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

ORCHARD HILL BUILDING COMPANY DBA GALLAGHER & HENRY,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 1:15-CV-6344

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In a decision dated July 19, 2013, the U.S. Army Corps of Engineers ("Corps") issued a final, reviewable decision that 13 acres of wetlands on Plaintiff's property are regulated by the Clean Water Act ("CWA"). Plaintiff seeks summary judgment that the July 2013 jurisdictional determination is arbitrary, capricious, or otherwise not in accordance with the law.

Plaintiff's argument rests on the assertion that the Corps violated its own regulations in two ways: (1) when the Corps concluded that the 13 acres of wetlands do not qualify for the "prior converted cropland" exemption from CWA regulation; and (2) when the Corps relied on an 11-page document (AR 036-046) that describes how the wetlands have a significant nexus to the Little Calumet River, and thus are waters of the United States. Plaintiff is incorrect on both points. The administrative record supports the Corps' finding that the 13 acres of wetlands have not been farmed for over 15 years. Farming has thus been abandoned, which disqualifies the wetlands from the prior converted cropland exemption. Further, the information on which the Corps relied for its finding that the wetlands have a significant nexus to waters of the United States, including the 11-page document, is properly part of the administrative record. Plaintiff concedes that the final agency action at issue in this case is the July 2013 jurisdictional determination, not the jurisdictional determination from March 2012, which has been superceded. *See* Memorandum of Law in support of Plaintiff's Motion for Summary Judgment ("Pl. Mem."), ECF. Doc. No. 40, at 24, 27. The July 2013 jurisdictional determination was issued in response to a May 2013 administrative remand, and the Corps' reliance on the contemporaneous 11-page supporting document is fully consistent with the Administrative Procedure Act, well-established caselaw, and the Corps' regulations. The Corps regulations which Plaintiff cites address the scope of the record for administrative appeals, and have no bearing on the scope of the record for final agency actions taken after such administrative appeals are completed.

In contrast, Defendant's cross-motion for summary judgment should be granted. The administrative record demonstrates that the 13 acres at issue are wetlands, and that, consistent with Justice Kennedy's opinion in *Rapanos v. United States*, those wetlands, along with similarly situated wetlands in the watershed, significantly affect the chemical, physical, and biological integrity of the Little Calumet River, a traditional navigable water. Therefore, the 13 acres constitute waters of the United States and are regulated by the Clean Water Act.

BACKGROUND

I. Statutory and Regulatory Background

A. The Clean Water Act

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 CWA defines "navigable waters" broadly to encompass all "waters of the United States," *id.* § 1362(7). Although the term "waters of the United States" is not defined in the statute, it is defined in the Corps' regulations (as well as in the United States Environmental Protection Agency's regulations, which contain an identical definition; for convenience this memorandum cites only the Corps' regulations).

The Corps identifies the following as waters of the United States: (1) traditional navigable waters; (2) interstate waters; (3) other waters, the use, degradation, or destruction of which could affect interstate commerce; (4) impoundments of jurisdictional waters; (5) tributaries of waters identified in (1) through (4); (6) the territorial seas; and (7) wetlands adjacent to waters identified in (1) through (6). 33 C.F.R. § 328.3(a)(1)-(7) (1987).[1] Wetlands, in turn, are defined as "areas that are

[1] EPA and the U.S. Army promulgated a new regulatory definition of the statutory term "waters of the United States" in 2015, 80 Fed. Reg. 37,054 (June 29, 2015), but that regulation has been stayed pending judicial review and in any event does not apply to the 2013 jurisdictional determination at issue in the case. In addition, on February 28, 2017, the President issued an Executive Order directing the review of the 2015 rule, and the proposal of a new regulation rescinding or revising the *Cont.*

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

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court reviewed the regulatory definition of waters of the United States as it applied to a wetland that the federal government asserted was adjacent to a tributary of a traditional navigable water, and therefore jurisdictional under 33 C.F.R. section 328.3(a)(7). The question presented in *Rapanos* was not whether the areas in dispute were wetlands, but instead whether those wetlands were waters of the United States and thus within the federal government's regulatory jurisdiction under the CWA.

A majority of the *Rapanos* Court declined to adopt the federal government's theory of Clean Water Act jurisdiction. In an opinion authored by Justice Scalia, a plurality concluded that the term "waters of the United States" covers "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. 547 U.S. at 739, 742. But in the Seventh Circuit the controlling standard for determining which wetlands are waters of the United States is currently set forth in Justice Kennedy's concurring opinion. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). Under Justice Kennedy's standard, CWA jurisdiction extends to

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2015 regulation, as appropriate and consistent with law. Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule. See https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic (last viewed on Apr. 28, 2017). In response, and consistent with their inherent authority to reconsider past decisions, EPA and the U.S. Army are reviewing the 2015 Rule, and have provided advanced notice of a forthcoming rulemaking regarding the definition of "waters of the United States." 82 Fed. Reg. 12,532 (March 6, 2017). Although the Corps has concluded the 13 acres of wetlands at issue are "waters of the United States" based on currently applicable law, the Corps may reconsider this determination in the future, after the agencies' current regulatory review and any related rulemaking.

wetlands that, either alone or in combination with "similarly situated lands in the region," have a "significant nexus" to a traditional navigable water. 547 U.S. at 779-80.

B. Prior Converted Cropland

In addition to defining which wetlands are federally regulated, the Corps' regulations (and the statute itself) also contain various exclusions to the CWA's prohibition on discharges into waters of the United States. Some exclusions focus on particular activities. For example, the discharge of dredged or fill material from "normal farming" activities such as plowing, seeding, and harvesting is "not prohibited by or otherwise subject to regulation under this section or section 1311(a)." 33 U.S.C. § 1344(f)(1). Other exclusions, including the one that is relevant here, focus on the nature of the land instead of on the activity. In particular, the Corps' regulations specify that "prior converted cropland" is not a water of the United States. 33 C.F.R. § 328.3(a)(8) (1994). Thus, the Clean Water Act's prohibition on discharges does not apply to discharges into prior converted cropland.

The Corps and EPA (the "Agencies") clarified at the time they adopted this exclusion that prior converted cropland only refers to wetlands that were manipulated for farming purposes before December 23, 1985. They also explained that the exclusion does not apply in any areas where farming has been abandoned for five consecutive years and where wetland characteristics have returned. *See* 58 Fed. Reg. 45,008, 45,031-34 (Aug. 25, 1993). They adopted this limitation on the exclusion in part to achieve the policy goal of greater consistency with the manner in which the U.S. Department of Agriculture ("USDA") was administering the "Swampbuster" provisions of the Food Security Act discussed below – a program the purpose of which is to determine eligibility for farm program benefits. 58 Fed. Reg. at 45,031-34. But the agencies also made clear that their "paramount objective" in administering the CWA is "protecting the nation's aquatic resources." *Id.* at 45,032. By limiting the prior cropland exclusion, the agencies "provide a mechanism for 'recapturing' into [CWA] jurisdiction those [prior converted] croplands that revert back to wetlands

where the [prior converted] cropland [is] abandoned." 58 Fed. Reg. at 45,034. They also expressly reserved EPA's authority to determine whether the CWA exclusion for prior converted cropland applies, "[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency." 33 C.F.R. § 328.3(a)(8) (1994).

Following promulgation of the prior converted cropland rule in 1993, EPA and the Corps have maintained their interpretation that "prior converted cropland" is subject to abandonment, notwithstanding subsequent changes to the Food Security Act that affect farmers' eligibility for USDA farm program benefits. Thus, if a particular wetland is prior converted cropland, it is excluded from the Clean Water Act's prohibition on discharges, unless the exclusion is lost due to abandonment.

C. The Food Security Act

The Food Security Act, 16 U.S.C. §§ 3801-62, pertains to federal benefits for farmers and is administered by the U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS," formerly the Soil Conservation Service). The Food Security Act is different from the Clean Water Act in two relevant ways. First, instead of prohibiting discharges into certain wetlands, the Food Security Act prohibits farmers from receiving certain benefits if they produce agricultural commodities on converted wetlands. 16 U.S.C. §§ 3821-24. Second, instead of applying only to wetlands that, either alone or in combination with similarly situated lands in the region, have a significant nexus to a traditional navigable waters, the Food Security Act is *not* limited to wetlands that are "waters of the United States," which is a statutory limitation in the Clean Water Act, but not in the Food Security Act.

The relevant provisions of the Food Security Act are commonly referred to as the "Swampbuster" provisions. In particular, farmers who plant an agricultural commodity on wetlands that were converted to cropland will generally be ineligible for farm program benefits such as loans

and payments. As originally enacted, the Food Security Act provided that a farmer who produces an agricultural commodity on converted wetlands after December 23, 1985, is ineligible for benefits. 16 U.S.C. § 3821 (1988). However, a person does not "become ineligible . . . for program loans, payments, and benefits as the result of the production of a crop of an agricultural commodity on -- (1) converted wetland if the conversion of such wetland was commenced before December 23, 1985." *Id.* § 3822(a)(1). USDA's implementing regulations that were in effect at the time the Corps adopted the prior converted cropland exemption for the Clean Water Act explained that converting a wetland means manipulating it to make possible the production of an agricultural commodity where such production would not have been possible but for the conversion. 7 C.F.R. § 12.2(a)(6) (1993). The regulations mirrored the statutory provision that a person remains eligible for program benefits if the conversion commenced before December 23, 1985. *Id.* § 12.5(b)(1)(i) (1993). The regulations added that a person remains eligible for program benefits if "the conversion is for a purpose that does not make the production of an agricultural commodity possible, such as conversions for . . . building and road construction and no agricultural commodity is produced on such land." *Id.* § 12.5(b)(1)(ii) (1993). However, as with the exclusion from the Clean Water Act's prohibition on discharges for prior converted croplands, the exclusion from the Food Security Act's prohibition on program benefits for prior converted cropland could also be lost by abandonment.

Under USDA's regulations that were in effect at the time the Corps adopted the prior converted cropland exemption for the Clean Water Act, abandonment is the cessation of cropping, management, or maintenance operations related to the production of agricultural commodities on converted wetland. *Id.* § 12.33(b) (1993). If there is no crop production at the end of five consecutive years, the land is abandoned. *Id.*

In 1996, Congress amended the Food Security Act to provide that farmers who continue to plant an agricultural commodity on wetlands that were previously identified by NRCS as having

been converted to cropland prior to December 23, 1985, will generally remain eligible for program benefits, even if wetland characteristics have returned to the cropland as a result of the lack of "maintenance," "management" or "circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(2)(D), 7 C.F.R. § 12.5(b)(1)(ii). Prior to the 1996 Amendments, the Swampbuster provisions on abandonment for farm benefits eligibility were consistent with EPA's and the Corps' CWA provisions on abandonment, and farmers could lose eligibility for farm program benefits if farming on prior converted cropland was abandoned for any five-year period. After the 1996 amendments the Swampbuster provisions on abandonment changed, and abandonment is no longer a limitation on farmers' eligibility for farm benefits. USDA also amended its abandonment definition, to refer to the cessation of management or maintenance on farmed wetlands or farmed wetland pasture, new terms that were added in 1996. *See* 61 Fed. Reg. 47,019, 47,027 (Sept. 6, 1996).[2]

D. Clean Water Act Jurisdictional Determinations and Administrative Appeals

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 United States' regulatory jurisdiction under the CWA. 33 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

[2] Under the 1996 definitions, a farmed wetland is a wetland that, prior to December 23, 1985, was used to produce an agricultural commodity, and on that date did not support woody vegetation but was inundated for certain timeframes. A converted wetland, by contrast, is a wetland or farmed wetland that has been manipulated to reduce the flow of water to allow the production of an agricultural commodity where such production was not previously possible. Prior converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced prior to that date, and as of that date the converted wetland did not support woody vegetation but was inundated for certain timeframes. 61 Fed. Reg. at 47,027; 7 C.F.R. § 12.2(a) (1997).

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 approved 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). However, the administrative appeal "is limited to the information contained in the administrative record by the date of the NAP [Notification of Appeal Process, a fact sheet that accompanies the approved jurisdictional determination and that explains the administrative appeal process]," 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 and information contained in the record." *Id.*

If the division engineer 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).

Neither the division engineer nor the Review Officer has the authority to issue a jurisdictional determination when deciding an administrative appeal. *Id.* § 331.3(a)(2). Instead, the final Corps decision "is the district engineer's decision made pursuant to the division engineer's remand of the appealed action." *Id.* § 331.10(b).

II. Factual Background

Plaintiff owns a 100-acre parcel in Cook County, Illinois, known as the Warmke Parcel. Def. SOF ¶ 1. Sometime before November 10, 2005, Plaintiff hired a consultant, JFNew, to delineate the boundaries of any waters of the United States on 60 acres of the Warmke Parcel. Def. SOF ¶ 2. Plaintiff's consultant collected on-site data during two site visits and delineated two wetlands which together total approximately 13 acres. Def. SOF ¶ 3. Plaintiff's consultant's delineation of the 13 acres of wetlands was performed in accordance with the Corps' policies. Def. SOF ¶ 3. Plaintiff's consultant submitted the delineation to the Corps' Chicago District ("Chicago District Engineer") and requested, on behalf of Plaintiff, a jurisdictional determination. Def. SOF ¶ 5. The Chicago District Engineer issued an initial Jurisdictional Determination in November 2006, concluding that the 13 acres of wetlands on the Warmke Parcel are waters of the United States and thus regulated under the Clean Water Act. Def. SOF ¶ 6. Plaintiff administratively appealed that decision to the Corps' Great Lakes and Ohio River Division ("Division Engineer"), Def. SOF ¶ 7, and in 2007 the Division Engineer remanded the jurisdictional determination to the Chicago District Engineer in light of the 2006 *Rapanos* decision. Def. SOF ¶ 8. The Chicago District Engineer issued a new approved jurisdictional determination in October 2010, Def. SOF ¶ 11, and Plaintiff filed another administrative appeal in January 2011. Def. SOF ¶ 12. Plaintiff argued that the Chicago District Engineer erred in finding that the 13 acres of wetlands possess a significant nexus to downstream waters and that the Chicago District Engineer erred in concluding that the wetlands do not qualify as prior converted cropland under 33 C.F.R. § 328.3(a)(8). Def. SOF ¶ 13.

The Division Engineer denied the January 2011 administrative appeal, Def. SOF ¶ 14, but Plaintiff requested the Corps to reconsider. Def. SOF ¶ 15. The Corps agreed, and Chicago District Engineer issued a new approved jurisdictional determination on March 26, 2012. Def. SOF ¶ 16. Plaintiff again administratively appealed to the Division Engineer. Def. SOF ¶ 17.

The Division Engineer issued a decision in May 2013, finding merit to the appeal and instructing the Chicago District Engineer "to include sufficient documentation to support its decision and to reconsider its decision as appropriate." Def. SOF ¶¶ 21, 22. On July 19, 2013, the Chicago District Engineer issued a final jurisdictional determination, concluding that the two wetlands have the requisite significant nexus and are within the protection of the Clean Water Act. Def. SOF ¶ 23. In order to support the July 2013 jurisdictional determination, and comply with the Division Engineer's remand, the Chicago District Engineer developed an 11-page document entitled "Warmke Site Wetland Functions and Benefits to Downstream Waters," AR 036-046.

III. Procedural Background

Plaintiff filed suit asserting that the Chicago District Engineer's July 19, 2013, approved jurisdictional determination, is a final agency action under the Administrative Procedure Act ("APA"). Def. SOF ¶ 57; *see also* Complaint ¶¶ 83 (describing the July 2013 decision as the "final jurisdictional determination on remand"), 88 (characterizing the July 2013 decision as "a final agency action within the meaning of" the APA), 106 (the July 2013 decision "is subject to judicial review under the APA"), 113 (same). Plaintiff moved to strike from the record the 11-page analysis of the site's wetlands' significant nexus to the Little Calumet River. *See* ECF Doc. No. 32, Pl. SOF ¶ 65. That motion was argued on September 8, 2016, and is pending. Pl. SOF ¶¶ 66-67.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);

see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When a party seeks judicial review of a federal agency's action under the Administrative Procedure Act ("APA"), the agency action may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is a highly deferential one, which presumes the validity of agency actions, and upholds them if the actions satisfy minimum standards of rationality. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The reviewing court must perform a "searching and careful" review of the administrative record to determine whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

Courts give agency decisions a particularly high degree of deference when reviewing an agency's scientific and technical determinations. *Zero Zone, Inc. v. United States Department of Energy*, 832 F.3d 654, 668 (7th Cir. 2016). Thus, a court reviewing a jurisdictional determination will generally defer to the Corps. *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1018-1019 (S.D. Tex. 2004) (A "jurisdictional determination under the CWA is a highly technical decision within the expertise of the Corps and it is entitled to substantial deference").

Judicial review is based on the administrative record that was before the agency at the time of the decision at issue. *Overton Park*, 401 U.S. at 420; *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). 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 "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) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)).

In reviewing a final agency action taken by the Corps under the CWA, the court's basic inquiry is "(1) did the Corps reasonably interpret its enabling statute, Section 404 of the Clean Water Act ... and (2) did the Corps rationally apply this interpretation to the facts" before the agency. *O'Connor v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 185, 189 (N.D. Ind. 1992) (upholding Corps decision to deny CWA permit).

Under existing case law related to agency deference, when judicial review involves the meaning of a regulation, the agency's interpretation of its own regulation receives substantial deference. "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (internal citations and quotations omitted). This deference is due "even when that interpretation is advanced in a legal brief." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

ARGUMENT

I. Farming Was Abandoned On The 13 Acres Of Wetlands At Issue In This Case.

Plaintiff's first argument in support of summary judgment is that the Corps erred when it found that the prior converted cropland exemption to the Clean Water Act's coverage was lost through abandonment. Pl. Mem. at 9 ("no area on the Warmke Parcel has been 'abandoned,' as defined by regulations adopted by three federal agencies"). Plaintiff is incorrect.

A. The 13 Acres Of Wetlands Have Not Been Farmed Since 1996.

Plaintiff concedes that farming on the 13 acres of wetlands stopped in 1996 and has not resumed. Pl. SOF ¶ 29 ("farming is not possible in those portions of the parcel that have been

disturbed"). *See also* Def. SOF ¶ 58 (citing AR 090, also cited in Pl. SOF ¶ 29: "The wetland areas on the Warmke parcel have not been used for agricultural purposes for more than fifteen years and therefore considered abandoned . . . . According to the *Report of Soils Exploration* (September 9, 2008) prepared by the Testing Service Corporation submitted on behalf of the applicant, the site was mass graded in the fall of 1996 . . . [and] never farmed again").

Plaintiff argues that "major portions of the Warmke Parcel continue to be farmed," Pl. Mem. 13, citing Pl. SOF ¶ 20 and ¶ 29, but Plaintiff never claims that the 13 acres of wetlands continue to be farmed. Plaintiff's SOF ¶ 20 simply argues that the Warmke Parcel continued to be farmed during the Village of Tinley Park's permitting process, but that occurred in 1995. Pl. SOF ¶¶ 18-20. In fact, the two pages Plaintiff cites in support of Pl. SOF ¶ 20, AR 066 and AR 630, both show the farming stopped. AR 066 says that the prior owners "were necessarily required to discontinue farming of the 13 acre filled area," although they continued to farm other portions of the 100-acre parcel. AR 630 states that "the 1996 excavation and grading of the stormwater detention ponds also led to filling the current wetland area (then, part of an active farm)." And as noted above, Pl. SOF ¶ 29 concedes that farming is no longer possible on the 13 acres of wetlands. None of the pages cited in support of Pl. SOF ¶ 29 (AR 066, 090, 156, and 630) demonstrates that any farming has occurred on the 13 acres since 1996. AR 066 and 630 have already been discussed. AR 156 states that agriculture in the area that NRCS designated as prior converted cropland in 1993 "ceased more than 15 years ago." And AR 090 explains that aerial photograph and site visits in 2006 and in 2010 confirm that "no farming has occurred in the identified wetland areas" since 1996, and that "wetland conditions have returned."

Because the 13 acres of wetlands have not been farmed since 1996, the administrative record supports the Corps' conclusion that farming has been abandoned and the 13 acres of wetlands can no longer be considered prior converted cropland for purposes of the Clean Water Act's prohibition

on the discharge of a pollutant. Def. SOF ¶¶ 58, 59 (citing, e.g., AR 014 (the "wetland areas have not been farmed for 15 consecutive years and wetland conditions have returned. This meets the abandonment requirement.")).

B. Farming Elsewhere On The 100-Acre Parcel Does Not Preserve The Prior Converted Cropland Status Of The 13 Acres Of Wetlands.

Plaintiff next argues that because farming continued elsewhere on the property, the unfarmed 13 acres of wetlands must also remain prior converted cropland. Pl. Mem. at 12-13 (noting that "major portions of the Warmke Parcel continue to be farmed"). But the prior converted cropland exclusion and the abandonment limitation focus on the wetland, not the legal description of one or more parcels.

When the Corps in 1993 adopted the prior converted cropland exclusion, and the abandonment limitation on that exclusion, the Corps explained that abandonment "will provide a mechanism for 'recapturing' into Section 404 [of the Clean Water Act] jurisdiction *those PC croplands that revert back to wetlands* where the PC cropland has been abandoned." 58 Fed. Reg. at 45,034/1 (emphasis added). The USDA's contemporary regulation similarly defined abandonment in terms of "cropping, management or maintenance operations related to the production of agricultural commodities *on converted wetland*." 7 C.F.R. § 12.33(b) (1993) (emphasis added). Furthermore, if crop production stops for five years, "such land shall be determined to be abandoned *if the land meets the wetland criteria* of § 12.31." *Id.* (emphasis added). Thus, both agencies focused on the *wetland*, and the activities on the wetland, regardless of whether the wetland is part of a larger parcel that might also contain non-wetlands. *See, e.g., United States v. Righter*, No. 1:08-CV-670, 2010 WL 2640189, at *2 (M.D. Pa. June 30, 2010) ("In applying [the definition of prior converted cropland] to Righter's land, it is important to note that the subject of the government's claim is the wetland portion of Righter's property, and *not* the hayfield adjacent to it.").

Plaintiff claims that NRCS considers the entire 100-acre parcel to be prior converted cropland. Pl. Mem. at 15. But the NRCS letter that Plaintiff cites refers to "this area, which appears on the National Wetland Inventory (NWI)." Def. SOF ¶ 60. The only area which appears on the NWI map is the 13 acre wetland, not the entire parcel. Def. SOF ¶ 61. Furthermore, the NRCS letter simply confirms that as of 1996, the "area" was prior converted cropland. Def. SOF ¶ 62. The NRCS letter does not address whether or not farming continued after 1996, Def. SOF ¶ 62, or what effect a cessation would have on the prior converted cropland designation. And even if there were a disagreement on this point, the Clean Water Act exclusion for prior converted cropland expressly reserves EPA's authority to determine whether the exclusion applies, "[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency." 33 C.F.R. § 328.3(a)(8) (1994).

C. The USDA's Provisions Under 7 C.F.R. §§ 12.5(b)(1)(iv) And 12.5(b)(1)(vii), On Converting Wetlands For A Purpose Such As Building Or Road Construction, And On Converting Artificial Wetlands, Do Not Affect Abandonment Of Prior Converted Croplands Under The Clean Water Act.

Plaintiff also argues that even if farming stopped on the 13 acres of wetlands, those wetlands are "artificial wetlands" as defined in 7 C.F.R. § 12.2(a), which do not lose their prior converted cropland status under 7 C.F.R. § 12.5(b)(1)(vii) regardless of abandonment. Pl. Mem. at 13. Similarly, Plaintiff argues that "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 . . . .'" *Id.* at 13-14 (quoting 7 C.F.R. § 12.5(b)(1)(iv)). Plaintiff is wrong on both points.

1. Plaintiff waived its argument.

As a threshold matter, Plaintiff did not raise its argument about the exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii) in any of its administrative appeals. Plaintiff's first administrative

appeal, in January 2007, argued that the Corps' November 2006 jurisdictional determination failed to apply the *Rapanos* decision. Def. SOF ¶ 7. Plaintiff's second administrative appeal, in January 2011, asserted that the Corps' October 2010 jurisdictional determination erroneously concluded that the wetlands are not prior converted cropland, and that the Corps failed to establish a significant nexus. Def. SOF ¶ 13. Plaintiff argued, as it does here, that farming was not abandoned on other portions of the parcel, but Plaintiff never made the argument that the 13 acres of wetlands meet the terms of either 7 C.F.R. § 12.5(b)(1)(iv) or 7 C.F.R. § 12.5(b)(1)(vii). Def. SOF ¶ 13. Plaintiff's third administrative appeal, in May 2012, again argued that the Corps misapplied the abandonment criteria, Def. SOF ¶ 17, but again, Plaintiff never mentioned either 7 C.F.R. § 12.5(b)(1)(iv) or 7 C.F.R. § 12.5(b)(1)(vii). *Id.*

"Absent exceptional circumstances," courts "do not consider issues that were not raised before the [agency]." *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 798 F.2d 215, 220 (7th Cir. 1986); *see also Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001) (noting the "sound principle that any objections not made before the administrative agency are subsequently waived before the courts"); *Sibley v. U.S. Department of Education*, 913 F. Supp. 1181, 1189 (N.D. Ill. 1995) (failure to raise a defense in an administrative proceeding waives the argument on judicial review); *Pro Schools, Inc. v. Riley*, 824 F. Supp. 1314, 1322 (E.D. Wis. 1993) (same).

Because Plaintiff did not previously raise the exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii), it cannot do so for the first time here.

2. Plaintiff has not demonstrated that the 13 acres meet the terms of the exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii).

Even if the effect of these provisions could be considered for the first time here, Plaintiff fails to show that it satisfies all of their terms. Both provisions depend on a determination by NRCS. *See* 7 C.F.R. § 12.5(b)(1)(vii) (a person shall not be ineligible for farm program benefits due

to the production of an agricultural commodity on converted wetlands, if "[t]he land is determined *by NRCS* to be . . . an artificial wetland.") (emphasis added); *id.* § 12.5(b)(1)(iv) (a person shall not be ineligible for farm program benefits due to the production of an agricultural commodity on converted wetlands, if "*NRCS has determined* that the conversion [is] for a purpose that does not make the production of an agricultural commodity possible, such as . . . building and road construction . . ."") (emphasis added). The NRCS has not made either such determination, Def. SOF ¶ 63, and Plaintiff does not assert that it has. This alone disposes of Plaintiff's new argument that either of these provisions applies here.

In addition, the USDA defines the term "artificial wetland" to mean (among other requirements) land that was formerly "non-wetland," which in turn is defined as either (a) land that does not exhibit wetland criteria under normal conditions, or (b) wetland converted before December 23, 1985, that did not meet wetland criteria on that date but that neither produced an agricultural commodity nor was managed for pasture or hay. 7 C.F.R. § 12.2. The Corps found that the 13 acres do exhibit wetland criteria under normal conditions, Def. SOF ¶¶ 10, 14, and Plaintiff does not seriously dispute that (although as noted above, Plaintiff does dispute that the wetlands are waters of the United States under the Clean Water Act). And, by Plaintiff's own assertion, the 13 acres did produce an agricultural commodity prior to December 23, 1985 (*see, e.g.*, Pl. SOF ¶ 7) – that is an essential element of Plaintiff's assertion that the 13 acres are prior converted cropland. Thus, it appears that a wetland can either be prior converted cropland, or an artificial wetland, but not both. Because Plaintiff insists that the 13 acres are prior converted cropland, by definition it does not appear that they can be artificial wetlands.

3. The exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii) are distinct from the exemption for prior converted croplands under 12.5(b)(1)(i).

More fundamentally, Plaintiff mischaracterizes the relationship between the artificial wetlands provision and the building and road construction provision on the one hand, and the prior converted cropland provision and its abandonment limitation on the other. Plaintiff argues that the "appearance of . . . 'artificial wetlands' are not considered grounds for losing the prior converted cropland exemption," regardless of whether or not farming has been abandoned. Pl. Mem. at 13. But the artificial wetlands provision and the building and road construction provisions are separate and distinct from the prior converted cropland provision. They are three of seven independent reasons why a person "shall not be determined to be ineligible for [farm] program benefits under § 12.4 as the result of the production of an agricultural commodity on converted wetland . . . ." 7 C.F.R. § 12.5(b). One way to avoid losing program benefits for producing crops on converted wetlands is if NRCS determines that the converted wetlands are artificial wetlands. 7 C.F.R. § 12.5(b)(1)(iv). Another way is if NRCS determines that the conversion is for a particular purpose. *Id.* § 12.5(b)(1)(vii). Yet another way is if the land is prior converted cropland. *Id.* § 12.5(b)(1)(i). The list goes on. If NRCS had determined that the 13 acres at issue here were artificial wetlands under section 12.5(b)(1)(vii), which it did not do, a person producing crops on that wetland would not lose his or her farm benefits, and the issue of abandonment would never arise. But that is not what happened here. Plaintiff asserts, and the Corps does not dispute, that the 13 acres were prior converted cropland as of 1995. Whether those 13 acres are instead artificial wetlands, or were converted for building or road construction (neither of which, as shown above, Plaintiff can establish), is an entirely separate matter.

4. The exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii) are exemptions from the loss of Food Security Act subsidies, not exemptions from the Clean Water Act prohibition on discharges into waters of the United States.

Plaintiff argues that the Corps is attempting "to apply a stricter definition of abandonment for prior converted croplands than that required by the NRCS/SCS," because the Corps' "position on abandonment no longer mirrors that of the NRCS/SCS." Pl. Mem. at 16. Plaintiff also argues that because the Corps is allegedly "departing" from the Swampbuster provisions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii), the Corps is violating Plaintiff's due process rights. *Id.* at 18-19. But Plaintiff concedes that Swampbuster's current definition of abandonment "is essentially identical to the standard adopted in the joint Corps/EPA 1993 regulatory preamble." *Id.* at 17-18. Because the definition of abandonment for purposes of the Food Security Act has not changed, and the Corps' definition of abandonment for purposes of the CWA has not changed, Plaintiff never explains in what way the Corps' position has changed.

Plaintiff also argues that a "reasonable person looking at the Code of Federal Regulations" in 1996 would have concluded that the prior converted cropland exemption applies the same way under the Clean Water Act and the Food Security Act, i.e., that the farm program benefit eligibility provisions in subsections 12.5(b)(1)(iv) and (vii) must be limitations on the prior converted cropland provision under the Clean Water Act. Pl. Mem. at 19. But as explained above, the structure of subsection 12.5(b) demonstrates that subsections 12.5(b)(1)(iv) and (vii) are distinct from subsection 12.5(b)(1)(i), the Swampbuster prior converted cropland provision. Plaintiff's convoluted reading of the Swampbuster regulations is not, as Plaintiff argues, Pl. Mem. at 19, a "reasonable" interpretation.

Plaintiff's final argument regarding the Food Security Act is that "the Corps will likely argue that" the artificial wetlands provision in 7 C.F.R. §§ 12.5(b)(1)(vii) and 12.2(a), and the building and road construction provision in 7 C.F.R. § 12.5(b)(1)(iv), "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." Pl. Mem. at 18-19. The Court need not reach this argument because, as explained above, Plaintiff waived its argument that those exemptions apply, and even if there were no waiver, those exemptions do not apply in this case based on their plain terms and based on the structure of subsection 12.5(b).

If the Court were to reach this argument, the reason the exemptions in 7 C.F.R. §§ 12.5(b)(1)(iv) and 12.5(b)(1)(vii) do not apply is not, as Plaintiff suggests, simply because they were added three years after the Corps' prior converted cropland rule. Underlying Plaintiff's argument is the incorrect notion that because the Corps decided to use the USDA's definition of abandonment when the Corps adopted the prior converted cropland exclusion in 1993, the Corps must automatically adopt *all* of USDA's provisions that address what a farmer can do on converted cropland without losing farm program benefits, even provisions added years after the Corps' 1993 regulation. Plaintiff seems to be arguing (albeit without actually saying so) that any time the USDA adopts a provision regarding eligibility for farm program benefits, such as when a person converts a wetland for a purpose such as building or road construction (to name one example), the Corps must adopt the same exclusion from the Clean Water Act. That is simply not the case.

The Food Security Act pertains to farmers' eligibility for farm program benefits. It does not address discharges of pollutants into waters of the United States. The CWA establishes the Federal program governing the discharges of pollutants into such waters. Congress has not authorized USDA to make determinations regarding the scope of "waters of the United States" or to regulate discharges of pollutants into such waters. Congress has instead authorized EPA and the Corps to do so.

Because the Food Security Act does not define the scope of the CWA, EPA and the Corps are not authorized, much less bound, in administering the CWA to adhere to determinations made

by the USDA for the purpose of administering farm program benefits. Indeed, the CWA prior converted cropland regulation states on its face that EPA is the final authority on whether a particular area qualifies for the CWA prior converted cropland exemption, regardless of any determinations that may have been made by separate agencies for other purposes and under other authorities. *See* 33 C.F.R. § 328.3(a)(8) (1994) ("[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the [CWA], the final authority regarding [CWA] jurisdiction remains with EPA").

Nothing in the 1996 Food Security Act amendments or USDA's subsequent regulations changes the situation, or modifies the scope of the CWA and its implementing regulations. In fact, the legislative history accompanying the 1996 Food Security Act amendments specifically makes this point clear. As set forth in the House Conference Report, Congress "intend[s] that the amendments to abandonment provisions under swampbuster *should not supersede* the wetland protection authorities and responsibilities of the Environmental Protection Agency or the Corps of Engineers under Section 404 of the Clean Water Act" (emphasis added). H.R. Rep. No. 104-494, at 380 (1996), reprinted in 1996 U.S.C.C.A.N. 683, 745 (Conf. Rep.). The legislative history is directly on point and supports the Corps' position here.

The two courts that have directly addressed the relationship between the 1996 Farm Security Act amendments and the Clean Water Act both held that the amendments had no effect on the scope or applicability of the CWA. In *United States v. Cam*, No. 3:05cr141 (D. Or. filed April 6, 2005), the prior converted cropland exemption was raised as a defense in a criminal case. The court explained:

> [E]ven if the wetlands had been farmed as of December 23, 1985, and it returned to wetlands after that date, there is no question that any agricultural production has been abandoned. Defendant argues that the [Food Security Act] amendments did away with the concept of abandonment. That may be true for purposes of any farm subsidies defendant may seek, but it is not true for purposes of the [Clean Water Act] . . . .

Opinion and Order, ECF Doc. No. 112 at 27 (emphasis added) (attached as Ex. 1). And in *Huntress v. United States Department of Justice*, the court concluded that the 1996 amendments to the Food Security Act did not repeal the Corps' CWA abandonment rule, and that the status of the property at issue in that case "is subject to the EPA's provisions on abandonment." No. 12-CV-1146S, 2013 WL 2297076, at *14 (W.D.N.Y. May 24, 2013).

Even if there could have been any doubt about the relationship between the Corps' CWA regulations and USDA's FSA regulations, the Corps and the USDA issued a joint guidance in 2005 that reiterates that prior converted cropland determinations made by USDA do not determine the status of an area under the Clean Water Act. *See* Def. SOF ¶ 64 (citing Feb. 25, 2005 Joint Guidance From the NRCS and the Corps Concerning Wetland Determinations for the CWA and the Food Security Act). The joint USDA and Corps guidance document explains that "[b]ecause of the differences now existing between the CWA and FSA on the jurisdictional status of certain wetlands (e.g., prior converted or isolated wetlands may be regulated by one agency but not the other), it is frequently impossible for one lead agency to make determinations that are valid for administration of both laws." Def. SOF ¶ 65. The joint guidance document then explains that USDA will inform landowners that wetland determinations performed by USDA "may not be valid for CWA jurisdiction and permitting requirements." Def. SOF ¶ 66.

Contrary to Plaintiff's argument, Pl. Mem. at 16-17, the *New Hope Power* case (to the extent it is relevant at all)[3] supports the Corps' view, not Plaintiff's. The *New Hope Power* court vacated two Corps memoranda that the court found would have created, without notice-and-comment rulemaking, a new exception to prior converted cropland status under the Clean Water Act (i.e., a limitation that would be in addition to the abandonment limitation). *New Hope Power Co. v. U.S.*

[3] The *New Hope Power* case is not on point because in this case the Corps did not rely on the memoranda challenged in that case.

Army Corps of Eng'rs, 746 F. Supp. 2d 1272, 1275-76 (S.D. Fla. 2010). But under Plaintiff's argument, any time that USDA adds a new provision regarding eligibility for farm program benefits on prior converted cropland, the Corps must also add that same new provision to the Clean Water Act prior converted cropland provision. Plaintiff's argument runs directly contrary to the *New Hope Power* court's holding that any such changes must go through notice and comment rulemaking.

Thus, neither changes in the Food Security Act nor in the USDA's implementing regulations change the exclusion of prior converted cropland under the Clean Water Act, or the abandonment limitation on that exclusion.

In conclusion, farming undeniably stopped on the 13 acres of wetlands in 1996, and any farming that continued elsewhere on the property is not relevant to the abandonment of farming on the 13 acres of wetlands. Furthermore, post-1996 changes to the regulations on abandonment for purposes of benefits under the Farm Security Act do not apply to abandonment for purposes of the prohibition on discharges into waters of the United States under the Clean Water Act. Therefore, the prior converted cropland exclusion does not apply to the 13 acres of wetlands at issue here, and Plaintiff's motion seeking summary judgment that those 13 acres are prior converted cropland and not waters of the United States under the Clean Water Act should be denied.

II. The Corps' Significant Nexus Analysis Is Properly Part of the Administrative Record

Plaintiff's second argument in support of summary judgment largely repeats the mischaracterizations in Plaintiff's motion to strike, ECF Doc. No. 32. Plaintiff gives three reasons why the Chicago District Engineer should not be able to rely on the 11-page July 2013 document as support for the conclusion in the July 2013 jurisdictional determination that the wetlands have a significant nexus to downstream waters. None of Plaintiff's arguments are convincing, but to the extent there is any ambiguity in the Corps' regulations, the Corps' interpretation is entitled to deference. *Decker*, 133 S. Ct. at 1337.

A. The Corps' Regulations And The Division's Remand Order Both Allow The Chicago District Engineer To Provide Supplemental Information And Analysis On Remand.

Plaintiff argues that the Corps' regulations close the administrative record "as of the date of the Notification of Appeal Process," Pl. Mem. at 21, which occurred before the 11-page July 2013 document existed. Pl. Mem. at 22-23. The regulations do close the record for the administrative appeal to the Division, but expressly allow a district engineer on remand from the Division to "further analyze or evaluate specific issues," *id.* § 331.10(b), which is precisely what the 11-page July 2013 document represents.

Similarly, Plaintiff argues that the Division's remand order states that any supplemental explanation by the Chicago District Engineer is not part of the record. Pl. Mem. at 23-24. The Division's order refers to the record for the administrative appeal, not the record of the final Corps decision after that remand, which is the final agency action at issue in this case.

1. The Corps' regulations on administrative appeals

Plaintiff argues that the Corps' regulations preclude the Corps' reliance on the 11-page July 2013 document, citing 33 C.F.R. §§ 331.7(f), 331.9(b), and 331.10(b). Pl. Mem. at 21-23. As explained above, the administrative appeal "is limited to the information contained in the administrative record" as of the date the affected party receives a Notification of Appeal Process, as well as any relevant information gathered by the Review Officer. 33 C.F.R. § 331.7(f).

In contrast, once the administrative appeal has been decided, the division engineer may instruct a 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) (emphasis added). This is precisely what happened here.

Plaintiff's argument would preclude the Chicago District Engineer on remand from carrying out instructions from the Division to further analyze or evaluate specific issues. If Plaintiff were correct, nothing the Chicago District Engineer did on remand would be part of the record, and the final agency action for judicial review would be the Division's decision remanding the approved jurisdictional determination. This cannot be correct, because it is contrary to the regulations and because it does not make sense. Plaintiff is not seeking judicial review of the Division's remand, Plaintiff is asking the Court to review the Chicago District Engineer's decision made in response to the remand. *See, e.g.*, Pl. Mem. at 24 ("The Corps decision on remand is the final administrative decision."). Furthermore, Plaintiff has not explained and cannot explain why the regulations would provide for a remand, if a district engineer were not allowed to respond to the division engineer's instructions on remand.

The Corps' administrative appeal process allows the division engineer to consider only the information in the record at the time of the administrative appeal. However, if the division engineer remands the decision to the district engineer, the district engineer may further analyze and evaluate whatever issues are identified in the remand order, and it is the district engineer's decision, and the information in the record at the time that decision is made, that is reviewable under the APA.

2. The Division's Remand Order

Plaintiff argues that the Division's remand "contained explicit instructions that nothing new would be added to the record after March 29, 2012." Pl. Mem. at 23. This misreads the Division's decision, and confuses the record for the administrative appeal with the record of the final agency action for judicial review.

The Division's decision is completely consistent with the Corps' regulations. The Division first explained that the record "is limited to the information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 C.F.R. §

331.2, no new information may be submitted" on appeal. Def. SOF ¶¶ 18, 19. As explained above, this closes the record *for the administrative appeal*. The record for the Chicago District Engineer's decision following an administrative appeal, in contrast, must contain all of the information that was before the Chicago District Engineer at the time of the final decision, *i.e.*, the July 2013 Third Appeal Decision. *See* 5 U.S.C. § 706 (the record consists of the full record before the agency at the time of the decision at issue).

The Division went on to explain that the Review Officer may allow the parties to explain information already in the record, but such explanation "does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the [approved jurisdictional decision]." Def. SOF ¶ 19. Again, this addresses the record for the administrative appeal. As the Division explained, 33 C.F.R. § 331.7(f) allows the division engineer to consider supplemental information *during the administrative appeal*, to determine whether the record supports the district engineer's decision. Def. SOF ¶ 20. Neither this regulation nor this part of the Division's decision addresses what the Chicago District Engineer should do on remand, or what the record of the Chicago District Engineer's decision on remand should contain.

If there were any further doubt about the Division's instructions, the Court need only look at the rest of the Division's actual decision. After describing what the record for the administrative appeal contains, the Division addressed Plaintiff's two grounds for appealing. The Division rejected the first ground, regarding prior converted cropland, and upheld the Chicago District Engineer's conclusion that farming had ended as of 1996 and had not resumed, so the prior converted cropland exception "does not apply here." Def. SOF ¶ 21. The Division then turned to Plaintiff's second ground, regarding the significant nexus. Def. SOF ¶ 21. The Division found that the district engineer "failed to provide the requisite explanation of the basis for its significant nexus conclusion," *id.*, and noted that the Corps' *Rapanos* Guidance requires a "case-by-case significant

nexus analysis" in this situation. Def. SOF ¶ 21. Because the district engineer provided only "summary conclusions" instead of the "required explanation," *id.*, the division engineer remanded the jurisdictional determination "to the District with the instruction to follow the *Rapanos* Guidance as discussed in this administrative appeal decision." Def. SOF ¶ 22.

Instead of precluding the district engineer from providing further analysis, the division engineer *required* further analysis on remand. The district engineer followed these instructions, produced the 11-page document, and issued a new jurisdictional determination. Including the July 2013 document in the record for the July 2013 approved jurisdictional determination is consistent with Division's remand order, as well as the Corps' regulations (and, as explained below, the APA).

B. There Is No Due Process Violation

Plaintiff asserts that due process requires a meaningful opportunity to rebut evidence produced by the Chicago District Engineer in response to the Division's remand. Pl. Mem. at 24-25. But as the Seventh Circuit has explained, the ability to obtain judicial review of a final agency action constitutes an "adequate remedy." *Gleason v. Board of Educ. of the City of Chicago*, 792 F.2d 76, 80 (7th Cir. 1986). Because such review is indisputably available here, under the APA, there are no due process concerns.

C. The APA Does Not Require Exclusion Of Materials Upon Which The Reviewable Agency Action Is Based.

Plaintiff next argues that the Corps' reliance on the July 2013 document is inconsistent with the APA. Pl. Mem. at 25-26. This is simply another attempt to characterize the agency's final action as the March 2012 approved jurisdictional determination. Plaintiff notes that the record is limited to the information before the agency "at the time of the decision at issue," Pl. Mem. at 25, but then complains that the July 2013 document represents "new information." *Id.* at 26.

The Corps' regulations are quite clear that the Corps' final decision is "the district engineer's decision made pursuant to the division engineer's remand of the appealed action." 33 C.F.R. § 331.10(b); *see also* Pl. Mem. at 24. The final agency action is the July 2013 jurisdictional determination, not the March 2012 decision that was administratively appealed, and the 11-page document is properly part of the record for the July 2013 jurisdictional determination because it provides part of the basis for the Chicago District Engineer's reviewable final decision.[4]

D. Vacatur And Remand Are The Appropriate Remedies If The Court Declines To Consider The Entire Record On Which The Corps Relied.

Plaintiff argues that the Court should set aside the July 2013 jurisdictional determination. Pl. Mem. at 28-29. If the Court were to find that the administrative record does not support the Corps' decision, the proper relief would be a remand to the agency.[5] *See, e.g., Board of Trade of City of Chicago v. SEC*, 187 F.3d 713, 725-26 (7th Cir. 1999) ("Normally, when a court of appeals concludes that an agency's decision is not adequately supported, it remands so that the agency may enlarge the record or apply correct legal principles to the existing record."); *Awad v. Kerry*, No. 15-C-6146, 2016 WL 5405050, at *6 (N.D. Ill. Sept. 28, 2016) (remanding for "additional investigation or explanation" because "the record and the agency's explanations to date do not adequately support [the agency's] finding").

A remand is especially appropriate in this context, where the District's alleged failure is one of insufficient explanation in support of an administrative determination of regulatory jurisdiction.

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[4] Plaintiff's final argument regarding the Corps' significant nexus analysis is that without the July 2013 document, the record does not support the Corps' significant nexus determination. Pl. Mem. at 27-28. This is in essence the same argument Plaintiff made in its motion to strike, i.e., that the March 2012 jurisdictional determination is the reviewable action. As we pointed out in our response to that motion, Plaintiff's Complaint concedes that the July 2013 jurisdictional determination, not the March 2012 jurisdictional determination, is the only reviewable agency action in this case.

[5] If, in contrast, the Court finds that the 13 acres of wetlands are prior converted cropland by operation of USDA's Swampbuster regulations, then a remand to the Corps for further investigation or explanation would not be necessary.

The Division clearly did not find that the 13 acres of wetlands *lack* a significant nexus to the Little Calumet River. Rather, the Division found that the Chicago District Engineer had not adequately explained its conclusion that regulatory jurisdiction exists. Def. SOF ¶ 21. If this Court were to agree with Plaintiff that the administrative record (absent the 11-page July 2013 document) is insufficient, it would be plainly erroneous to conclude that there are no circumstances and no facts under which the Corps could establish regulatory jurisdiction. Instead, the proper course would be to direct the Corps on remand to address whatever infirmities this Court finds.

Hawkes is not to the contrary. In *Hawkes* the district court held that after an initial jurisdictional determination was remanded from the division engineer to the district engineer, the district engineer in that case "was given a chance to supplement the Administrative Record with additional site-specific evidence and information to support its significant nexus determination." *Hawkes Co. v. United States Army Corps of Eng'rs*, Civ. No. 13-107, 2017 WL 359170, at *11 (D. Minn. Jan. 24, 2017). The *Hawkes* court found that the district engineer in that case "did not do so." *Id.* Here, in contrast, the Chicago District Engineer did provide site-specific evidence and information in response to the Division's instruction. Thus, allowing the Corps an opportunity to address whatever errors this Court may find, would not force Plaintiffs through a "never ending loop." *Id.*

III. The 13 Acres of Wetlands Are Waters Of The United States

In addition to rejecting Plaintiff's motion for summary judgment, the Court should grant the Corps' cross motion for summary judgment and uphold the July 2013 jurisdictional determination. There is no genuine dispute that the Warmke Parcel contains 13 acres of wetlands, and the administrative record more than adequately supports the Corps' finding that those wetlands have a significant nexus to the Little Calumet River, and therefore are waters of the United States. That finding is precisely the type of scientific and technical determinations on which courts give agencies a high degree of deference. *Zero Zone*, 832 F.3d at 668.

Plaintiff owns a 100-acre parcel in Cook County, Illinois, known as the Warmke Property. Def. SOF ¶ 1. Plaintiff's consultant submitted a report to the Corps which found approximately 13 acres on the property are wetlands. Def. SOF ¶ 3.

The wetlands are on the northern portion of the property, and they drain to the south through a ditch, into an open water detention pond. Def. SOF ¶ 24. From there the water flows east into another open water pond, then north via storm sewer pipe into a third open water pond. Def. SOF ¶ 24. Water from the pond then travels into Midlothian Creek, a perennial stream that flows directly to the Little Calumet River, a traditional navigable water. Def. SOF ¶ 24. On March 24, 2010, a field visit was conducted and flowing water was observed in each intermediate basin from the site to the Creek, which is a relatively permanent water that flows directly into the Little Calumet River, a traditional navigable water. Def. SOF ¶ 25.

The Chicago District found that there are approximately 463 acres of wetlands in Midlothian Creek's watershed. Def. SOF ¶ 26. Wetlands are waters of the United States, and therefore within the Corps' regulatory jurisdiction, if they, either alone or in combination with "similarly situated lands in the region," have a "significant nexus" to a traditional navigable water. *Rapanos*, 547 U.S. at 779-80 (Kennedy, J, concurring).

These wetlands in the Midlothian Creek watershed, along with the 13 acres of wetlands on the site, are similarly situated for the purpose of determining a significant nexus under *Rapanos*. Def. SOF ¶ 26. The Corps reasonably found that these wetlands significantly affect the physical, chemical, and biological integrity of the Little Calumet River. Def. SOF ¶ 27.

The 13 acres of wetlands on the site, in combination with the other wetlands in the watershed, affect the physical integrity of the Little Calumet River because the wetlands significantly reduce peak flows and flood damages in the River. Def. SOF ¶ 28. The Corps calculated that the loss of wetlands on the site, in combination with other wetlands in the watershed, would increase

peak flood flows in the Creek by 13.5%. Def. SOF ¶ 29. The Creek is a major source of floodwater in the River, Def. SOF ¶ 30, and already experiences significant flooding problems. Def. SOF ¶ 30. The Metropolitan Water Reclamation District of Greater Chicago is already spending $117 million to address flooding in the Creek's watershed, and increasing population, with attendant increases in impervious surfaces, will increase the amount of stormwater entering the Creek. Def. SOF ¶ 31. As water moves downstream from the Creek into the River, the flood problems worsen. Def. SOF ¶ 32. Flooding in the River is expected to cost $75 million in damages over the next 50 years in Cook County alone, and the Corps is spending $270 million on flood control projects on the River. Def. SOF ¶ 33.

The Corps determined that, in addition to the flood control benefits that wetlands in general provide, Def. SOF ¶ 34, the size, surface cover, topography, and location of the specific 13 acres of wetlands on Plaintiff's property influence downstream flooding. Def. SOF ¶ 35. The 13 acres represents the fourth largest emergent wetland in the Creek's watershed, which is significant because the larger the wetland, the greater its flood storage capacity and the more it can reduce the velocity of flood waters. Def. SOF ¶¶ 36, 27. These wetlands are densely covered by tall, robust plants that create a rough surface, which creates frictional resistance to water entering the site. Def. SOF ¶ 38. This surface characteristic reduces the velocity of floodwater that enters from residential areas to the north and west, and agricultural areas to the east. Def. SOF ¶ 38. Wetlands with dense vegetation like this one intercept more stormwater, retain water longer, and discharge water more slowly, than areas with less cover. Def. SOF ¶ 39. This reduces peak flows and flooding in both the Creek and the River. Def. SOF ¶ 40. In addition, the 13 acres have a gentle slope, which allows flowing water to widen out, decreasing its velocity and increasing the amount of time water spends on-site before being released downstream. Def. SOF ¶ 41. Thus, the removal of wetlands like the 13 acres on

Plaintiff's property, will increase peak stream flows and contribute to increased flood damages downstream. Def. SOF ¶ 42.

In addition to these physical effects, the Corps also found that the 13 acres of wetlands, in combination with similarly situated wetlands in the watershed, significantly affect the chemical integrity of the River. Def. SOF ¶ 43. The Corps documented the effect of excess nitrogen on the Creek and the River. Def. SOF ¶¶ 44, 45. The wetlands on the site are "particularly well-suited for nitrogen reduction." Def. SOF ¶ 46. The large size of the wetlands, and their vegetation cover, both assist in filtering pollutants. Def. SOF ¶ 47. The wetlands' flat topography, and their location at the top of the Creek's watershed, also enhance their ability to remove nitrogen. Def. SOF ¶ 48. As water leaves the site, much of the nitrogen (and sediment) is left behind. Def. SOF ¶ 49. The Corps calculated that without the 13 acres of wetlands and the other wetlands in the watershed, 27%-51% more nitrogen would impact the Creek, and ultimately pollute the River. Def. SOF ¶ 50.

Third, the wetlands significantly affect the biological integrity of the River. Def. SOF ¶ 51. Numerous species of fish and wildlife, such as birds, salamanders, and turtles, utilize the Creek and the River for a portion of their life cycle. Def. SOF ¶ 52. These species also use wetlands in the watershed, including the 13 acres of wetlands on the site. Def. SOF ¶ 53. The physical structure of the site's wetlands, with surrounding trees and interspersed upland islands, provides attractive habitat for many bird species. Def. SOF ¶ 54. The wetlands also offer shallow, sparsely vegetated areas, which are well suited for native species such as frogs. Def. SOF ¶ 55. The loss of these wetlands would affect the fish and other types of wildlife in the River, by removing a portion of their upstream habitat. Def. SOF ¶ 56.

These findings are well supported in the record, and taken together demonstrate that the wetlands on the site meet Justice Kennedy's significant nexus test. Therefore, the record supports the Corps' conclusion that the wetlands are jurisdictional waters of the United States.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for summary judgment and grant Defendant's cross motion for summary judgment.

Respectfully submitted,

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MAY 1, 2017
90-5-1-4-20526

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, I electronically filed the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Daniel R. Dertke
DANIEL R. DERTKE

[

Exhibit 1

United States v. Cam, No. 3:05cr141 (D. Or.), December 21, 2007, opinion and order, ECF No. 112.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Case No. 05-141-KI
	)	
vs.	)	OPINION AND ORDER
	)	
IVAN CAM,	)	
	)	
Defendant.	)	
	)	

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KING, Judge:

Defendant Ivan Cam was indicted for a knowing unauthorized discharge of a pollutant into navigable waters in violation of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(c)(2)(A). Defendant entered a guilty plea to a superseding information subsequently filed by the government charging him with negligently discharging a pollutant without a permit in violation of 33 U.S.C. §§ 1311(a), 1319(c)(1)(A). Before the court is defendant's Motion to Withdraw Plea of Guilty (#85).

BACKGROUND

Defendant was indicted on April 6, 2005 for discharging dredge and fill material on tax lots 800 and 500 (Count One) (referred to by the government as the "northern site") and tax lots 1800, 1700, 1600, and 200 (Count Two) (referred to by the government as the "southern site"). These were felony counts.

When Corrie Veenstra, Enforcement Project Manager for the Corps, first visited the southern site (the "affected area") on June 14, 2004, she observed approximately one acre of disturbance, including a small excavator buried up to its cab in one of several water-filled holes measuring about 20 feet in diameter.

The government later concluded that the disturbance to the affected area covered 1.33 acres. The disturbance began just south of defendant's residence (on tax lot 1700) extended east and west to the wetlands on neighboring properties (tax lots 1800 and 1600) and extended down to and into the unnamed tributary (tax lot 200). Tax lot 1700 begins 70 feet from the lip of the unnamed tributary on tax lot 200. James Goudzwaard, Wetland Specialist with the U.S. Army Corps of Engineers ("Corps"), calculated the affected acreage by taking measurements at the site with a tape measure and later transposing the measurements to an enlarged aerial photograph, and then calculating the total area of impact with a planimeter. Defendant's expert, Jay McCaulley, contends the area affected by defendant's activities was only .1 acre. He came to this conclusion by "examining the photographs and schematic drawings prepared by law enforcement officers at the time of the activity and the survey map" prepared by the remediation consultant. Supp. McCaulley Aff. ¶ 12f.

The affected area abuts an unnamed tributary. The unnamed tributary travels 1.75 uninterrupted miles from the affected area to the Pudding River, passing through four culverts along the way. The point at which the unnamed tributary enters the Pudding River is 32 miles from the Willamette. Some properties along the unnamed tributary have been certified by the Natural Resources Conservation Service ("NRCS") as prior converted cropland.

On May 12, 2007, Veenstra measured the flow of water in the unnamed tributary at the location of the affected area and, depending on how she calculated it, concluded that the flow was either 3.55 or 7.1 cubic feet per second. She also found the width of the channel to be 10 feet and the depth to be 3 feet.

Neither the unnamed tributary nor the Pudding River has been surveyed for fish. Oregon Department of Fish and Wildlife (ODF&W) assumes the waters are fish bearing based on the habitat and condition of the water. The Pudding River has documented evidence of rearing habitat for spring Chinook and winter steelhead. The 2006 Pudding Watershed Assessment identified the Pudding River as a migratory corridor for spring Chinook, and the watershed as an "important area for winter steelhead populations." Veenstra Aff., Ex. 9 Part I, at 72, 104.

At his arraignment on April 22, 2005, defendant's pretrial release was revoked for disturbing the alleged wetlands. He was released on April 26, 2005. He came to court again on July 25, 2005 for disturbing the wetlands, but the court merely admonished defendant and did not otherwise sanction him. On August 17, 2005, defendant's supervision was revoked again for digging a trench through the wetlands, removing vegetation, and building retaining walls, either personally or by directing others to do so. He was not released from custody until August 30, 2005.

On June 19, 2006, the Supreme Court issued its most recent opinion on CWA jurisdiction, Rapanos v. United States, 126 S. Ct. 2208 (2006).

On July 24, 2006, defendant's pretrial release was revoked yet again when he or someone under his supervision operated and buried excavators in the wetlands.

In responding to a plea offer, defendant's counsel argued to the United States Attorneys' Office that the Supreme Court in Rapanos significantly narrowed the definition of "waters of the United States," that the affected area did not constitute a "water of the United States," but "a reasonable disposition barring any further litigation would allow [defendant] to enter into a

diversion with the government to resolve the federal indictment and allow the civil action to proceed separately." Gov. Ex. 17 at 2-3.

On August 15, 2006, a superseding information was filed, charging defendant, in two counts, with violating the CWA by negligently discharging a pollutant into a navigable water on only tax lots 1800, 1700, 1600 and 200 (the southern site). The First Count covers the period of October 1, 2003 through April 5, 2005, and the Second Count covers the period of July 18, 2006 through July 24, 2006. Defendant entered a guilty plea on August 16, 2006, and following his guilty plea he was released from custody.

As part of his guilty plea, defendant admitted that, during two separate periods of time, he

> negligently discharged, and caused to be discharged, pollutants, including dredged and fill material, from a point source on the Southern unnamed tributary to the Pudding River, at or about a parcel of land located near Howell Prairie Road, south of Mt. Angel-Gervais Road, in Marion County, Oregon, and located on Marion County tax lots 1800, 1700, 1600, and 200, **into navigable waters**, including wetlands, without a permit.

Plea Agreement, ¶ 4 at 2 (emphasis added). Defendant also admitted that he was "freely and voluntarily accept[ing] the terms and conditions of [the] please offer" and was pleading guilty because he is "in fact . . . guilty." Plea Agreement, Acceptance at 5. A sentencing hearing was scheduled for November 1, 2006.

On September 5, 2006, defendant did not appear at a violation hearing to address another allegation that he violated pretrial release conditions, for again operating an excavator in the wetlands. On September 11, 2006, the court found defendant in violation of pretrial release conditions, but consolidated sentencing on the violation with the sentencing date.

The Corps issued a total of 22 cease and desist orders, including two after defendant entered his guilty plea. Veenstra testified that defendant had buried in the affected area approximately ten pieces of heavy equipment, such as excavators, bobcats, and backhoes, during that time. Restoration work on the property took place in August of 2006.

The sentencing hearing was moved to January 2, 2007. Defendant obtained new counsel. Sentencing was rescheduled again, to March 23, 2007. On March 14, 2007, defendant filed this motion to withdraw his guilty plea. After several months of investigation, the government filed a response, and defendant filed a reply. The court visited the site on October 17, and held a two-day in-court hearing on October 17 and 18, 2007.

LEGAL STANDARDS

A defendant may withdraw his plea if "defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Cr. P. 11(d)(2)(B). The defendant bears the burden, and the decision is within the discretion of the court. "Fair and just" reasons allowing withdrawal of a guilty plea include "inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." United States v. Garcia, 401 F.3d 1008, 1011 (9th Cir. 2005) (quoting United States v. Ortega-Ascanio, 376 F.3d 879, 883 (9th Cir. 2004)). There is generally a strong preference to preserve the guilty plea, given the protections surrounding the decision to enter such a plea. United States v. Hyde, 520 U.S. 670, 676 (1997).

DISCUSSION

The CWA makes it unlawful to "discharge" a "pollutant," defined to include "dredged spoil," from a "point source" into a "navigable water" except as otherwise permitted by the

statute. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(6); 33 U.S.C. § 1362(12). "Navigable water" is defined to mean "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Defendant seeks to withdraw his guilty plea for three reasons: the Corps kept internal regulatory guidance from him; under Rapanos the federal government has no jurisdiction over the affected area; and the affected area is exempt from the CWA as "prior converted cropland."

I. Reasons for Requesting Withdrawal of Guilty Plea

Defendant asserts a number of reasons to justify his request, but all go to the question of what he considers to be this court's subject matter jurisdiction. Specifically, defendant states that when he entered his guilty plea he "was unaware of information in the possession of the government that demonstrated that the federal court did not have jurisdiction under the CWA over the area and activity involved in his prosecution." D.'s Mem. in Supp. of Mot. to Withdraw Plea of Guilty at 3. He contends this might be due to "inadequate investigation" by his previous counsel or the fact that the government withheld information from him. Nevertheless, he clarified at oral argument that he is not attempting to withdraw his guilty plea on the basis of ineffective assistance of counsel. Rather, he insists that he has identified a fair and just reason because he entered a guilty plea to a charge over which this court had no subject matter jurisdiction.

In every federal criminal prosecution, however, this court's subject matter jurisdiction arises from 18 U.S.C. § 3231. See United States v. Moses, 496 F.3d 984, 987 (9th Cir. 2007) (district court had jurisdiction over criminal CWA case pursuant to 18 U.S.C. § 3231). That statute provides, "The district courts of the United States shall have original jurisdiction,

exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231. Defendant's argument actually goes to the question of whether the government has regulatory authority over the affected area under the CWA, "but the existence of regulatory power differs from the subject-matter jurisdiction of the courts." Hugi v. United States, 164 F.3d 378, 380-81 (7th Cir. 1999). Instead,

> [T]he nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of [the offense]. Although courts frequently call it the "jurisdictional element" of the statute, it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime . . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.* a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231.

Id. (quoting United States v. Martin, 147 F.3d 529, 531-32 (7th Cir. 1998)); see also United States v. Ratigan, 351 F.3d 957, 963 (9th Cir. 2003) (relying on Hugi to find, in a bank robbery case, that failure to prove bank was FDIC-insured did not undermine court's jurisdiction).

Accordingly, the gravamen of defendant's complaint goes to the sufficiency of the government's evidence to prove an element of the crime–whether the affected area constitutes "waters of the United States" under the CWA. See United States v. Moses, 496 F.3d at 987 (in CWA criminal prosecution, defendant "attacks his conviction on the ground that the evidence does not support a determination that the portion of Teton Creek that he manipulated constitutes a water of the United States"). Typically, "once a defendant pleads guilty in a court which has jurisdiction of the subject matter and of the defendant, . . . the court's judgment cannot be assailed on grounds that the government has not met its burden of proving so-called jurisdictional facts." Hugi, 164 F.3d at 381 (internal quotation marks omitted).

Furthermore, while an intervening Supreme Court decision could constitute a "fair and just" reason to allow withdrawal of a guilty plea, defendant is not faced with that circumstance. See United States v. Ortega-Ascanio, 376 F.3d at 887 (reversing district court, intervening Supreme Court decision overruling Circuit precedent constitutes "fair and just" reason). Rather, plaintiff entered his guilty plea two months after Rapanos was issued, and after his counsel had analyzed it and concluded that it was in defendant's best interests to resolve the indictment with a plea agreement. In an abundance of caution, however, I evaluate below defendant's claim that the government lacked regulatory jurisdiction over the affected area under the CWA, to ensure that I can accept his guilty plea in good conscience.

Finally, newly discovered evidence may be a viable basis on which defendant may request to withdraw his guilty plea. Defendant contends that the government failed to disclose 2003 guidance the EPA and the Corps issued after the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), and failed to disclose 2006 internal interim guidance issued by the Corps after the Supreme Court's Rapanos decision. Defendant argues the government's failure to hand over these documents is tantamount to an admission that it lacked CWA jurisdiction over the affected area, that the guidance constitutes exculpatory material, and that without the guidance his plea was not knowing and voluntary. I evaluate this contention next.

II. Whether Withholding Guidance Constitutes a "Fair and Just" Reason

Defendant contends that the government withheld two separate guidance documents, one issued after SWANCC and one issued after Rapanos.

The published guidance following SWANCC directed staff to obtain approval from Headquarters before asserting jurisdiction over isolated waters that were both intrastate and non-navigable. 68 Fed. Reg. 1991, 1995 (January 15, 2003). This guidance was not provided to defendant prior to his guilty plea, nor had Corps' field staff obtained approval from Headquarters.

The internal interim Rapanos guidance, issued July 5, 2006, directed Corps' personnel to continue settlement and inspections so long as personnel did not need to take a position on CWA jurisdiction, but to seek stays or delays in ongoing litigation, and directed personnel to avoid referring to the Department of Justice new regulatory enforcement actions other than those affecting traditionally navigable waters. Most applicable here, the guidance stated, "Corps personnel should not represent any Corps position on the effect of those decisions on Clean Water Act jurisdiction in court pleadings or in any sort of dealings with outside parties" until Corps Headquarters issues substantive guidance. McCaulley Aff., Ex. 16.

The published guidance following SWANCC is inapplicable. In SWANCC, the Supreme Court held that the Corps exceeded its authority in asserting jurisdiction over isolated waters serving as habitat for migratory birds. However, at no time did the government rely on the "migratory bird rule" to assert jurisdiction over the affected area here. Furthermore, the published guidance after SWANCC specifically states that "Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands)." 68 Fed. Reg. at 1998. This is the basis on which the government asserts its regulatory reach here. Any failure by the government to point defendant to this published guidance does not justify a withdrawal of defendant's guilty plea.

The internal guidance following Rapanos also does not support defendant's request. The internal guidance was directed at Corps' staff and it was not something of which the United States Attorneys' Office was aware. It asked only that staff delay making jurisdictional determinations, and delay representing the agencies' position about the regulatory reach of the CWA, while the Corps and EPA prepared substantive guidance about the effect of Rapanos. The thrust of the guidance was to give the agencies an opportunity to digest the Supreme Court's decision.

I reject defendant's implication that this internal guidance is Brady material. It is not exculpatory or impeachment "evidence [that is] material either to guilt or punishment which is favorable to the accused, irrespective of the good faith or bad faith of the prosecution." United States v. Hanna, 55 F.3d 1456, 1459 (9th Cir. 1995). It speaks only to the agency's hesitation in moving forward, for a short period, prior to forming a cohesive policy on jurisdictional questions after Rapanos. The United States Attorneys' Office experienced the same hesitation, and in plea negotiations concluded that federal jurisdiction did not attach to the "northern site." Defendant and his counsel similarly evaluated the case and determined that it was in defendant's best interest to plead guilty to a misdemeanor.

Defendant has failed to meet his burden of demonstrating the withholding of these guidance documents constitutes a fair and just reason supporting withdrawal of his guilty plea.

III. Whether the Federal Government has Jurisdiction Over the Affected Area Under Rapanos

As I stated above, although I do not believe this to be an issue that goes to the court's subject matter jurisdiction, in an abundance of caution, I now evaluate whether defendant's

discharge of dredge and fill material over the course of almost three years took place in a wetlands over which the federal government has jurisdiction, as clarified by Rapanos.

As I noted above, jurisdiction under the CWA extends to "waters of the United States," which has in turn been defined by the Corps to mean waters "currently used or . . . used in the past, or . . . susceptible to use in interstate or foreign commerce;" tributaries of such waters; and wetlands adjacent to these waters. 33 CFR § 328.3(a)(1), (5), and (7). "Adjacent" is defined to mean wetlands "bordering, contiguous [to], or neighboring" waters of the United States. 33 C.F.R. § 328.3(c).

The Court examined the language of the statute in Rapanos, but did not provide a majority opinion. Accordingly, the Ninth Circuit has opined that Justice Kennedy's opinion, concurring only in the judgment, is the "narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007) (citing United States v. Gerke, 464 F.3d 723, 724 (7th Cir. 2006) and Rapanos, 126 S. Ct. at 2265 n.13 (Stevens, J., dissenting)). As a result, Justice Kennedy's opinion "provides the controlling rule of law for our case." River Watch, 496 F.3d at 999-1000. I, too, apply the test set out by Justice Kennedy.

According to Justice Kennedy, "waters of the United States" include isolated wetlands or wetlands adjacent to a non-navigable tributary if the wetlands "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Rapanos, 126 S. Ct. at 2236 (Kennedy, J., concurring). He discussed what he meant by "significant nexus" as follows:

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

Id. at 2248.

A. Whether the Affected Area is a Wetlands

Defendant disputes that the government properly evaluated the affected area to determine whether the area constitutes a wetlands.

Wetlands are defined to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). In implementing this definition, the Corps adopted the 1987 Corps of Engineer's Wetland Delineation Manual. The 1987 Manual requires that three parameters be met in order for an area to be designated a wetlands: (1) hydrophytic vegetation; (2) hydric soils; and (3) wetland hydrology. Pursuant to the 1987 Manual, where a site is disturbed, alternative methods of obtaining indicators of the parameters may be used.

In this case, Goudzwaard took soil samples from an undisturbed area with similar topography adjacent to the disturbed area. He saw soil saturation from the ground surface to 12 inches deep, he saw reed canary grass and sedge, and concluded that the affected area is wetlands. He also compared aerial photographs from 1936 through 2004 and determined that the photographs depicted wetland conditions. Similarly, Veenstra examined the site on 29 occasions from June 2004 through July 2007. Based on her observation of dark soil with a sulfuric smell,

standing water, a submerged excavator, and reed canary grass, she concluded that the area is wetlands as well.

First, defendant is right to raise questions about the Corps' preliminary jurisdictional determination. The Corps did not identify on the form the kind of jurisdictional water to which the unnamed tributary was connected. Veenstra testified that the form was properly completed, but when asked where she would put the mark she said that the waters would be "interstate waters," referring to 33 C.F.R. § 328.3(a)(2). All of the waters at issue here, however, are located entirely in Oregon. In contrast, in its briefing, the government contends the wetlands are adjacent to a tributary of waters "currently used or . . . used in the past, or . . . susceptible to use in interstate commerce," referring to 33 C.F.R. § 328.3(a)(1). Despite this confusion, if I conclude that defendant has failed to raise significant questions about the government's jurisdiction over the affected area, which I deal with below, an improperly completed preliminary jurisdictional form is of no moment.

In addition, defendant has properly raised one legitimate problem with Goudzwaard's February 22, 2005 visit to the property when Goudzwaard analyzed the affected area to determine whether it was a wetland. The visit occurred one month prior to the growing season. Although Goudzwaard testified that a delineation or determination could be done at any time, the 1987 Manual is clear that, "Hydrology is often the least exact of the parameters, and indicators of wetland hydrology are sometimes difficult to find in the field. However, it is essential to establish that a wetlands is periodically inundated or has saturated soils **during the growing season**." 1987 Corps of Engineers Wetland Delineation Manual 29 (1987), http://el.erdc.usace.army.mil/

elpubs/pdf/wlman87.pdf (emphasis added). Following this guidance, the growing season starts March 24, just as defendant argues.

Nevertheless, Veenstra discovered during her site visit in June of 2004, plumb in the middle of the growing season, an excavator buried up to its cab in a hole filled with water. She also observed other holes approximately 20 inches in diameter filled with standing water. The 1987 Manual permits a conclusion about hydrology, which can be determined by visual observation, based on whether "[t]he area is inundated either permanently or periodically at mean water depths of ≤6.6 ft, or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation." Id. at 10, 31-32. Veenstra opines in her affidavit that, based on her site visits, the disturbed site contains the hydrology necessary to constitute a wetlands.

Defendant does not challenge Veenstra's conclusion, based on her many site visits, that the disturbed area is a wetlands. Furthermore, defendant has not produced any evidence that the affected area is not a wetlands under the 1987 Manual.

Finally, defendant makes much of Goudzwaard's assertion in his affidavit that the affected area is approximately 400 feet by 200 feet, contending that 200 feet from the lip of the ditch contains non-hydric soils. Goudzwaard's actual measurements at the site, however, established 178 feet as being the longest distance from the lip, and it was from this and other measurements at the site that Goudzwaard calculated the affected acreage to be 1.33 acres. His calculation comports with Veenstra's initial observation in 2004 that defendant had disturbed approximately one acre of wetlands. Both observations occurred before the restoration work began in August of 2006. Defendant's criticism of Goudzwaard's descriptive estimation of the size of the disturbance is not persuasive.

In sum, after reviewing defendant's arguments and evidence, I conclude he has failed to meet his burden of showing that this is a fair and just basis on which to withdraw his plea.[1]

B. Status of the Unnamed Tributary

Defendant argues that what the government calls an unnamed tributary is a man-made ditch. Defendant relies on an aerial photograph from 1936 which he claims demonstrates the ditch was recently dug because it depicts sidecast material. Defendant also contends the unnamed tributary goes dry in the summer, and in the winter and spring it carries excess water from the surrounding fields. On an Oregon Department of State Lands ("DSL") map, the ditch is labeled as "an unnamed intermittent stream." McCaulley Aff., Ex. 12 at 2.

The unnamed tributary to which the wetlands abut is approximately 10 feet wide and 3 feet deep. Corps personnel saw water flowing even in the summer. Veenstra testified that she had been to the site 29 times, over three and a half years, in almost every month of the year and she always saw water flowing in the unnamed tributary. McCaulley testified that he had examined the unnamed tributary seven or eight times and had not always seen water. Specifically, in August at the area the parties call culvert #1, approximately two-thirds of a mile from the affected area, McCaulley had seen the unnamed tributary dry.

A 1923 Edition of a U.S. Geological Survey map shows the tributary as a naturally occurring stream/tributary to the Pudding River, not a man-made drainage ditch. Even if ditching or channelization occurred, such human activity does not change the jurisdictional status of the water. See United States v. Moses, 496 F.3d at 988 (9th Cir. 2007) (tributary rendered

[1]Marion County's conclusion that the affected area is not a wetlands, pursuant to regulations not provided by defendant, is neither binding nor persuasive evidence that the area is not a wetlands under the Corps' criteria.

intermittent by man-made diversion is within CWA jurisdiction); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals exchanging water with streams and a lake are tributaries and, as such, "the canals are 'waters of the United States'").

Pursuant to Rapanos, the fact that McCaulley noticed that no water was flowing at culvert #1 in August, two-thirds of a mile from the affected area, does not undermine the government's jurisdiction over the wetlands. McCaulley testified that he had never seen the unnamed tributary, where it abuts the affected area, to be completely dry, and never saw the unnamed tributary dry at any other place along its length. Veenstra testified that she checked culvert #1 on three occasions, in July of 2004, and in May and October of 2007, and the water was flowing at those times. This is not the "remote and insubstantial" drainage or ditch about which Justice Kennedy would be concerned. Rapanos, 126 S. Ct. at 2247. Indeed, Justice Kennedy observed that even an "intermittent flow can constitute a stream" and "the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 2243; see also Moses, 496 F.3d at 990.

Accordingly, I conclude any question about the permanence of the unnamed tributary does not raise a fair and just reason for defendant to withdraw his guilty plea.

C. Whether Unnamed Tributary Flows Into Navigable Water

Defendant asserts that the Pudding is not navigable in fact.

The government acknowledges that the Pudding and Molalla are not formally listed as navigable riverways, but contends they are navigable based on a 1979 "Mollala [sic]-Pudding Rivers Navigability Study," conducted by the Oregon Division of State Lands ("DSL"). The study shows that from the late 1800s through the 1940s the Pudding River and its tributary streams were used to transport logs from harvest sites to mills, and the Molalla River was used

for this purpose from 1904 to 1914. The Pudding River was used by a steamboat in the spring of 1860. The government submitted evidence that kayakers use the Pudding River today.

Defendant argues that the 1979 Study was inconclusive about whether the Pudding was navigable, and that DSL did not recommend to the Oregon legislature that the Pudding be identified as a navigable water.

On the first point, defendant is incorrect. The 1979 DSL study confirmed that the Pudding had been used for log transport from its mouth to river mile 26, and from the mouth of Silver Creek to river mile 48.6. The study reported no evidence of log drives between river mile 26 and 48.6.

Defendant accurately points out, however, that DSL did not include the Pudding as a navigable water in its January 1983 Report and Recommendation on the Navigable Waters of Oregon ("Report and Recommendation"), a report DSL submitted to the Oregon legislature. Although there is no statement from DSL about why it did not include the Pudding on its list of navigable waters, as a general matter it is apparent that DSL had several concerns in mind and winnowed down the list to those waters for which it had substantial evidence of vessel navigation and commercial tourism, as well as log drives, for purposes of asserting title over the beds and banks of the waters. For example, DSL "vigorously omitted" rivers that used splash dams for log drives even if drives at the beginning of the season, or drives early in the history of the state, did not require such assistance. Report and Recommendation 20 (1983), http://www.oregon.gov/DSL/NAV/docs/nav_waters_rpt.pdf.

Defendant also contends that because the Oregon legislature directed "[a]ny conclusion of [the Report and Recommendation] that a particular body of water is or is not navigable shall not

be considered evidence to prove or disprove the navigability" of any stream, this court cannot consider the 1979 Mollala-Pudding Rivers Navigability Study. See Supp. McCaulley Aff., Ex. 35 (Senate Bill 562, later codified as the preamble to ORS 274.036). I reject this argument. First, the legislature prohibited the use of a "conclusion" of navigability, not the evidence of historical use that informed that conclusion. Second, the legislature's prohibition specifically references the Report and Recommendation and, although the report listed all of the waters that DSL had studied, it did not incorporate the studies themselves.

In sum, where the unnamed tributary meets the Pudding River, the Pudding River is approximately 100 feet wide. The Pudding River flows year round. The Pudding River flows 28 miles to the Molalla River, and the Molalla River flows 1.5 miles to the Willamette River. The unnamed tributary flows into the Pudding River near river mile 32. The Pudding has been confirmed to have been historically navigable in fact up to river mile 26, and from the mouth of Silver Creek to river mile 48.6. The Molalla was used to transport logs as well. Defendant does not dispute that kayakers use the Pudding River. Paddling Oregon recommends the river for canoes and small craft, and suggests that boaters put in at river mile 26.8.

I conclude defendant has failed to meet his burden of showing that this is a fair and just basis on which to withdraw his plea.

D. Whether a Significant Nexus Exists Between the Wetlands and the Pudding River

Defendant disputes that the wetlands significantly affect any navigable water. Defendant contends there is no permanent surface connection between the wetlands and the ditch. Defendant chides the government for relying on a 1996 aerial photograph taken during the flood of 1996, arguing that such a photograph (taken at the 100-year high water mark) does not comply

with the Corps' own regulations which require a determination of jurisdiction based on the "ordinary high water mark." Supp. McCaulley Aff., Ex. 26. Defendant also highlights the *de minimus* size of the disturbance.

Additionally, according to defendant, the government does not explain how dredged and fill material would reach the Willamette 32 miles away, or even 1.75 miles to the Pudding. The government asserts 7.1 cubic feet per second flow through the unnamed tributary, but it does not indicate the course of the water–i.e. how much of that water is from Tax Lot 1700. The government's tests also measured the flow at 3.55 cubic feet per second. The defendant contends it is doubtful that the flow reaches the Pudding since the area is in the middle of farm fields, many of which are "undoubtedly" irrigated from the ditch.

The government presented sufficient evidence to satisfy me that the unnamed tributary and the wetlands help protect the chemical, physical, and biological integrity of the navigable waters of the Pudding, the Molalla and the Willamette Rivers. Furthermore, the government presented sufficient evidence that defendant's repeated disturbance of the wetlands, over the course of almost three years, affected the wetlands and surrounding areas.

Justice Kennedy explained that wetlands have the capacity to "filter and purify water draining into adjacent bodies of water" and "slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion." Rapanos, 126 S. Ct. at 2245 (Kennedy, J., concurring). Filling wetlands can "increase downstream pollution" and "may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands." Id. In short, he recognized that "wetlands can perform critical

functions related to the integrity of other waters–functions such as pollutant trapping, flood control, and runoff storage." Id. at 2248.

Here, under Corps guidance, the wetlands is "adjacent" to the unnamed tributary because it is bordering, contiguous or neighboring the channel. In other words, there is no berm or other physical feature separating the wetlands and the tributary, so rainwater, flood water and wetlands waters flow directly to and from the bodies of water.

In 1996, the unnamed tributary flooded the wetlands. Contrary to defendant's assertion, relying on this photograph is not a violation of any Corps' guidance; the guidance to which defendant refers deals with determining "ordinary high water marks" in the absence of adjacent wetlands. See Supp. McCaulley Aff., Ex. 26 at 2 n.2. Furthermore, beyond the 1996 flood event, the government points to a photograph of dredge and fill material spilling into the unnamed tributary after defendant disturbed the wetlands. The photograph depicts the unnamed tributary at the level of the wetlands. Govt. Ex.16.4, 16.15. Indeed, defendant himself has testified that the unnamed tributary has risen seasonally and washed away portions of his backyard, and that one reason he built the rock wall was to keep his backyard from continuing to wash away.

Where the unnamed tributary abuts the wetlands, the flow of water in the channel is continuous–neither McCaulley nor Veenstra ever saw it dry. Veenstra measured the flow to be 7.1 and 3.55 cubic feet per second, depending on how she calculated it. As I described above, the flow is relatively permanent–McCaulley observed the channel dry in August at only one location. The wetlands is only 1.75 miles from the Pudding River.

As I noted above, the disturbance was by no means *de minimus*. Goudzwaard took measurements at the site with a tape measure and later transposed the measurements to an enlarged aerial photograph, calculating the total area of impact with a planimeter. He concluded that 1.33 acres was disturbed. His calculation comports with Veenstra's initial observation in 2004 that defendant had disturbed approximately one acre of wetlands. McCaulley came to this conclusion after "examining the photographs and schematic drawings prepared by law enforcement officers at the time of the activity and the survey map" prepared by the remediation consultant. Supp. McCaulley Aff. ¶ 12f. Since Goudzwaard's measurement was obtained on site, and is consistent with Veenstra's, I reject defendant's argument that the disturbance was *de minimus*.

Veenstra photographed sediments pluming into the unnamed tributary from the wetlands as a result of defendant's excavation activity. Veenstra Aff. at ¶ 9. Goudzwaard explained, "Soil disturbance encourages downstream transportation of sediments" which can "require maintenance dredging in the future." Goudzwaard Aff. at ¶ 11. Defendant also destroyed vegetation, increasing the risk of erosion and reducing the wetlands' ability to filter sediments. Defendant disrupted the wetlands' "capacity of biofiltration, flood capabilities, and wildlife support." Id. at ¶ 12.

It is true that defendant confirmed with ODF&W that neither the unnamed tributary nor the Pudding River has been inventoried for fish presence. Similarly, the government produced no evidence, only "common sense" in the words of Veenstra, that defendant's buried excavators released any oil or other chemicals. The government submitted evidence, however, demonstrating that the Pudding River contains rearing habitat for spring Chinook and winter

steelhead. Goudzwaard testified that soil disturbance negatively affects fish survival, as well as breeding, hiding and nesting cover.

Finally, the wetlands lie within the flat flood plain of the unnamed tributary. Goudzwaard opined that similar hydrological conditions, soil and vegetation existed at least a mile upstream and a mile downstream of the affected area. McCaulley generally agreed with that.

In sum, given the status of the affected area as wetlands, its adjacency to the unnamed tributary, unseparated by any berm or other physical feature, the relatively permanent and continuous flow of the unnamed tributary to the navigable in fact Pudding River 1.75 miles away, together with the government's evidence of the importance of this wetland, especially in the context of the larger wetland system extending at least a mile in either direction, I find defendant has failed to raise a fair and just reason supporting withdrawal of his guilty plea.

IV. Whether the Exemption for "Prior Converted Cropland" Applies

Defendant asserts that the wetlands is excluded from CWA jurisdiction because it is "prior converted cropland." 33 C.F.R. § 328.3(a)(8). As set forth above, CWA jurisdiction extends over "waters of the United States." The Corps, however, has further defined that jurisdictional term as follows,

> Waters of the United States do not include **prior converted cropland**. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

33 C.F.R. § 328.3(a)(8) (emphasis added).

Defendant does not explain how his failure to investigate the application of this exemption constitutes a "fair and just reason" justifying withdrawal of his guilty plea. The exemption was not affected by any of the guidance discussed earlier, and was not affected by the Rapanos decision. Nevertheless, even if, as defendant argues, the status of the affected area as prior converted cropland goes to this court's subject matter jurisdiction, the law does not support his argument that the wetlands is beyond the reach of the CWA.

The Corps adopted the "prior converted cropland" exemption to "clarify which areas in agricultural crop production would not be regulated as waters of the United States." 58 Fed. Reg. 45,008 (August 25, 1993). The amendment attempted to bring the CWA in line with the way agricultural lands were regulated under the Food Security Act of 1985 ("FSA"). 16 U.S.C. Chapter 58. Under the FSA, or Swampbuster Act, farmers lost their farm subsidies if they converted their wetlands to farmland. Farmers maintained their farm subsidies, however, if they continued to farm previously cropped wetlands because the Act recognized that such cropland no longer retained the ecological value of wetlands.

EPA and the Corps did not define the term "prior converted cropland" in the regulation, but instead relied on the definition in "the National Food Security Act Manual published by the Soil Conservation Service." 58 Fed. Reg. at 45,031. The agencies also accepted the Soil Conservation Service's ("SCS") concept of 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 Section 404 regulation." Id. at 45,034. The SCS considered prior converted cropland to be abandoned if it was not used for the production of an agricultural commodity every five years. Id.

In 1996, Congress enacted the FAIRA amendments, revising the FSA, to ensure that farmers would not lose their program loans or payments, even if they did not continuously till the soil. So long as they produce an "agricultural commodity" on a wetlands that is cropland before December 23, 1985 (the effective date of the FSA), and so long as the "Secretary determines the wetland characteristics returned after that date" as a result of lack of maintenance, management or circumstances beyond the control of the person, the farmer will maintain subsidies. 16 U.S.C. § 3822(b)(1)(G). Additionally, the FAIRA amendments protect farmers' loans or payments even if they convert "[a] wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date" due to lack of maintenance, management or circumstances beyond the person's control. 16 U.S.C. § 3822(b)(2)(D).

The NRCS (formerly the SCS) adopted regulations to implement the FAIRA amendments.

> Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
>
> (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
>
> (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more)[.]

7 C.F.R. § 12.2(a)(8).

The agency explained that the FAIRA amendments were intended to "revise[] the concept of 'abandonment' to ensure that as long as land is used for agriculture, a certified prior converted cropland designation remains in effect." 61 Fed. Reg. 52,664, 52,669 (Oct. 7, 1996); see also 61 Fed. Reg. 47,019, 47,021 (Sept. 6, 2006) ("[e]nsures that wetlands that were certified as prior-converted cropland will continue to be considered prior-converted cropland even if wetland characteristics return . . . provided the prior-converted cropland continues to be used for agricultural purposes.").

Defendant provides argument and evidence that Tax Lot 1700 is prior converted cropland. Tax Lot 1700 is zoned Exclusive Farm Use, and Marion County has identified the area as Goal 3 agricultural lands in its Comprehensive Plan. The affected area is included in the Mt. Angel Drainage District, which is now the Marion County Drainage District.

Defendant has multiple reports that prior owners grew squash, corn, and pickles, to give only a few examples, on the property since at least the 1940's. George Kushnick[2] told McCaulley that he personally helped to install cedar boxing to drain the property, prior to December 23, 1985, and that his uncle, Hans Kushnick, farmed the site until his death.[3] The most recent report of agricultural activity came from McCaulley's interview with Joanne Kuehn. Kuehn reported that her grandmother, Anna McGuire, had the property planted with mint, and farmed it continuously until her death in 1987. McCaulley admits that Kuehn may not have differentiated between the property behind defendant's home and the property south of the home, which is the

[2]The parties also spell the name Kuschnik. I will utilize the spelling contained in McCaulley's affidavit.

[3]Defendant does not give the year of Hans Kushnick's death, but McCaulley's notes appear to indicate that he died in 1978 or 1979.

affected area at issue here. He thinks he called Kuehn back to confirm that the wetlands had been farmed, and remembers Kuehn was "startled" to learn that the defendant's property did not include the unnamed tributary. In addition, defendant contends, without dispute from the government, that the lands are not inundated 15 consecutive days during the growing season. According to defendant, pursuant to United States v. Hallmark, 30 F. Supp. 2d 1033 (N.D. Ill. 1998), a case involving property that had been farmed from 1969 to 1988 without a prior converted cropland certification from NRCS, the affected area is prior converted cropland which is not "waters of the United States."

Defendant's evidence that an agricultural commodity was produced on the affected area as of December 23, 1985 is very slight, but the government has no evidence to the contrary. Nevertheless, even if the wetlands had been farmed as of December 23, 1985, and it returned to wetlands after that date, there is no question that any agricultural production has been abandoned.[4] Defendant argues that the FAIRA amendments did away with the concept of abandonment. That may be true for purposes of any farm subsidies defendant may seek, but it is not true for purposes of the CWA. The Corps' regulation is clear that the "final authority regarding Clean Water Act jurisdiction" remains with the EPA, and the Corps for day-to-day administration of the Section 404 program. 33 C.F.R. § 328.3(a)(8).

Indeed, in 2001, the Corps' Portland District issued Operating Procedures for Completing Wetland Delineations/Determinations on Agricultural Land in Oregon which directs Corps personnel to assert jurisdiction over prior converted cropland where "[a]n area is not enrolled in a

[4]Indeed, as defendant represents in his reply, his "contention regarding PCC has always been that the area had been converted to farm use by prior owners well before December 1985." Reply at 22 n. 18.

typical rotational, set-aside program . . . and [t]he area is abandoned . . . and [w]etland criteria are met." Goudzwaard Aff., Ex. 7 at 3.[5] "Abandoned" is defined to mean "[m]anagement . . . related to food or fiber production has ceased for 5 consecutive years and the parcel no longer remains in agricultural use (i.e. is considered abandoned)." Id.[6]

Finally, even the NRCS has explained,

> While most PC areas have been extensively manipulated and drained, and are therefore no longer wetlands, a PC area may meet the Corps' wetlands hydrology criterion. Production of an agricultural commodity or maintenance or improvement of drainage systems on the PC area is exempt from the swampbuster provisions. However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA.

Fact Sheet, Certified Wetland Determinations, http://www.nrcs.usda.gov/programs/compliance/WC-files/SWAMP-CertFct-2005.pdf. Furthermore, in withdrawing from the 1994 Memorandum of Agreement to which the Departments of Agriculture, Interior, Army and the Environmental Protection Agency were party, the NRCS explained, "1996 amendments eliminated the concept of 'abandonment' for prior converted (PC) cropland. As a result, land may be considered non-wetlands for Swampbuster purposes, and wetland for CWA purposes." Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act 2 (2005) http://www.nrcs.usda.gov/programs/compliance/pdf_files/

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[5]The page is not numbered, but it is the third page in Exhibit 7.

[6]This position is consistent with other Corps' statements. In explaining the adoption of new and modified Nationwide Permits (NWPs), the Corps explained, "The new and modified NWPs do not need to address impacts to prior converted cropland, since these areas are not waters of the United States. If prior converted cropland is abandoned and reverts back to jurisdictional wetlands, then those areas are subject to the permit requirements of Section 404 of the Clean Water Act." 65 Fed. Reg. 12,818, 12,841 (Mar. 9, 2000).

2-28-05_NewGuidance_Wet_Det.pdf.

In sum, although the defendant has presented some evidence that agricultural activity occurred on the wetlands as of December 23, 1985, the defendant has failed to demonstrate that he did not abandon the agricultural activity. Accordingly, defendant has not met his burden of raising a just and fair reason for withdrawing his guilty plea.

CONCLUSION

For the foregoing reasons, I deny defendant's Motion to Withdraw Guilty Plea (#85).

IT IS SO ORDERED.

Dated this 21st day of December, 2007.

/s/ Garr M. King
Garr M. King
United States District Judge