of substantial site-specific evidence gathered on a case-by-case basis.

4) The Corps provides no site-specific evidence to support its argument that the 13 acres provide significant wildlife habitat.

The government's brief asserts that the 13 acres, "in combination with the other wetlands in the watershed, significantly affect the biological integrity of the Little Calumet River because they

[8] "The wetlands' position at the top of the watershed, its large size, and flat topography all ensure that water and pollutants entering the site reside long enough to interact with the vegetation there. Moreover, the types of vegetation (such as Phragmites australis, a grassy reed) located at the site are "ideal" for removing nitrogen."

'provide habitat and lifecycle support functions' for species that are present in the river." Corps' Br. at 28. But as with its other assertions, the government provides little in the way of site-specific evidence to support this claim.

The Corps' primary site-specific evidence is that "various wildlife species, such as American Toad and Western Chorus Frog, have been observed at the Warmke wetlands." Corps' Br. at 29. But the fact that a toad or a frog has been seen once on a property is not sufficient to show that the property provides habitat or that such habitat has a significant nexus to a navigable water. *See United States v. Hallmark Const. Co.*, 30 F.Supp.2d 1033, 1042 (N.D. Ill. 1998) (rejecting habitat argument, noting that a "single sighting does not demonstrate well-established use.")

Moreover, even if the Corps could establish that a frog from the Warmke Parcel travelled to the Little Calumet River, that alone would be insufficient to show a significant nexus. *See SWANCC*, 531 U.S. at 121 (2001) (rejecting Corps argument that use of wetland by migratory birds was sufficient to show connection to a navigable water.); *see also Rapanos*, 547 U.S. at 749 (Kennedy, J., concurring) ("the ponds at issue in *SWANCC* could, no less than the wetlands in these cases, 'offer 'nesting, spawning, rearing and resting sites for aquatic or land species'", and "'serve as valuable storage areas for storm and flood waters.'" The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as waters of the United States."). Accordingly, the Corps' biological impact argument also fails under Justice Kennedy's significant nexus test.

C. The Corps' efforts to establish similarly situated wetlands are inconsistent with Justice Kennedy's instructions.

The government's brief argues that every wetland in the watershed is similarly situated for the purpose of determining whether a significant nexus is present.[9] The sole evidence of similarly situated wetlands is the National Wetlands Inventory. Corps' Br. at 36 (citing APPX 0020-22; APPX 0037).[10] But that bare listing of wetlands does not contain descriptions of those wetlands other than their sizes.

The Corps' reading of Justice Kennedy's instructions swallows the "similarly situated" part of the significant nexus test by postulating that all wetlands in a watershed will always be "similarly situated." Such a broad reading would be contrary to the result in *Rapanos*—which rejected the watershed theory of jurisdiction insofar as nonnavigable tributaries are concerned. Moreover, it invokes significant constitutional concerns by sweeping in property with only a tenuous connection to interstate commerce. *See SWANCC*, 531 U.S. at 172. A narrower reading is therefore required.

Rightly understood, Kennedy's instructions regarding similarly situated sites require the Corps to show that the 13 acres in fact have similar characteristics to other wetlands in the region and that the combined wetlands have a significant nexus to navigable waters. But that analysis requires some minimal quantum of site-specific evidence about the 13 acres and about the other wetlands in the region to ensure that they are similarly situated. Here, there is insufficient site-specific information regarding the functions and benefits of the 13 acres to establish a baseline for

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[9] *See* Corps' Br. at 13, 15, 20-29, 32 (using impacts of the watershed as an aggregated whole to establish a significant nexus).

[10] The pages cited do not even contain a map, but merely a list of "wetlands" the majority of which are indicated to not directly abut Midlothian Creek. The wetlands are not even named and have no data identifying where they are located or their characteristics. See, APPX 0020-22.

comparison with other wetlands "in the region," and there is even less site-specific evidence regarding the functions and benefits of those other wetlands. *See* APPX 0020-22; APPX 0037.

The Corps argues (for the first time on appeal) that Gallagher & Henry waived any arguments regarding the sufficiency of the Corps' evidence of similarly situated wetlands because it allegedly did not raise those arguments at the administrative level. But "[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). At every step of the administrative process Gallagher & Henry raised the claim that the Corps lacked sufficient evidence that 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.'" AR 0542 (emphasis added). Accordingly, arguments supporting that claim are not waived. *Yee*, 503 U.S. at 534.

II. THE CORPS FAILS TO REFUTE APPELLANT'S ARGUMENT THAT THE WARMKE PARCEL IS PRIOR CONVERTED CROPLAND EXEMPTED FROM THE CWA.

33 C.F.R. § 328.3(a)(8) (1994) unequivocally states that "[w]aters of the United States do not include prior converted cropland." It is undisputed that the 13 acres are prior converted cropland. *See* APPX 013 (Corps stating that "we agree that the site was likely converted from wetland to agricultural use before December 23, 1985, and for that reason would likely be considered PC cropland.") And the unambiguous text of the rule speaks for itself: prior converted croplands are exempted from CWA jurisdiction.

The Corps provides three arguments to the contrary. First, it argues for the first time on appeal that the term "prior converted cropland" is ambiguous because it does not refer explicitly to "*all*" or "*any*" prior converted cropland. Second, the Corps argues that even if the term is not

ambiguous, this Court is bound by the language of the preamble. Third, the Corps argues that the Corps long practice of interpreting the term to include "abandonment" is dispositive. Each of those arguments fails.

A. "Prior converted cropland" is not an ambiguous term.

The regulatory exclusion 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), and the government did not argue in the lower court that the term "prior converted cropland" is ambiguous. Now it tries to infuse ambiguity by claiming that not "all" prior converted cropland is exempted. That is not an interpretation, it is using the "guise of interpreting a regulation, to create de facto a new regulation." *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000);[11] *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.")

A similar approach by the government was rejected in *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001), where the regulation at issue provided that any investigation by the Federal Elections Commission ("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

[11] An agency "interpretation" is deemed a new and different rule if it will "effect a change in existing law . . . or which affect individual rights and obligations." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). 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.

rule." *Id*. And deference could not create one. Similarly, here, the prior converted cropland rule contains no exceptions, and the Corps may not rely on deference to create one.

The Corps attempts to distinguish *In re Sealed Case* by arguing that, unlike the provision in that case, the Corps' prior converted cropland exemption "does not use the words 'all' or 'any." Corps' Br. at 41. But the mere omission of those unnecessary modifiers does not raise any ambiguity. *See* Laurence H. Tribe, *Taking Text and Structure Seriously*, 108 Harv. L. Rev. 1221, 1241 (1995) (It "is old news in … statutory interpretation that … attributing substantive meaning to what a text does not say can be a hazardous enterprise."). The Corps argues also that *In re Sealed Case* does not apply because that case dealt with an agency interpretation of a statute, whereas this case turns on the interpretation of a regulation. Corps' Br. at 41. But that is a distinction without a difference. "Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties." *Perez*, 135 S.Ct. at 1219. In this context Justice Scalia observed:

> Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

Perez, 135 S.Ct. at 1212 (Scalia, J concurring).

Reading ambiguity into the term "prior converted cropland" also a raises concerns about allowing agencies to justify their actions by *post-hoc* rationalizations. This is particularly true given that the Corps knew how to include the abandonment provisions of the National Food Security Manual ("NFSAM") because it was included by reference in the proposed regulation. *See* 58 Fed. Reg. 45008-01, 45033 (August 25, 1993). In response to a comment that the manual (which

contained an abandonment exception) could not be incorporated in the final rule because it had not gone through notice and comment under the APA, the Corps removed the reference. *Id.* *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616-20 (2013) (Scalia, J., concurring) (deference not appropriate when "the agency has vividly illustrated that it can write a rule saying precisely what it means").

B. The preamble to the prior converted cropland rule cannot create an exception to the plain language of the rule.

As explained in Gallagher & Henry's opening brief, the primary basis of the Corps' abandonment argument is several sentences in the preamble to 33 C.F.R. § 328.3(a)(8) (1994), which did not make it into the language of the final rule. Generally, 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."); *see also D.C. v. Heller*, 554 U.S. 570, 688 (2008) ("the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.") As Justice Thomas recently noted, "[o]nly the text of a regulation goes through the procedures established by Congress for agency rulemaking. And it is that text on which the public is entitled to rely." *Perez*, 135 S.Ct. at 1224 (Thomas, J., concurring).[12]

[12] Even if for argument's sake one were to categorize the preamble statement as interpretive, as 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).

Here, as in *Brock*, the record establishes that the Corps intentionally did not include an abandonment exception in 33 C.F.R. § 328.3(a)(8) (1994). *See* 58 Fed. Reg. at 45033. The government's brief tries to distinguish *Brock* on the grounds that the agency in *Brock* was trying to apply a rule in a manner different than that described in the Federal Register, whereas here, the Corps' interpretation is allegedly consistent with the preamble. *See* Corps' Br. at 43. The *Brock* court did not adopt such a one-sided rule. Instead, the court held that the "dividing point between [legally binding] regulations and [nonbinding] general statements of policy is publication in the Code of Federal Regulations." *Brock*, 796 F.2d at 539. Other cases reach the same conclusion. *See, e.g., Eisai, Inc. v. United States Food & Drug Admin.*, 134 F.Supp.3d 384, 396 (D.D.C. 2015) ("the preamble is not …binding."); *U.S. v. L.E. Myers Co.*, 2007 WL 1703922 *17 N.D. Ill. June 13, 2007 (statements made in a preamble generally are not binding on private parties); *see also Horn Farms v. Johanns*, 397 F.3d 472, 476 (7th Cir. 2005) (only interpretations of language "expressed in regulations" merit deference to the agency implementing those regulations.)

The government's response brief also points to *Huntress v. U.S. Dep't. of Justice*, No. 12-CV-1146S, 2013 WL 2297076, at *13 (W.D.N.Y. May 24, 2013), which held that *Brock* did not preclude the Corps from relying on the abandonment criteria in the preamble when enforcing the prior converted cropland rule. *Huntress* is an unpublished district court opinion that is not binding on this court. More importantly, the court in *Huntress* was operating under assumptions about the prior converted cropland rule that have been disproven by the record in this case. In distinguishing *Brock*, the *Huntress* court relied heavily on the misconception that there was no evidence that the Corps had deliberately excluded the abandonment criteria from the rule. The court noted that:

> In *Brock*, … the Secretary 'took pain to exclude the enforcement guidelines from the final rule[,] ... direct[ing] that they not be published with the rule in the Code of Federal Regulations.' ***There is no evidence of such efforts or belief in this case.***

Huntress, 2013 WL 2297076 at *13 (emphasis added). As pointed out above and in more detail in in Gallagher & Henry's opening brief, the record in this case is clear that the Corps "took pain to exclude" the abandonment criteria from the final rule. Accordingly, the incorrect conclusion reached by the *Huntress* court should not be followed here.

C. Longstanding practice does not make an unlawful interpretation of a regulation lawful.

The Corps argues that its longstanding practice of applying abandonment to prior converted cropland is entitled to deference. Corps' Br. at 40. But the Supreme Court has held that "the existence of a prior administrative practice, even a well-explained one, [does not] relieve us of our responsibility to determine whether that practice is consistent with the [law at issue]." *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978). It remains, "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch, at 177. The passage of time does not render an unlawful interpretation lawful.

Finally, the 13 acres are not the type of wetland the CWA was designed to protect. The Corps concedes that prior converted cropland no longer falls within the purpose of the CWA:

> We believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition . . . in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for purposes of the CWA."

58 Fed. Reg. at 45032. Until 1995 the 13 acres were actively farmed. AR 013; APPX 0013. Any wetland conditions on the property today exist solely due to drainage issues created after the change of use from farming to residential development, when the area was graded and extensively modified for residential construction. AR 284-85; APPX 0241-42. The Corps has never asserted that the 13 acres provide wetlands functions and benefits that are remotely comparable to those

provided by the 100-acre Warmke Parcel before farming was commenced on the property. Nor could it. Accordingly, reading the abandonment exception into the categorical exclusion for prior concreted cropland not only is legally impermissible as a rewriting of a regulation without notice and comment but also, under the facts of this case, does not further the environmental goals of the CWA, which is already suspect based on constitutional and federalism concerns

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Gallagher & Henry's opening brief, the district court ruling should be reversed.

DATED: May 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I electronically filed the foregoing Reply Brief of Appellant, 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 6,916 words according to the count of Microsoft Word.

Dated: May 10, 2018

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