

Wetlands Designations/Clean Water Act: Federal Appellate Court Addresses Whether Appropriations Act Mandates Use of U.S. Corps of Engineers Guidance Manual



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The United States Court of Appeals for the Ninth Circuit (“Court”) addressed in a September 21st opinion whether language in a prior Congressional Act required the United States Army Corps of Engineers (“Corps”) to continue use of a 1987 guidance manual. See *Tin Cup, LLC v. United States Army Corps of Engineers*, No. 17-35889, 2018 WL 4516123.

The Corps has used guidance manuals in delineating what constitutes “wetlands” under the Clean Water Act (“CWA”).

Tin Cup, LLC (“Tin Cup”), owns a 455 acre parcel in North Pole, Alaska. It filed suit in United States District Court (“District Court”) seeking to set aside the Corps’ permitting decision. The decision restricted the use of property on which Tin Cup wished to conduct excavation and the laying down of gravel material.

Under the CWA, gravel material is a regulated “pollutant,” and, therefore, may not be placed on jurisdictional wetlands without a permit. (See Section 404 of the CWA.) The Corps, in considering Tin Cup’s permit application, determined that wetlands were present on 351 acres of Tin Cup’s 455 acre site.

Tin Cup disputed the wetlands designation. It argued that the Energy and Water Development Appropriations Act of 1993 (the “1993 Budget Act”) required that the Corps use the U.S. Army Corps of Engineers, Corps of Engineers Wetlands Delineation Manual (Jan. 1987) (the “1987 Manual”) in determining the existence of wetlands within the meaning of the CWA.

Under the 1987 Manual, an area may be designated a wetland if it has a “growing season,” defined as a season during which soil temperature at 19.7 inches below the surface is above 5°C. Tin Cup contended that the “discontinuous permafrost” on its property did not reach the requisite temperature for a definitional “growing season,” and, thus, the area could not be considered a wetland.

The Corps rejected this argument. It relied instead upon the U.S. Army Corps of Engineers, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) (Sept. 2007) (the “Alaska Supplement”), which “recogniz[ed] the existence of permafrost and the need to rely

instead upon locally or regionally developed methods to determine growing season dates . . . as well as direct observation of vegetation.”

In its consideration of the parties’ cross-motions for Summary Judgment, the District Court found for the Corps. It determined that the 1993 Budget Act did not require that the Corps continue to use the 1987 Manual’s guidelines to delineate wetlands. The Court (Ninth Circuit) affirmed.

The Court found that the provision of the 1993 Budget Act which required use of the 1987 Manual in the delineation of wetlands was not controlling. The Court noted that “there is . . . ‘a very strong presumption’ that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill is passed” unless there is a clear statement of futurity. Because the 1993 Budget Act contained no such statement, the Court held that the requirement for use of the definition of a growing season in accordance with the 1987 Manual expired at the end of the 1993 fiscal year. Thus, the Corps’ determination was upheld and Tin Cup was barred from laying gravel material outside of the approved and permitted acreage.

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