

Clean Water Act Jurisdiction/Waters of the United States: Federal Appellate Court Addresses Wetland Adjacency Exemption



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The United States Court of Appeals for the 9th Circuit (“Court”) addressed in an August 30th opinion an exception to the United States Corps of Engineers (“Corps”) regulations defining the term Waters of the United States (“WOTUS”). *Universal Welding & Fabrication, Inc. v. United States Army Corps of Engineers, et al.*, 2017 WL 3727017.

Plaintiff Universal Welding (“UW”) appealed a District Court’s grant of summary judgment to the Corps arguing that jurisdiction was lacking over the wetland on its property.

UW asserted that the Corps was mistaken in interpreting 33 C.F.R. § 328.3(a)(7) to “provide, rather than preclude,” the Corps’ jurisdiction over UW’s wetland.

328.3(a)(7) lists the waters over which the Corps may exercise regulatory jurisdiction. One of the waters listed contains an exception. The description of the water and the exception read as follows:

(7) “Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.”

UW argued that § 328.3(a)(7) should be interpreted to mean that its wetland falls within the exception.

The exception UW references is a scenario in which one wetland is adjacent to another wetland.

The Corps apparently did not disagree that UW’s wetland is adjacent to another wetland. However, the Corps concluded that because the wetland is adjacent to “Channel C,” it had jurisdiction. Channel C is described as a tributary to a non-wetland jurisdictional water.

The Court summarizes the Corps’ argument:

Despite the subject wetland’s adjacency to another wetland, the Corps determined that its regulatory authority was not precluded by the parenthetical language within § 328.3(a)(7), which it interpreted as prohibiting the exercise of jurisdiction over a wetland only if based upon that wetland’s adjacency to another wetland.

The Court noted that an agency’s interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation. It further characterizes the Corps’ interpretation of this regulatory provision as the most reasonable reading of the text, stating:

. . . The Corps' interpretation of the regulation is supported by the placement of the parenthetical, "other than waters that are themselves wetlands," which modifies the "waters" to which the wetlands must be adjacent for the Corps to exercise jurisdiction on that provision's basis. . . .

The Court also rejected UW's arguments which included:

- the wetland's adjacency to Channel C is defeated by a wetland situated between the subject wetland and Channel C (noting that despite the wetland not immediately abutting Channel C, the definition of "adjacent" permits "neighboring" waters to meet the adjacency requirement)
- Its interpretation is "better" than the Corps (noting the Corps interpretation is not plainly erroneous)
- The interpretation is arbitrary or capricious (noting the records support this conclusion referencing performance of a variety of hydrologic , physical, geochemical and biological functions)

The Corps assertion of jurisdiction was upheld.

[A copy of the opinion can be found here.](#)