UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORCHARD HILL BUILDING COMPANY DBA GALLAGHER & HENRY,	)	
Plaintiff,	)	Case No.: _____
v.	)	
UNITED STATES ARMY CORPS OF ENGINEERS,	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Orchard Hill Building Company, dba Gallagher & Henry ("Gallagher & Henry"), for its Complaint seeking declaratory and injunctive relief alleges as follows:

NATURE OF THE ACTION

1. The Plaintiff seeks review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, of a final agency action of the United States Army Corps of Engineers (the "Corps") determining that portions of certain property owned by the Plaintiffs (the "Warmke Property," sometimes referred to as the "Property") is a "water of the United States" under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, known as the Clean Water Act ("CWA"), and therefore subject to the Corps' jurisdiction.

2. As a result of the Corps' unlawful assertion of jurisdiction, Plaintiffs are unable to use a portion of the Warmke Property without fear of a CWA enforcement action, fines, and penalties. The Corps' improper assertion of jurisdiction also subjects Plaintiffs to unlawful and burdensome permitting requirements.

3. Plaintiffs seek by this action a declaration that the portion of the Warmke Property over which the Corps' has asserted jurisdiction is not a water of the United States under the CWA. Plaintiffs also seek an injunction enjoining the Corps from exercising jurisdiction over such portion of the Warmke Property.

4. The Court's review of the agency action that is the subject of this proceeding is based upon the administrative record.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 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 5 U.S.C. §§ 702, 704, and 706 (providing for judicial review of final agency action under the APA). Injunctive relief is authorized by 28 U.S.C. § 2202.

6. The Warmke Property consists of approximately 100 acres of real estate located in Tinley Park, Cook County, Illinois (the "Village"). Venue in this judicial district is proper under 28 U.S.C. § 1931(e)(2) because the Warmke Property is located within this district.

PARTIES

7. Plaintiff, Gallagher & Henry, is an Illinois partnership with its principal place of business in Countryside, Illinois. Plaintiff owns the Warmke Property.

8. Defendant United States Army Corps of Engineers is a branch of the Department of the Army and an agency of the United States.

LEGAL BACKGROUND

"Waters of the United States"

9. In 1972, Congress enacted the Federal Water Pollution Control Act, amended as the Clean Water Act ("CWA") to regulate "navigable waters."

10. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredged and fill material into "navigable waters."

11. Section 502(7) of the CWA, *id.* § 1362(7), defines "navigable waters" to mean the "waters of the United States, including the territorial seas."

12. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged and fill material into "navigable waters."

13. By regulation, the Corps determines whether a particular parcel of property contains "waters of the United States" by issuing an Approved Jurisdictional Determination ("JD"). 33 C.F.R. §§ 320.1(a)(6), 331.2.

14. The Corps has promulgated regulations defining "waters of the United States." *Id.* § 328.

15. Under the regulations cited in paragraph 14, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered "waters of the United States."

16. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), held that isolated, intrastate, non-navigable bodies of water are not "waters of the United States."

17. After *SWANCC*, the Corps and EPA continued to interpret their authority under the CWA to extend to waterbodies and wetlands so long as those features had a "hydrological connection" to navigable-in-fact waterbodies. *See e.g.*, *United States v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004), *vacated, remanded by Rapanos v. United States*, 547 U.S. 715 (2006).

18. In *Rapanos v. United States*, the Supreme Court rejected the agencies' hydrological connection theory of CWA jurisdiction. *See* 547 U.S. at 739 (plurality opinion); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

19. In *Rapanos v. United States*, Justice Scalia authored a plurality opinion, joined by three other Justices, which concluded that the Corps' jurisdiction over the non-navigable waters only extends to "relatively permanent, standing or continuously flowing bodies of water that are "connected to traditional intestate navigable waters." *Id.* at 739, 742 (plurality opinion). In addition, wetlands adjacent to such jurisdictional waters will qualify as jurisdictional waters when "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins". *Id.* at 742.

20. Justice Kennedy concurred in the judgment but adopted a broader interpretation of the Corps' jurisdiction over non-navigable wetlands, finding them jurisdictional if they "possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice Kennedy, a significant nexus exists where non-navigable wetlands, either alone or in combination with similarly situated waterbodies, "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters (also know as "traditional navigable waters"). *Id.* at 780. The Seventh Circuit recognizes Justice Kennedy's significant nexus test as controlling. *See United States v.*

Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006). *See also U.S. v. Johnson*, 467 F.3d 56, 61 (1st Cir. 2006); *U.S. v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009).

21. After *Rapanos*, the Corps, in conjunction with EPA, issued a non-binding guidance document opining on the scope of the agencies' CWA jurisdiction. *See* Clean Water Act Jurisdiction Following the United States Supreme Court's decision in *Rapanos v. United States* (Dec. 2, 2008). In that guidance document, the Corps and EPA asserted their intention to exercise jurisdiction over "waters of the United States" that satisfy either the Scalia "relatively permanent" test or the Kennedy "significant nexus" test.

22. On June 29, 2015, the Corps and the United States Environmental Protection Agency ("EPA") jointly promulgated a rule in which the term "waters of the United States" is defined to include traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of jurisdictional waters; covered tributaries of such waters; and adjacent waters, including adjacent wetlands. 33 U.S.C. Section 328.3(a), 80 Fed. Reg. 37054, 37104 (June 29, 2015). In addition, the rule includes within the definition of the term "waters of the United States" any "other waters" that either alone or in combination with similarly situated waters in the region have a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. *Id.*

"Prior Converted Cropland"

23. The CWA exempts farming operations from the dredged and fill material permitting requirements. 33 U.S.C. § 1344(f).

24. By regulation, the Corps has exempted from the permitting requirements lands formerly used for agricultural purposes, known as "prior converted cropland." 33. C.F.R. § 228.3(a)(8).

25. The preamble to the regulations defines the term "prior converted cropland" as "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, of having the effect, of making production of a commodity crop possible." In addition, prior converted cropland "is inundated for no more than 14 consecutive days during the growing season and excludes potholes or playa wetlands." 58 Fed. Reg. 45,008-01, 45,031 (Aug. 25, 1993). The Corps adopted the definition from the National Food Security Act Manual, which incorporated the definition used by the Soil Conservation Service. *Id.*

26. The preamble also stated that "[i]n response to commentators who opposed the use of [prior converted] croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA Jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas." *Id.* at 45,033. The preamble further states that prior converted cropland may return to the Corps' jurisdiction if it has been "abandoned" and the lands "revert back to wetlands." *Id.*

27. In January, 2009, the Corps' Jacksonville Field Office prepared an issue paper announcing that prior converted cropland that is shifted to non-agricultural use is subject to regulation by the Corps. *See* Issue Paper Regarding Normal Circumstances(the "Issue Paper") (**Exh. A**). The Issue Paper was written in response to five pending applications for jurisdictional determinations involving the transformation of prior converted cropland to limestone quarries. The Issue Paper found that active management such as continuous pumping to keep out wetland conditions would subject the prior converted cropland to the Corps' jurisdiction. *Id.*

28. In an affirming Memorandum, the Issue Paper was adopted by the Corps as being an accurate reflection of the Corps' national position. *See* Memorandum for South Atlantic Division

Commander (Apr. 30, 2009) (the "Affirming Memorandum") (**Exh. B**). The Issue Paper and the Affirming Memorandum are collectively referred to as the "Stockton Rules."

29. In 2010, the United States District Court for the Southern District of Florida set aside the Stockton Rules on the ground that they had not been promulgated in accordance with the Administrative Procedure Act, and enjoined the Corps' from implementing them "without engaging in rulemaking using appropriate notice-and-comment procedures." *New Hope Power Company v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1282-83 (2010).

30. This Court has held that where prior converted cropland is switched to nonagricultural use "that area will no longer come under the Corps' jurisdiction." *See United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1040 (N.D. Illinois 1998).

"Jurisdictional Determinations"

31. The Corps of Engineers has primary responsibility for determining whether any particular geographic area, including a wetland, is subject to the Corps' regulatory authority under CWA section 404. *See* 60 Fed. Reg. 37,289-01, 37,282 (July 19, 1995).

32. Delineating wetlands is a two-step process. First, a decision is made regarding whether an area falls within the technical definition of a wetland, which is set forth at 33 C.F.R. § 328.3(b). Second, the boundary line between regulated wetlands and unregulated uplands is established. Guidelines for taking both steps are set forth in the 1987 Corps of Engineers Wetland Delineation Manual. *See* 60 Fed. Reg. at 37,282.

33. Jurisdictional determinations are made by the Regulatory Division of the Corps' District Office responsible for the geographic area at issue. *Id.*

34. There is one level of administrative appeal from a jurisdictional determination made by the relevant Corps District Office. 33 C.F.R. § 331.7(a). That appeal is made to and decided by

the Corps' Division Engineer with oversight responsibility for the jurisdictional determinations of the District Engineer, or by a duly designated delegate of the Division Engineer. 33 C.F.R. § 331.3(a)(1). *See id.* at 331.1(b).

35. The administrative appeal must be decided on the basis of the then-existing administrative record. *Id.* at 331.3(b)(2); 331.7(f).

36. The Corps' regulations allow the Corps to conduct a site investigation and meet at the site with the persons seeking the jurisdictional determination and its representatives. 33. C.F.R. § 331.7(c).

37. In relevant part, the term "jurisdictional determination" means "a written Corps determination that a wetland . . . is subject to regulatory jurisdiction under section 404 of the [CWA]." *Id.* at 331.2

38. In relevant part, the term "approved jurisdictional determination" means "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document." *Id.*

39. If the Division Engineer determines that the appeal is without merit, the final Corps decision is the Division Engineer's letter advising the applicant that the appeal is without merit. *Id.* at 331.10(a).

40. If the Division Engineer determines that the appeal has merit, the final Corps decision is the District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action. *Id.* at 332.10(b).

41. The final decision on the merits of the appeal "concludes the administrative appeal process." *Id.* at 331.9(b).

FACTUAL ALLEGATIONS

42. The Warmke Property is approximately 100 acres of generally flat terrain, which have been historically farmed.

43. Gallagher & Henry contracted to purchase the Warmke Property in 1990, whereby portions were paid for and deeded in stages between September, 1991, through December, 1995.

44. Farming operations on the Warmke Property were never abandoned.

45. Gallagher & Henry actively and properly changed the use of the Warmke Property pursuant to an annexation, rezoning and phased development agreement with the Village executed in April of 1995 (the "Annexation Agreement").

46. The 100-acre property is configured in the shape of a rectangle with the northern boundary at 179th Street and southern boundary at 183rd Street. Pursuant to the Annexation Agreement, the south 25 acres(Phase I) is approved for 168 townhomes and the north 61 acres (Phase II) for 169 single family lots. The 14-acre parcel lying between the two residential areas was approved by the Village as a storm water management system, including two storm water detention ponds, one wet and one dry, to detain storm water and service both the Phase I townhomes to the south and the Phase II single family lots to the north, as well as other offsite properties. (**Exh. C**).

47. The Warmke Property was designed and approved as a unified development with streets and utilities, including water mains, sanitary sewers and storm sewers interconnecting not only between the two residential areas of Phase I and Phase II, but also engineered and designed to connect to surrounding Village streets and utilities.

48. Construction began on the Warmke Property in early 1996 with the excavation of the two storm water detention ponds. Excavation materials from the ponds were stockpiled north of the 14-acre storm water management area and within the area of the approved single family lots, later

purported to be wetlands, but at the time part of an active farm. Up to six feet of fill materials were stockpiled and intended to be used to "level and balance" the area of single family lots. (*See* pp. 2 and 4 of letter dated June 11, 2008, from David Zajicek to Paul Leffler, reproduced in **Exh. D**).

49. Although the storm water detention system and detention ponds were completed in 1997, the systematic buildout and sale of the Phase I townhome area continued for another 10 years through 2007.

50. The 1996 excavation and grading of the two storm water detention ponds which led to filling the two current wetland areas are man-made conditions which have reduced the historic drainage and allowed wetlands characteristics to develop in that area, which had not been identified as wetlands in the past.

51. The remaining acreage (excluding the townhome area, the storm water management system area and the two now purported wetlands areas) continues to be farmed.

52. The storm water management system including the two detention ponds are part of a drainage system serving an approximate 600-acre tributary to the Little Calumet River. The drainage system consists of six retention/detention ponds (three wet and three dry) all connected by approximately 6,000-feet of underground pipe extending from Pond I and beneath and through the other five ponds, ultimately terminating at the headwater of Midlothian Creek, which is not a traditionally navigable water.

53. Midlothian Creek flows approximately 11.3 miles into the Little Calumet River, which is a traditionally navigable water.

54. The detention ponds are located within a historical depression that can be seen on the National Resource Conservation Service National Wetland Inventory Map (Exhibit E).

55. Consistent with the National Wetland Inventory, the detention ponds correspond with a Palustrian Emergent Farmed Wetland with a temporary flooded water regime.

56. The National Resource Conservation Service Wetland Inventory Map identified this area as non-wetland prior converted ("NW/PC"). (*See* **Exh. E**).

57. The Corps first asserted jurisdiction over the Warmke Property in its JD dated November 17, 2006 (the "First JD"). In that JD, jurisdiction was asserted over two purported wetlands (I) a 0.63-acre area ("Wetland A") and (ii) a 12.24-acre area ("Wetland B"). The JD did not address the jurisdictional standards set forth in *Rapanos v. United States.*

58. In the First JD, dated November 17, 2006, the Corps based jurisdiction on 33 C.F.R. § 328.3(a)(5) and (7), the presence of a tributary to a water of the United States, as well as the presence of wetlands adjacent to the tributary. **(Exh. F)**.

59. On January 12, 2007, Gallagher & Henry appealed the JD, on the ground that it did not take into account the Supreme Court's decision in *Rapanos*. ("First Administrative Appeal").

60. The Corps responded to the appeal by letter dated October 21, 2007, indicating that it would review the JD in light of *Rapanos*. The letter also served to remand the JD to the District, stating "this letter serves as the decision document for your RFA and this concludes the Corps' administrative appeal process.

61. On June 11, 2008, Gallagher & Henry submitted to the Corps a request for a "No Jurisdiction" determination from the Corps, based upon the Supreme Court's decision in *Rapanos*, addressing Justice Scalia's plurality test (surface hydrology) and Justice Kennedy's concurring test (significant nexus) and arguing that the site (i) lacks continuous surface connection and (ii) lacks a significant nexus to a traditionally navigable water. **(Exh. G)**.

62. The Corps proceeded to reconsider its prior decision in light of the remand.

63. In a letter dated July 10, 2009, Robert Jankowski, District Conservationist, National Resources Conservation Service ("NRCS") stated that the area in question had been designated as prior converted cropland. **(Exh. H)**.

64. On March 31, 2010, the Corps issued a Preliminary Memorandum for Record ("MFR") that again asserted jurisdiction over Wetland A and Wetland B.

65. On April 14, 2010, the United States Environmental Protection Agency ("EPA") wrote the Corps stating the EPA concurs with the Corps assertion of Jurisdiction.

66. On May 26, 2010, Gallagher & Henry responded to the MFR, citing errors and omissions in the document.

67. On October 6, 2010, the Corps responded by again claiming jurisdiction over Wetland A and Wetland B, asserting a significant nexus to the Little Calumet River.

68. The October 6, 2010, letter stated, "the 0.01-acre wetland on the eastern edge of the soil pile in the center of the site [was] isolated and therefore not under the Jurisdiction of this office."

69. The October 6, 2010, letter stated that it was to be considered an "approved jurisdictional determination" for the site and included an approved jurisdictional determination form (the "Second JD").

70. The October 6, 2010, letter rejected the NRCS designation of the areas as prior converted cropland, on the ground that the designation was "uncertified."

71. By letter and supporting legal and factual analysis dated January 21, 2011, Gallagher & Henry appealed the Second JD, asserting that the Corps's significant nexus finding and its rejection of the prior converted cropland exclusion were in error because they were not based on substantial evidence in the record.

72. On June 21, 2011, the Corps denied the appeal of the Second JD on the ground that the record supported the Corps' jurisdictional determination (the "Second Appeal Decision").

73. The Second Appeal Decision stated, "[t]his concludes the Corps' administrative appeal process."

74. On July 7, 2011, Gallagher & Henry requested the Corps to reconsider its Second Appeal Decision on the issue of prior converted cropland and significant nexus.

75. In November 2011, the Division remanded to the District for reconsideration of the prior converted cropland exemption.

76. On or about March 26, 2012, the District restated its position that the prior converted cropland exemption does not apply (the "Third JD").

77. On May 24, 2012, Gallagher & Henry appealed the District's Third JD to the Division on the ground that the District was in error on the converted cropland exemption and that the record did not contain substantial evidence to support a significant nexus finding (the "Third Appeal").

78. On September 12, 2012, representatives from the Corps met with representatives of Gallagher & Henry at the Property to conduct a site investigation, and the issues were limited to those in the administrative record at the time the Third Appeal was taken, namely, May 24, 2012.

79. On October 4, 2012, Gallagher & Henry submitted to the Corps' post-meeting written comments to address issues and questions, and the comments were limited to matters in the administrative record.

80. The Division decided the appeal based on the administrative record, as reflected in its letter dated May 9, 2013, by which the Division remanded to the District stating that the Third Appeal "has merit because the District failed to provide the requisite explanation for its significant nexus determination" and that the District should "include sufficient documentation to support its

decision and to reconsider its decision." The Division's May 9, 2013, remand stated that "[t]he administrative record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form" and that "no new information may be submitted on appeal." The Division stated that the final Corps' decision on Jurisdiction "will be the Chicago district Engineer's decision made pursuant to my remand." **(Exh. I)**.

81. Nothing in the remand by the Division authorized the District to supplement the administrative record in making the final decision.

82. By letter dated May 21, 2013, Gallagher & Henry reminded the District Officer to whom the decision to decide the Third Appeal had been delegated that (i) the appeal must be decided within 60 days, (ii) the "District is bound by the administrative record in explaining its significant nexus finding on remand," and (iii) the "District may not supplement that record or create any new record on remand." **(Exh. J)**.

83. On July, 19, 2013, the District made its final jurisdictional determination on remand, confirming its prior positions that Wetland A and B "exhibit a significant nexus to the navigable Little Calumet River," and that the prior converted cropland exemption did not apply (the "Third Appeal Decision"). (Exhibit K).

84. With regard to the significant nexus issue, the Third Appeal Decision was based on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal. In basing its decision on this new document, the District acted in violation of the Corps' Regulations limiting the scope of the remand from the Division Engineer to reviewing the administrative record and further analyzing and evaluating specific issues. 33 C.F.R. § 331.10(b). *See* **Exh. K**.

85. Gallagher & Henry never had the opportunity in any proceeding to review, comment, or otherwise address the new information in the "Warmke Site Wetlands Functions and Benefits to Downstream Waters" document or its attachments.

86. On September 25, 2013, Gallagher & Henry sent a letter to the Chicago District confirming its understanding that the Third Appeal Decision is the Corps' final action on the issues.

87. On October 24, 2013, the Corps responded with a letter confirming the fact that the Third Appeal Decision was the "final Corps decision" in connection with Gallagher & Henry's request for a jurisdictional determination regarding the Warmke Property. **(Exh. L)**.

88. The Third Appeal Decision constitutes a final agency action within the meaning of 5 U.S.C. § 704.

89. The Third Appeal Decision is an agency action by which obligations of the Plaintiff have been determined or from which legal consequences flow.

90. The Third Appellate Decision is (i) unsupported by credible evidence in the record, (ii) arbitrary and capricious, and (iii) contrary to law.

DECLARATORY RELIEF ALLEGATIONS

91. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

92. The Corps acted unlawfully when it based the Third Appeal Decision on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal, thereby violating its own regulations.

93. The Corps acted unlawfully when it improperly determined pursuant to the Third Appeal Decision that the prior converted cropland exemption does not apply to Wetland A or Wetland B, thereby violating its own regulations.

94. An actual and substantial controversy exists between the Plaintiff and the Corps over the Corps' failure to comply with the CWA and its own regulations in determining that Plaintiff's Property contains a jurisdictional waterbody.

95. Plaintiff contends that its Property contains no jurisdictional waterbodies, whereas the Corps, through its Third Appeal Decision, contends that it does. The Corps has had nine years to develop information supporting its allegations of jurisdiction, there is an extensive and complete administrative record, and any further administrative proceedings before the Corps would be futile. Therefore, no further factual development is necessary to resolve the legal issues raised by this action.

96. The case is currently justiciable because the Corps has unlawfully asserted jurisdiction over Plaintiff's Property.

97. Plaintiff is therefore entitled to a declaratory judgement declaring that the Third Appeal decision is invalid and that the Corps does not have jurisdiction over the Property pursuant to the CWA.

INJUNCTIVE RELIEF ALLEGATIONS

98. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as thought fully set forth herein.

99. Plaintiff wishes to continue its business activities on the Property that the Corps' wrongfully claims to be subject to its CWA permitting authority.

100. Plaintiff is and will continue to be directly affected and injured by the Corps' unlawful assertion of CWA jurisdiction over its Property.

101. The Third Appeal Decision imposes significant injury on Plaintiff by preventing it from using its Property as it wishes without risk of enforcement proceeding, fines, and penalties. The Third Appeal decision also imposes on Plaintiff the illegal, burdensome, and expensive requirement that it obtain a Section 404 CWA permit in order to further conduct its lawful activities on the Property. As a result, Plaintiff's use of the Property has been, is being, and (unless the Court grants relief) will continue to be adversely affected. Hence, the Corps' unlawful exercise of jurisdiction causes Plaintiff irreparable injury.

102. The Plaintiff is currently and continuously injured by the Corps' unlawful exercise of jurisdiction because the existence of the Third Appeal Decision decreases the value of its Property and prevents the Plaintiff from exercising its lawful business pursuits.

103. Setting aside the Third Appeal Decision, which embodies the Corps' illegal assertion of jurisdiction over the Property, will redress Plaintiff's injury by allowing Plaintiff to use its Property without reference to the Corps' assertion of jurisdiction.

104. Plaintiff has no plain, speedy, and adequate remedy at law. Absent judicial intervention by injunctive relief, Plaintiff will continue to suffer irreparable injury.

COUNT 1

(Declaratory and Injunctive Relief - Final Jurisdictional Decision Based on Evidence Not in the Administrative Record On Appeal)

105. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

106. The Corps' Third Appeal Decision is subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

107. The Corps acted unlawfully when it based the Third Appeal Decision on a new eight page document prepared by the District in connection with the Third JD Appeal called, "Warmke Site Wetlands Functions and Benefits to Downstream Waters," citing and incorporating approximately 40 studies, reports and other data not contained in the administrative record on appeal.

108. Under the Corps' own regulations, the Corps may not use extra-record materials on appeal. *See* 33 C.F.R. § 331.10(b).

109. The Corps' Third Appeal Decision is a final agency action ripe for judicial review. *See* 5 U.S.C. § 704.

110. The Plaintiff has exhausted all administrative remedies. *See* 33 C.F.R. § 331.5(b)(3).

111. This action is timely. 28 U.S.C. § 2401(a).

COUNT 2

(Declaratory and Injunctive Relief - Failure to Properly Apply the Regulatory Exclusion for Prior Converted Cropland)

112. Plaintiff hereby realleges and incorporates by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

113. The Corps' Third Appeal Decision is subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

114. The Corps acted unlawfully when it improperly determined pursuant to the Third Appeal Decision that the prior converted cropland exemption does not apply to Wetland A or Wetland B, thereby violating its own regulations. *See* 33. C.F.R. § 228.3(a)(8).

115. The Corps' Third Appeal Decision is a final agency action ripe for judicial review. *See* 5 U.S.C. § 704.

116. The Plaintiff has exhausted all administrative remedies. *See* 33 C.F.R. § 331.5(b)(3).

117. This action is timely. 28 U.S.C. § 2401(a)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Gallagher & Henry requests that this Court:

1. Order a speedy hearing of this declaratory judgment action;

2. Declare unlawful the Corps' resort to extra-record evidence in determining that Wetland A and Wetland B have a significant nexus to the Little Calumet River;

3. Declare that Wetland A and Wetland B constitute prior converted cropland;

4. Declare unlawful and set aside the Corps' final jurisdictional determination as embodied in the Third Appeal Decision;

5. Enjoin the Corps from asserting jurisdiction over Wetlands A and B

6. Award Plaintiff Gallagher & Henry attorney's fees and costs of court; and

7. Grant such other and further relief as the Court deems just and necessary.

DATED: July 21, 2015.

Respectfully submitted,

By /s/David E. Zajicek
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2015, I electronically filed the foregoing COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by Certified Class Mail, Return Receipt Requested, postage prepaid, to the following non-CM/ECF participants:

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EXHIBIT A

Issue Paper regarding "normal circumstances" and use of Section F, Atypical Situations, of the 1987 Wetland Delineation Manual for jurisdictional determinations in the Everglades Agricultural Area

January 2009

PROBLEM STATEMENT:

The Jacksonville District has five pending applications for approved jurisdictional determinations (JDs) in the Everglades Agricultural Area (EAA) associated with proposed mining. The applicants have asserted that the normal circumstance is the current "pumped" condition and that Section F of the 1987 Wetland Delineation Manual does not apply.

BACKGROUND:

The Central and Southern Florida Project for Flood Control and Other Purposes (C&SF Project) of 1948 provided flood protection and water control for 1,027 square miles of developed and potentially productive agricultural land adjoining the southern shore of Lake Okeechobee. Called the Everglades Agricultural Area (EAA), this area covered approximately 700,000 acres and encompassed about 27% of the historic Everglades. The major crop of the EAA is sugar cane, but winter vegetables are also grown as well as sod. The area has been the location of substantial soil subsidence due to draining over time and the majority of the EAA is now at a lower elevation than the land around it and even the canals that run through it. Active pumping throughout the area keeps the land farmable by artificially lowering the water table elevation to between 18 and 36 inches below the surface.

There is some indication that Natural Resource Conservation Service (NRCS) has classified the farm fields in the EAA as prior converted cropland (PC) but there is no evidence of a certified PC designation. The NRCS policy is that determinations done prior to July 3, 1996 are subject to revision upon onsite determination since they may not have been "of sufficient quality to make a determination of ineligibility" as stated in the law. Since mining represents a change in land use the PC classification is no longer applicable to the sites as only the NRCS can classify an area as a PC, and according to their regulations at 7 CFR 12.30(C)(6) (enclosed), once a property changes from agricultural use to non-agricultural use, a PC designation is no longer applicable. Since the PC designation no longer has meaning independent of the NRCS regulations, the land becomes subject to regulation under Section 404 of the Clean

Water Act (CWA). This has been the Jacksonville District's practice since around 2000.

JDs have been completed in the EAA by the Jacksonville District for farm fields converted to other land uses. Examples include abandoned, fallow fields and agricultural lands with active operations converted to stormwater treatment areas and above-ground storage reservoir as indicated in the following examples:

Compartment A: In 2006 a JD was performed for approximately 16,000 acres of predominately farm lands in Compartment A of the EAA. The Jacksonville District asserted jurisdiction over 15,467.48 acres of agricultural lands, i.e., atypical wetlands, due to the positive indicators of wetland hydrology and hydric soils. The Jacksonville District applied Section F of the 1987 Manual and ignored the vegetation component which consisted primarily of sugarcane. It is not know whether the site was actively being drained at the time of the site visit but positive indicators of hydrology were present at all sampling points. Compartment A also includes 187.63 acres of natural wetlands which were not previously farmed.

Compartment B South: In 2007 the Jacksonville District asserted jurisdiction over 4,906 acres of wetlands that had been previously farmed. The area had been abandoned and wetland vegetation had recolonized throughout the entire parcel. A routine wetland determination resulted in positive indicators of wetland vegetation, wetland hydrology, and hydric soils at all sampling points.

Compartment B North: In 2007 the Jacksonville District asserted jurisdiction over 4,049 acres of active agricultural lands, i.e., atypical wetlands. The Jacksonville District applied Section F of the Manual and ignored the vegetation and hydrology parameters. The parcel contained hydric soils at all sampling points. Wetland hydrology was not present at the time of the site visit since the site was actively being managed for sod and sugarcane. A geotechnical investigative report performed by the applicant's consultant stated if the pumps were turned off the water table would be within 12 inches of the surface. The Jacksonville District asserted this (pumps turned off) was the normal circumstance for purposes of the JD.

Compartment C: In 2007, the Jacksonville District asserted jurisdiction over 317 acres of wetlands that had been previously

farmed and 3,544 acres of fallow agricultural lands or i.e., atypical wetlands. Agricultural operations were only recently abandoned in Compartment C such that the majority of the lands still contained a predominance of sugarcane vegetation with no active pumping. Positive indicators of wetland hydrology and hydric soil were observed throughout the jurisdictional areas.

In all of the above cases, the Jacksonville District applied Section F of the 1987 Manual and ignored the vegetation parameter which was predominately sugarcane in the case of Compartment A, and Compartment C and sugarcane and sod in the case of Compartment B North. With respect to hydrology, the normal circumstance was considered to be current landscape containing the canals and agricultural ditch network, but with the pumps turned off. For all sites where no pumping/draining was occurring, positive indicators of wetland hydrology were present. Positive indicators of hydrology were not observed for the site with active pumping; however, a geotech report confirmed that under the normal circumstance (no pumping) wetland hydrology would exist. The Jacksonville District considers the normal circumstance to be the land as modified by the agricultural activities (i.e. ditch network) but with no active pumping.

Discussion:

The pending applications are as follows: Lake Harbor Quarry - 7,629 acres, South Bay - 3,773 acres, Bergeron - 553 acres, Five Star - 1,070 acres, and Stewart - 5,400 (JD request only). The applicants have asserted the normal circumstance is the active agricultural operations (with pumping) and that Section F for atypical situations is not applicable and active agricultural is the normal condition. The applicants have based their assumptions on the fact that the EAA was partially converted to agriculture prior to passage of the CWA thus the activity is not recent, and since the conversion did not require a permit, it is their position that Section F is not applicable. Additionally, the applicants have stated that the agricultural activities will not cease once the mining commences since in some cases the mines will be connected to the agricultural ditch network. Taking this into account, the miners assert that a routine determination should be conducted. Under this approach, the sites would not be considered jurisdictional since wetland vegetation was historically removed and replaced with farm crops that are generally not considered to be hydrophytic species. An exception is cultivated rice (*Oryza spp.*) since some species of rice such

as *Oryza sativa* are classified as OBL. Additionally, wetland hydrology may or may not be present depending on whether the fields are being drained or flooded at the time of the site visit.

Although it is true that parts of the EAA were indeed being farmed prior to the authorization of the C&SF Project in 1948, the C&SF did not convert the EAA from wetland to nonwetland conditions. This is observed in parcels within the EAA that have been abandoned (Compartment B South) as well as parcels where the agricultural crop is still present but pumping has ceased (Compartment A and Compartment C). Furthermore, construction of similar flood control features (that were not part of a congressionally authorized project) today would require permit authorization under Section 404 of the CWA.

At the national level, the Corps is fairly consistent in applying Section F, Atypical Situations, when conducting a JD for CWA purposes on agricultural areas proposed for non-agricultural uses. This has been the practice since around 2000 when the Corps recognized the NRCS designation was only valid if the land remained in agricultural use. Continuous pumping to draw down the water table is not considered the "normal circumstance" for those PC areas that are changing from agricultural to non-agricultural uses. In the EAA, the water table can be manipulated by pumping so it can be kept at any depth, depending on purpose. Depending on the crop rotation, fields are pumped down for several consecutive years and then may be back-pumped for a season and flooded. The flooding allows rice to be grown, controls nematodes and slows the soil from oxidizing. However, if the pumps were to be turned off, the water table would be at or above the surface over most of the EAA.

It is important to note that EAA is in the United States Department of Agriculture (USDA) category of "Unique Farm Land" since it has the potential to produce high value crops such as sugarcane and vegetables. A USDA classification of "Prime Farm Land" is restricted to soils which have no limitations to produce crops in their native condition. In the EAA drainage and management inputs such as drawdown of the water table is required to produce agricultural crops. This artificial manipulation is not the normal circumstance.

In those areas where the water table (hydrology) is manipulated by pumping, it will not be possible to evaluate the normal

circumstance for hydrology by monitoring of the water table unless the pumping has ceased for a minimum of one year, provided said year has been determined to have normal precipitation as defined in Technical Standard for Water-Table Monitoring of Potential Wetland Sites by U.S. Army Corps of Engineers (ERDC TN-WRAP-05-2, June 2005). Additionally, all monitoring should be performed in accordance with the aforementioned Technical Standard.

SUMMARY:

Regardless of whether agriculture ceases on lands adjacent to the proposed mines, the land itself within the footprint of the mines will be permanently converted to non-wetland. The PC designation is not valid and the Jacksonville District is conducting JDs in accordance with Section F of the 1987 Manual since one or more of the parameters have been manipulated and removed. The Jacksonville District interprets the "normal circumstances" to be the non-pumped condition since the water table can be manipulated at will by mechanical pumping but the land is changing from agriculture to non-agriculture.

EXHIBIT B

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

CECW-CO

APR 30 2009

MEMORANDUM FOR SOUTH ATLANTIC DIVISION COMMANDER

SUBJECT: Jacksonville District's March 10, 2009, request that CECW-CO-R review and comment on the district's approach to "normal circumstances" and application of Section F of the 1987 Wetland Delineation Manual for jurisdictional determinations in the Everglades Agricultural Area

1. References:

a. 33 CFR 328.3(b), U.S. Army Corps of Engineers definition of wetlands

b. 7 CFR 12.30(C)(6), Natural Resource Conservation Service responsibilities regarding wetlands

c. U.S. Army Corps of Engineers 1987 Wetland Delineation Manual, Section F

d. Regulatory Guidance Letter 90-07, Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands

e. Memorandum to All Division and District Counsels, 10 April 1990, "Attempts to Evade 404 Jurisdiction by Pumping Water from Wetlands

2. The Jacksonville District (SAJ) has requested that CECW-CO-R review and comment on an issue paper that discusses the district's approach to "normal circumstances" and the application of Section F of the 1987 Wetland Delineation Manual for jurisdictional determinations in the Everglades Agricultural Area (EAA). The Jacksonville District is currently processing five requests for approved jurisdictional determinations (JDs) for proposed mining operations in the Everglades Agricultural Area (EAA), in Palm Beach County, Florida. The district has indicated that the parcels proposed for mining operations do not constitute prior converted croplands under Natural Resource Conservation Service (NRCS) regulations since mining represents a change in use and that once a property changes from an agricultural use to non-agricultural use, the PC designation is no longer applicable. Further, the district asserts that upon cessation of mechanized "pumping" the area would revert to jurisdictional wetlands, in accordance with Section F of the 1987 Wetland Delineation Manual that provides for Atypical Situations.

3. CECW-CO-R has reviewed SAJ's issue paper and agrees with SAJ's interpretation of the NRCS regulations and that the change in use provision applies. CECW-CO-R also supports the district's assertion that active "pumping" of the area does not represent new normal circumstances and that when the mechanized pumping ceases, the areas will reestablish as

CECW-CO
SUBJECT: Jacksonville District's March 10, 2009, request that CECW-CO-R review and comment on the district's approach to "normal circumstances" and application of Section F of the 1987 Wetland Delineation Manual for jurisdictional determinations in the Everglades Agricultural Area

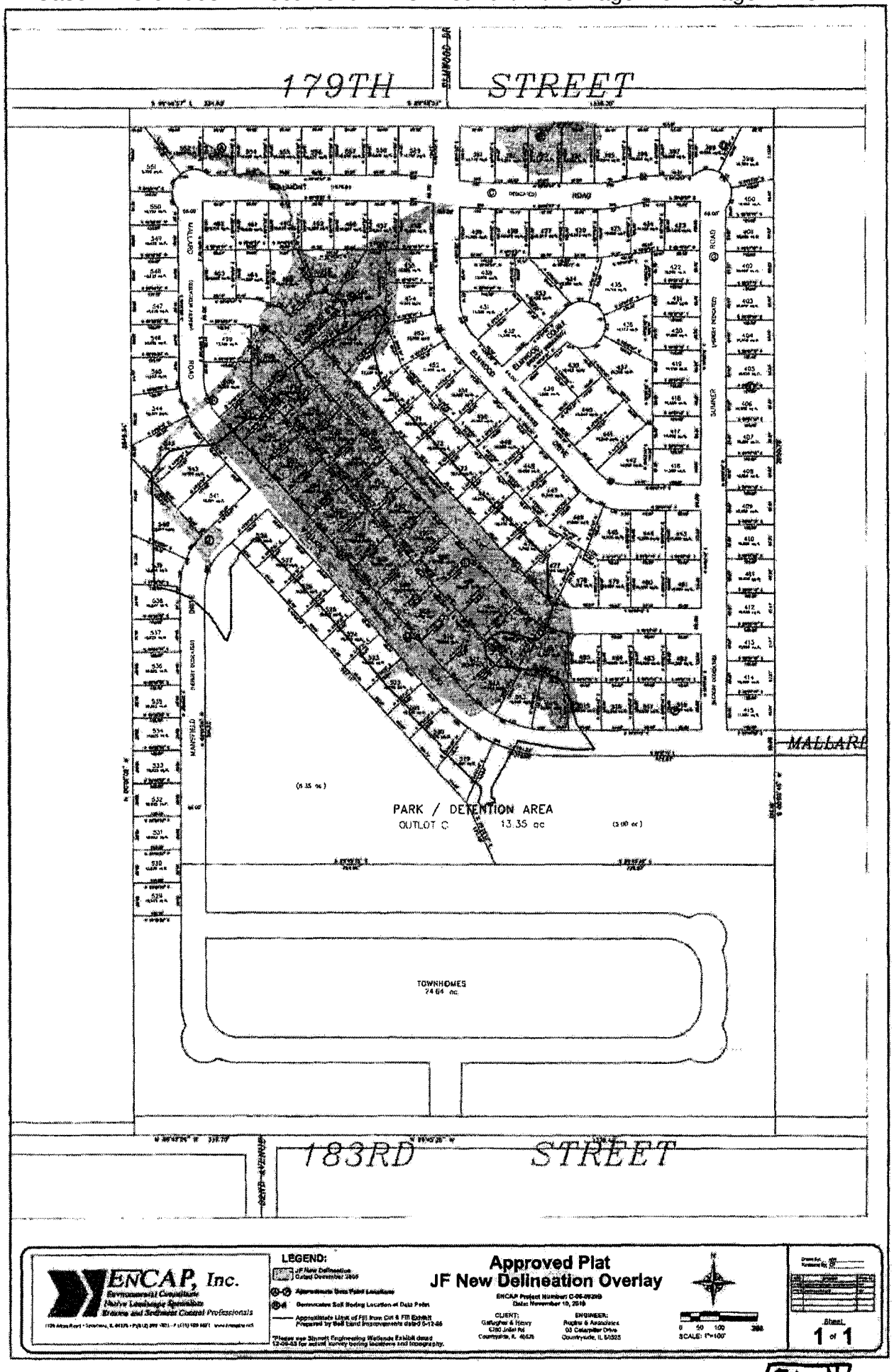
wetlands. Finally, CECW-CO-R supports the district's application of Section F of the 1987 Wetland Delineation Manual to account for the lack of hydrophytic vegetation and manipulated hydrology under the active farming operations and finds the district's position to be consistent with national policy.

FOR THE COMMANDER:

STEVEN L. STOCKTON, P.E.
Director of Civil Works

Enclosure

EXHIBIT C


179TH STREET
MALLARD
PARK / DETENTION AREA
OUTLOT C 13.35 ac
TOWNHOMES
24.64 ac.
183RD STREET
ENCAP, Inc.
Environmental Consultants
Native Landscape Specialists
Erosion and Sediment Control Professionals
LEGEND:
JF New Delineation Dated December 2005
Approximate Area Field Locations
Benmeadow Soil Boring Location or Data Point
Approximate Limit of Fill from Cut & Fill Exhibit Prepared by Bell Land Improvements dated 6-12-06
*Please see Stymest Engineering Wetlands Exhibit dated 12-06-05 for actual survey boring locations and topography.
Approved Plat
JF New Delineation Overlay
ENCAP Project Number: C-06-0020
Date: November 10, 2010
CLIENT:
Gallagher & Henry
6260 Joliet Rd
Countryside, IL 60525
ENGINEER:
Pagnia & Associates
93 Caterpillar Drive
Countryside, IL 60525
SCALE: 1"=100'
Sheet
1 of 1

EX N

EXHIBIT D

HINSHAW

& CULBERTSON LLP

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June 11, 2008

Paul M. Leffler
Project Manager
Chicago District USACE
111 N. Canal Street, 6th Floor
Chicago, IL 60606-7206

Re: Post Rapanos EPA Guidance Analysis in Support of Request for Determination of No Jurisdiction for Gallagher & Henry's Warmke Parcel, LRC-2006-14112

Dear Mr. Leffler:

On behalf of Gallagher & Henry ("G&H"), we are submitting this analysis supporting our request for a determination of No Jurisdiction and our conclusion, as well as the conclusion of ENCAP, Inc. that the land in question does not have any waters of the United States that are subject to federal jurisdiction under the Clean Water Act ("CWA").

I. Procedural History

The Corps originally asserted jurisdiction over the Warmke Parcel in its JD dated November 17, 2006, (LRC-2006-14112), which failed to take into consideration the jurisdictional standards set forth in *Rapanos*. Instead, the Corps based its jurisdiction on 33 C.F.R. Section 328.3(a)(5) and (7) (the presence of a "tributary" to a water of the U.S. and the presence of wetlands adjacent to the tributary). On January 12, 2007, G&H appealed the JD based on both the Scalia test and the Kennedy test set forth in *Rapanos*, namely (i) a lack of a continuous surface connection and (ii) lack of significant nexus. *See* G&H Original Appeal.

On October 31, 2007, Michael Montone, Administrative Appeal Review Officer for the Corps, remanded the JD back to the District "to undertake any necessary data collection and analysis and to re-evaluate and document its determination consistent with the *Rapanos* Guidance." *See* Montone Remand Letter. The remand mooted the original JD and stated that "any concerns" regarding jurisdiction should be raised in the course of the preparation of the revised JD. In essence, we are starting afresh. *Id.*

II. Introduction

This analysis concerns the remand of the jurisdictional determination ("JD") for the land known as the Warmke Parcel and designated by the U.S. Army Corps of Engineers ("Corps") as LRC-2006-14112. For the reasons stated below, the Corps should determine that it does not have jurisdiction over the parcel. This conclusion is reached by (a) re-examining the attached **JFNew Wetland Delineation Report dated January 6, 2006** which inadvertently failed to take into consideration the non-existence of hydric soils in the project area and the actual existence of several feet of impermeable clay of which JFNew was unaware of; and (b) by applying each of the *Rapanos* legal tests and the factors described by the Corps and the U.S. Environmental Protection Agency ("EPA") in the document, *CWA Guidance to Implement the U.S. Supreme Court Decision for the Rapanos and Carabell Cases* (June 5, 2007)("Guidance").

For the reasons stated below, the Corps should determine that it does not have jurisdiction over the alleged wetland area. As discussed below: (i) the alleged wetland lacks one of the three criteria for delineating a wetland, namely hydric soils; (ii) there is no continuous surface connection exists between the parcel and any traditional navigable water ("TNW"—here the Little Calumet River); (iii) the parcel has no significant nexus with any TNW; and (iv) the parcel is isolated and has no impact on interstate commerce. Therefore, the parcel does not fall within federal CWA jurisdiction.

III. Summary

(i) The **JFNew Report** relied solely on USDA – SCS soil surveys to determine that two of the five types of soils shown on the surveys were hydric soils, Bryce silty loam (235) and Peotone silty clay loam (330). Unknown to JFNew, however, but later discovered and pointed out in the attached **ENCAP, Inc. Report dated January 11, 2007 and September 18, 2006 (the ENCAP Reports),** an on-site investigation made by ENCAP and records researched by ENCAP show that the area was a "Prior Converted Farm Wetland" which did not meet wetland criteria regulated by the Corps, and which was excavated and filled in connection with a residential development resulting in the placement of several feet of impermeable clay fill in the project area in order to prepare it for single family lots. The native soils were striped and stockpiled and the clay was spread. This earth work raised the elevation of the area from an average of 715 feet to an average of 721 feet. As a result, the alleged wetland area consists of impermeable clay fill which does not allow rain water to infiltrate the ground. Accordingly, no infiltration or ground water recharge benefits are realized. Rather, accumulated water on top of the clay has allowed the hydrophytic vegetation and wetland hydrology to exist but, most importantly, the third criterion for delineation of a wetland does not exist, namely, hydric soils do not exist. **See January 11, 2007 ENCAP Report.** Therefore, the term "wetland" as applied to this area is a misnomer and although used in various reports supporting this request for a No Jurisdiction determination, the word "wetland" as related to the project area is used only as a matter of consistent reference and not as a matter of fact.

(ii) According to the attached **Robinson Engineering Ltd. Report dated January 15, 2007** and the **January 11, 2007 ENCAP Report**, there is no continuous surface connection between the parcel and the Little Calumet River (TWN); rather, the connection between the wetlands and the TNW consists of a six-mile long stormwater system comprised of six detention ponds (three of which are generally dry) and connected by approximately 6,000 feet of underground pipe.

(iii) The 100-acre project area is surrounded by residential area, has been farmed for decades, and is nearly 12 miles from the nearest TNW. These alleged wetlands are far different than those wetlands found to be jurisdictional by courts under the ruling in *Carabell v. U.S. Army Corps of Eng'rs, Rapanos v. United States*, 126 S.Ct. 2208 (2006) ("*Rapanos*"), where the wetlands were very close to, and may have had a significant ecological relationship with, the adjacent tributary. The **January 11, 2007 ENCAP Report**, addresses all of the "significant nexus" factors laid out in *Rapanos* and in the Guidance. Specifically, after examining the wetlands' functions and flow characteristics, hydrology, and ecology, ENCAP determined that the wetlands have no "measurable, appreciable or significant chemical, physical, or biological relationship" with the Little Calumet River. This conclusion was based on the alleged wetlands' low functional value, lack of infiltration or groundwater recharge benefits, hydrologic isolation, historic disturbance, and domination by weed species with "no conservation value," as well as other matters set forth in its full report.

(iv) The alleged wetlands are isolated and do not meet any of the criteria for asserting CWA jurisdiction under the Commerce Clause of the Constitution.

IV. Background and Site Description

The project area covers approximately 100 acres. The study area described in the **JFNew Report**, consists of approximately 61 acres of generally flat terrain that has been historically farmed. A 14-acre stormwater management system currently exists directly south of the study area. This system was built in 1996 to accommodate both a 25-acre townhome neighborhood to the south and the planned 61-acre single family neighborhood within the study area. Both neighborhoods, consisting of 168 townhomes and 169 single family lots along with two large stormwater detention ponds, were approved in 1995 by the Village of Tinley Park pursuant to an Annexation Agreement. These two detention ponds are part of a drainage system serving an approximate 600-acre area tributary to the Little Calumet River and consist of six retention/detention ponds (three wet and three dry) all connected by approximately 6,000 feet of underground pipe extending from Pond 1 and beneath and through the other five ponds, ultimately terminating at the headwater of Midlothian Creek (not a TNW[1]), which then flows

[1] Midlothian Creek is not a TNW as defined in Appendix D to the Guidance. The Creek is not currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce, nor is it subject to the "ebb and

approximately 11.3 miles into the Little Calumet River (a TNW). ***See also*** **Robinson Engineering Report**.

Currently, soil stockpiles and associated disturbed areas are also found within the study area. It appears that the recent development to the south, east, and west—combined with the associated onsite disturbance—has ruptured or otherwise clogged the area's agricultural drainage tiles.[2] In addition, the 1996 excavation and grading of the stormwater detention ponds also led to filling the current wetlands (then part of an active farm) with up to six feet of compacted clay. See attached **January 11, 2007 ENCAP Report and cut/fill drawing prepared by Bell Land Improvement dated 6/12/96**. These relatively recent, man-made conditions have reduced the historic drainage and allowed wetland characteristics to develop within an area that was never identified as wetland on any natural resource maps. The detention basin to the south of the study area is located within a historical depression that can be seen on both the Hydrologic Atlas and the U.S. Geologic Service Map in the Administrative Record. Consistent with the National Wetland Inventory, this detention basin corresponds with a Palustrine Emergent Farmed Wetland with a temporarily flooded water regime ("PEMAf"). The Natural Resources Conservation Service wetland inventory identified this area as prior converted non-wetland ("PC/NW").

Since the site has been planned for development for more than 10 years and is currently surrounded by residential neighborhoods, the tenant farmer has not repaired the recently disrupted tiles and drainage. The remainder of the site still consists of agricultural land used for the production of row crops.

V. Relevant Legal Standard in Determining Corps Jurisdiction

The Supreme Court's decision in *Rapanos* articulated two tests to determine whether waters and wetlands fall within federal jurisdiction—namely, the Scalia test and the Kennedy test.

Justice Scalia, writing for the plurality, stated that federal jurisdiction applies to "relatively permanent, standing or continuously flowing bodies of water," and to "wetlands with a continuous surface connection to" such relatively permanent waters. *Rapanos*, 126 S.Ct at 2225-27. Justice Scalia set forth a two-part test to establish federal jurisdiction for wetlands: "First, that the adjacent channel contains 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 'wetlands' begin." *Id.* at 2227.

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flow of the tide." Guidance, Appendix D, quoting 33 C.F.R. § 328.3(a)(1).

[2] While we prefer to resolve the wetland question through the JD process, we note in passing that the site's farmer has the right to fix the broken drains under the Illinois Drainage Law and U.S. Department of Agriculture regulations—which would, of course, remove the water which has allowed the wetland to grow over the last few years: "For Swampbuster, the scope and effect of the drainage system as it existed on December 23, 1985 may be maintained in most cases. This means that tile may be repaired and ditches may be cleaned as long as no added drainage capacity is achieved." 58 Fed. Reg. 45008, 45033 (Aug. 25, 1993).

The second *Rapanos* test was set out by Justice Kennedy in concurrence. It does not require such a permanent hydrologic connection but, rather, requires that a wetland possess a "significant nexus" to a traditional navigable water. Justice Kennedy explained that "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,'" the wetlands rightly come within federal jurisdiction. *Id.* at 2248. In contrast, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* Justice Kennedy also found that the Corps's definition of "adjacent" (forming the border of or in reasonable proximity to) was reasonable when applied to wetlands adjacent to TNWs.

The Seventh Circuit examined the split *Rapanos* decision and found Kennedy's significant nexus test to be the standard which "must govern." *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), *cert. denied*, 128 S.Ct. 45 (2007). *Gerke* concerned a civil enforcement case where the defendant was cited for discharging pollutants into navigable waters from a point source without having obtained a Section 404 permit from the Corps. In the original pre-*Rapanos* appeal, the Seventh Circuit concluded that "Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the [CWA]." *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005). In light of *Rapanos*, the Supreme Court remanded the case so that the tenuous connection could be reexamined, which led to the Seventh Circuit's September 2006 ruling remanding the case to the district court for fact-finding under the Kennedy significant nexus test.

To clarify *Rapanos*, the Guidance embodies the Scalia test and the Kennedy test—and allows the agencies to apply either. The Guidance also states that the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), should be incorporated into the current jurisdictional practices. Corps field staff was instructed "to not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.'" Guidance Q&A at 83. The Guidance provides discretion for Corps districts to assert federal jurisdiction over isolated waters based on other Commerce Clause factors, including use by foreign or interstate travelers for recreational or other purposes, or from which fish or shellfish can be taken for sale, or which could be used by industry in interstate commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s). As detailed below and in the **January 11, 2007 ENCAP Report and the Robinson Engineering Report**, the Warmke Parcel does not meet any of these tests for CWA jurisdiction.

Although the "significant nexus" test is the controlling test in the Seventh Circuit, we have analyzed potential jurisdiction under both the Scalia and the Kennedy tests, as well as under SWANCC, as provided in the Guidance.

VI. Discussion

A. The wetlands are not regulable under the Scalia test.

The Warmke Parcel wetlands will not meet the Scalia test. Justice Scalia formulated a two-part test to determine if a wetland is covered by the Clean Water Act. First, the adjacent channel must contain a water of the United States (i.e., a relatively permanent body of water connected to traditional interstate navigable waters. *Rapanos*, 126 S.Ct. at 2227. Second, the wetland must have a "*continuous surface connection* with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins. *Id.* (emphasis added). Here, the facts make the determination easy: the wetland at issue is not jurisdictional because the two elements of the Scalia test are not met.

The first element of the Scalia test fails. Neither of the adjacent channels (the stormwater detention pond and the agricultural drain) are waters of the United States. The stormwater system—six ponds (three of them dry) and 6,000 feet of underground sewer pipe—are collectively a point source, not a water in its own right. Justice Scalia recognized this concept when he noted that "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Id.* at 2222. He went on to quote the definition of a point source: "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, and rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the adjacent storm water detention pond and its sewer lines may also be described as a point source, not a water of the U.S.[3] Furthermore, the storm water system at issue contains at least three dry detention ponds—hardly the "relatively permanent" body of water Justice Scalia had in mind as a connection to navigable waters—and even these lack any above-ground connection except in the rare flood event. ***See* Robinson Engineering Report at Pg. 2.**

Moreover, the Warmke agricultural drain is subterranean—by definition, only ground water flows through it. Case law instructs us that "ground waters are not protected waters" under the CWA. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *see also, U.S. v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605, 612 (N.D.Tex. 2006)(post-*Rapanos*, only "relatively permanent, standing or continuously flowing bodies of water" can be jurisdictional—not groundwater—citing to *Rice*, *supra*, and *In re Needham*, 354 F.3d 340 (5th Cir. 2003)).

The Seventh Circuit has also decided not to regulate ground water under the CWA. Specifically, in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.

[3] Another name for the detention pond and sewer pipe is "MS4," or Municipal Separate Storm Sewer System—a type of point source. Even if the wetlands were to overflow into the MS4, it should be found non-jurisdictional for the same reasons stated by the Chicago District in the Rigsby Development Group JD, LRC-2007-393 (Aug. 1, 2007): "The subject on-site wetland drains into a City of Mokena storm sewer system with no known outlet to a TNW."

1994), the court held that discharges into ground water from a six-acre artificial detention pond are not regulated. The case is instructive for this appeal because of the similarities. There, a national retailer built a large distribution facility on a 110-acre site, including 25 acres of parking. A six-acre artificial pond was built to handle the rainwater runoff. Tracing legislative history, the court concluded that both Congress and EPA had opportunities to regulate ground water, but failed to do so. Here, development on the Warmke Parcel will also increase impermeability, necessitating storm water detention ponds. In most cases, rainfall will simply collect and then percolate into the soil or evaporate to the sky. Since G&H is similar to *Dayton Hudson*, we must reach a similar conclusion: "As the [CWA] and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters." *Id.* at 966. Ground water as well as water piped underground through a 6,000-foot man-made storm water retention/detention system to drain an approximate 600-acre area is outside of the scope of the CWA, and the Corps has no jurisdiction here.

Even ignoring its lack of jurisdiction over ground water discharges, the Corps will still fail to find jurisdiction over the sewer pipe or agricultural drain based on historic surface tributary theory. One General Accounting Office study documents examples of the Corps using underground drain tiles, storm drains, and pipes to establish a hydrological connection to establish jurisdiction over wetlands. U.S. GENERAL ACCOUNTING OFFICE, *Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf. The Chicago District of the Corps, for example, uses drain tiles to establish a jurisdictional connection between a wetland and a water of the United States, but only when evidence supports that it had replaced a historic tributary. GENERAL ACCOUNTING OFFICE at 24. Here, because no evidence in the Record supports the historic tributary theory, neither the sewer pipe nor the drain tiles can be used to establish jurisdiction.

The second element of the Scalia test must also fail. The wetland here has *no* surface connection—and definitely not a continuous one—to a water of the U.S. The water in the wetland has no visible drainage or flow. For any flow to happen, the water in the wetland would have to "rise 10 feet before overtopping the existing topography." *See* **ENCAP Report**. The **January 11, 2007 ENCAP Report** concludes that since "the site does not contain floodplain nor the limits of the flood of record, there is no proof that this is even possible." *Id.* This high berm separating the wetland from the storm water detention pond makes it easily apparent where the water ends and the wetland begins.

If anything, the Warmke Parcel wetlands are similar to other depressions that the Corps has determined to be non-jurisdictional. *See, e.g.,* Chicago District JD LRC-2007-570 (Dec. 18, 2007) (the wetland "does not exhibit a surface water connection to a navigable waterway. The wetland is a depressional feature. Therefore, the subject wetland is not regulated under the Clean Water Act"). *See also,* Chicago District JD LRC-2007-602 (Sept. 27, 2007) ("The wetland area within the project site is an isolated depression area that does not have a hydrological connection to a jurisdictional waters of the U.S. The dominant vegetation included Common Reed [and other weeds]"). Even if water flowed south in a volume great enough to overcome the natural absorption that takes place in the six ponds, the water would become, as discussed above, a

discharge from a point source, not a water of the U.S. Under *Rapanos*, as interpreted by the Seventh Circuit in *Gerke*, a mere hydrological connection is no longer sufficient to support CWA jurisdiction over wetlands. *Rapanos*, 126 S.Ct. at 2250-2251.

B. Nor are the wetlands regulable under the Kennedy test. A fact-specific analysis clearly shows there can be no federal jurisdiction under the Kennedy test because the Warmke Parcel wetlands have no significant nexus to the Little Calumet River.

1. *The wetlands are not adjacent to a relatively permanent non-navigable tributary.*

Under the Kennedy test, the first issue is whether the wetlands are adjacent to a relatively permanent non-navigable tributary, Midlothian Creek. Here, the Warmke Parcel wetlands are not. The Guidance explained that the agencies will consider a wetland adjacent to a relatively permanent tributary where it is "separated from [the tributary] by uplands, a berm, dike, or similar feature." Guidance at 7. Adjacency is not present here because, as noted above, nearly 6,000 feet separate the subject wetlands from Midlothian Creek—a distance much greater than the width of any berm or dike. *See* attached maps.[4]

2. *Even if the Parcel's wetlands were adjacent to a tributary—which they are not—no significant nexus exists between the wetlands and the downstream TNW, the Little Calumet River.*

Justice Kennedy has instructed that when assessing whether a wetland has a significant nexus to a TNW, EPA and the Corps must consider whether 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.'" *Rapanos*, 126 S.Ct. at 2248. The Corps, in its Approved Jurisdictional Determination Form, section III.C., has identified various factors to be taken into account in the analysis, including the capacity to carry pollutants or flood waters to TNWs or reduce the amount of pollutants or flood waters reaching a TNW; the ability to provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW; and the capacity to transfer nutrients and organic carbon.

The facts in this remand of the Warmke Parcel are even more compelling than in *Gerke*. As distinct from *Gerke*, where the water flowed through a tenuous surface system, including flow through a ditch, here no surface water flows from the wetlands. Under Supreme Court and Seventh Circuit law, such facts will not support CWA jurisdiction over wetlands within the Warmke Parcel.

[4] *See also* 33 C.F.R. § 328.3, 40 C.F.R. § 230.3 (defining "adjacent" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'").

Indeed, the facts here are wholly different from the facts in one of the few post-*Rapanos* court decisions to date that have interpreted the significant nexus test: *Northern Calif. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). In *Healdsburg*, the City discharged sewage into a pond (an old quarry pit filled with water from a surrounding aquifer) which was next to a river. The issue was whether the pond was subject to the CWA because it contained wetlands that were adjacent to a navigable river of the U.S.

To answer the jurisdiction question, the *Healdsburg* court first interpreted Justice Kennedy's concurrence and his significant nexus test as the "controlling rule of law." *Id.* at 999-1000. The Ninth Circuit then held that the pond and its wetlands possessed a significant nexus to water that was navigable based on a fact-specific analysis. For example, the court noted that the pond waters seeped underground into the navigable river; the river and surrounding area rested on top of a vast gravel bed extending as much as 60 feet into the earth; the bed was a porous medium saturated with water; beneath the surface, water soaked in and out of the pond via the aquifer 24 hours a day, seven days a week, 365 days a year. Moreover, there was an actual surface connection between the pond and the river where the river overflowed the levee between them. Thus, there were hydrological connections between the two; further, there were ecological connections, and the pond significantly affected the chemical integrity of the river by increasing its chloride levels.

The substantial facts establishing a nexus in *Healdsburg* are lacking here. **The evidence we submit with this remand demonstrates that no chemical, biological, or hydrological relationship exists between the Warmke wetlands and the Little Calumet River, the closest navigable water.** Having been drained and farmed until 10 years ago, the wetlands on the site are of low functional value. The **January 11, 2007 ENCAP Report** shows that the study area has almost no ecological function and is of low floristic quality. The dominant vegetation is Giant Reed Grass which is inefficient at trapping pollutants and absorbing toxics and has "no conservation value." Any small value of this emergent marshy area is lessened by the surrounding urban development and dissipated by the drains and the mile-plus of underground storm sewer pipe. These facts are wholly different from the facts in *Healdsburg* where the evidence showed that the discharge from the pond tripled the chloride levels of the Russian River, a mere 60 feet away.

Furthermore, our evidence indicates the wetland will not in any way *physically* affect the Creek. The 13-acre Warmke wetlands in question are dwarfed by the size of the drainage area which also is tributary to Midlothian Creek – approximately 600 acres. *See* **Robinson Engineering Report.** In a wet weather event, the tremendous amount of water flowing through the storm water system from nearly 600 acres (nearly one square mile of developed land, paved roads, and fertilized lawns) would dilute and negate any water quality benefits from the wetlands. Said another way, the wetlands in question would add no benefit whatsoever to the water quality of the Little Calumet River.[5] *Id.* No evidence indicates whether the wetlands trap

[5] The water quality of the Little Calumet River is currently described as "poor." Illinois Environmental Protection Agency, Bureau of Water, Surface Water Section.

pollutants, control floods, and store run-off—more factors singled out as important by Justice Kennedy. *Rapanos*, 126 S.Ct. at 2248, 2251. What is known is that no appreciable, meaningful, or significant sediment from the proposed development will make it into the wetland and further downstream to the headwaters of Midlothian Creek because the Village of Tinley Park enforces its Erosion and Sedimentation Control Ordinances by requiring silt fences and other safeguards during construction and revegetation after construction. Notably, the IEPA requires similar safeguards during construction in accordance with NPDES permit regulations. The storm water retention/detention system will capture and treat any sediment from the site as required by state and local law post-construction, as well, by the planting of vegetation designed to stabilize soil conditions and prevent post construction erosion and sedimentation from finding its way into the drainage system. Even in a worst-case scenario, a 100-year flood, there should be no effects downstream mainly because the storm water retention/detention system has been designed and constructed to hold such a flood. In any case, that level of run-off has not occurred in the Tinley Park area during the last 10 years – the latest flood being 1996. ***See* Robinson Engineering Report**.

Furthermore, the storm sewer system that the Corps determined connected the wetlands to a navigable water lacks any perceptible "ordinary high water mark" ("OHWM"). Under Corps regulations, "when wetlands are present, jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands." 33 C.F.R. Section 328.4(c)(2). The OHWM is defined as a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. Section 328.3(e). Here, no clear evidence of an OHWM links the wetlands to the Little Calumet River. Indeed, this man-made system is primarily concrete pipe. Thus, there are no "natural lines impressed on the bank" or the other characteristics mentioned in the OHWM definition. Even if an ordinary high water mark was present, that would not be dispositive of the significant nexus test. As Justice Kennedy concluded, "the breadth of this [OHWM] standard . . . precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Rapanos*, 126 S.Ct. at 2249.

Accordingly, these wetlands are exactly the kind of wetlands the Supreme Court said should not be regulated by the Corps under the CWA. Justice Kennedy specifically noted that the Corps's interpretation of the CWA went too far when it found jurisdiction over wetlands that "lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 2247. Because case law is clear that the wetland in question must be able to impact a TNW in order for there to be a nexus sufficient to confer jurisdiction, *see id.* at 2251 (requiring "substantial evidence" of such an impact), there can be no federal jurisdiction over the Warmke Parcel where any impact on the Little Calumet River is, at best, "speculative and insubstantial." *Id.* at 2248.

C. No jurisdiction exists under the SWANCC test as the Warmke Parcel does not affect interstate or foreign commerce.

Under the Commerce Clause test set forth in the Corps and EPA's post-*SWANCC* regulations, the Corps may assert jurisdiction (with the exception of migratory bird usage) over "waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce including such waters" used for foreign or interstate travelers for recreational or other purposes, from which fish or shellfish can be taken for sale, or which could be used by industry in interstate commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s). The Warmke Parcel does not come within federal jurisdiction under this test, either. As detailed in the **ENCAP Report**, the subject wetlands are extremely degraded and offer nothing in the way of recreation or other purposes for travelers. No evidence shows visitors flocking to the area to hunt waterfowl. Nor is there any evidence that the wetlands in their current state provide fish or shellfish that could be sold in interstate or foreign commerce. Additionally, the subject property is private land; the public has no right of access to even trigger Commerce Clause connections.

VII. Supporting Enclosures

The **ENCAP Reports** and the **Robinson Engineering Report**, as well as the Supporting Exhibits are all attached hereto and are incorporated herein by this reference.

VIII. Conclusion

In conclusion, the parcel discussed above is not a wetland – and even if it were, it does not meet any test for CWA jurisdiction including the tests set forth in the *Rapanos* decision and in the Rapanos Guidance.

We request the opportunity to meet with the Corps to further discuss our analysis.

Sincerely,

HINSHAW & CULBERTSON LLP

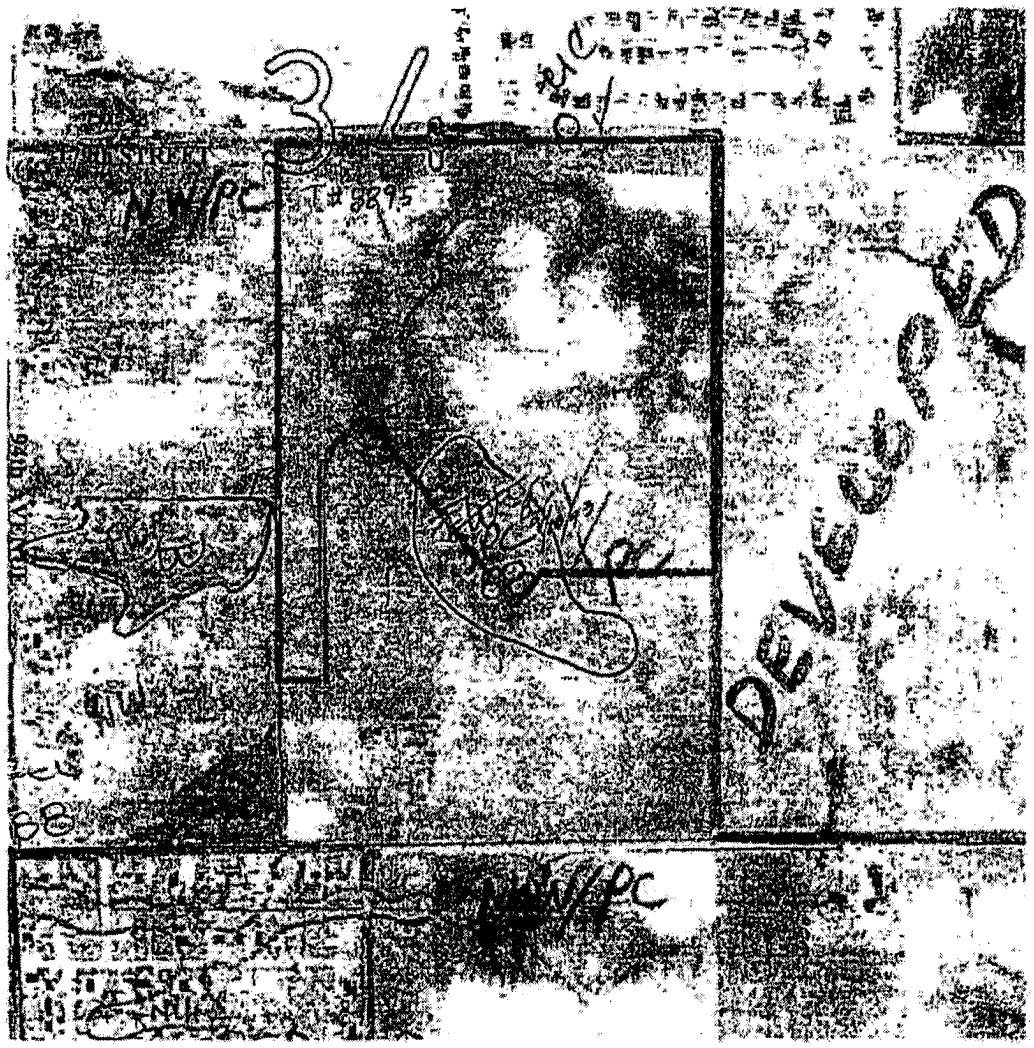
David E. Zajicek

David E. Zajicek

DEZ:rmz
Enclosures

EXHIBIT E

FIGURE 6, Farmed Wetland Determination



Source:
WIWS Cook County (IL) USDA-NRCS Office

Legend

Approximate Site Boundary

Figure 6: USDA-NRCS Uncertified Farmed Wetland Inventory Map

±60-Acres, Warmke Property
Gallagher and Henry
Section 34, Township 36N, Range 12E
Tinley Park, Cook County, Illinois

N

Scale 1" = 660'

JFNew
1378 Main Street, Crete, Illinois 60417
Phone 708-367-1130 / Fax 708-367-1132
www.jfnew.com

JFNew File #05-10-22

EXHIBIT F

DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO, ILLINOIS 60606-7206

REPLY TO
ATTENTION OF:

NOV 17 2006

Technical Services Division
Regulatory Branch
LRC-2006-14112

SUBJECT: Jurisdictional Determination For The 61 Acre Warmke Property Located South of 179th Street And West Of Pheasant Lake Drive In Tinley Park, Cook County, Illinois

Gallagher & Henry
Attn: Mr. Terry Woolums
6820 Joliet Road
Countryside, Illinois 60525

Dear Mr. Woolums:

This is in response to your request that the U.S. Army Corps of Engineers complete a jurisdictional determination for the above-referenced site submitted on your behalf by Encap, Inc and JFNew. The subject project has been assigned number LRC-2006-14112. Please reference this number in all future correspondence concerning this project.

Following a review of the information you submitted, this office has determined that the subject property contains "waters of the United States". The 13.12 acre wetland referenced as "Wetland A" in the wetland survey dated December 2005 (revised May 19, 2006), prepared by JFNew, drains northwest to Midlothian Creek which is a tributary to the Little Calumet River, a navigable water. "Wetland A" has a direct, hydrologic connection to Midlothian Creek via a stormsewer pipe. The connection is clearly displayed in the Tinley Park Storm Sewer Atlas. The 0.01 acre wetland, referenced as "Wetland B" is considered isolated and therefore not under the jurisdiction of this office. For a detailed description of our determination please refer to the enclosed decision document. This determination covers only your project as depicted in the Wetland Survey dated December 2005 (revised May 19, 2006), prepared by JFNew. This office concurs with the submitted wetland delineation and wetland boundaries at the subject site. This confirmation of is valid for a period of five years from the date of this letter unless new information warrants revision of the delineation prior to the expiration date.

This determination is valid for a period of five (5) years from the date of the letter, unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing

environmental conditions merit re-verification on a more frequent basis.

This letter is considered an approved jurisdictional determination for your subject site. If you object to this determination, you may appeal, according to 33 CFR Part 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and a Request for Appeal (RFA) form. If you request to appeal the above determination, you must submit a completed RFA form to the Great Lakes/Ohio River Division Office at the following address:

Mr. Mike Montone, Regulatory Review Officer
Great Lakes and Ohio River Division
CELRD-PDS-O
550 Main Street
Cincinnati, OH 45201-1159
Phone: 513-684-6212
Fax: 513 684-2460
E-mail: michael.g.montone@usace.army.mil

In order to be accepted, your RFA must be complete, meet the criteria for appeal and be received by the Division Office within sixty (60) days of the date of the NAP. If you concur with the determination in this letter, submittal of the RFA form to the Division office is not necessary.

This determination has been conducted to identify the limits of the Corps Clean Water Act jurisdiction for the particular site identified in this request. This determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

It is your responsibility to obtain any required state, county, or local approvals for impacts to wetland areas not under the Department of the Army jurisdiction. Pursuant to Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States, including wetlands. A Department of the Army permit is required for any proposed work involving the discharge of dredged or fill material within the jurisdiction of this office. To initiate the permit process, please submit a joint permit application form along with detailed plans of the proposed work. Information concerning our program, including the application form and an application

checklist, can be found at and downloaded from our website: http://www.lrc.usace.army.mil/co-r.

If you have any questions, please contact Mr. Paul Leffler of my staff by telephone at (312) 846-5529 or email at paul.m.leffler@usace.army.mi.

Sincerely,

Leesa A. Beal
Chief, East Section
Regulatory Branch

Enclosures

Copy Furnished w/out Enclosure:

Encap, Inc. (Mr. Peterson)

APPROVED JURISDICTIONAL DETERMINATION DECISION DOCUMENT
U.S. Army Corps of Engineers, Chicago District

APPLICANT: Gallagher & Henry **PROJECT LOCATION/WATERWAY:** 61 Acre Warmke Property Located South of 179th Street And West Of Pheasant Lake Drive In Tinley Park, Cook County, Illinois

FILE NUMBER: LRC-2006- 14112 **PROJECT REVIEW COMPLETED:** ☐ **Office** ☒ **Field**

Approved Jurisdictional Determination (JD) (For Sites regulated under 33 CFR 320-330). An approved JD is an appealable action. (33 CFR 331.2)

Based on available information:
- ☐ *There are no* waters on the project site.
- ☐ *There are* non-jurisdictional waters on the project site.
- ☐ *There are* waters of the United States on the project site.
- ☒ *There are* both waters of the United States and non-jurisdictional waters on the project site.

Basis of Jurisdictional Determination:

- ☐ There are no jurisdictional waters of the United States present on the project site.
- ☐ The presence of waters which are currently used, or were used in the past, or may be susceptible for use to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide (i.e., navigable waters of the U.S.) (33 CFR 328.3(a)(1))
- ☐ The presence of interstate waters (including interstate wetlands[1]). (33 CFR 328.3 (a)(2))
- ☒ The presence of a tributary to an interstate water or other water of the US. (33 CFR 328.3 (a)(5))
- ☒ The presence of wetlands adjacent[2] (bordering, contiguous, or neighboring) to interstate or other waters of the US, except for those wetlands adjacent to other wetlands. (33 CFR 328.3 (a)(7))
- ☐ The presence of an isolated water (e.g., intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds).
- ☐ Other:
- ☐ Section 10 waterway.

Information Reviewed

- ☐ U. S. Fish and Wildlife Service National Wetland Inventory: _____.
- ☐ U. S. Geological Survey Hydrologic Atlas: _____.
- ☐ USDA Natural Resources Conservation Service Soil Survey for Cook County.
- ☐ U. S. Geological Survey 7.5 Minute Topographic Maps: _____.
- ☐ U. S. Geological Survey 7.5 Minute Historic Quadrangles: _____.
- ☐ U. S. Geological Survey 15 Minute Historic Quadrangles: _____.
- ☐ Aerials (Name & Date):
- ☐ Advanced Identification Wetland Maps: _____.
- ☒ Site Visit Conducted on: November 9, 2006
- ☐ Other information:

Rationale for Basis (applies to any boxes checked above): The 13.12 acre wetland referenced as "Wetland A" in the wetland survey dated December 2005 (revised May 19, 2006), prepared by JFNew, drains northwest to Midlothian Creek which is a tributary to the Little Calumet River, a navigable water.

Lateral Extent of Jurisdiction (33 CFR 328 and 329):

Ordinary High Water Mark indicated by:

- ☐ clear, natural line impressed on the bank
- ☐ the presence of litter and debris
- ☐ changes in the character of soil
- ☒ wetland boundary
- ☐ destruction of terrestrial vegetation
- ☐ shelving
- ☐ other:

Basis for Declining Jurisdiction:

- ☐ Unable to confirm the presence of waters listed in 33 CFR 328.3(a)(1), 328.3(a)(2), or 328.3(a)(4) through 328.3(a)(7)
  - ☐ Area under consideration is likely to have been jurisdictional under pre-SWANCC Migratory Bird Rule criteria
  - ☐ Area under consideration is not likely have been jurisdictional under pre-SWANCC Migratory Bird Rule criteria
- ☐ Headquarters declined to approve jurisdiction on the basis of 328.3(a)(3) [attach copy of HQ rationale]

Confirmation of Wetland Boundaries

- ☒ This office concurs with your wetland delineation report dated December 2005 (revised May 19, 2006), prepared by JFNew.
- ☐ This office does not confirm your wetland boundary.

Recommended by: _____ **Date:** 11/15/2006

Approved by: _____ **Date:** 11/16/06

[1]Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology). Processes for determining wetlands on agricultural lands may vary from methods described in the Corps Wetland Delineation Manual (1987).

[2] Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.

EXHIBIT G

HINSHAW

& CULBERTSON LLP

David E. Zajicek
(630)505-4167
dzajicek@hinshawlaw.com

ATTORNEYS AT LAW
4343 Commerce Court
Suite 415
Lisle, IL 60532-1099

630-505-0010
630-505-0959 (fax)
www.hinshawlaw.com

June 11, 2008

Paul M. Leffler
Project Manager
Chicago District USACE
111 N. Canal Street, 6th Floor
Chicago, IL 60606-7206

Re: Post Rapanos EPA Guidance Analysis in Support of Request for Determination of No Jurisdiction for Gallagher & Henry's Warmke Parcel, LRC-2006-14112

Dear Mr. Leffler:

On behalf of Gallagher & Henry ("G&H"), we are submitting this analysis supporting our request for a determination of No Jurisdiction and our conclusion, as well as the conclusion of ENCAP, Inc. that the land in question does not have any waters of the United States that are subject to federal jurisdiction under the Clean Water Act ("CWA").

I. Procedural History

The Corps originally asserted jurisdiction over the Warmke Parcel in its JD dated November 17, 2006, (LRC-2006-14112), which failed to take into consideration the jurisdictional standards set forth in *Rapanos*. Instead, the Corps based its jurisdiction on 33 C.F.R. Section 328.3(a)(5) and (7) (the presence of a "tributary" to a water of the U.S. and the presence of wetlands adjacent to the tributary). On January 12, 2007, G&H appealed the JD based on both the Scalia test and the Kennedy test set forth in *Rapanos*, namely (i) a lack of a continuous surface connection and (ii) lack of significant nexus. *See* G&H Original Appeal.

On October 31, 2007, Michael Montone, Administrative Appeal Review Officer for the Corps, remanded the JD back to the District "to undertake any necessary data collection and analysis and to re-evaluate and document its determination consistent with the *Rapanos* Guidance." *See* Montone Remand Letter. The remand mooted the original JD and stated that "any concerns" regarding jurisdiction should be raised in the course of the preparation of the revised JD. In essence, we are starting afresh. *Id.*

II. Introduction

This analysis concerns the remand of the jurisdictional determination ("JD") for the land known as the Warmke Parcel and designated by the U.S. Army Corps of Engineers ("Corps") as LRC-2006-14112. For the reasons stated below, the Corps should determine that it does not have jurisdiction over the parcel. This conclusion is reached by (a) re-examining the attached **JFNew Wetland Delineation Report dated January 6, 2006** which inadvertently failed to take into consideration the non-existence of hydric soils in the project area and the actual existence of several feet of impermeable clay of which JFNew was unaware of; and (b) by applying each of the *Rapanos* legal tests and the factors described by the Corps and the U.S. Environmental Protection Agency ("EPA") in the document, *CWA Guidance to Implement the U.S. Supreme Court Decision for the Rapanos and Carabell Cases* (June 5, 2007)("Guidance").

For the reasons stated below, the Corps should determine that it does not have jurisdiction over the alleged wetland area. As discussed below: (i) the alleged wetland lacks one of the three criteria for delineating a wetland, namely hydric soils; (ii) there is no continuous surface connection exists between the parcel and any traditional navigable water ("TNW"—here the Little Calumet River); (iii) the parcel has no significant nexus with any TNW; and (iv) the parcel is isolated and has no impact on interstate commerce. Therefore, the parcel does not fall within federal CWA jurisdiction.

III. Summary

(i) The **JFNew Report** relied solely on USDA – SCS soil surveys to determine that two of the five types of soils shown on the surveys were hydric soils, Bryce silty loam (235) and Peotone silty clay loam (330). Unknown to JFNew, however, but later discovered and pointed out in the attached **ENCAP, Inc. Report dated January 11, 2007 and September 18, 2006 (the ENCAP Reports)**, an on-site investigation made by ENCAP and records researched by ENCAP show that the area was a "Prior Converted Farm Wetland" which did not meet wetland criteria regulated by the Corps, and which was excavated and filled in connection with a residential development resulting in the placement of several feet of impermeable clay fill in the project area in order to prepare it for single family lots. The native soils were striped and stockpiled and the clay was spread. This earth work raised the elevation of the area from an average of 715 feet to an average of 721 feet. As a result, the alleged wetland area consists of impermeable clay fill which does not allow rain water to infiltrate the ground. Accordingly, no infiltration or ground water recharge benefits are realized. Rather, accumulated water on top of the clay has allowed the hydrophytic vegetation and wetland hydrology to exist but, most importantly, the third criterion for delineation of a wetland does not exist, namely, hydric soils do not exist. **See January 11, 2007 ENCAP Report.** Therefore, the term "wetland" as applied to this area is a misnomer and although used in various reports supporting this request for a No Jurisdiction determination, the word "wetland" as related to the project area is used only as a matter of consistent reference and not as a matter of fact.

(ii) According to the attached **Robinson Engineering Ltd. Report dated January 15, 2007** and the **January 11, 2007 ENCAP Report**, there is no continuous surface connection between the parcel and the Little Calumet River (TWN); rather, the connection between the wetlands and the TNW consists of a six-mile long stormwater system comprised of six detention ponds (three of which are generally dry) and connected by approximately 6,000 feet of underground pipe.

(iii) The 100-acre project area is surrounded by residential area, has been farmed for decades, and is nearly 12 miles from the nearest TNW. These alleged wetlands are far different than those wetlands found to be jurisdictional by courts under the ruling in *Carabell v. U.S. Army Corps of Eng'rs, Rapanos v. United States*, 126 S.Ct. 2208 (2006) ("*Rapanos*"), where the wetlands were very close to, and may have had a significant ecological relationship with, the adjacent tributary. The **January 11, 2007 ENCAP Report**, addresses all of the "significant nexus" factors laid out in *Rapanos* and in the Guidance. Specifically, after examining the wetlands' functions and flow characteristics, hydrology, and ecology, ENCAP determined that the wetlands have no "measurable, appreciable or significant chemical, physical, or biological relationship" with the Little Calumet River. This conclusion was based on the alleged wetlands' low functional value, lack of infiltration or groundwater recharge benefits, hydrologic isolation, historic disturbance, and domination by weed species with "no conservation value," as well as other matters set forth in its full report.

(iv) The alleged wetlands are isolated and do not meet any of the criteria for asserting CWA jurisdiction under the Commerce Clause of the Constitution.

IV. Background and Site Description

The project area covers approximately 100 acres. The study area described in the **JFNew Report**, consists of approximately 61 acres of generally flat terrain that has been historically farmed. A 14-acre stormwater management system currently exists directly south of the study area. This system was built in 1996 to accommodate both a 25-acre townhome neighborhood to the south and the planned 61-acre single family neighborhood within the study area. Both neighborhoods, consisting of 168 townhomes and 169 single family lots along with two large stormwater detention ponds, were approved in 1995 by the Village of Tinley Park pursuant to an Annexation Agreement. These two detention ponds are part of a drainage system serving an approximate 600-acre area tributary to the Little Calumet River and consist of six retention/detention ponds (three wet and three dry) all connected by approximately 6,000 feet of underground pipe extending from Pond 1 and beneath and through the other five ponds, ultimately terminating at the headwater of Midlothian Creek (not a TNW[1]), which then flows

[1] Midlothian Creek is not a TNW as defined in Appendix D to the Guidance. The Creek is not currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce, nor is it subject to the "ebb and

approximately 11.3 miles into the Little Calumet River (a TNW). ***See also*** **Robinson Engineering Report.**

Currently, soil stockpiles and associated disturbed areas are also found within the study area. It appears that the recent development to the south, east, and west—combined with the associated onsite disturbance—has ruptured or otherwise clogged the area's agricultural drainage tiles.[2] In addition, the 1996 excavation and grading of the stormwater detention ponds also led to filling the current wetlands (then part of an active farm) with up to six feet of compacted clay. See attached **January 11, 2007 ENCAP Report and cut/fill drawing prepared by Bell Land Improvement dated 6/12/96.** These relatively recent, man-made conditions have reduced the historic drainage and allowed wetland characteristics to develop within an area that was never identified as wetland on any natural resource maps. The detention basin to the south of the study area is located within a historical depression that can be seen on both the Hydrologic Atlas and the U.S. Geologic Service Map in the Administrative Record. Consistent with the National Wetland Inventory, this detention basin corresponds with a Palustrine Emergent Farmed Wetland with a temporarily flooded water regime ("PEMAf"). The Natural Resources Conservation Service wetland inventory identified this area as prior converted non-wetland ("PC/NW").

Since the site has been planned for development for more than 10 years and is currently surrounded by residential neighborhoods, the tenant farmer has not repaired the recently disrupted tiles and drainage. The remainder of the site still consists of agricultural land used for the production of row crops.

V. Relevant Legal Standard in Determining Corps Jurisdiction

The Supreme Court's decision in *Rapanos* articulated two tests to determine whether waters and wetlands fall within federal jurisdiction—namely, the Scalia test and the Kennedy test.

Justice Scalia, writing for the plurality, stated that federal jurisdiction applies to "relatively permanent, standing or continuously flowing bodies of water," and to "wetlands with a continuous surface connection to" such relatively permanent waters. *Rapanos,* 126 S.Ct at 2225-27. Justice Scalia set forth a two-part test to establish federal jurisdiction for wetlands: "First, that the adjacent channel contains 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 'wetlands' begin." *Id.* at 2227.

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flow of the tide." Guidance, Appendix D, quoting 33 C.F.R. § 328.3(a)(1).

[2] While we prefer to resolve the wetland question through the JD process, we note in passing that the site's farmer has the right to fix the broken drains under the Illinois Drainage Law and U.S. Department of Agriculture regulations—which would, of course, remove the water which has allowed the wetland to grow over the last few years: "For Swampbuster, the scope and effect of the drainage system as it existed on December 23, 1985 may be maintained in most cases. This means that tile may be repaired and ditches may be cleaned as long as no added drainage capacity is achieved." 58 Fed. Reg. 45008, 45033 (Aug. 25, 1993).

The second *Rapanos* test was set out by Justice Kennedy in concurrence. It does not require such a permanent hydrologic connection but, rather, requires that a wetland possess a "significant nexus" to a traditional navigable water. Justice Kennedy explained that "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,'" the wetlands rightly come within federal jurisdiction. *Id.* at 2248. In contrast, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* Justice Kennedy also found that the Corps's definition of "adjacent" (forming the border of or in reasonable proximity to) was reasonable when applied to wetlands adjacent to TNWs.

The Seventh Circuit examined the split *Rapanos* decision and found Kennedy's significant nexus test to be the standard which "must govern." *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), *cert. denied*, 128 S.Ct. 45 (2007). *Gerke* concerned a civil enforcement case where the defendant was cited for discharging pollutants into navigable waters from a point source without having obtained a Section 404 permit from the Corps. In the original pre-*Rapanos* appeal, the Seventh Circuit concluded that "Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the [CWA]." *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005). In light of *Rapanos*, the Supreme Court remanded the case so that the tenuous connection could be reexamined, which led to the Seventh Circuit's September 2006 ruling remanding the case to the district court for fact-finding under the Kennedy significant nexus test.

To clarify *Rapanos*, the Guidance embodies the Scalia test and the Kennedy test—and allows the agencies to apply either. The Guidance also states that the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), should be incorporated into the current jurisdictional practices. Corps field staff was instructed "to not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.'" Guidance Q&A at 83. The Guidance provides discretion for Corps districts to assert federal jurisdiction over isolated waters based on other Commerce Clause factors, including use by foreign or interstate travelers for recreational or other purposes, or from which fish or shellfish can be taken for sale, or which could be used by industry in interstate commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s). As detailed below and in the **January 11, 2007 ENCAP Report and the Robinson Engineering Report,** the Warmke Parcel does not meet any of these tests for CWA jurisdiction.

Although the "significant nexus" test is the controlling test in the Seventh Circuit, we have analyzed potential jurisdiction under both the Scalia and the Kennedy tests, as well as under SWANCC, as provided in the Guidance.

VI. Discussion

A. The wetlands are not regulable under the Scalia test.

The Warmke Parcel wetlands will not meet the Scalia test. Justice Scalia formulated a two-part test to determine if a wetland is covered by the Clean Water Act. First, the adjacent channel must contain a water of the United States (i.e., a relatively permanent body of water connected to traditional interstate navigable waters. *Rapanos*, 126 S.Ct. at 2227. Second, the wetland must have a "*continuous surface connection* with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins. *Id.* (emphasis added). Here, the facts make the determination easy: the wetland at issue is not jurisdictional because the two elements of the Scalia test are not met.

The first element of the Scalia test fails. Neither of the adjacent channels (the stormwater detention pond and the agricultural drain) are waters of the United States. The stormwater system—six ponds (three of them dry) and 6,000 feet of underground sewer pipe—are collectively a point source, not a water in its own right. Justice Scalia recognized this concept when he noted that "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Id.* at 2222. He went on to quote the definition of a point source: "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, and rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the adjacent storm water detention pond and its sewer lines may also be described as a point source, not a water of the U.S.[3] Furthermore, the storm water system at issue contains at least three dry detention ponds—hardly the "relatively permanent" body of water Justice Scalia had in mind as a connection to navigable waters—and even these lack any above-ground connection except in the rare flood event. ***See* Robinson Engineering Report at Pg. 2.**

Moreover, the Warmke agricultural drain is subterranean—by definition, only ground water flows through it. Case law instructs us that "ground waters are not protected waters" under the CWA. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *see also, U.S. v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605, 612 (N.D.Tex. 2006)(post-*Rapanos*, only "relatively permanent, standing or continuously flowing bodies of water" can be jurisdictional—not groundwater—citing to *Rice*, *supra*, and *In re Needham*, 354 F.3d 340 (5th Cir. 2003)).

The Seventh Circuit has also decided not to regulate ground water under the CWA. Specifically, in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.

[3] Another name for the detention pond and sewer pipe is "MS4," or Municipal Separate Storm Sewer System—a type of point source. Even if the wetlands were to overflow into the MS4, it should be found non-jurisdictional for the same reasons stated by the Chicago District in the Rigsby Development Group JD, LRC-2007-393 (Aug. 1, 2007): "The subject on-site wetland drains into a City of Mokena storm sewer system with no known outlet to a TNW."

1994), the court held that discharges into ground water from a six-acre artificial detention pond are not regulated. The case is instructive for this appeal because of the similarities. There, a national retailer built a large distribution facility on a 110-acre site, including 25 acres of parking. A six-acre artificial pond was built to handle the rainwater runoff. Tracing legislative history, the court concluded that both Congress and EPA had opportunities to regulate ground water, but failed to do so. Here, development on the Warmke Parcel will also increase impermeability, necessitating storm water detention ponds. In most cases, rainfall will simply collect and then percolate into the soil or evaporate to the sky. Since G&H is similar to *Dayton Hudson*, we must reach a similar conclusion: "As the [CWA] and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters." *Id.* at 966. Ground water as well as water piped underground through a 6,000-foot man-made storm water retention/detention system to drain an approximate 600-acre area is outside of the scope of the CWA, and the Corps has no jurisdiction here.

Even ignoring its lack of jurisdiction over ground water discharges, the Corps will still fail to find jurisdiction over the sewer pipe or agricultural drain based on historic surface tributary theory. One General Accounting Office study documents examples of the Corps using underground drain tiles, storm drains, and pipes to establish a hydrological connection to establish jurisdiction over wetlands. U.S. GENERAL ACCOUNTING OFFICE, *Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf. The Chicago District of the Corps, for example, uses drain tiles to establish a jurisdictional connection between a wetland and a water of the United States, but only when evidence supports that it had replaced a historic tributary. GENERAL ACCOUNTING OFFICE at 24. Here, because no evidence in the Record supports the historic tributary theory, neither the sewer pipe nor the drain tiles can be used to establish jurisdiction.

The second element of the Scalia test must also fail. The wetland here has *no* surface connection—and definitely not a continuous one—to a water of the U.S. The water in the wetland has no visible drainage or flow. For any flow to happen, the water in the wetland would have to "rise 10 feet before overtopping the existing topography." *See* **ENCAP Report**. The **January 11, 2007 ENCAP Report** concludes that since "the site does not contain floodplain nor the limits of the flood of record, there is no proof that this is even possible." *Id.* This high berm separating the wetland from the storm water detention pond makes it easily apparent where the water ends and the wetland begins.

If anything, the Warmke Parcel wetlands are similar to other depressions that the Corps has determined to be non-jurisdictional. *See, e.g.*, Chicago District JD LRC-2007-570 (Dec. 18, 2007) (the wetland "does not exhibit a surface water connection to a navigable waterway. The wetland is a depressional feature. Therefore, the subject wetland is not regulated under the Clean Water Act"). *See also,* Chicago District JD LRC-2007-602 (Sept. 27, 2007) ("The wetland area within the project site is an isolated depression area that does not have a hydrological connection to a jurisdictional waters of the U.S. The dominant vegetation included Common Reed [and other weeds]"). Even if water flowed south in a volume great enough to overcome the natural absorption that takes place in the six ponds, the water would become, as discussed above, a

discharge from a point source, not a water of the U.S. Under *Rapanos*, as interpreted by the Seventh Circuit in *Gerke*, a mere hydrological connection is no longer sufficient to support CWA jurisdiction over wetlands. *Rapanos*, 126 S.Ct. at 2250-2251.

B. Nor are the wetlands regulable under the Kennedy test. A fact-specific analysis clearly shows there can be no federal jurisdiction under the Kennedy test because the Warmke Parcel wetlands have no significant nexus to the Little Calumet River.

1. The wetlands are not adjacent to a relatively permanent non-navigable tributary.

Under the Kennedy test, the first issue is whether the wetlands are adjacent to a relatively permanent non-navigable tributary, Midlothian Creek. Here, the Warmke Parcel wetlands are not. The Guidance explained that the agencies will consider a wetland adjacent to a relatively permanent tributary where it is "separated from [the tributary] by uplands, a berm, dike, or similar feature." Guidance at 7. Adjacency is not present here because, as noted above, nearly 6,000 feet separate the subject wetlands from Midlothian Creek—a distance much greater than the width of any berm or dike. *See* attached maps.[4]

2. Even if the Parcel's wetlands were adjacent to a tributary—which they are not—no significant nexus exists between the wetlands and the downstream TNW, the Little Calumet River.

Justice Kennedy has instructed that when assessing whether a wetland has a significant nexus to a TNW, EPA and the Corps must consider whether 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.'" *Rapanos*, 126 S.Ct. at 2248. The Corps, in its Approved Jurisdictional Determination Form, section III.C., has identified various factors to be taken into account in the analysis, including the capacity to carry pollutants or flood waters to TNWs or reduce the amount of pollutants or flood waters reaching a TNW; the ability to provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW; and the capacity to transfer nutrients and organic carbon.

The facts in this remand of the Warmke Parcel are even more compelling than in *Gerke*. As distinct from *Gerke*, where the water flowed through a tenuous surface system, including flow through a ditch, here no surface water flows from the wetlands. Under Supreme Court and Seventh Circuit law, such facts will not support CWA jurisdiction over wetlands within the Warmke Parcel.

[4] *See also* 33 C.F.R. § 328.3, 40 C.F.R. § 230.3 (defining "adjacent" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'").

Indeed, the facts here are wholly different from the facts in one of the few post-*Rapanos* court decisions to date that have interpreted the significant nexus test: *Northern Calif. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). In *Healdsburg*, the City discharged sewage into a pond (an old quarry pit filled with water from a surrounding aquifer) which was next to a river. The issue was whether the pond was subject to the CWA because it contained wetlands that were adjacent to a navigable river of the U.S.

To answer the jurisdiction question, the *Healdsburg* court first interpreted Justice Kennedy's concurrence and his significant nexus test as the "controlling rule of law." *Id.* at 999-1000. The Ninth Circuit then held that the pond and its wetlands possessed a significant nexus to water that was navigable based on a fact-specific analysis. For example, the court noted that the pond waters seeped underground into the navigable river; the river and surrounding area rested on top of a vast gravel bed extending as much as 60 feet into the earth; the bed was a porous medium saturated with water; beneath the surface, water soaked in and out of the pond via the aquifer 24 hours a day, seven days a week, 365 days a year. Moreover, there was an actual surface connection between the pond and the river where the river overflowed the levee between them. Thus, there were hydrological connections between the two; further, there were ecological connections, and the pond significantly affected the chemical integrity of the river by increasing its chloride levels.

The substantial facts establishing a nexus in *Healdsburg* are lacking here. **The evidence we submit with this remand demonstrates that no chemical, biological, or hydrological relationship exists between the Warmke wetlands and the Little Calumet River, the closest navigable water.** Having been drained and farmed until 10 years ago, the wetlands on the site are of low functional value. The **January 11, 2007 ENCAP Report** shows that the study area has almost no ecological function and is of low floristic quality. The dominant vegetation is Giant Reed Grass which is inefficient at trapping pollutants and absorbing toxics and has "no conservation value." Any small value of this emergent marshy area is lessened by the surrounding urban development and dissipated by the drains and the mile-plus of underground storm sewer pipe. These facts are wholly different from the facts in *Healdsburg* where the evidence showed that the discharge from the pond tripled the chloride levels of the Russian River, a mere 60 feet away.

Furthermore, our evidence indicates the wetland will not in any way *physically* affect the Creek. The 13-acre Warmke wetlands in question are dwarfed by the size of the drainage area which also is tributary to Midlothian Creek – approximately 600 acres. *See* **Robinson Engineering Report**. In a wet weather event, the tremendous amount of water flowing through the storm water system from nearly 600 acres (nearly one square mile of developed land, paved roads, and fertilized lawns) would dilute and negate any water quality benefits from the wetlands. Said another way, the wetlands in question would add no benefit whatsoever to the water quality of the Little Calumet River.[5] *Id.* No evidence indicates whether the wetlands trap

[5] The water quality of the Little Calumet River is currently described as "poor." Illinois Environmental Protection Agency, Bureau of Water, Surface Water Section.

pollutants, control floods, and store run-off—more factors singled out as important by Justice Kennedy. *Rapanos*, 126 S.Ct. at 2248, 2251. What is known is that no appreciable, meaningful, or significant sediment from the proposed development will make it into the wetland and further downstream to the headwaters of Midlothian Creek because the Village of Tinley Park enforces its Erosion and Sedimentation Control Ordinances by requiring silt fences and other safeguards during construction and revegetation after construction. Notably, the IEPA requires similar safeguards during construction in accordance with NPDES permit regulations. The storm water retention/detention system will capture and treat any sediment from the site as required by state and local law post-construction, as well, by the planting of vegetation designed to stabilize soil conditions and prevent post construction erosion and sedimentation from finding its way into the drainage system. Even in a worst-case scenario, a 100-year flood, there should be no effects downstream mainly because the storm water retention/detention system has been designed and constructed to hold such a flood. In any case, that level of run-off has not occurred in the Tinley Park area during the last 10 years – the latest flood being 1996. ***See* Robinson Engineering Report.**

Furthermore, the storm sewer system that the Corps determined connected the wetlands to a navigable water lacks any perceptible "ordinary high water mark" ("OHWM"). Under Corps regulations, "when wetlands are present, jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands." 33 C.F.R. Section 328.4(c)(2). The OHWM is defined as a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. Section 328.3(e). Here, no clear evidence of an OHWM links the wetlands to the Little Calumet River. Indeed, this man-made system is primarily concrete pipe. Thus, there are no "natural lines impressed on the bank" or the other characteristics mentioned in the OHWM definition. Even if an ordinary high water mark was present, that would not be dispositive of the significant nexus test. As Justice Kennedy concluded, "the breadth of this [OHWM] standard . . . precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Rapanos*, 126 S.Ct. at 2249.

Accordingly, these wetlands are exactly the kind of wetlands the Supreme Court said should not be regulated by the Corps under the CWA. Justice Kennedy specifically noted that the Corps's interpretation of the CWA went too far when it found jurisdiction over wetlands that "lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 2247. Because case law is clear that the wetland in question must be able to impact a TNW in order for there to be a nexus sufficient to confer jurisdiction, *see id.* at 2251 (requiring "substantial evidence" of such an impact), there can be no federal jurisdiction over the Warmke Parcel where any impact on the Little Calumet River is, at best, "speculative and insubstantial." *Id.* at 2248.

C. No jurisdiction exists under the SWANCC test as the Warmke Parcel does not affect interstate or foreign commerce.

Under the Commerce Clause test set forth in the Corps and EPA's post-*SWANCC* regulations, the Corps may assert jurisdiction (with the exception of migratory bird usage) over "waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce including such waters" used for foreign or interstate travelers for recreational or other purposes, from which fish or shellfish can be taken for sale, or which could be used by industry in interstate commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s). The Warmke Parcel does not come within federal jurisdiction under this test, either. As detailed in the **ENCAP Report,** the subject wetlands are extremely degraded and offer nothing in the way of recreation or other purposes for travelers. No evidence shows visitors flocking to the area to hunt waterfowl. Nor is there any evidence that the wetlands in their current state provide fish or shellfish that could be sold in interstate or foreign commerce. Additionally, the subject property is private land; the public has no right of access to even trigger Commerce Clause connections.

VII. Supporting Enclosures

The **ENCAP Reports** and the **Robinson Engineering Report,** as well as the Supporting Exhibits are all attached hereto and are incorporated herein by this reference.

VIII. Conclusion

In conclusion, the parcel discussed above is not a wetland – and even if it were, it does not meet any test for CWA jurisdiction including the tests set forth in the *Rapanos* decision and in the Rapanos Guidance.

We request the opportunity to meet with the Corps to further discuss our analysis.

Sincerely,

HINSHAW & CULBERTSON LLP

David E. Zajicek

David E. Zajicek

DEZ:rmz
Enclosures

EXHIBIT H

United States Department of Agriculture

NRCS

Natural Resources Conservation Service
1201 South Gougar Road
New Lenox, IL 60451
Phone: (815) 462-3105 x 3 Fax: (815) 462-3176 www.il.nrcs.usda.gov

07/10/2009

ENCAP Inc.
Mr. Carl Peterson
1709 Afton Road
Sycamore, Illinois 60178

Subject: Tract 8895
Orland Township Section 34

Dear Mr. Peterson:

This letter is a response to your question about the above mentioned tract. The NRCS wetland map indicates that the Farmed Wetland (FW) designation was crossed out and changed to Prior Converted (PC) on 6/93. The wetland maps for Will and South Cook County were reviewed by an NRCS wetlands team in 1995-1996 and concurred with the change made by the Field Office for this tract. In order for this area, which appears on the National Wetland Inventory (NWI,) to have been considered an FW by NRCS, it must have had wetland signatures 2 out of 5 years of normal precipitation required by NRCS. Since the requirements were not identified and met, it is considered PC.

If you have any further question please contact me.

Sincerely,

Robert Jankowski
District Conservationist

Helping People Help the Land

An Equal Opportunity Provider and Employer

EXHIBIT I

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DIVISION, GREAT LAKES AND OHIO RIVER
CORPS OF ENGINEERS
550 MAIN STREET
CINCINNATI, OH 45202-3222

May 9, 2013

Regulatory Division

Mr. Terry Woolums
Gallagher & Henry
6820 Joliet Road
Countryside, Illinois 60525

Dear Mr. Woolums:

I have completed my review of your Request for Appeal of an approved jurisdictional determination issued by the Chicago District (file number LRC-2006-14112) for property located near 179th Street and Pheasant Lake Drive, Tinley Park, Cook County, Illinois.

I find that your request for appeal has merit because the District failed to provide the requisite explanation for its significant nexus determination. The appeal decision document is enclosed. I have instructed the District to include sufficient documentation to support its decision and to reconsider its decision as appropriate. The District reconsideration should be completed within 60 days unless they request and receive an extension from me. In accordance with the appeal regulations, the final Corps decision on jurisdiction in this case will be the Chicago District Engineer's decision made pursuant to my remand.

A copy of this letter has been provided to Mr. David Zajicek of Hinshaw & Culbertson LLP and Ms. Leesa Beal, the Chicago District Chief of Regulatory.

This concludes the Corps administrative appeal process. Questions regarding the appeal decision should be directed to the Appeal Review Officer, Ms. Mary J. Hoffman, at (503) 808-3888.

Sincerely,

Suzanne Chubb

Suzanne Chubb
Regulatory Program Manager

Enclosure

ADMINISTRATIVE APPEAL DECISION

GALLAGHER & HENRY; FILE # LRC-2006-14112

CHICAGO DISTRICT

MAY 9, 2013

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: Gallagher & Henry

Permit Authority: Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: May 24, 2012

Site Visit/Appeal Meeting: September 12, 2012

Summary of Decision: The Appellant is challenging the Chicago District's approved jurisdictional determination which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over wetlands located near 179th Street and Pheasant Lake Drive, Tinley Park, Cook County, Illinois (hereafter called the Warmke parcel). The Request For Appeal (RFA) challenged the approved jurisdictional determination on the basis that the District incorrectly applied law, regulation or officially promulgated policy when identifying Federal CWA jurisdiction over wetlands on the subject property. The Appellant cited two reasons for the appeal as follows:

1. The Corps' interpretation and application of the "Abandonment" criteria for voiding the prior converted cropland exclusion from CWA jurisdiction is in error.

2. The Corps' finding that Wetland B has a significant nexus to the closest Traditional Navigable Water (the Little Calumet River) is in error and is not supported by substantial evidence.

For reasons detailed in this document, Reason 1 is found to have no merit while Reason 2 has merit. The District followed codified regulations and applied current agency guidance in applying the prior converted cropland and associated abandonment criteria. However, the District's basis for its significant nexus conclusion is insufficient because it fails to provide the requisite explanation of the basis for its significant nexus conclusion. As a result, the Appellant's second Reason for Appeal has merit.

Background Information: Three jurisdictional determinations and one other appeal decision have been completed by the Corps for the Appellant's Warmke parcel. The initial request for a jurisdictional determination was received by the Chicago District (District) on January 17, 2006. The District provided an approved jurisdictional determination (AJD) on November 17, 2006.

The AJD was appealed to the Great Lakes & Ohio River Division (LRD) on January 12, 2007. On October 31, 2007, LRD advised the District to reevaluate the AJD in light of the recent U.S. Supreme Court Decision in *Rapanos v. United States & Carabell v. United States* (dated June 5, 2007). The Appellant, Gallagher & Henry (G&H), retained appeal rights pending the outcome of the reevaluation.

A new AJD was provided to G&H on October 6, 2010, which was then appealed to LRD on January 21, 2011. LRD reached an appeal decision on June 21, 2011, concluding that the Appellant's reasons for appeal were without merit.

In a July 7, 2011, letter to LRD, the Appellant requested that the AJD and appeal decision be reconsidered given the court decision issued by the U.S. District Court for the Southern District of Florida in *New Hope Power Company v. United States Army Corps of Engineers*, 2010 WL 383499 (S.D. Fla. September 29, 2010). The District agreed to reconsider the AJD to determine the applicability of the *New Hope Power* decision on the Warmke parcel.

The District amended the administrative record and provided a new AJD for the Warmke parcel on March 26, 2012. LRD received a request for appeal of the March 26th decision on May 24, 2012. This is the subject of the current appeal action.

Information Received and Its Disposition During the Appeal:

The administrative record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. The District provided a copy of the AR to the RO and the Appellant on July 13, 2012. The AR is limited to information contained in the record by March 29, 2012.

2. A site visit and informal meeting was held on September 12, 2012. The site visit consisted of a tour of the site to inspect the general character of the area. The informal meeting consisted of clarification of the reasons for appeal provided by the Appellant, and clarification of rationale used in the JD and AR provided by the District.

Appeal Evaluation, Findings and Instructions to the Chicago District Engineer:

Appellant's First Reason for Appeal: The Corps' interpretation and application of the "Abandonment" criteria for voiding the Prior Converted (PC) cropland exclusion of CWA jurisdiction is in error.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The Appellant submits that the Corps may not void the PC cropland exclusion of the CWA jurisdiction over Wetland B because of the "change of use" from farming to development.

In the October 6, 2010, AJD, the District based its determination *in part* on a conclusion that the Appellant's use of the parcel had shifted to non-agricultural (residential) purposes. As outlined in the Background Section above, the October 2010 AJD was replaced by a new AJD dated March 21, 2012, in which the District considered the applicability of the *New Hope Power* decision on the Warmke parcel. Information provided by G&H indicated that farming ceased when the site was mass graded in the fall of 1996 for a residential development. G&H's work disabled the drain tile, which resulted in wetland conditions returning to the area and the area was not farmed again.[1] The District's March 2012 AJD, the subject of this appeal, concluded that the Warmke parcel met the agricultural "abandonment" criteria, wetland conditions had returned to the area, and the area is subject to CWA jurisdiction.

The abandonment criteria set forth in the preamble to 1993 rulemaking [2] states as follows:

> PC 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.

There is no evidence in the record that there has been any cropping, management of the drainage systems, or maintenance activities related to agricultural production on the area at issue. Accordingly, the area has been agriculturally abandoned and the PC cropland exception to the CWA does not apply here.

Next, G&H expressly encouraged the RO to apply the holding of *New Hope Power* to the AR of the District's jurisdictional determination with regard to a "change in use." The *New Hope Power* holding with regard to "change in use," however, does not apply here because the District's determination is based on the abandonment criteria referenced above. Nevertheless,

[1] Pg 5 of District's Record of Decision dated July 20, 2010 (revised March 21, 2012) referencing a *Report of Soils Exploration: Fill Pads, Warmke Property* dated September 9, 2008, Prepared for G&H by the Testing Service Corporation.
[2] 58 Fed. Reg. 168 at 45034 (August 25, 1993).

the court in *New Hope Power* concurs with the conclusion that abandonment is a proper method for prior converted croplands to return to Corps CWA jurisdiction under 58 Fed. Reg. 168. See New Hope, 746 F. Supp. 2d at 1276 ("The only method provided for prior converted croplands to return to the Corps' jurisdiction under this regulation is for the cropland to be 'abandoned,' where cropland production ceases and the land reverts to a wetland state.").

The District followed current promulgated guidance and applied Federal standards regarding the PC cropland abandonment criteria. The District's AR sufficiently documents its determination that wetlands on the subject property are wetlands subject to Federal jurisdiction under Section 404 of the Clean Water Act. As a result this reason for appeal does not have merit.

Appellant's Second Reason for Appeal: The Corps' finding that Wetland B has a significant nexus to the closest TNW (the Little Calumet River) is in error and is not supported by substantial evidence.

Finding: This reason for appeal has merit because the Corps failed to provide the requisite explanation of the basis for its significant nexus conclusion.

Action: The AJD is remanded to the District with instruction to follow procedures set forth in the 2008 *Rapanos* Guidance. [3]

Discussion: The Appellant argues that the Corps' finding of jurisdiction was not supported by substantial evidence under Justice Kennedy's "significant nexus" test in *Rapanos*.

The AR describes the flow path from the onsite wetlands to the nearest TNW, the Little Calumet River, at a distance of approximately 5-10 miles. The District found that the onsite wetlands drain from Wetland A on the northern portion of the site a short distance southwest to Wetland B. Wetland B then drains south via an eroded ditch to an open water detention pond. From the open water detention pond water drains east then north via storm sewer pipes to Midlothian Creek. The District states that from the site to Midlothian Creek water has been observed flowing uninterrupted, passing through three open water detention basins and bypassing three dry-bottom detention basins. At times of larger flood events water will enter the dry-bottom detention basins, but typically bypasses them.

Further, the District's AR describes a storm sewer pipe, which replaced a historic tributary to Midlothian Creek, as a clearly identifiable hydrologic connection to a Relatively Permanent Water (RPW), Midlothian Creek, which drains to the Little Calumet River, a TNW. The District recorded findings on two AJD forms included in the AR, both dated January 20, 2012. One AJD form compiles information regarding Wetland A (0.6 acre), and Wetland B (12 acres), which records the significant nexus determination (the "Wetland A&B AJD"). The second AJD form records findings that a third wetland (0.01 acre) located on the eastern side of a large spoil pile in the center of the parcel was determined isolated.

[3] Current CWA guidance may be referenced at:
http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx

The District concluded that the hydrologic connection between on-site wetlands A and B and the Little Calumet River demonstrates the ability of the tributary, Midlothian Creek, to carry pollutants, flood waters, nutrients and organic carbon to the TNW. It also concluded that the thirteen acres of wetland on the project site limit the amount of water being sent down stream; this storm 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.

According to the *Rapanos* Guidance, a case-by-case significant nexus analysis to determine whether waters and their adjacent wetlands are jurisdictional is required when wetlands are adjacent to but do not directly abut the relatively permanent, non-navigable tributary (Midlothian Creek). A significant nexus may be found where the tributary (Midlothian Creek), including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of the TNW (Little Calumet River).

The *Rapanos* Guidance specifically states in part:

> Corps districts and EPA regions shall document in the administrative record the available information whether a tributary and its adjacent wetlands have a significant nexus with the traditional navigable water, including the physical conditions of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. *The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have more than speculative or insubstantial effect on the chemical, physical, and biological integrity of the traditional navigable water.*

Rapanos Guidance, *supra*, n.1, at 11 (emphasis added).

The District's AR provides an evaluation and summary of the physical, chemical and biological characteristics of the Warmke parcel wetlands. (Wetland A&B AJD at 4.) The AR also provides a list of "all wetlands adjacent to the tributary." (Id. at 5-6.) This list includes 165 distinct wetlands adjacent to Midlothian Creek, and a summary of functions of "all adjacent wetlands." The summary states, "[t]hese wetlands decrease sedimentation, pollutants, and flood waters downstream while offering beneficial nutrients and habitat providing a *positive effect* to the downstream Midlothian Creek, a Relatively Permanent Water, and to the Little Calumet River, a [TNW]." (Id. at 7.) (emphasis added.) Further, the AJD states that "[t]he wetland alone and in combination with the wetlands in the area *significantly* affect the chemical, physical, and biological integrity of the Little Calumet River." (Id. at 8.)

The District, however, failed to explain the basis for these summary conclusions, and in so doing, failed to follow the procedures contained in the *Rapanos* Guidance. Although one may induce from the summary statements that the combined effect of the tributary and its adjacent wetlands is more than merely speculative or insubstantial, the Corps and EPA jointly drafted the *Rapanos* Guidance to avoid such inductive analysis. The District failed to provide the required explanation (i.e. failed to show its work justifying its summary conclusions) and must follow the

Rapanos Guidance procedures before it may retain jurisdiction over the subject wetlands. Accordingly, the jurisdictional determination is remanded to the District with the instruction to follow the *Rapanos* Guidance as discussed in this administrative appeal decision.

Conclusion: After reviewing and evaluating the RFA, the District's AR, and the recommendation of the RO, I have determined that the District's conclusions regarding the first reason for appeal were reasonable, supported by the AR, and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. Regarding the second reason for appeal, I have determined that the District's conclusion is supported by summary statements; however, the District failed to provide the requisite explanation of its basis for those summary conclusions. As a result, I am remanding this jurisdictional determination to the District to address the items as discussed under Reason for Appeal No. 2 above. The final Corps jurisdictional decision will be made by the Chicago District Engineer, or his designated representative, pursuant to my remand.

Suzanne Chubb

Suzanne Chubb
Regulatory Program Manager
Great Lakes & Ohio River Division

EXHIBIT J

Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955 5564
Holland & Knight LLP | www.hklaw.com

May 21, 2013

Ms. Lisa Beale
Chief
Regulatory Branch
U.S. Army Corps of Engineers
Chicago District
111 North Canal Street
Chicago , Ill. 60606-7206

Re: Gallagher & Henry Appeal Decision. File # LRC- 2006- 14112

Dear Ms. Beale:

Along with David Zajicek and Hinshaw & Culbertson, we represent Gallagher & Henry regarding the Administrative Appeal of the Chicago District's March 26, 2012 Jurisdictional Determination (JD) for the Warmke site in Tinley Park, Ill. We are in receipt of the Division's May 9, 2013 Administrative Appeal decision issued by Ms Suzanne Chubb, that the District's finding that Wetland B has a significant nexus to the closest TNW (Little Calumet River) was conclusory and not supported by the administrative record. Ms Chubb's decision referenced the September 12, 2012 site visit and appeal meeting held by Review Officer Ms. Mary J. Hoffman. (copy of Ms. Hoffman's notes of site visit and meeting are attached) . Ms. Chubb's Decision remanded the Jurisdictional Determination to the District with directions that the District provide an explanation of its significant nexus JD determination within 60 days unless the District requests and receives an extension of time from the Division office. As further explained below, our position is that there can be no basis for any extension and this matter must finally be brought to a conclusion within 60 days or less with a finding that Wetland B is not jurisdictional under the Clean Water Act.

First, this is the third administrative appeal that our client has taken over the past seven years (2007, 2011 and 2012). Over this long period, the District has been unable to provide ~~sufficient~~ technical to support CWA jurisdiction over the Wetland B at the Warmke parcel. Indeed, our May 24, 2012 JD appeal noted that the Corps March 26, 2012 JD did not provide any more technical support than found in the October 6, 2010 JD subject to the January 21, 2011 RFA. Despite three opportunities, the Corps has been unable to meet its burden of proof for asserting jurisdiction over the Warmke parcel under the *Rapanos* significant nexus test, the controlling test in the Seventh Circuit. *United States v. Gerke Excavating Inc.*, 464 F.3d. 723 (7tth Cir. 2006).

Second, under the Corps regulations, the District is bound by the administrative record in explaining its significant nexus finding on remand. 33 CFR 331.10 (b).The District may not supplement that record or create any new record on remand. As we have repeatedly argued, the

District's record does not provide any qualitative or quantitative evidence to support a comparative analysis between the wetlands at issue and the functions of the Little Calumet River, the closest TNW. Instead, the District has repeatedly relied on unsupported, conclusory statements. Indeed, the District official stated at the September 12, 2012 appeal conference that it would be "extremely burdensome" to develop site specific evidence regarding the comparative relationship between the functions and values of the wetlands at issue and the functions and values of the closest TNW (See our attached 10/4/11 memo to Appeal Officer Mary Hoffman clarifying Ms. Hoffman's notes of the appeal conference). The District's "rationale" for failing to meet its burden of proof is clear evidence that there is nothing in the record to support CWA jurisdiction under the significant nexus test. Indeed, the Appeal Decision recognizes that "extreme burden" is no excuse for failing to follow the required procedures ("although one may induce from the summary statements that the combined effect of the tributary and its adjacent wetlands is more than merely speculative or insubstantial, the Corps and EPA jointly drafted the *Rapanos* Guidance to avoid such inductive analysis. The District failed to provide the required explanation (i e. failed to show its work justifying its summary conclusions) and must follow the *Rapanos* guidance procedures before it may retain jurisdiction over the subject wetlands.") (Appeal Decision, p. 5).

Our client has devoted considerable time and expense over six years of appeals and delays in contesting the Corps JDs and yet the District has not been able to meet its burden of proof. The District cannot further "explain" the basis for its "summary conclusions" because the administrative record simply does not contain sufficient evidence to support assertion of Clean Water Act jurisdiction under the *Rapanos* guidance. We request that the District fairly reach that conclusion in 60 days or less with a determination of non jurisdiction under the Clean Water Act.

It is time to bring this process to an end.

Sincerely,

Lawrence R. Liebesman,
Partner
Holland & Knight LLP
Washington, D.C.

David E Zajicek
Partner
Hinshaw & Culbertson LLP
Lisle, Ill

cc: Mary Hoffman
Suzanne Chubb
Kyle Shaw, Esq.
Kim Sabo, Esq.

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GALLAGHER & HENRY (Warmke Parcel)
APPEAL SITE VISIT / MEETING - Notes

The goal of the site visit and informal meeting was to familiarize the Appeal Review Officer (RO) with the site; provide an opportunity to Appellant to summarize and clarify the reasons stated in their Request for Appeal (RFA); and provide an opportunity to the District to summarize/discuss rationale used in reaching its jurisdictional decision, and clarify information contained within the Administrative Record (AR).

File No:	LRC-2006-14112
Date of Site Visit/Mtg:	12 September 2012, Wednesday
Time:	09:00-12:30

Representing the Appellant: Mr. Terry Woolums, Gallagher & Henry Appellant; Mr. John Gallagher, Gallagher & Henry Appellant; Mr. David Zajicek, Hinshaw Law, legal consultant to Appellant; Mr. Larry Liebsman, Holland & Knight, legal consultant to Appellant; and Mr. Carl Peterson, EnCAP, wetlands & environmental consultant to Appellant

Representing the District: Mr. Paul Leffler, USACE, Chicago District, Regulatory Project Manager; and Mr. Kevin Jerbi, USACE, Chicago District, legal counsel to Chicago District

Representing the Division and facilitating the meeting:
Ms. Mary Hoffman, Administrative Appeal Review Officer (Northwestern Division)

I. Review of Site

Participants met at 09:00 at the Warmke parcel Parcel, west end of Mallard Road, south of 179th and north of 183rd streets, Tinley Park, IL. The Appellant and the District provided a brief overview of the property and flow pathways using engineered drawings of the site. Drainage from the subject wetlands flows southward via an open eroded ditch into an open water detention pond. An intake structure located at the eastern edge conveys drainage into the municipal storm sewer system. Following a walking tour of the parcel, we drove to the location of the storm sewer outfall pipe at Midlothian Creek. Midlothian Creek is a Reasonably Permanent Water (RPW) and tributary of the Little Calumet River, a Traditional Navigable Waterway (TNW).

II. Informal Meeting

Following the site review, participants convened at the Gallagher & Henry Office, 6280 Joliet Road, Countryside, IL, to discuss the Appellant's reasons for appeal, the District's overall approach used to reevaluate the on-site wetlands in reaching the jurisdictional determination, and clarify points in the Administrative Record (AR).

Points of discussion:

- The Appellant stated that they believe the Corps' interpretation and application of the 'abandonment' criteria for voiding the prior converted cropland (PCC) exclusion of the Clean Water Act (CWA) Jurisdiction is in error and is inconsistent with the 1993 regulations and 2005 joint guidance.
- The preamble of the 1993 regulations discusses abandonment and was intended to advise farmers of potential adverse consequences on ag benefits if land was not cropped for longer than a 5y period. The Appellant contends that it was not intended to address changes from agriculture/farming practices to property [commercial or residential] development.
- The District summarized the 1993 regs, indicating that the Corps recognized practices established by NRCS (aka, SCS) with ag producers regarding identification and regulation of wetlands under the FSA. As such the Corps consciously chose to accept certain NRCS FSA rules (e.g., wetland determinations, PCC certifications, and some terminologies such as 'abandonment'). In 1996

Congress removed the 'abandonment' provision from the FSA, which resulted in NRCS' change in practice to determine that if land was certified as PCC, there would be no provision to reverse that certification. As a result of this 1996 change, the Corps and NRCS 'parted ways' regarding PCC exemptions and recapture under CWA. The Corps continues to apply the 1993 promulgated rule regarding PCC, including the 'abandonment' criteria.

- The District summarized their reevaluation of PCC status regarding the subject parcel. Using aerial photos they reached a determination that agricultural/ cropland farming activities were discontinued approximately 15 years ago. As a result, the district determined that the 'abandonment' criterion was met, and that wetlands on the parcel are now subject to CWA regulatory authority.
- The Appellant contended that the parcel had not been abandoned in that while it was still under a PCC situation, the landowner began residential development in phases.
- The Appellant believes the Corps finding that Wetland B has a significant nexus to the closest Traditionally Navigable Water (TNW), the Little Calumet River, is in error and is not supported by substantial evidence. The Little Calumet River is approximately 11 miles from the subject wetlands. Referenced the 2007 CWA guidance, indicating the District has failed to provide site-specific analysis that ties the wetland to the TNW.
- The District discussed the flow pattern from the wetland to the Little Calumet River, identifying which features were determined to be 'waters of the United States' (WOUS) and which were not WOUS. In essence, drainage from the subject wetlands (WOUS) flows into an eroded ditch (a WOUS and non-RPW), then into 'Pond 1' (non-WOUS). Drainage then enters the storm sewer system (non-WOUS) and flows through a series of ponds and pipes (non-WOUS) prior to discharging into Midlothian Creek (WOUS and RPW) via an outfall structure. Drainage continues within Midlothian Creek until it reaches the Little Calumet River (WOUS and TNW). The District basis for significant nexus was the hydrological connection and the ability to transfer pollutants between the wetlands and TNW.
- RO asked District to clarify parameters of the JD that the District agreed to reevaluate. Specifically of interest, the Division Engineer previously provided a decision regarding the 'significant nexus' reason for appeal. No new information was submitted for reconsideration prior to the NAP (dated March 26, 2012; however the District reevaluated and updated entries in the SN section within the AJD form, and updated the finalization date to January 20, 2012.

Memorandum

To: Mary Hoffman

From: Lawrence R. Liebesman and David E. Zajicek

Re: Appellant Gallagher & Henry's Supplemental Response

Date: October 4, 2012

This Memo is intended to supplement and clarify the notes you prepared from the 9/12/12 Gallagher & Henry Appeal Site Visit and Meeting, as follows:

- Prior converted Cropland (PCC) -- The notes summarized the position of the District at the conference regarding the effect of the 1996 FSA amendment stating that "as a result of the 1996 change, the Corps and NRCS parted ways' regarding the PCC exemption and recapture under the CWA and that the Corps continues to apply the 1993 rule regarding PCC, including the abandonment criteria." (p. 1, third bullet) The notes do not fully explain the Appellant's position as articulated at the meeting and in its RFA as follows:

  First, and most important, while Congress removed the "abandonment" criteria in 1996 FSA Amendments, the Corps never amended the 1993 rule to conform to that change. The Corps may not rely on the fact that the Corps and NRCS "parted ways" after the 1996 FSA amendments to assert jurisdiction based on an "abandonment" test unrelated to the original intent of the 1993 rule without amending that rule as required under the APA. New Hope Power v. Corps, 746 F. Supp 2d. 1272,1282. (S.D. Fla. 2010)

  Second, the original intent of the 1993 rule must control here and the Corps may not "recapture" CWA jurisdiction where there has been a change in use unrelated to the Food Security Act ("FSA"). That language must be read in the context of the rule's preamble as to the meaning of "abandonment" to "recapture" CWA jurisdiction. Your notes recognize that fact in summarizing the District's interpretation of the 1993 rule stating that "the Corps consciously chose to accept certain NRCS FSA rules (e.g. Wetlands determinations, PCC certifications and some terminologies such as 'abandonment.')" That statement reflects the preamble language. (*"while we agree that the SCS's abandonment provision may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program and farmers have become familiar with the standards in determining whether a property has been abandoned."* Vol. 58 Fed. Reg. 45034 (August 25, 1993). Indeed, Corps 1990 Regulatory Guidance Letter (90- 6, "normal circumstances") specifically cited to the Food Security Act Manual's definition of abandonment (section 512.17) in determining whether an area is subject to regulation under section 404. (see. para 5 e). Further, Mr. Jerbi seemed to suggest that the five year abandonment test is found in the express language of 1993 rule allowing the Corps to apply the abandonment criteria independent of the FSA. That is incorrect. The 1993 rule at 33 CFR 328. 4 (a) (8) does even not mention "abandonment" but simply states that "waters of the United States do not include prior converted cropland." This further reinforces appellant's position that "abandonment must be

interpreted in the context of the preamble to the rule. Therefore, a lawful change in use from farming to development does not recapture CWA jurisdiction under the CWA.

Third, the Corps suggestion that the New Hope Power court supported the Corps independent application of the "abandonment" test for CWA jurisdiction following the 1996 FSA amendments is incorrect. The Court cited to the rule's "abandonment" test as the only exception "whereby prior converted cropland can lose their exempt status." The New Hope Power court never held that the Corps can interpret "abandonment" outside the context of the 1993 rule. Rather, the court reaffirmed the importance of the 1993 rule in striking down the Stockton rules that were issued without undergoing APA notice and comment rulemaking. 746 F. Supp 2d. at 1282. Thus, just as the New Hope Power court held that the Stockton rules improperly created a "second exception" (change in use) so too must the 1993 rule's "abandonment" criteria be read as the Corps deferring to the SCS interpretation in the context of loss of FSA benefits for farmers --- and not to "recapture" CWA jurisdiction where there has been a lawful change of use from PCC to development.

Fourth, even assuming that the Corps and NRCS "parted ways" after the 1996 FSA amendments, it is clear that the appellant's "change in use" should be "grandfathered" under the 1993 rule. The Congress' removal of the FSA "abandonment" concept in the 1996 Act while the Corps continued to use that criteria for CWA jurisdiction should not be used to penalize G & H here. As described in detail on pp 2-5 of our May 24, 2012 RFA, the Warmke property was never "abandoned." Rather, G & H actively changed the use of the PCC site beginning in 1991 when it contracted to buy the Warmke property and began closing on a four phase takedown in each of 1991, 1992, 1993 and 1994. In 1995 G & H had acquired title to all of the acreage and worked with the Town of Tinley Park to complete the annexation and zoning process through 1995. During the Spring of 1996 G & H conducted excavation and other activities necessary to develop Phase II of the approved residential development. These activities all commenced and were actively underway before the 1996 amendments became law on April 4, 1996 as P.L 104- 127. The Corps has never contested those facts. Thus, G & H reasonably relied on status of the site as PCC under the 1993 rule in moving forward with its development process. That reliance should not be negated as a result of the 1996 FSA amendments.

- "Significant Nexus" - The statement (p.2. fourth bullet) that "The District basis for significant nexus was the hydrologic connection and the ability to transfer pollutants between the wetlands and TNW" underscores appellant's arguments that the Corps has not met its burden of establishing jurisdiction under the CWA. The Corps conceded at the appeal conference that the storm drain system was not a tributary and recognized that there was a distance of over a mile to Midlothian Creek and 11 miles to the Little Calumet River, the closest TNW. The Corps then stated that it would be "extremely burdensome" to develop site specific evidence regarding the comparative relationship between the functions and values of wetlands and the functions and values of the closest TNW and therefore, it should be able to rely on general statements regarding wetlands functions and the existence of a hydrologic connection. However, that rationale is at odds with Justice Kennedy's Rapanos "significant nexus" test (controlling law in the Seventh circuit) which made clear that a hydrologic connection alone is not sufficient

stating that an "allegedly adjacent wetland with a remote, speculative and insubstantial relationship to a navigable after would not be jurisdictional" 126 S. Ct. 2208, 2227. The Corps own Rapanos guidance states that "as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditionally navigable water." (June 5, 2007 guidance at p. 10). The Fourth Circuit's decision in Precon Development Corps. v. Corps, 633 F. 3d. 278 (4th Cir. 2011) that we discussed at the conference (and at an earlier appeal conference call with Ms. Thorndike on April 25, 2011) further supports the obligation of the Corps to provide the kind of evidence that the Corps conceded at the hearing would be too "burdensome."

Additionally, Mr. Liebesman pointed out at the meeting G&H's continued position, raised on pp 8-9 of its June 11, 2008 RFA, that Wetland B is not adjacent to the creek under the Corps regulations defining "adjacent" as "bordering, contiguous or neighboring" (33 CFR §328.4 (b)), given the 6000 ft. separation between the wetlands and creek and the fact that water had to flow a considerable distance through an underground storm water system to even reach the creek which is 11 miles from the River. However, even assuming that the wetlands are adjacent (which we do not concede), the Corps statement at the appeal conference further supports Appellant's position that the Corps has not met its burden of proof to establish CWA jurisdiction.

In closing, we wish to stress that the "clarification" provided here does not present new facts or information not already in the record. Rather, the above points are all reflected in the record documents.

EXHIBIT K

DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO, ILLINOIS 60606-7206

REPLY TO
ATTENTION OF:

July 19, 2013

Technical Services Division
Regulatory Branch
LRC-2006-14112

SUBJECT: Jurisdictional Redetermination for the Warmke Property Located south of 179th Street and west of Pheasant Lake Drive in Tinley Park, Cook County, Illinois

Gallagher & Henry
Attn: Mr. Terry Woolums
6820 Joliet Road
Countryside, Illinois 60525

Dear Mr. Woolums:

The jurisdictional determination for the "Warmke Property" has been remanded to the Chicago District by letter dated May 9th, 2013 prepared by the appeal officer at the Great Lakes and Ohio River Army Corps of Engineers Division office. We have reviewed this information and provided additional significant nexus documentation in the attached document titled "Warmke Site Wetland Functions and Benefits to Downstream Waters."

This office has determined that the approximately 0.6 acre Wetland A and the approximately 12 acre Wetland B, as referenced in your January 6, 2006 Wetland Delineation Report prepared by JFNew, do exhibit a significant nexus to the navigable Little Calumet River. The 0.01 acre wetland on the eastern edge of the spoil pile in the center of the site was determined to be isolated and therefore not under the jurisdiction of this office. Wetland A and B drain via surface and subsurface connection to Midlothian Creek, a perennial stream tributary to the navigable Little Calumet River. This physical hydrologic connection demonstrates the ability of pollutants, flood waters, nutrients and organic carbon to transport from the onsite wetland to the navigable water. The approximately 12.6 acres of wetland onsite provide important stormwater storage, habitat, sediment/toxicant retention and nutrient removal/transformation functions. The wetland alone and in combination with other wetlands in the area significantly affect the chemical, physical and biological integrity of the Little Calumet River, a traditional navigable water.

Pursuant to Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States, including wetlands. A Department of the Army permit is required for any proposed work involving the discharge of dredged or fill material within the jurisdiction of this office. To initiate the permit process, please submit a joint permit application form along with detailed plans of the proposed work. In the event an application is submitted for work within jurisdictional areas, a concurrence of the

wetland boundaries and a professional survey of the wetlands will need to be prepared and shall accompany your wetland delineation report. Furthermore a pre-application meeting is encouraged to help clarify any potential permitting issues. Information concerning our program, including the application form and an application checklist, can be found at and downloaded from our website: http://www.lrc.usace.army.mil/co-r.

This letter is considered an approved jurisdictional determination for your subject site. It is your responsibility to obtain any required state, county, or local approvals for impacts to wetland areas not under the Department of the Army jurisdiction. If you have any questions, please contact Mr. Paul Leffler of my staff by telephone at 312-846-5529 or email at Paul.M.Leffler@usace.army.mil.

Sincerely,

Leesa A. Beal
Chief, Regulatory Branch

Copy Furnished w/ Enclosures:

Hinshaw & Culbertson LLP
Attn: Mr. David Zajicek
4343 Commerce Court, Suite 415
Lisle, IL 60532

Chicago District Regulatory Branch
LRC-2006-14112
July 19th, 2013

Warmke Site Wetland Functions and Benefits to Downstream Waters

The wetlands located on the Warmke Site, and the 165 other wetlands and waters in the watershed, provide important functions for the watershed and downstream navigable waters. They decrease sediments, pollutants, and flood waters from moving downstream while providing habitat to numerous species. These wetland functions provide a positive effect to the downstream Midlothian Creek, a Relatively Permanent Water, and to the Little Calumet River, a Traditionally Navigable Water. This document describes these important wetland functions and the significant nexus to the downstream navigable waters. The site has been subject to three previous jurisdictional determinations, dated November 17, 2006, October 6, 2010, and March 26, 2012. This decision is made pursuant to the remand order issued by the Great Lakes and Ohio River Division administrative appeal decision issued May 9, 2013. That remand order required the Chicago District to document, support, and potentially reevaluate its decision that the subject wetlands exhibited a significant nexus to the downstream traditionally navigable water, the Little Calumet River. This Final Corps decision, thus, incorporates all previous findings and supplements the discussion of significant nexus.

Wetlands perform a variety of functions including physical, chemical, and biological processes that create economic or aesthetic values to society in addition to supporting plant and animal populations (Sather and Smith, 1984; Mitsch and Gosselink, 1986). While the functional attributes of wetlands are variable in quality and quantity, approximate functional levels for the Warmke Site wetland can be described using the existing research in combination with considerations of the size, structure, topography, hydrology, plant community, and soils of the site.

Site Description

The approximately 60-acre Warmke Site is located south of 179th Street and west of Pheasant Lake Drive in Tinley Park, Cook County, Illinois. Residential neighborhoods are to the immediate east and west, and large wet-bottom and dry-bottom detention basins are to the south. The majority of the site is upland farmland. The remainder includes a large soil stockpile in the central portion of the site and several other small stockpiles further west. In addition, approximately 12.6 acres of wetland has been identified on the western portion of the site. These wetlands were originally identified by the applicant, Gallagher & Henry, in their *Wetland Delineation Report* prepared by JFNew dated January 6, 2006. As noted in the Jurisdictional Determination and Decision Document dated March 26, 2012 prepared by the Chicago District the subject property contains headwater wetlands that exhibit a physical hydrologic connection to a traditional navigable waterway (TNW). The site drains from Wetland A on the northern portion of the site a short distance southwest to Wetland B. Then Wetland B drains south via an eroded ditch to an open-water detention pond. From the open-water detention pond water

drains east then north to Midlothian Creek. From the site to Midlothian Creek water passes through three open-water detention basins and bypasses three dry-bottom detention basins ("Tinley Park Storm Sewer Atlas: Warmke Property" dated September 19, 2006, prepared by Encap, Inc.). Water only enters the dry-bottom detention basins during large flood events but primarily bypasses them entirely ("Warmke Site Visit *w/* USEPA," March 24, 2010). During a field visit conducted on March 24, 2010, flowing water was observed at each basin to Midlothian Creek, which is a Relatively Permanent Water that flows directly to the Little Calumet River. This hydrologic connection, documented in the Jurisdictional Determination and Decision Document dated March 26, 2012 demonstrates the ability of the tributary to carry pollutants, flood waters, nutrients and organic carbon to the TNW.

The National Wetland Inventory map identifies 165 wetlands in the Midlothian Creek watershed totaling 462.9 acres. The total area of the Midlothian Creek watershed is 12,626 acres; more than 70 percent is classified as urban land. The wetlands on the Warmke Site are gently sloped and receive water via stormwater pipes from residential areas to the north and west. Water also enters the wetlands via overland flow from the approximately 45-acre agricultural area to the east. Since 1990 the average annual rainfall for Tinley Park, Illinois, is 38.3 inches.

The National Wetland Inventory Map identified 6.75 acres of the area identified as Wetland B as a palustrine emergent wetland that temporarily floods and is farmed (*National Wetlands Inventory: Tinley Park, Illinois Quadrangle*, 1981). In the mid-1990s a majority of Wetland B's soil was removed and replaced with clay by Gallagher & Henry to prepare the site for a residential development. The northern portion of Wetland B and all of Wetland A have retained their original soils but have been disturbed by agricultural activities.

Flood Control Functions & Benefits

The Warmke Site is located in a watershed with extensive flooding problems costing millions of dollars on the local level and billions of dollars on a regional level. The ability of wetlands to accept, slow down, and store flood waters thereby attenuating flood peaks is well known (Dugan, 1990). The large size, level topography, and dense vegetation of the Warmke Site wetlands effectively store floodwaters and slowly release them downstream reducing peak flows thereby helping to prevent flooding downstream. As a result the Warmke Site wetland, alone and in combination with other wetlands in the watershed, significantly reduces peak flows and flood damages in the downstream, navigable, Little Calumet River.

Flooding Problems

The Warmke Site wetlands drain from north to south across the site. Water exits the site via an eroded ditch to a storm sewer pipe that flows to Midlothian Creek (*Tinley Park Storm Sewer Atlas: Warmke Property,* September 19, 2006). There is no disagreement that water from the site drains to Midlothian Creek. From Midlothian Creek it then flows northeast to the Little Calumet River, a traditionally navigable water. From here it flows to the Calumet-Sag Channel then to the Des Plaines River then to the Illinois River, and from the Illinois River to the Mississippi River basin. Flooding in all of

these watersheds, from the local level on up to the regional level, is a substantial problem costing billions of dollars in damage and flood-control projects.

Flooding problems in the Midlothian Creek watershed have been studied extensively by the Metropolitan Water Reclamation District of Greater Chicago (MWRD). Hundreds of structures and multiple roadways in this watershed are threatened by flood waters on an annual basis. This problem is expected to worsen. MWRD predicts a 21% increase in population in this watershed from 2000 to 2030. Urban development in currently undeveloped areas is expected, increasing impervious surfaces and thereby increasing stormwater in Midlothian Creek. As a result, additional flooding problems are anticipated, leading MWRD to identify the Midlothian Creek watershed as a priority for new flood-control projects. MWRD's "Little Calumet River Detailed Watershed Plan (DWP) and Phase B Report" recommended flood control projects totaling $117,853,000 to address the flooding problems within the Midlothian Creek Watershed (Metropolitan Water Reclamation District of Greater Chicago, 2010).

Midlothian Creek is a major source of floodwaters to the navigable Little Calumet River. High flows on Midlothian Creek raise river levels very quickly on the Little Calumet River during flood events contributing to millions of dollars of flood damage annually. According to Army Corps modeling, Cook County residents are expected to suffer $75,000,000 in flood damages from the Little Calumet River over the next 50 years (MWRD, 2010). The cost of flooding and the extent of the problem are also represented in the measures taken to prevent it. The Army Corps is close to completing a $270,000,000 flood control project on the Little Calumet River just over the border of Illinois in Lake County, Indiana (U.S. Army Corps, 2013).

As water moves downstream from the onsite wetland via Midlothian Creek to the Little Calumet River and then to the Mississippi River, flood problems worsen. The 1993 flooding in the Mississippi River Basin was the most severe flooding in recent United States history. An important factor contributing to the severity of the flood was the extensive loss of wetlands that had occurred prior to the flooding. The removal of wetlands in the basin through channelization, leveeing, draining, and filling resulted in an approximately 80% reduction of flood storage capacity (Daily et al., 1997).

Site Characteristics Influencing Flooding

Through interception of storm water runoff and storage of storm waters, wetlands are able to change sharp runoff peaks to slower discharges over longer periods of time. Since it is the flood peaks that produce flood damage, wetlands are able to significantly reduce damage and loss of property and human lives (Mitsch and Gosselink, 1986; Dugan, 1990). To determine the flood benefits of the Warmke Site wetlands to the downstream Midlothian Creek, a Relatively Permanent Water, and the Little Calumet River, a Traditionally Navigable Water, the following attributes were considered: size, topography, roughness of the wetland surface, and location in the watershed.

The National Wetland Inventory identifies 165 wetlands and open water areas in the Midlothian Creek watershed. Based on this information, the 12.6-acre emergent wetland located on the Warmke Site is the fourth largest emergent wetland in the watershed. This is significant because the larger the wetland, the greater the flood storage and velocity reduction contributions to downstream waters. In

addition, the large onsite wetland is densely populated by *Phragmites australis* and other tall, robust plants that create a rough surface. As a result the water entering the site is met with frictional resistance and the velocity of the flow is reduced. An area with dense vegetation like this will intercept more stormwater and discharge less water than an area with less vegetative cover. Accordingly, stormwater stays onsite longer, which reduces peak flows and flooding downstream in Midlothian Creek and the Little Calumet River (Illinois Department of Conservation, 2003).

In addition to the dense vegetation onsite, the wetlands on the Warmke Site are gently sloped and receive water via stormwater pipes from residential areas to the north and west. Water also enters the wetlands via overland flow from the agricultural area to the east. When stormwater enters the onsite wetlands the velocity of the water decreases as it encounters the densely vegetated wetlands and the flow widens out across the generally flat 12.6 acres of wetland. The level topography increases the residence time of stormwater and the attenuating ability of the onsite wetlands (Gosselink *et al.*, 1990).

The Warmke wetlands are located in the headwaters of Midlothian Creek. Upstream wetlands like these reduce the likelihood of flood and erosion damage downstream by detaining and slowly releasing storm flows. Consequently, wetlands downstream benefit from the reduced stormwater velocities; vegetation becomes more established thereby increasing its functional ability to reduce downstream flood damages. When viewed individually, upstream wetlands tend to have less functional benefits to downstream flooding then wetlands located further downstream (Ogawa and Male, 1986). However wetlands and their functions should not be viewed individually but collectively as a system working in combination with surrounding upland areas, downstream wetlands and the streams they all are hydrologically interconnected with. In other words significant flood control is the result of the combined effect of a series of wetlands within a particular watershed (Verry and Boelter, 1978).

Calculating Flood Benefits

The removal of the upstream wetlands, like the Warmke Site wetland, will result in increased peak stream flows and increased flood damages downstream (Ogawa and Male, 1986; Illinois Department of Conservation, 1993). The 12.6-acre Warmke Site wetlands represent 2.7 percent of the 462.9 acres of wetlands in the Midlothian Creek watershed. The 2003 Illinois Water Survey found that decreasing the percentage of wetland in a watershed by 1 percent will increase peak stream flows by an average of 3.7 percent. Because 3.6% of the watershed is wetland, loss of the Warmke Site wetlands and the similar 462.9 acres of wetlands in the watershed would increase peak stream flows by more than 13.5%. This rough estimate is illustrative of the significance of the impact wetlands have on downstream navigable waters related to flooding (Illinois Department of Conservation, 1993).

Water Quality Functions & Benefits

The Warmke Site wetland has a significant impact on the traditionally navigable Little Calumet River because the wetland filters, slows, and retains pollutants that enter the site. Pollutants that enter the site have the potential of reaching the Little Calumet River through a direct hydrologic connection via Midlothian Creek. Filling of this wetland, therefore, would increase downstream pollution.

The Warmke Site wetland is located in northeastern Illinois, an area that produces significant runoff from residential development and agricultural production. More than 70 percent of the Midlothian Creek watershed is comprised of urban development such as houses, buildings, parking lots and roads. Run-off from urban residential areas in NE Illinois was characterized by Polls and Lanyon (1980); pollutants in non-point stormwater run-off from residential areas include organic matter (measured as biochemical oxygen demand or chemical oxygen demand), ammonia and nitrate nitrogen, soluble phosphorus, and solids. The second-largest land use is agricultural comprising 13 percent of the watershed. Whenever it rains or snows, oil and grease from the urban areas and excess fertilizer, herbicide and pesticides from agricultural areas are deposited into the nearest wetland or waterway. These non-source pollutants are the most significant water-quality threat to downstream waters (USEPA 2004).

The 12.6-acre Warmke Site wetland significantly benefits the Little Calumet River by storing water onsite. This onsite water storage serves to reduce runoff velocities, as well as retaining, then removing pollutants received from the adjacent agricultural field and residential areas, preventing them from entering Midlothian Creek and ultimately the Little Calumet River. Several studies show that wetlands effectively retain sediment and reduce pollutants from agricultural areas, turf lawns, pet wastes, and even septic systems. Wetlands can reduce pollutants such as nitrogen through denitrification, sedimentation, and plant uptake. Nitrogen reduction capacity is one of the many important ecosystem services that wetlands provide to society, because it contributes to the mitigation of eutrophication effects in downstream waters.

Nitrogen Problem

A primary benefit produced by the Warmke Site wetland is its ability to reduce pollutants from entering downstream navigable waters. This function is particularly critical because the Chicagoland region is responsible for a disproportionate amount of nitrogen pollution. Tributaries, including Midlothian Creek and the Little Calumet River, are responsible for dumping excessive nitrogen downstream to the Mississippi River and consequently contributing to the devastating eutrophic conditions in the Gulf of Mexico (Goolsby et al., 1999). Though Illinois covers only 3% of the Mississippi River watershed, it contributes 15% to its annual nitrogen load (David and Gentry, 2000). This disproportionate impact is caused by the eleven-fold increase in nitrogen production over the past century while Illinois' wetland area has been reduced by 90% (Dahl, 1980). The increased nitrogen and a lack of wetlands to filter out these harmful pollutants have contributed to the eutrophic conditions visible within the Gulf of Mexico. The nitrogen-created "Dead Zone" is unsuitable for aquatic life and is the second largest in the world—extending 12,400 square miles or roughly the size of Massachusetts (Mitsch et al., 2001).

Moreover, nitrogen loading has been associated with lower quality stream habitats in northeastern Illinois, including Midlothian Creek (Heatherly et al., 2007). Midlothian Creek itself is considered poor quality based on the Illinois Alternative Index of Biotic Integrity and only fair under the Habitat Based Predicted Index of Biotic Integrity (Fitzpatrick et al., 2004). Because the Warmke Site

wetland is the fourth largest wetland in the Midlothian Creek watershed, its loss would adversely affect the already degraded Midlothian Creek and Little Calumet River.

Filtering Ability

The ability of wetlands to filter out pollutants has been long recognized and studied thoroughly. Wetlands are often referred to as "nature's kidneys" due to a mixture of physical, chemical and biological processes that occur in these complex systems and are regularly used as natural wastewater treatment facilities. Fisher and Acreman (2004) reviewed a large number of wetland studies and found that the majority of wetlands do indeed remove both nitrogen and phosphorus from waters entering the wetland, leading to improved water quality downstream. The authors point out that one strategy for meeting water quality requirements is to maximize nutrient removal of wetlands, and to protect those wetlands.

Natural wetlands are very effective filters, with the potential to remove 77% of onsite nitrogen (Hammer and Knight 1994). Studies suggest that created wetlands can remove an estimated 27–51% of the nitrogen load entering the system (Kovacic et al., 2000). One such study found wetlands created in a tile-drained agricultural system in Champaign County, Illinois, reduced nitrogen by as much as 46% before exiting the system to the downstream tributary (Xue et al., 1999; Kovacic et al., 2000). These results are similar to those of Fink and Mitsch (2005), in which formerly forested Ohio wetlands experienced a 41% reduction of nitrogen. These studies suggest that despite different soil types and situations there is a commonality in Midwest wetland nitrogen removal dynamics (Kovacic et al., 2000). Similar results were found in the Netherlands when comparing denitrification amongst six different wetlands. No significant difference was observed in the ability to remove nitrogen between a clay soil wetland dominated by *Phragmites australis* (similar to the Warmke Site wetland) and the other non-tidal wetlands in the study (Hefting et al., 2013).

The Warmke Site wetland is particularly well-suited for nitrogen reduction. A wetland's effectiveness in reducing nitrogen is primarily influenced by how long water remains within the site enabling nitrogen uptake by plants, microbes and macrophytes. (Mitsch et al., 2005). The Warmke Site wetland's position at the top of the watershed, its large (12.6 acre) size, and its flat topography, combine to ensure that water and sediment entering the wetland reside long enough to interact with the well-established emergent vegetation, such as *Phragmites australis*, an ideal plant for removing nitrogen (Tanner, 1996). Moreover, the extensive emergent vegetation encourages pollutant-laden sediments to settle out of the surface water and also stimulates carbon fixation, assisting in the denitrification process. The water that eventually makes its way off the site to Midlothian Creek and Little Calumet River leaves much of its sediment and nitrogen behind.

Without the Warmke Site wetland and the other wetlands in the watershed an estimated 27-51% more nitrogen would enter and adversely affect Midlothian Creek, which in turn would pollute the navigable Little Calumet River. The Warmke Site wetland is particularly critical because no other wetland complexes are located between the site and Midlothian Creek therefore, in this immediate area, the only other opportunity to remove these pollutants is in the dry-bottom and open-water detention

basins. But these basins are designed for flood-control purposes and offer minimal water quality benefits. In fact unless there is a significant rain event water bypasses the dry bottom basins entirely. When it does enter these areas residence time is short and interaction with the low-growing, shallow-rooted turf grass provides little to no pollutant removal benefits. Studies show dry detention basins designed for water quantity control only remove 5% of the nitrogen entering into them (Collins et al., 2010). Open-water detention basins are modestly more effective than dry-bottom basins, especially if they allow a lengthy residence time for pollutant-laden sediments to settle out. But if they are devoid of vegetation, as they are on this site, then the dentirication functions of plants are not utilized as they are in the emergent wetland (Collins et al., 2010). The ability of the Warmke Site wetland to remove pollutants such as nitrogen from getting downstream demonstrates the significance of this wetland's impact on water quality of navigable waters.

Wildlife Functions & Benefits

The Warmke Site wetland, alone and in combination with all the 165 wetlands in the Midlothian Creek watershed, has a significant effect on wildlife within the watershed and wildlife located downstream in the Little Calumet River. Wetlands are important ecosystems that provide valuable habitat for wildlife. Wetlands provide wildlife with habitat for hibernation, foraging, breeding, and interspersion for different life stages. The destruction of wetlands across Illinois has undermined the survival of some of our native fish, mammals, bird, and amphibian populations that rely on these areas (Balcombe et al., 2005).

As mentioned previously in the "Water Quality Functions & Benefits" section the Warmke wetland traps and absorb pollutants limiting nitrogen from getting downstream thereby helping preventing eutrophic conditions that have the potential to cause fish kills. Elevated nutrient concentrations have been linked to poor biotic integrity in streams by degrading habitat, altering food resources and depleting dissolved oxygen (Miltner and Rankin, 1998). Studies have shown that animal species like amphibians had lower survival, growth, and development rates due to nitrogen pollution and heavy metals in urban areas (Boone and Bridges, 2003; Casey et al., 2005; Massal et al., 2007).

Wildlife Problems

The Midlothian Creek watershed has experienced significant urban development and as result water quality and wildlife populations have suffered. Urban land use within the watershed has increased from 10% in 1954 to 72% in 1996 (Hejazi and Markus, 2009). The introduction of buildings, roads and parking lots increases the amount of storm water and pollutants entering Midlothian Creek. The ability of a stream to support aquatic life decreases as urban land increases. In 1984 the Illinois Department of Natural Resources rated Midlothian Creek as "poor" in its ability to support fish populations (Fitzpatrick et al., 2004).

Wildlife has not fared well in this disturbed environment resulting in a low diversity of aquatic species. Within Midlothian Creek bullfrogs, green frogs, northern water snakes and snapping turtles are

likely to be found. Fish species that may be found here include minnows, carp, round goby, goldfish, catfish, bass, sunfish and crappies. These species are also found further downstream in the Little Calumet River. Though none of the 25 native mussel species can be found due to degraded conditions in the River, the Asian clam and the zebra mussel, two nonnative species that thrive in these disturbed conditions, are present. Many bird species can also be observed using the Little Calumet River for foraging or to roost in trees along the banks. The state-threatened Common Moorhen, Pied-Billed Grebe, Black Crowned Night Heron, and Least Bittern have been observed utilizing the river corridor (Moore et al., 1998).

Site Characteristics Benefitting Wildlife

The large Warmke wetland is wet perennially and home to several dozen plant and animal species. The modest diversity of plant species and growth forms nevertheless provide a range of wildlife niches within the wetland. The physical structure of the site has an important influence on wildlife diversity and abundance as well. For example, many birds are attracted to emergent wetland areas interspersed with upland islands and surrounded by trees to nest in. In addition the Warmke Site offers shallow, sparsely vegetated littoral areas well suited for invertebrates like frogs and other important food sources for larger vertebrates (Balcombe et al., 2005).

The following bird species have been observed at the Warmke Site wetland: Red-winged blackbirds, black-capped chickadees, American Goldfinch, Mallard, Eastern Kingbird, Canadian Geese, Gulls, Northern Cardinals, and Killdeer. The following bird species reside nearby and are expected to also utilize the Warmke Site wetland: Red-tailed Hawks, Eastern Meadowlark, American Robin, Field Sparrow, Song Sparrow, European Starlings, Tree Swallows, Gray Catbird Thrashers, Yellow-Throat Warblers, Red-bellied Woodpeckers, and House Wrens. In addition the American Toad and Western Chorus Frog were detected on the site. The onsite wetlands also provide habitat to deer, raccoons, salamanders, and turtles. Many of these wildlife species will use the Warmke Site wetland for a portion of their life cycle but will also utilize other wetland areas in the watershed, Midlothian Creek and the Little Calumet River.

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