

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GREAT NORTHWEST, INC.,

Plaintiff,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS; BRIGADIER GENERAL
MARK W. YENTER, in his
official capacity as Division
Engineer; and COLONEL KEVIN
WILSON, in his official
capacity as Commander of the
Alaska District,

Defendants.

Case No. 4:09-cv-0029-RRB

ORDER OF SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Plaintiff Great Northwest, Inc., with a Motion for Summary Judgment at Docket 18. Great Northwest seeks a ruling by this Court that the Army Corps of Engineers lacks jurisdiction under the Clean Water Act ("CWA") to regulate Great Northwest's gravel mining activity on approximately 300 acres of property located near the Tanana River in Fairbanks, Alaska. According to Great Northwest, the gravel mine's separation from the

Tanana River by a railroad track and other structures precludes the extension of CWA jurisdiction to Great Northwest's land.

Defendant the Army Corps of Engineers ("the Corps") makes a Cross-Motion for Summary Judgment at Docket 21, arguing that the gravel mine, or what is referred to colloquially as a gravel pit, is part of continuous "wetland complex" adjacent to the Tanana River¹ and that the Corps therefore has jurisdiction to regulate Great Northwest's activities under the CWA. After reviewing the parties' briefs and the Administrative Record, the Court has determined that oral argument is neither necessary nor warranted.

II. FACTUAL BACKGROUND

Great Northwest's gravel pit is located approximately one-third of a mile (1760 feet) from the Tanana River in Fairbanks, Alaska.² The property is contained within geographic survey parcels 19 and 20, T.1 South, R.1 West, Fairbanks Meridian.³ The property is bounded on the north by Van Horn Road and on the south by a railroad track. The easternmost extent of Great Northwest's

¹ The Tanana River is a large glacial fed waterway that naturally runs brown with silt and mud when not covered by winter ice. The Court has observed it, floated it, and fallen in on numerous occasions.

² Administrative Record ("AR") 130.

³ AR 58.

property is Peger Road; the property extends not quite to Beaverland Road on the west.⁴

Drainage Channel A is a man-made westward-flowing channel which crosses the southeast corner of Great Northwest's property, near the intersection of Peger Road and the railroad track. After briefly passing through Great Northwest's property, the channel then turns southward and exits the property as it passes through a culvert in the railroad track. The channel then runs parallel to the railroad track on the south side of the track until it drains into the Tanana River west of Great Northwest's property. Channel A does not flow regularly.⁵ South of both the railroad track and drainage channel A lies a flood control levee, which runs parallel to the river bank and the railroad.⁶

The railroad berm is culverted in two locations; at the crossing point for Drainage Channel A, and at a point west of the property near the Fairbanks International Airport.

Great Northwest has operated its gravel pit on the above-described property since 1993, usually under a permit issued by the Corps. The permit challenged here was issued on March 28,

⁴ See <http://gis.co.fairbanks.ak.us>.

⁵ AR 52.

⁶ AR 131.

2007.⁷ The permit authorized mechanized land-clearing of 170.4 acres of wetlands and filling of 62.4 acres of wetlands, while imposing certain requirements on Great Northwest, including preventative environmental measures and financial obligations.⁸ In particular, the permit provided for Great Northwest to deposit \$55,000 into an escrow account, to be paid to "The Conservation Fund" in the event that Great Northwest's administrative appeal of jurisdiction were denied.⁹

Great Northwest has challenged the Corps' authority to regulate the gravel pit a number of times previously in response to developments in case law regarding the CWA. This is done by asking the Corps for a jurisdictional determination, or "JD." The Corps has previously predicated its jurisdiction on the adjacency of Great Northwest's property to Drainage Channel A. For example, on the April 2004 JD form, under the heading "Rationale for the Basis of Jurisdiction Determination," the Corps wrote only the following: "The Tanana River is a navigable water of the United States. Drainage Channel 'A' is a tributary of the Tanana River. The Van

⁷ AR 183-86.

⁸ AR 183-86.

⁹ AR 184.

Horn Road property contains wetlands that are adjacent to the 'A' Channel."¹⁰

Great Northwest's most recent request for a JD is predicated upon the U.S. Supreme Court's decision in Rapanos v. U.S., 547 U.S. 715 (2006), a case in which the Court considered the limits of CWA jurisdiction over wetlands.¹¹ On November 1, 2007, the Corps reaffirmed its finding of jurisdiction, taking into account the Rapanos decision. The Corps determined that the "large complex of contiguous wetlands on [Great Northwest's property] is adjacent to the Tanana River, a traditional navigable waterway," and therefore constitutes "waters of the United States" within the agency's regulatory jurisdiction.¹² The Corps also determined that "the parcel is directly abutting Drainage Channel A, a relatively permanent waterway."¹³

Great Northwest then filed an administrative appeal of the Corps' finding of CWA jurisdiction. On July 28, 2008, the Corps' appellate Review Officer affirmed jurisdiction based on the wetlands' adjacency to the Tanana River, but remanded on the issue

¹⁰ AR 847.

¹¹ Docket 1 at 4-5.

¹² AR 130.

¹³ AR 130.

of adjacency to Drainage Channel A.¹⁴ The Corps' District office subsequently withdrew adjacency to Drainage Channel A as a basis for jurisdiction, after finding that they could not document that Channel A was "relatively permanent," but reaffirmed jurisdiction based on adjacency to the Tanana River.¹⁵ Great Northwest filed its complaint initiating this case on June 4, 2009.

III. GOVERNING PROVISIONS

Under the CWA, the Corps has authority to regulate the placement of dredged and fill material into "navigable waters."¹⁶ To place dredged or fill material into "navigable waters" requires a permit under 33 U.S.C. § 1344(a). These permits are known as Section 404 permits, referring to Title IV, § 404 of the CWA.¹⁷

The CWA defines "navigable waters" as "waters of the United States."¹⁸ In its own regulations, the Corps has defined "waters of the United States" to include, among other things, wetlands that are "adjacent" to such waters.¹⁹ The Corps has defined "adjacent"

¹⁴ See AR 56-71.

¹⁵ AR 52.

¹⁶ See 33 U.S.C. § 1344(d).

¹⁷ See 33 U.S.C. § 1344.

¹⁸ 33 U.S.C. § 1362(7).

¹⁹ 33 C.F.R. § 328.3(a)(7).

to mean "bordering, contiguous, or neighboring."²⁰ The Corps has defined wetlands that are separated from other waters of the United States by "man-made dikes or barriers, natural river berms, beach dunes and the like [to be] 'adjacent wetlands.'"²¹ The Corps has declined to assert jurisdiction over wetlands that are themselves adjacent to other jurisdictional wetlands.²²

IV. STANDARD OF REVIEW

Summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When the dispute requires review of an administrative record, as in this case, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did."²³ A district court reviews an agency's decision under the APA to determine whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in

²⁰ 33 C.F.R. § 328.3(c).

²¹ 33 C.F.R. § 328.3(c).

²² 33 C. F.R. § 328.3(a)(7).

²³ City & County of San Francisco v. United States, 130 F.3d 873, 877 (9th Cir. 1997) (quoting Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985)).

accordance with law."²⁴ "In making this inquiry, [the court] ask[s] whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'"²⁵ An abuse of discretion necessarily occurs where there has been an error of law.²⁶

V. DISCUSSION

Although the parties agree that there remain no genuine issues of material fact in this case, the fairly complex facts of this case defy easy categorization under the CWA. First, the Court will examine the standard which the Corps must meet in order to exercise jurisdiction under the CWA, as discussed in Rapanos v. U.S., 547 U.S. 715 (2006). The Court will then determine whether the Corps has met that standard with regard to Great Northwest's property.

A. The Corps Must Show that the Wetlands and the River Share a "Significant Nexus", or that They Are Adjacent

In Rapanos, the Corps was found to have exceeded its Congressional mandate by attempting to regulate "four Michigan wetlands lying near ditches or man-made drains that eventually

²⁴ 5 U.S.C. § 706(2)(A).

²⁵ Natural Res. Def. Council v. U.S. Dep't of the Interior, 113 F.3d 1121, 1124 (9th Cir. 1997) (quoting Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)).

²⁶ See Koon v. United States, 518 U.S. 81, 100 (1996).

empty into traditional navigable waters."²⁷ A plurality of the Rapanos Court held that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."²⁸ There is no question that, under the plurality's reasoning, Great Northwest's gravel pit cannot be regulated under the CWA.

However, Justice Kennedy's concurrence (which provided the decisive fifth vote) held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."²⁹ A wetland possesses the requisite nexus, if the wetland, "alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense."³⁰

²⁷ Rapanos at 715.

²⁸ Rapanos at 742.

²⁹ Rapanos at 779.

³⁰ Rapanos at 780.

According to Justice Kennedy,

[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.³¹

Justice Kennedy added the following:

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.³²

Although the Rapanos case addressed jurisdiction over wetlands adjacent to tributaries rather than other wetlands, Justice Kennedy did have this to say about wetlands adjacent to jurisdictional wetlands: "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region."³³

The Corps argues, based on Justice Kennedy's opinion, that it need not show a "significant nexus" because its jurisdiction is premised on the gravel pit's alleged adjacency to the Tanana River,

³¹ Rapanos at 780.

³² Rapanos at 782.

³³ Rapanos at 782.

a "navigable-in-fact" water. "Because the Corps' adjacency finding is supported by a 'reasonable inference of ecologic interconnection,' [...] it made no specific findings on the wetlands' 'significant nexus' with the Tanana River, which may provide an alternative basis for CWA jurisdiction."³⁴ This statement gets Justice Kennedy's opinion precisely backwards; a finding of adjacency between bodies of water cannot be "supported" by a "reasonable inference of ecological interconnection." It is the other way around. When the bodies of water are "adjacent," Justice Kennedy would permit the Corps to make a reasonable inference of ecological connection. But if the Corps is to base its jurisdiction on adjacency to navigable waters, that adjacency cannot be "inferred" from a ecological connection. Otherwise, the Corps could find adjacency based on an "ecological interconnection," which may be inferred from... adjacency.

Nonetheless, the Corps is correct in stating that it must choose whether to establish jurisdiction under the CWA either by proving that there is a "significant nexus" between the wetlands and the river, or merely by proving that the wetlands are "adjacent" to the Tanana River. If the wetlands and the river are "adjacent," then the "significant nexus" between the river and the

³⁴ Docket 21 at 21.

gravel pit is presumed, and jurisdiction is therefore proper under the CWA. Otherwise, the significant nexus is not presumed and must be established "on a case-by-case basis" by the Corps if it is to properly exercise jurisdiction under the CWA.

As the Corps acknowledges, it has never conducted an "assessment of the particularized nexus between the wetlands and the Tanana River"³⁵ Thus, in order to exercise jurisdiction under the CWA, it must show that the wetlands and river are "adjacent" as that term is defined by the CWA and appurtenant regulations.

B. The Wetlands on Great Northwest's Property Are Not "Adjacent" to the Tanana River for Purposes of the CWA

When the Corps originally found that it had jurisdiction over the pit, it relied on two separate rationale; 1) that the gravel pit was adjacent to Drainage Channel A, which it referred to as a "tributary" of the Tanana River, and 2) that the gravel pit was adjacent to the Tanana River itself.

Under the Corps' regulations, a wetland which is adjacent to a "tributary" of a navigable waterway is subject to the Corps' jurisdiction.³⁶ Therefore, if Drainage Channel A were a "tributary" of the Tanana River, then the gravel pit would be subject to jurisdiction by virtue of its adjacency to the channel. However,

³⁵ Docket 21 at 21-22.

³⁶ 33 C.F.R. § 328.3 (5)-(7).

the Corps' has determined that the channel is not a tributary of the Tanana because it is not a "relatively permanent waterway." According to the Corps, "Channel A does not have year round surface flow throughout its length, and we have not confirmed that flow occurs in the shallow subsurface in those areas where flow is not visible, although that flow is a possibility."³⁷

Therefore, the Corps has instead relied on the gravel pit's alleged adjacency to the Tanana River for jurisdiction. It should be noted that this basis for jurisdiction somewhat contradicts the first. Because the drainage channel lies between the gravel pit and the river, it cannot be "adjacent" to both the channel and the river. Indeed, this is the crux of Great Northwest's argument; that the gravel pit is adjacent not to the river but to the wetland (including the drainage channel) on the south side of the railroad track. Thus, it would be a wetland adjacent to a jurisdictional wetland, rendering it outside the Corps' jurisdiction under 33 C.F.R. § 328.3(a)(7).

The Corps gets around this apparent contradiction by arguing that the gravel pit is part of "a continuous wetland complex," which includes the wetlands on both sides of the railroad tracks.³⁸

³⁷ AR 52.

³⁸ Docket 21 at 11.

The entire complex is therefore adjacent to the Tanana River and subject to jurisdiction, according to the Corps. Great Northwest counters that the presence of the railroad track and berm between the gravel pit and the channel makes them "adjacent" to one another, due to the Corps' regulation providing that wetlands which are separated by "man-made dikes or barriers" from other waters are considered "adjacent" to those waters.³⁹ Such a reading would make them separate wetlands as a matter of law.

This case therefore boils down to a single question: Are the wetlands on Great Northwest's property part of the same jurisdictional "wetland" as the drainage channel and other waters on the south side of the railroad berm, or are they separate "wetlands"? As Great Northwest points out, the Corps' regulations refer only to jurisdiction over "wetlands" and do not mention such a thing as a "complex" or "continuum" of wetlands.⁴⁰ The regulations simply define a "wetlands" as "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

³⁹ 33 C. F.R. § 328.3(a)(7).

⁴⁰ Docket 22 at 2.

saturated soil conditions."⁴¹ The regulation gives several examples of such "wetlands," including "swamps, marshes, bogs, and similar areas."⁴²

The question of where one "wetland" ends and another begins is not one that has been addressed at great length by the federal courts. The Corps points to North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003), in which a "continuous network" of wetlands was found to be entirely within CWA jurisdiction despite the "wetlands adjacent to other wetlands" exception found in 33 C. F.R. § 328.3(a)(7). According to the Court in Holly Ridge, to hold otherwise would be "absurd" because it would "mean[] that only the first millimeter of wetlands adjacent to a jurisdictional water would be covered by the CWA."⁴³

It would seem that the Holly Ridge Court's concern for "absurd" results in applying the "wetlands adjacent to wetlands" exception is limited to cases in which the "network of wetlands" is "continuous." Where the wetlands are "continuous" it would indeed be absurd to draw an arbitrary line of adjacency in order to limit

⁴¹ 33 C. F.R. § 328.3(b).

⁴² 33 C. F.R. § 328.3(b).

⁴³ Holly Ridge at 674 n. 5.

jurisdiction. However, the Corps' regulations must presume some possible delineation between adjacent wetlands, or else the § 328.3(a)(7) exception to jurisdiction would be rendered a nullity. To ask whether the wetlands on the south and north side of the railroad tracks are "continuous" is merely to rephrase the aforementioned question of whether they are one wetland or separate wetlands.

The Corps also cites U.S. v. Banks, 115 F.3d 916 (11th Cir. 1997), a case in which a wetland slough was found to be "adjacent" to a navigable water despite their separation from one another by a paved road and one half mile of distance. The question in that case is whether the wetland was "adjacent" or "isolated" from the water. The Court held that there was a "hydrological connection" between the wetland and the water, which passed "mainly through ground water".⁴⁴ However, Banks is not applicable to this case because it does not address the "wetlands adjacent to wetlands" exception to jurisdiction.

The Court must give meaning to the wording of the Corps' regulations, which clearly state that wetlands which are not adjacent to navigable-in-fact waters, but rather only to other jurisdictional wetlands, are not subject to CWA jurisdiction. The

⁴⁴ Banks at 921.

Court must also credit the Corps' regulation which provides that wetlands separated from other waters by man-made barriers are "adjacent" to those waters. At the same time, the Court agrees with the Holly Ridge Court that, where the wetlands are "continuous" with one another, a man-made barrier cannot defeat jurisdiction. **The most logical synthesis of these principles is as follows: Where a jurisdictional wetland is separated from another wetland by a man-made barrier, jurisdiction will only extend beyond the man-made barrier if the wetlands are "continuous" such that they should be considered to be the same wetland.**

Thus, the Court is still left to determine whether the wetlands on the north and south side of the train tracks are "continuous" or separate. The Corps claims that its administrative finding that the wetland was "continuous" is due deference by this Court.⁴⁵ However, the Court finds the discussion of wetland continuity within the Administrative Record and the Corps' briefing to be fairly cursory and contradictory.

For example, the Corps' post-Rapanos JD, dated November 1, 2007, contains a finding that the "large complex of contiguous wetlands on the parcel is adjacent to the Tanana River," and states that "[t]he wetlands extend on both sides of both the railroad berm

⁴⁵ Docket 21 at 10-11.

and the levee."⁴⁶ But "contiguous" could mean anything from "touching" or "adjoining"⁴⁷ to merely "nearby."⁴⁸ Moreover, the Corps itself defines "adjacent" as "bordering, contiguous, or neighboring."⁴⁹ The wetlands on the north and south sides of the railroad berm might be "contiguous" in the sense that they are "adjacent" to one another, but not "continuous" in the sense of being the same jurisdictional wetland.

The Court notes, for example, that a May 14, 2004, letter from the Corps states that the "wetlands on the subject property are adjacent to Drainage Channel 'A'" because they are "separated from Drainage Channel 'A' by the Alaska Railroad embankment."⁵⁰ Such a statement strongly indicates that the wetlands on the north and south sides of the railroad are "contiguous" and "adjacent" but "separated," and therefore not "continuous."

Also of note is the following passage from an April 23, 2004, letter written by the Corps in response to certain questions raised

⁴⁶ AR 130.

⁴⁷ Black's Law Dictionary (8th ed. 2004).

⁴⁸ Webster's II New College Dictionary 243 (1999).

⁴⁹ 33 C.F.R. § 328.3(c).

⁵⁰ AR 831.

by Edmond Packee, an environmental consultant retained by Great Northwest:

You also requested Alaska District procedures for interpreting that the Alaska Railroad constitutes a levee, or dike, and how many man-made barriers are necessary for a property to be isolated. As addressed in our April 7, 2004 DA letter, drainage Channel "A" is a tributary of the Tanana River. The Van Horn Road property contains wetlands that are adjacent to the Channel "A." The term "adjacent" means bordering, contiguous, or neighboring (nearby). The railroad grade south of the subject property is a man-made barrier that separates the Great Northwest wetlands from Channel "A". We have no written local guidance or standard operating procedures as to how many man-made barriers are necessary for a property to be isolated. Each action is reviewed on a case-by-case basis.⁵¹

Once again, this letter shows the Corps taking the position that the wetlands on Great Northwest's property are adjacent to the drainage channel and other wetlands south of the railroad berm, but separate from them. Of course, this letter was written at a time when the Corps had predicated jurisdiction primarily on the wetlands' adjacency to the channel rather than the river.

The Corps cites the Administrative Appeal Decision issued by the Review Officer on July 18, 2008, for the proposition that the wetlands on both sides of the railroad berm constitute a "broad continuum of wetlands." However, this quoted passage is merely the Review Officer's characterization of the Corps' position on appeal.

⁵¹ AR 835.

The appeal decision itself does little to support the notion that the wetlands are continuous. For example, the Review Officer describes the railroad berm and levee as "man-made barriers or obstructions separating portions of a once intact wetland adjacent to and contiguous with the Tanana River."⁵² If the wetlands are no longer "intact," then it is reasonable to conclude that they are no longer "continuous."

The majority of the administrative appeal decision is devoted to asserting that a man-made barrier cannot defeat a wetland's adjacency to a navigable water. The decision expends far less effort in establishing that Great Northwest's wetlands are in fact adjacent to the Tanana River. For example, the Review Officer writes that "because the wetlands on the Appellants' property meet the definition of waters of the US under 33 C.F.R. 328.3(a)(7), they are adjacent wetlands."⁵³ But this is an utterly circular assertion. Sections 328.3(a)(7) merely establishes that "waters of the United States" include wetlands adjacent to jurisdictional waters. The appeal decision might just as well have said that "the wetlands on the Appellants' property are adjacent wetlands because

⁵² AR 63.

⁵³ AR 64.

they are adjacent wetlands." The Court finds this reasoning unpersuasive.

In upholding the Corps' determination that Great Northwest's property is "adjacent" to the river, the Review Officer cited the Corps' JD form. The form is quoted as follows:

The wetlands on the parcel are separated from the Tanana River by a railroad berm and a flood control levee. Side channels of the river are shoreward of the levee, thus separated from the wetlands by only a railroad berm.⁵⁴

It is unclear which "side channels" this passage refers to, other than Drainage Channel A. Regardless, any such "side channels" are not navigable-in-fact waters, but are at most jurisdictional wetlands. The property's adjacency to such wetlands is insufficient to prove adjacency to the river. The Review Officer himself notes that Great Northwest's property is "separated from the Tanana River by a large levee, an access road, and a railroad berm."⁵⁵

The Review Officer also cites the JD form as stating that "Drainage Channel A is a manmade [Relatively Permanent Waterway]" and that "[t]he wetlands are therefore also abutting a RPW."⁵⁶ It is unclear from this citation why the wetland's adjacency to the channel makes it ipso facto adjacent to the river. In any event,

⁵⁴ AR 63.

⁵⁵ AR 60.

⁵⁶ AR 63.

after the appeal decision was issued, the Corps conceded that this is not a true statement.⁵⁷ The channel has been downgraded from an RPW and tributary to, essentially, a wetland. There is no discussion in the record as to what effect this change has on the status of Great Northwest's property vis-a-vis its adjacency to the Tanana River.

Thus, the Court is left with little more to rely upon than the Reviewing Officer's conclusion that, "[b]y reviewing aerial photography and observing the area during the site visit, the adjacent wetlands appear to be historically part of a contiguous wetland system that is connected to the Tanana River, a traditional navigable water."⁵⁸ The Review Officer goes on to cite 33 C.F.R. § 329.4, which provides that a "determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." According to the Review Officer, "It is apparent that the intent of the above regulations is to ensure that man-made structures cannot isolate adjacent wetlands to a [navigable waterway]."⁵⁹ The Court strongly disagrees that § 329.4

⁵⁷ AR 52.

⁵⁸ AR 64.

⁵⁹ AR 64.

has any application whatsoever to non-navigable wetlands. The Review Officer's application of that regulation in this case is a clear error of law.

It is clear from the Administrative Record and from the Corps' motion that the sole justification for its finding of adjacency between the Tanana River and Great Northwest's property is its position that the wetlands on both sides of the railroad berm are part of the same "contiguous wetland system." The Corps' legal position is that its "regulations make clear that neither natural nor man-made barriers can defeat adjacency under the CWA."⁶⁰

As noted above, there is no authority for this legal position in Corps regulations or in case law. The Corps' regulations say nothing about a man-made barrier being unable to "defeat adjacency." All they say about such barriers is that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"⁶¹ While the railroad berm does not "defeat" the adjacency of the gravel pit to the drainage channel, there is no legal reason why it cannot divide them into two distinct wetlands. To the extent that the Corps premises jurisdiction on an

⁶⁰ AR 21 at 2.

⁶¹ 33 C.F.R. § 328.3(c).

incorrect reading of the law, that decision is an abuse of discretion.⁶²

The Corps itself has repeatedly characterized the wetlands on the north and south sides of the railroad as "separate" and no longer "intact." The Court finds that while the wetlands may be "contiguous" in the sense of being adjacent to one another, they are distinct and separate wetlands for purposes of CWA regulations. Great Northwest's wetlands are therefore adjacent to the wetlands on the south side of the railroad berm, not to the Tanana River.

C. The Declaratory and Injunctive Relief Sought By Great Northwest is Appropriate

Great Northwest seeks declaratory relief in this case, establishing that Great Northwest's property is not adjacent to the Tanana River, and that therefore Great Northwest is not subject to regulation under the CWA, and the permit issued to Great Northwest is null and void.⁶³ Great Northwest also seeks a "preliminary and permanent prohibitory injunction barring the Corps, its agents, employees, officers, and representatives from asserting Clean Water Act jurisdiction over Great Northwest's property by virtue of its supposed adjacency to the Tanana River."⁶⁴

⁶² Koon at 100.

⁶³ Docket 1 at 8.

⁶⁴ Docket 1 at 8.

The Corps argues that if this Court finds "that the Corps' jurisdictional determination based on adjacency to the Tanana River was arbitrary and capricious or contrary to law, the matter should be remanded to the Corps."⁶⁵ The Corps suggests that "[o]n remand, in addition to 'significant nexus' findings, the Corps might also perform fact-finding as to whether the wetlands on Great Northwest's property are within CWA jurisdiction (regardless of the other portions of the wetland complex) because their proximity to the Tanana River is 'reasonably close.'"⁶⁶

Great Northwest responds that it "does not object to a remand to allow the Corps, if it chooses, to develop some alternative theory of jurisdiction. Nevertheless, in that instance Great Northwest would still be entitled to a declaration that the particular theory advanced here—jurisdiction by virtue of adjacency to the Tanana—is impermissible."⁶⁷

The Court finds that remand is unnecessary because the Corps' regulations place Great Northwest's wetlands outside CWA jurisdiction as a matter of law. The "significant nexus" analysis espoused by Justice Kennedy in Rapanos describes the outer limits

⁶⁵ Docket 21 at 22.

⁶⁶ Docket 21 at 22 (citations omitted).

⁶⁷ Docket 22 at 11.

of what the Corps *may choose* to regulate under the CWA. But the Corps' regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the CWA, as defined by 33 C.F.R. § 328.3(a)(7). Thus, even if the Corps were to determine that there exists an "ecological interconnection" or "significant nexus" between the wetlands and the Tanana River (or some other alternative basis for jurisdiction suggested by Justice Kennedy), the wetlands would still not be "waters of the United States" as defined by the Corps itself.

The Corps also contends that the requested injunction is overbroad because it would preclude the Corps from pursuing a later enforcement action under § 402 of the CWA, 33 U.S.C. § 1342, which addresses permits for the discharge of pollutants. Great Northwest responds that it seeks only a declaration "that the wetlands on its property are not subject to CWA regulation by virtue of their supposed adjacency to the Tanana," and that "Great Northwest does not seek *carte blanche* to violate the CWA with impunity."⁶⁸ Subject to these caveats, the injunctive relief sought by Great Northwest is not overbroad.

⁶⁸ Docket 22 at 8-9.

VI. CONCLUSION

Great Northwest's wetlands are not "adjacent" to the Tanana River and therefore fall outside the definition of "waters of the United States" as defined by 33 C.F.R. § 328.3. The wetlands therefore fall outside CWA jurisdiction. Great Northwest's Motion for Summary Judgment at **Docket 18** is **GRANTED**, and the Army Corps of Engineers' Motion for Summary Judgment at **Docket 21** is **DENIED**. The oral argument currently set for June 18, 2010, is hereby **VACATED**.

IT IS SO ORDERED.

ENTERED this 8th day of June, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE