UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| ORCHARD HILL BUILDING COMPANY DBA GALLAGHER & HENRY,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES ARMY CORPS OF ENGINEERS,<br><br>Defendant. | ) | Case No. 1:15-cv-06344 |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff ORCHARD HILL BUILDING COMPANY, DBA GALLAGHER & HENRY ("Gallagher & Henry") submits this Memorandum of Law in Support of its Motion for Summary Judgment (the "Motion"). The Motion seeks declaratory and injunctive relief against the UNITED STATES ARMY CORPS OF ENGINEERS (the "Corps") for its unlawful issuance of a Final Jurisdictional Determination ("JD" or "jurisdictional determination") asserting that Gallagher & Henry's 100-acre property, located in the Village of Tinley Park, Illinois (the "Warmke Parcel"), contains jurisdictional wetlands governed by the Clean Water Act.

This case is the culmination of two decades of effort by Gallagher & Henry to develop the Warmke Parcel, a farm it purchased in 1995, for the purpose of constructing a residential subdivision in an area surrounded on all sides by other residential subdivisions. For over seven of those years, the Corps prevented Gallagher & Henry from completing the subdivision because it asserted that the Warmke Parcel contained jurisdictional wetlands under the federal Clean Water Act, thereby subjecting Gallagher & Henry to the risks of severe civil and criminal sanctions if it continued its development activities. Accordingly, Gallagher & Henry stopped construction and participated in the Corps' laborious administrative process to set the record straight. Now that the costly and lengthy proceedings leading to the Corps' final jurisdictional determination have been completed, Gallagher & Henry seeks relief from this Court.

The Little Calumet River, the only navigable water that the Corps uses to support its jurisdictional determination, is located approximately 11 miles from the Warmke Parcel. In its present state, the Warmke Parcel contains active farmland and 132 sold and inhabited townhomes, as well as storm water retention ponds, compacted clay base for roads, compacted clay slabs for home construction, and mounds of topsoil reserved for post-construction fill. The

bulk of the remaining Warmke Parcel, intended for detached single family residential development, cannot be utilized due to the Corps' assertion of jurisdiction over approximately 13 acres of grassy fields that are located so as to prevent further construction. Thus, not only the 13 acres but the entire undeveloped portion of the Warmke Parcel, comprising approximately 65 acres, is essentially unmarketable.

In making its jurisdictional determination, the Corps violated its own regulations in two ways. First, the Corps' prior converted cropland regulatory exemption applies to the Warmke Parcel because it was converted to cropland use before 1985, thereby grandfathering the parcel and immunizing it from regulation under the Act. The Corps asserted during the administrative proceedings that the prior converted cropland exemption no longer applies because farming operations have been "abandoned." That assertion is false because a substantial portion of the Warmke Parcel continues to be farmed. Although certain portions of the Warmke Parcel underwent a change of use when Gallagher & Henry commenced residential construction activities, such changes do not equate with "abandonment." Moreover, the 13 acres over which the Corps asserts jurisdiction are themselves specifically exempted because they are "artificial wetlands" resulting from construction activities and, consequently, are not deemed "abandoned" under the regulations. Finally, those specific 13 acres cannot in any event now be used for farming because the building activities attendant to the change of use make farming impossible on those acres, and for that independent reason, they are not "abandoned" under the regulations. Thus, the prior converted cropland exemption applies to the Warmke Parcel generally, and to the 13 acres specifically, and neither the parcel as a whole nor the 13 acres have been "abandoned." Accordingly, they are excluded from Clean Water Act jurisdiction.

Second, by going outside of the closed administrative record in a misguided effort to support a finding that the 13 acres have a "significant nexus" to the Little Calumet River, the Corps violated another set of its regulations. Crucially, in this Circuit a finding of "significant nexus" is the *sine qua non* of Clean Water Act jurisdiction. Accordingly, even if the prior converted cropland exemption does not apply in this case, the jurisdictional determination cannot stand because the Corps' "significant nexus" finding cannot be sustained based on the administrative record.

The Corps' division engineer on final administrative appeal found that there was insubstantial evidence in the record to support a "significant nexus" finding. In accordance with the applicable regulations, the division engineer remanded to the district office with specific instructions that the district make the final jurisdictional determination based on the existing administrative record, without supplementation, in accordance with the requirements of the remand order and the regulations.

In violation of both the remand order and the regulations, the district supplemented the record by adding 11 pages discussing approximately 30 extra-record studies, and concluding, based almost entirely on those studies, that a significant nexus existed between the 13 acres and the Little Calumet River. In addition to the fact that adding the pages and citing the studies directly violated the Corps' regulations and the remand order, the 30 studies that formed the basis of the 11-page record supplement did not address *any* conditions on either the Warmke Parcel as a whole or on the 13 acres in particular. Nor did they address the relationship between the Warmke Parcel, or the 13 acres, to the Little Calumet River. Rather, the studies discussed generally how wetlands function in the environment. Thus, they are factually irrelevant to the issue of whether the Warmke Parcel or any portion of it had a "significant nexus" to the Little

Calumet River. Yet the final jurisdictional determination was based almost entirely on those extra-record studies.

Importantly, because the decision by the district was the final agency action, with no further administrative review possible, Gallagher & Henry had no opportunity to rebut any evidence contained in the 11 pages or in the 30 studies, nor even to argue that the significant nexus finding was unsupported by the last-minute record insertion. Because Gallagher & Henry's legal challenge in this Court must be based exclusively on the administrative record, Gallagher & Henry is foreclosed from raising arguments not reflected in the record, thereby depriving it of any opportunity to present rebuttal evidence regarding those 11 pages, even in this Court. Accordingly, serious due process issues are raised unless the Court grants Gallagher & Henry's pending motion to strike the 11 pages unlawfully inserted into the record by the Corps.

Moreover, the final word from the Corps on the significant nexus issue that *is* consistent with the Corps' own regulations and with the division engineer's instructions is that the administrative record does *not* support a significant nexus finding. That finding by the division engineer is the only one supported by the true administrative record, as defined by the Corps' regulations and the division commander's remand order, and it belies the contradictory finding of significant nexus made by the district office on remand.

After seven years of administrative proceedings, no legitimate purpose would be served at this time by remanding this case to the Corps for further review. The intransigence of the district office shows that nothing could be gained except further delay. Accordingly, Gallagher & Henry asks this Court to declare (1) that the prior converted cropland exemption applies, or (2) that the significant nexus finding cannot be sustained by the record, or (3) both. In addition, Gallagher & Henry asks this Court to exercise its equity powers to vacate the Corps'

jurisdictional determination and to enjoin the Corps from bringing enforcement action against Gallagher & Henry in connection with the matters set forth herein.

**JURISDICTION**

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. § 220 I (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. The Warmke Parcel is 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 Parcel is located within this district.

**FACTS**

The relevant facts of this case are set forth in Gallagher & Henry's Statement of Undisputed Facts, filed with this motion and incorporated in full by reference herein.

**STANDARD OF REVIEW**

The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.,* sets forth the standard of judicial review for federal agency actions. *See F.C.C. v. Fox Tele. Stations, Inc.,* 556 U.S. 502, 513-14 (2009); *J.N. Moser Trucking, Inc. v. U.S. Dep't of Labor,* 306 F.Supp.2d 774, 781 (N.D. Ill. 2004). Section 10(e) of the APA instructs that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2); *Little Co. of Mary Hosp. v. Sebelius,* 587 F.3d 849, 856 (7th Cir. 2009). Courts must limit their review of the agency's action to the administrative record. *See Judulang v. Holder,* 132 S.Ct. 476, 483 (2011).

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). It is up to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial," and where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citations and quotation marks omitted). Finally, when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to its position and on which it has the burden of proof at trial, there is no genuine issue of material fact and summary judgment in favor of the movant is appropriate. *Celotex Corp.,* 477 U.S. at 322–23.

**STANDING OF PETITONER GALLAGHER & HENRY**

To have standing, "the party bringing suit must show that the action injures him in a concrete and personal way." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007). To meet this standard, a litigant must demonstrate that 1) it has suffered "a concrete and particularized injury that is either actual or imminent," 2) that the injury is "fairly traceable to the defendant," and 3) that it is "likely that a favorable decision will redress that injury." *Id.*

That burden is easily met here. The Corps' jurisdictional determination has injured Gallagher & Henry because it prevents Gallagher & Henry from developing its property as it sees fit without Corps approval or threat of prosecution under the Clean Water Act. Gallagher Decl. ¶ 1-14. In particular, Gallagher & Henry cannot complete its planned and permitted Phase II development on the property without a permit from the Army Corps of Engineers, which there

is no guarantee that the Corps would grant. *Id*. ¶ 15-17. As a result, the market value of Phase II of the Warmke Parcel is substantially diminished from what it would have been were it not for the assertion of Clean Water Act jurisdiction by the Corps. *Id*. ¶ 21. Absent a permit, which requires the expenditure of substantial resources, time, and effort, the Warmke Parcel is unusable for its intended purposes as a direct result of the jurisdictional determination. *Id.* ¶ 14-16. The overall economic burdens to Gallagher & Henry have been and continue to be substantial. *Id* ¶ 16-24. If this Court declares invalid and vacates the jurisdictional determination, Gallagher & Henry could develop its property without these additional costs and burdens. *Id*. ¶ 20, 22-24.

## ARGUMENT

### I. THE CORPS' FINAL JURISDICTIONAL DETERMINATION IS UNLAWFUL BECAUSE THE PRIOR COVERTED CROPLAND EXEMPTION APPLIES TO THE WARMKE PARCEL

#### A. The Clean Water Act and Its Implementing Regulations Were Not Intended to Regulate the Type of Land Found on the Warmke Parcel

The Clean Water Act is a statute that seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's *waters*." 33 U.S.C. § 1251(a) (emphasis added). *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1331 (2013). Since 1972, pursuant to § 404 of the Clean Water Act, the Corps has regulated the "navigable waters" of the United States. *See* 33 U.S.C. § 1344(a). "Wetlands" are considered "navigable waters" if "those areas . . . are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that *under normal circumstances* do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(c) (emphasis added). In 1977, the Corps released Final Rules that clarified that the phrase "under normal circumstances" in the regulation does not refer to properties "that once were wetlands and part of an aquatic system, but which, in the past, have

been transformed into dry land for various purposes." 42 Fed.Reg. 37122, 37122 (July 19, 1977). Thus, former wetlands that were altered to dry land before the Clean Water Act's passage were not considered jurisdictional wetlands.

In 1986, the Corps released a Regulatory Guidance Letter ("RGL") which clarified and explained:

> [I]t is our intent under § 404 to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The wetland definition is designed to achieve this intent. [ ] Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by 'normal circumstances' in the definition quoted above. 'Normal circumstances' are determined on the basis of an area's characteristics and use, at present and recent past. Thus, if a former wetland has been converted to another use [other than by recent unauthorized activity] and that use alters its wetland characteristics to such an extent that it is no longer a 'water of the United States,' that area will no longer come under the Corps' regulatory jurisdiction for purposes of § 404.

RGL 86–9 (Aug. 27, 1986); *see also* RGL 05–06 (Dec. 7, 2005) (stating that RGL 86–9 still applies).

Along the same lines, in 1993 the Corps indicated in its regulations that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8). In a joint final rule the Corps and the United States Environmental Protection Agency ("EPA") stated:

> By definition, [prior converted] cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has the values that the area did in its natural condition. [Prior converted] cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the [Clean Water Act].

58 Fed.Reg. 45008–01, at 45032. The only avenue for prior converted cropland to return to the Corps' jurisdiction under this regulation is for the cropland to be "abandoned," where crop

production ceases and the land reverts to a wetland state. *Id*. at 45033. *See New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F.Supp.2d 1272, 1276 (S.D. Fla. 2010). As set forth in the following discussion, no area on the Warmke Parcel has been "abandoned," as defined by regulations adopted by three federal agencies.

**B. Three Federal Agencies Have Coordinated Their Regulations to Ensure that Properties Such As the Warmke Parcel Are Not Deemed "Abandoned" Under the Prior Converted Cropland Exemption**

Wetlands are regulated by three different federal agencies, and their relationship to each other is crucial to an understanding of this case. The Corps, the EPA, and the National Resources Conservation Service—formerly the Soil Conservation Service ("NRCS/SCS") each have roles. The Corps has authority to determine whether jurisdictional wetlands exist on a property for the purposes of the Clean Water Act. 33 C.F.R. §§ 320.1(a)(6), 331.2. If jurisdictional wetlands are found, the Clean Water Act requires a permit from the Corps to discharge dredged or fill materials on the property. *See* 33 U.S.C. §§ 1311(a), 1342, 1344. Movement of dirt or other materials on the property without such permits, or in violation of such permits, can result in significant civil and criminal penalties. *See* 33 U.S.C. § 1319; *Hawkes Co., Inc. v. U.S. Army Corps of Engineers,* 782 F.3d 994, 997 (8th Cir. 2015), *affirmed, U.S. Army Corps of Engineers v. Hawkes*, 136 S.Ct. 1807 (2016).

In turn, EPA develops and interprets the environmental criteria that the Corps uses in evaluating permit applications, reviews and comments on individual applications, and has joint authority with the Corps to enforce the prohibitions of the Clean Water Act. 33 U.S.C. § 1344(b); *See Res. Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1166 (9th Cir. 1998).

The NRCS/SCS has authority to determine whether wetlands exist on a given property for the purpose of federal monetary benefits under the so-called "Swampbuster" provisions of the Food Security Act. 16 U.S.C. § 3821. The Swampbuster program was designed to discourage farmers from converting pre-existing wetlands into farming operations. *See Horn Farms, Inc. v. Johanns,* 397 F.3d 472, 474 (7th Cir. 2005). Producers converting a wetland area to cropland lose eligibility for several federal farm program benefits. 16 U.S.C. § 3821(a)(1). Importantly, however, the Food Security Act exempts from Swampbuster penalties wetlands that were converted to agricultural use prior to December 23, 1985. 16 U.S.C. § 3822. These protected farms are referred to as prior converted croplands. 7 C.F.R. § 12.2 (a)(8).

Historically, farmers facing these three sets of regulations found it difficult to comply with all three because of differing standards, terminologies, and procedures among the three federal agencies. For example, a farmer moving soil on his property could be in compliance with the Swampbuster provisions of NRCS/SCS without losing federal subsidies but at the same time could run afoul of the Corps' regulations prohibiting discharge of dredged material, thereby risking civil or criminal penalties, or both. To deal with this issue, in 1993 the Corps and EPA adopted a joint rule in an attempt to make wetlands designations between the three agencies more consistent. 58 Fed.Reg. 45008, 45034 (August 25, 1993). In particular, the joint Corps/EPA rule adopted the NRCS/SCS's practices for exempting prior converted croplands from Clean Water Act wetlands jurisdiction, in order to limit unnecessary potential liabilities for farmers. 33 C.F.R. § 328.3(a)(8). In this way, the 1993 joint rules established the important regulatory concept that farmers could rely on the Swampbuster prior converted cropland exemption to protect them from civil and criminal sanctions under the Clean Water Act.

The Corps, EPA, and NRCS/SCS all define prior converted croplands as wetlands converted to farming prior to December 23, 1985. 58 Fed.Reg. 45008–01, at 45031 (Aug. 25, 1993), 40 C.F.R. § 230.3(o)(ii) (EPA); 33 C.F.R. § 328.3(b)(2) (Corps); 7 C.F.R. § 12.2(a)(8) (NRCS/SCS definition of "wetland determination"). When a prior converted cropland changes from agricultural to nonagricultural use, the exemption remains with the property under the Clean Water Act. *See New Hope Power Co.*, 746 F.Supp.2d at 1282; *United States v. Hallmark Const. Co.,* 30 F.Supp.2d 1033, 1040 (N.D. Ill. 1998).

Gallagher & Henry purchased the parcel in 1995. SOF ¶ 6; AR 065. At the time of purchase, the parcel had been farmed continuously for more than a decade. SOF ¶ 7; AR 104. The Corps acknowledges that the Warmke Parcel "was likely converted from wetland to agricultural use before December 23, 1985, and for that reason would likely be considered PC cropland" when construction of the residential development on the property began in 1996. SOF ¶ 11; AR 013. Neither farming nor development activities were "abandoned" on the Warmke Parcel.

**1) The Clean Water Act abandonment criteria must be read in tandem with the NRCS/SCS Swampbuster provisions**

The Corps and the EPA have never codified the abandonment concept in their respective sections of the Code of Federal Regulations. On the face of the codified joint Corps/EPA rules, the prior converted cropland exemption applies in perpetuity, regardless of whether farming or development continues. *See* 33 C.F.R. § 328.3(b)(2) ("waters of the United States" does not include "[p]rior converted cropland"). Indeed, such a reading is consistent with the Corps' manual that preceded the rule. The limitation that the prior converted cropland exemption will not apply to properties which are "abandoned" is derived solely from explanations in the Federal

Register regarding how the Corps and the EPA intended to enforce the prior converted cropland exemption. 58 Fed.Reg. 45008, 45034 (August 25, 1993). Specifically:

> The Corps and EPA will use the **[*NRCS]/SCS provisions*** on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of ***those*** provisions and which exhibit wetlands characteristics will be considered wetlands subject to [Clean Water Act ] regulation.

*Id.* (emphasis added). This standard was adopted "to ensure consistency in the way various federal agencies are regulating wetlands." *See* 58 Fed.Reg. 45008, 45032-34 (August 25, 1993). Accordingly, the definition of abandonment under the Act must be viewed through the lens of the Swampbuster provisions from which it is borrowed.

**2) The Warmke Parcel is not abandoned under the NRCS/SCS Swampbuster Provisions**

The Swampbuster program was designed to discourage farmers from converting existing wetlands *into* farming operations. *Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 474 (7th Cir. 2005). To meet this goal, the Swampbuster program made farms operating on converted wetlands ineligible for certain federal agricultural support programs. *Id*. But the program was designed to protect "wetlands as they actually existed on the date of its enactment…without attempting to restore lands then under agricultural production." *Id.* at 475. Accordingly, the Swampbuster program exempts from its penalty provisions prior converted croplands converted before December 23, 1985. A wetland converted to agricultural production prior to that date may lose its prior converted cropland exemption only if it is "abandoned."

The NRCS/SCS Swampbuster provisions define abandonment as "the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or farmed-wetland pasture." 7 C.F.R. § 12.33(c). In addition, wetland criteria must reappear. *Id.* The Corps and the EPA expressly adopted this standard in the preamble of their

joint 1993 rulemaking. *See*, 58 Fed. Reg. 45,034. ("P[rior] C[onverted] cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area *has been used for the production of an agricultural commodity*, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.") (emphasis added). Here, major portions of the Warmke Parcel continue to be farmed. SOF 20, 29. Accordingly, it matters not whether any portion of the parcel currently meets wetland criteria.

In addition, the specific 13 acres for which the Corps made its jurisdictional determination are considered "artificial wetlands" under the Swampbuster program. *See* 7 C.F.R. § 12.2(a) (artificial wetland is a "wetland that is temporarily or incidentally created as a result of adjacent development activity.")[1]. The wetlands were allegedly created on the 13 acres at issue when adjacent development activity within the subdivision damaged a drainage tile causing water to pool in those acres. SOF 28-29 (AR 051-76). Under Swampbuster, the appearance of such "artificial wetlands" are not considered grounds for losing the prior converted cropland exemption, regardless of whether the area has or has not been farmed for five years. *See* 7 C.F.R. § 12.5(b)(1)(vii)(A). Because the Corps has decided to adopt Swampbuster's provisions regarding prior converted cropland, the exemption under the Clean Water Act for such areas, including the 13 acres at issue here, is not forfeited.

Likewise, Swampbuster's abandonment provision does not apply if the property has been converted to "a purpose that does not make the production of an agricultural commodity possible, such as…building and road construction and no agricultural commodity is produced on such land." 7 C.F.R. § 12.5(b)(1)(iv). Here, the Warmke Parcel was converted to a purpose

[1] This provision is part of the definition of the term "wetland determination."

inconsistent with the production of an agricultural commodity when it was graded and clay was compacted for housing construction. SOF ¶ 28, AR 066. Farming in that area now is not possible. SOF ¶ 29; AR 066, 090, 156.

Thus, farming continues on the Warmke Parcel, which still produces crops on a yearly basis, except for areas with completed townhomes, areas that have been prepared for detached single family homes, or areas with infrastructure designed to serve both. SOF ¶ 20, 29; AR 066, 630. Moreover, the alleged wetlands exist solely due to drainage issues caused "as a result of adjacent development activity." 7 C.F.R. § 12.2(a)(1)(ii) (definition of "wetland determination"). *See* SOF 37-38; AR 051, 076 (construction damaged drainage tile causing water to pool). Just as importantly, the specific area of the Warmke Parcel that contains the alleged wetlands was converted to a use inconsistent with farming when it was filled and clay was compacted for housing construction. The physical alteration consisted of: (a) stripping topsoil and excavating clay from the site of the two storm-water detention ponds to serve both Phase I and Phase II; (b) transporting and using the excavated clay from the storm-water construction area to fill and compact the low areas within Phase II with up to six feet of load bearing clay to support building pads and act as stable bases for road construction; (c) trenching and installing sanitary sewer and potable water supply mains and lines to serve both Phase I and Phase II; and (d) storing steep mounds of topsoil in the area to be later used for berming, final grading and landscaping during the final stages of the development of both Phases I and II. SOF ¶ 26; AR 066. Farming in that area would now be impossible. SOF ¶ 27; AR 066; AR 090; AR 156.

Moreover, Gallagher & Henry received a letter from NRCS/SCS dated July 10, 2011, stating that the Warmke Parcel, identified as Tract 8895, Orland Township Section 34, qualified

as prior converted cropland as of the date of the letter. SOF 12; AR 396. The letter attached a map showing the undeveloped acreage on the Warmke Parcel. SOF 12; AR 395. The Corps discounts the letter and the map. AR 075. But those documents provide clear evidence that the NRCS/SCS considers the entire Warmke Parcel to be prior converted cropland, a fact that is reflected extensively in the record. *See* AR 013, 075, 104, 161-165, 178, 392.

Accordingly, regardless of whether viewed from the broad lens of the parcel as a whole or from the narrow lens of the specific 13 acres over which the Corps asserts jurisdiction, the Warmke Parcel has not been abandoned and, therefore, consistent with the findings of NRCS/SCS, the parcel retains the prior converted cropland exemption. *See New Hope,* 746 F.Supp.2d at 1282.

**3) The Corps may not employ a definition of abandonment different from that of the NRCS/SCS Swampbuster provisions without notice and comment rulemaking under the APA**

As explained *supra*, the Swampbuster regulatory provisions are the only place where the abandonment criteria are codified. The Corps/EPA rule exempting prior converted cropland from Clean Water Act jurisdiction has no abandonment qualification. *See* 33 C.F.R. § 328.3(b)(2). On its face, the Corps' rule exempts prior converted croplands from the Clean Water Act in perpetuity. *Id.* ("Waters of the United States do not include prior converted cropland."). When the Corps adopted its official rule exempting prior converted croplands from the Clean Water Act, the preamble to the Federal Register noted that the Corps' treatment of prior converted cropland would mirror that of the NRCS/SCS Swampbuster program, including the NRCS/SCS provisions on abandonment. 58 Fed.Reg. 45008, 45032 (August 25, 1993) (The Corps is "utilizing the NRCS/SCS definition of PC cropland for purposes of § 404 of the Clean Water Act."); *Id.* at 45034 ("The Corps and EPA will use the [NRCS]/SCS provisions on

'abandonment,' thereby ensuring that PC cropland that is abandoned within the meaning of those provisions…"). The reason for the adoption is clear: it is "critical" that property owners "be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the [Clean Water Act.]" *Id.* at 45032-33.

The Corps now attempts to apply a stricter definition of abandonment for prior converted croplands than that required by the NRCS/SCS. But, as the court recognized in *New Hope,* 746 F.Supp.2d 1272, the Corps may not alter the standards it applies to prior converted cropland without going through formal rule making. In *New Hope*, the Corps attempted to adopt the so-called "Stockton Rules" regarding abandonment of prior converted cropland without going through notice and comment rule making. As relevant here, the Stockton Rules attempted to eliminate the prior converted cropland exemption for properties that had been converted to non-agricultural use. *Id.* at 1276. The Court rejected the Corps' approach, noting that in order to narrow the prior converted cropland exemption, the Corps would have to go through notice-and-comment rule making—which it had not done. *Id.* at 1282.

Similarly, here, the Corps may not depart from the NRCS/SCS provisions on abandonment (a concept that only exists in *reference* to the NRCS/SCS program) without going through the rule making process. To date, the Corps has not gone through notice and comment rulemaking to explain why it is departing from its policy of harmonizing the prior converted cropland abandonment criteria with those of the NRCS/SCS Swampbuster program, despite the fact that the current NRCS/SCS provisions on abandonment have been on the books since 1996. Under these circumstances, to change course without rule making is impermissible. *See New Hope,* 746 F.Supp.2d at 1282. In fact, the Corps has never proffered an adequate explanation of why it's position on abandonment no longer mirrors that of the NRCS/SCS, even though the

regulated community, including Gallagher & Henry, relies on such mirroring. *See National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981–982 (2005) (agency must adequately explain changing positions).

The Corps will likely point to *Huntress v. U.S. Dep't of Justice*, No. 12-CV-1146S, 2013 WL 2297076, (W.D.N.Y. May 24, 2013) for the proposition that, for the purpose of the Clean Water Act, the Swampbuster provisions on abandonment are frozen in time as they existed in 1993, when the Corps' rule on prior converted croplands was adopted. The Corps reliance on *Huntress* would be misplaced for three reasons. First, *Huntress* is an unpublished district court opinion from another circuit with no binding effect. And its inconsistency with *New Hope* is striking, as *New Hope* required rulemaking before the so-called "Stockton Rules" could be adopted by the Corps.

Second, *Huntress* is palpably distinguishable. In *Huntress,* the plaintiffs argued that the 1996 amendments to the Swampbuster program had *done away* with the concept of abandonment entirely. *Id.* at *11 ("Plaintiffs, argue that, even assuming the land was abandoned, the abandonment rule was repealed by the 1996 amendments to the Food Security Act, and is no longer in effect."). Based on that argument, the court found that the pree-1996 provisions on abandonment remained controlling. *Id.* at 11-12. However, the plaintiffs in *Huntress* were incorrect about the law. The 1996 amendments did not eliminate the concept of abandonment from the Swampbuster program, which still clearly provides that "abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture… such land is considered to be abandoned when the land meets the wetland criteria of § 12.31." 7 C.F.R. 12.33(c). That standard is essentially

identical to the standard adopted in the joint Corps/EPA 1993 regulatory preamble. *See*, 58 Fed. Reg. 45,034.

Third, *Huntress* is simply wrongly decided. The Corps' abandonment exception to the prior converted cropland exemption is not created by a Corps rule. It is adopted by reference from the NRCS/SCS Swampbuster provisions in the preamble to the 1993 joint rule. 58 Fed.Reg. 45008, 45034. If the Corps wants to adopt a standard that is inconsistent with NRCS/SCS it has no textual basis to do so, and must go through rulemaking. *See New Hope,* 746 F.Supp.2d at 1282; *National Cable & Telecommunications Assn,* 545 U.S. at 981–982 (2005).

**4) Departing from the NRCS/SCS Swampbuster Provisions without notice would violate due process**

"The point of due process of the law in general is to allow citizens to order their behavior." *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 418 (2003). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice … of the conduct that will subject him to punishment." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Accordingly, due process requires that regulations must be worded and enforced in such a way that a reasonable citizen can predict the legal outcomes of his choices. *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

Here, the Corps contends that the Corps' prior converted cropland exemption to the Clean Water Act must be interpreted in a fundamentally different way than the prior converted cropland exemption under the NRCS/SCS Swampbuster program. In particular, the Corps will likely argue that 7 C.F.R. § 12.5(b)(vii), 7 C.F.R. § 12.2(1)(ii), and 7 C.F.R. § 12.5(b)(iv) of the NRCS/SCS Swampbuster provisions regarding prior converted croplands do not apply to prior converted croplands under the Clean Water Act because those provisions were added in

September of 1996—three years after the Corps entered its rule on prior converted croplands. Yet Gallagher & Henry would have no basis for reaching such a conclusion at the time it began grading and construction on the Warmke Parcel in the fall of 1996. *See* SOF 28. Indeed, a reasonable person looking at the Code of Federal Regulations at the time would have come to precisely the opposite conclusion—namely, that the prior converted cropland exemption was applied in the same way under both the Clean Water Act and the NRCS/SCS Swampbuster program.

Thus, the overwhelming evidence shows that the Warmke Parcel as a whole, and the 13 acres specifically, are covered by the prior converted cropland exemption, and that the exemption has not been lost because neither was "abandoned." But even if the exemption does not apply to the parcel, the Corps "significant nexus" finding is unlawful because it was made in violation of the Corps' regulations. As set forth in more detail in Section II, *infra,* that is an independent reason why the finding should be vacated.

## II. THE CORPS ACTED UNLAWFULLY BY BASING ITS FINAL JURISDICTIONAL DETERMINATION ON OVER THIRTY STUDIES AND OTHER DATA NOT CONTAINED IN THE ADMINISTRATIVE RECORD

The Clean Water Act prohibits the discharge of any "pollutant" into "navigable waters" unless authorized, generally by a permit. 33 U.S.C. § 1311(a), 1362(12). The Clean Water Act defines "navigable waters" broadly to encompass all "waters of the United States," *id.* § 1362(7), which is not defined in the statute but which the Supreme Court construed in *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* case yielded multiple opinions. The plurality opinion, authored by Justice Scalia, concluded that Congress intended to protect only "relatively permanent" waters that connect to traditional navigable waters, as well as wetlands that have a "continuous surface connection" to such relatively permanent waters, such that it is difficult to

tell where water ends and land begins. 547 U.S. at 742. Justice Kennedy's concurring opinion concluded that Clean Water Act jurisdiction extends to waters that, either alone or in combination with similarly situated lands in the region, have a "significant nexus" to traditional navigable waters. *Id*. at 779-80. The Seventh Circuit has held that the significant nexus standard in Justice Kennedy's opinion is controlling. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006).

The portions of the parcel alleged to be jurisdictional wetlands consist of approximately 13 acres of grassy fields adjacent to piled topsoil (moved for construction) that may collect water when it rains. SOF ¶ 5; AR 601-605. The parcel is surrounded on all four sides by residential development. SOF ¶ 4; AR 061. The nearest "navigable water"—the lynchpin for CWA jurisdiction—is the Little Calumet river, which is up to an additional 11 miles away. SOF ¶ 3, 41; AR 065, 052. To reach this navigable water, rain water from the alleged wetlands on the Warmke Parcel would have to travel across a portion of the dry property through erosion- caused ruts, pass through as many as 6 storm water retention basins, navigate approximately 6,000 feet of underground pipe, and flow through up to 11 miles of winding creek-bed. SOF ¶ 41-42; AR 087, 065. Those are the facts in the administrative record as they existed at the time of the final administrative appeal when the division commander determined that the record was insufficient to sustain a finding of significant nexus between the Warmke Parcel and the Little Calumet River.

The Corps' regulations authorize a district engineer to make a jurisdictional determination as to whether an area is a "water of the United States" and thus within the agency's regulatory jurisdiction. 40 C.F.R. §§ 320.1(a)(6), 325.9. Jurisdictional determinations can be "preliminary" or "approved." An approved jurisdictional determination (which is what is

at issue here) is "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." *Id.* § 331.2.

A district engineer's jurisdictional determination can be reviewed through the Corps' administrative appeal process. An administrative appeal is initiated when an affected party submits a Request for Appeal. *Id*. § 331.6(a). The administrative appeal is made to the division engineer, and is typically conducted by a Review Officer. *Id*. § 331.7(a). The Corps' regulations spell out in detail what information the Review Officer may consider as part of the administrative appeal. The Review Officer may hold a meeting "to review and discuss issues directly related to the appeal for the purpose of clarifying the administrative record." *Id*. § 331.7(d). The Review Officer may also conduct a site investigation if it is needed to clarify the administrative record (or on request, if the Review Officer determines a site investigation "would be of benefit in interpreting the administrative record"). *Id*. § 331.7(c).

The administrative appeal "is limited to the information contained in the administrative record" as of the date of the Notification of Appeal Process, which is a fact sheet that accompanies the approved jurisdictional determination and explains the administrative appeal procedures to the person or entity who sought the jurisdictional determination, as well as any relevant information gathered by the Review Officer. *Id*. § 331.7(f). Neither party to the administrative appeal may present new information, but either party may "interpret, clarify, or explain issues or information contained in the record." *Id*.

If the division engineer, normally the Reviewing Officer, determines that an administrative appeal has merit, the division engineer may instruct the district engineer on how to correct any procedural errors, or may instruct the district engineer "to reconsider the decision

where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record." *Id*. § 331.9(b). The division engineer "will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues." *Id*. § 331.10(b). The final Corps decision on administrative appeal "is the district engineer's decision made pursuant to the division engineer's remand of the appealed action." *Id*.

On March 26, 2012, the district engineer entered a finding that the Warmke Parcel contained jurisdictional wetlands under the Clean Water Act. SOF ¶ 53-55; AR 047, 050. This was the third such finding in the seven-year administrative proceeding in connection with this matter. Gallagher & Henry appealed that decision to the division engineer, who held that the district had failed to adequately establish the significant nexus finding necessary to justify its jurisdictional determination. SOF ¶ 58; AR 048-49. The division engineer remanded the decision to the district with specific instructions that the district explain its significant nexus finding. SOF ¶ 60; AR 053-54. The remand explicitly instructed that the final decision on remand shall be based solely on the Administrative Record as it existed on March 29, 2012. SOF ¶ 61; AR 050 ("The AR is limited to information contained in the record by March 29, 2012."). And the remand stated explicitly that any explanation of the significant nexus decision in connection with the remand shall "not become part of the District's AR." SOF ¶ 62; AR 050.

Notwithstanding this explicit command, which is consistent with Corps regulations, the district issued a final significant nexus determination on remand containing 11 pages unlawfully relying on more than 30 studies that were not contained in the Administrative Record. SOF ¶¶ 62-63; AR 036-46. Absent this additional information the district's decision on remand was virtually identical to its prior decision, which the division held to be insufficient to justify a

wetlands finding. As explained more fully in sections A, B, and C below, the Corps' finding that the Warmke Parcel contains jurisdictional wetlands is therefore impermissible because it relies on information outside the record in violation of the Corps' own regulations and procedures.

**A. The District Engineer Violated Corps Regulations and Explicit Instructions from the Division Engineer by Basing the Final Jurisdictional Determination on Documents Not Contained in the Administrative Record**

The decision of the district on remand shall be based solely on the existing administrative record. 33 C.F.R § 331.10(b) ("The division engineer will remand the decision to the district engineer with specific instructions to review ***the administrative record***, and to further analyze or evaluate specific issues."); 33 C.F.R § 331.9(b) (the division engineer may instruct the district engineer "to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, ***in the administrative record.***"); 33 C.F.R § 331.7(f) (Neither party to the administrative appeal may present new information, but either party may "interpret, clarify, or explain issues or information contained ***in the record***.") Moreover, the district engineer must follow the remand instructions of the Division Engineer. 33 C.F.R § 331.10(b) (the "final Corps decision is the district engineer's decision ***made pursuant to the division engineer's remand*** of the appealed action.")

The remand in this case contained explicit instructions that nothing new would be added to the record after March 29, 2012. SOF ¶ 61-62; AR 050 ("The AR is limited to information contained in the record by March 29, 2012."). This restriction makes sense. The Corps decision on remand is the final administrative decision. 33 C.F.R § 331.10(b). There is no additional hearing and no opportunity for the property owner to submit additional evidence to rebut claims made by the district. *Id.* Nonetheless, the *entirety* of the District Engineer's additional

justification for its significant nexus finding (11 pages) relies on more than 30 studies not found in the administrative record. SOF ¶ 63; AR 036-46.[2]

**B. Allowing the District to Submit Additional Documents to the Record on Remand, without providing Gallagher & Henry an Opportunity to Review Those Documents or Submit Evidence to Rebut Them Prior to the Corps Issuing Its Jurisdictional Determination Violates Due Process**

Courts "ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin* 323 U.S. 101, 105 (1944). Thus, the "rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden* 275 U.S. 142, 148 (1927).

The Corps' interpretation of its regulations would violate Gallagher & Henry's rights to due process and therefore should be rejected. On its face, 33 C.F.R § 331.9 (b) provides that the "division engineer will remand the decision to the district engineer with specific instructions to review ***the administrative record***, and to further analyze or evaluate specific issues." (emphasis added.) The Corps argues that this invitation to "analyze or evaluate specific issues" gives it carte blanche to go beyond the scope of the administrative record in its analysis. ECF # 35, at 7-8. But such an interpretation is not only unsupported by the text, but raises constitutional concerns by allowing the Corps to present evidence for which a property owner will not have an opportunity for rebuttal.

The Corps decision on remand is the final administrative decision. 33 C.F.R § 331.10(b) There is no additional hearing and no opportunity for the property owner to submit additional

[2] On August 30, 2016, G&H filed a motion to strike those 11 pages from the Administrative Record. ECF Doc. No. 32. The hearing on that motion was held on September 8, 2016. ECF Doc. No. 36. The motion remains pending before the Court. *Id.* At the hearing, Gallagher & Henry submitted a modified version of AR 036-46 that highlighted portions of the 11-page document that rely on extra record documents. A black-and-white copy of that document is set forth in Exhibit A hereof.

evidence to rebut claims made by the district. *Id*. If the property owner chooses to appeal the decision under the APA, he is likewise precluded from submitting rebuttal evidence, as the APA limits judicial review to those facts already in the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Put simply, under the Corps interpretation, the district may simply load the administrative record on remand in anticipation of litigation and there is nothing the property owner may do to protect his interests.

Due process requires that a court afford an individual "a meaningful opportunity to be heard and a reasonable opportunity to present evidence on his or her behalf." *Pronsivakulchai v. Gonzales*, 461 F.3d 903, 907 (7th Cir. 2006). This includes the right to rebut evidence produced against them in the administrative process. *Id.* at 908 ("The IJ's refusal to consider Pronsivakulchai's rebuttal evidence denied her an opportunity to be heard and to present evidence on her behalf."); *Gleason v. Bd. of Educ. of City of Chicago*, 792 F.2d 76, 79 (7th Cir. 1986) (right to rebut allegations in a dismissal action for a public employee); *Jt. Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, Concurring) ("The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge.") Interpreting the relevant provisions such that the Corps can expand the record without allowing Plaintiff an opportunity to respond and rebut the new evidence would violate due process. Accordingly, this Court should reject such an interpretation.

### C. The District Engineer's Use of Extra-Record Documents on Remand Is Inconsistent with the Administrative Procedure Act

Judicial review under the APA turns on a consideration of "the whole record or those parts of it cited by a party...." 5 U.S.C. § 706. The "whole record" consists of the full record that was "before the agency" at the time of the decision at issue. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("The focal point for

judicial review should be the administrative record already in existence."). The record is limited to "all documents and materials that the agency directly or indirectly considered .... ***nothing more*** and nothing less." *Maritel, Inc. v. Collins,* 422 F.Supp.2d 188, 196 (D.D.C. 2006) (emphasis added) (*quoting Bar MK Ranches v. Yuetter,* 994 F.2d 735, 739 (10th Cir. 1993)). And no new information may be added on administrative appeal. 33 C.F.R § 331.2.

Were "reviewing courts to treat as 'contemporaneous explanations' the statements of agencies issued not in conjunction with administrative action, but some time afterwards when the propriety of that action is under attack, that would amount to judicial sanctioning of administrative practice based on a principle of 'act now; figure out why later.'" *Smith v. F. T. C.*, 403 F.Supp. 1000, 1011 (D. Del. 1975).

Yet that is precisely what the Corps' interpretation of its regulations would allow. The Corps had seven years and three administrative appeals to put evidence into the administrative record to support its findings that the Warmke Parcel contained jurisdictional wetlands. Under the Corps' interpretation of its regulations, it may wait until the final remand on administrative appeal to dump its evidence into the administrative record without rebuttal. That is precisely the sort of "act now; figure out why later" approach that the APA does not allow. *Smith*, 403 F.Supp. at 1011.

### D. Without the Extra-Record Documents, the Corps' Jurisdictional Determination Is Not Justified by the Facts In the Record

On March 26, 2012, the Corps entered a jurisdictional determination that Gallagher & Henry's property contained jurisdictional wetlands under the Clean Water Act. SOF ¶ 53; AR 047. Gallagher & Henry duly appealed that JD to the Division Engineer, who entered a finding that the Corps had failed to adequately establish its "significant nexus" finding. SOF ¶ 55-57; AR 053-54.

Significant nexus is a term of art borrowed from Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). The test requires more than a casual or surficial inquiry. The Corps' own guidance document states that, to support a significant nexus finding, the Corps must "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*."[3] More importantly, the Corps must "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." *Id.*

Here, the division engineer found during the administrative appeal that the district, failed to explain the basis for [its] summary conclusions, and in so doing, failed to follow the procedures contained in the *Rapanos* Guidance. SOF ¶ 57-60; AR 048, 053-54. As a result, the division engineer concluded that the district's jurisdictional determination was not supported in a manner sufficient to justify a significant nexus finding. *Id*. The division remanded the case to the district to explain its findings. *Id*.

The district responded with the final jurisdictional determination at issue in this case. The final jurisdictional determination is virtually identical to that already rejected by the division, with the exception of an eleven-page document, titled "Warmke Site Wetlands Functions and Benefits to Downstream Waters." SOF ¶ 63; AR 036-46. As explained in § II. C., *supra*, those eleven pages unlawfully rely on more than 30 studies not contained in the administrative record. *Id*. If this unlawful material is removed, then the Corps' final

[3] AR 053; Army Corps 2008 *Rapanos* Guidance, p 11. Clean Water Act guidance may be referenced at: http://www.usace.armv.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx. (emphasis added).

jurisdictional determination is virtually identical to the one the Corps already rejected as not being sufficient to comply with *Rapanos'* significant nexus test. Therefore, because, the inclusion of this extra record material was unlawful, the final jurisdictional determination must fail for the same reason that the prior jurisdictional determination was rejected on appeal—it does not adequately explain its significant nexus finding.

Significant nexus is the *sine qua non* of Clean Water Act wetlands jurisdiction in the Seventh Circuit. *See Rapanos*, 547 U. S. at 742; *Gerke*, 464 F.3d at 724-25. Accordingly, even if the prior converted cropland exception does not apply in this case, the Corps' failure to establish a significant nexus, based on the evidence in the administrative record, between the Warmke Property and any navigable water, is unsupportable because the Corps has failed to establish a rational relationship between the facts found and the choice it made in its jurisdictional determination. *See Motor Vehicle Manufactures Ass'n v. State Farm,* 463 U.S. 29, 43 (1983) (agency action should be stricken if there is no rational connection between the facts found and the choice made).

## III. VACATUR IS APPROPRIATE IN THIS CASE

Invalid agency actions are ordinarily vacated and remanded. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp*., 423 U.S. 326, 331 (1976). An agency's failure to comply with statutory requirements usually results in vacating a rule. See 5 U.S.C. § 706(2) ("The reviewing court shall…hold unlawful and set aside agency action…found to be…not in accordance with law."); *California Communities Against Toxics v. U.S. E.P.A.,* 688 F.3d 989, 994 (9th Cir. 2012) ("[W]e have only ordered remand without vacatur in limited circumstances.").

Seven years of administrative proceedings are enough. It would serve no useful purpose to remand the case to the Corps but would only create further delay in Gallagher & Henry's

ability to develop the Warmke Parcel. Given the fact that the Corps violated its own rules and procedures in connection with the prior converted cropland exemption and the finding of significant nexus, vacatur is required. *See* 5 U.S.C. § 706. Any post-hoc justifications for its actions raised for the first time in this litigation cannot be relied upon. *See Michigan v. EPA*, 135 S.Ct. 2699 (2015) (noting that it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action.") (*citing SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943)).

After seven years of expensive and fruitless administrative proceedings, equity requires that Gallagher & Henry no longer be required to wait to use the Warmke Parcel. *See Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987) ("[T]he full scope of [a federal court's equity] jurisdiction is to be recognized and applied.").

## CONCLUSION

For the foregoing reasons, this court should grant Gallagher & Henry's motion for summary judgment and vacate the Corps' jurisdictional determination.

Dated: December 21, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2016, I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system, and all attorneys of record will be served by the CM/ECF system.

*s/Theodore Hadzi-Antich*
THEODORE HADZI-ANTICH

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



**EXHIBIT A**

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 Bas 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 Band 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



# EXHIBIT A

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



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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 fload 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.



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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



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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



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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 limitingnitrogen 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



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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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