

Universal Welding & Fabrication, Inc. v. United States Army..., --- Fed.Appx. ---- (2017)

2017 WL 3727017

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UNIVERSAL WELDING & FABRICATION,  
INC., an Alaska Corporation, Plaintiff-Appellant,

v.

UNITED STATES ARMY **CORPS** OF ENGINEERS  
and Christopher D. Lestochi, Colonel, in his  
official capacity as Commander of the Alaska  
District of the **CORPS**, Defendants-Appellees.

No. 15-35906

Argued and Submitted August  
16, 2017 Anchorage, Alaska

Filed August 30, 2017

Appeal from the United States District Court for the District of Alaska, Timothy M. Burgess, Chief Judge, Presiding, D.C. No. 4:14-cv-00021-TMB

**Attorneys and Law Firms**

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Before: GRABER, CLIFTON, and M. SMITH, Circuit Judges.

MEMORANDUM\*

\*1 Plaintiff Universal Welding appeals the district court's grant of summary judgment to the United States Army **CORPS** of Engineers as to Plaintiff's claim that the **CORPS** permit decision was invalid under the Administrative Procedure Act. Reviewing de novo, "thus reviewing directly the agency's action under the [APA's] arbitrary and capricious standard," we affirm. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (internal quotation marks omitted).

Plaintiff argues that the **CORPS** permit decision was invalid because the **CORPS** lacks jurisdiction over the **wetland** on Plaintiff's property. Specifically, Plaintiff contends that the **CORPS** plainly erred in interpreting 33 C.F.R. § 328.3(a) (7) to provide, rather than preclude, the **CORPS** jurisdiction over the subject **wetland**. That provision appears within a list of waters over which the **CORPS** may exercise regulatory jurisdiction:

- (1) Waters that were, are, or may be used in interstate or foreign commerce;
- (2) "All interstate waters including interstate **wetlands**";
- (3) "All other waters ..., the use, degradation or destruction of which could affect interstate or foreign commerce";
- (4) All impoundments of identified waters;
- (5) "Tributaries of waters identified in paragraphs (a) (1) through (4) of this section";
- (6) "The territorial seas"; and,
- (7) "**Wetlands** adjacent to waters (other than waters that are themselves **wetlands**) identified in paragraphs (a) (1) through (6) of this section."

33 C.F.R. § 328.3(a) (2014).

The regulation clarifies that "[t]he term adjacent means bordering, contiguous, or neighboring" and that "**wetlands** separated from other waters of the United States by man-made dikes or barriers, natural river berms,

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beach dunes and the like” are nonetheless “adjacent **wetlands**.” 33 C.F.R. § 328.3(c).

Plaintiff argues that, under § 328.3(a)(7), the **wetland** on its property falls within an exception to the **Corps** regulatory authority. The **Corps** concluded that it had jurisdiction over the subject **wetland** under § 328.3(a)(7) because that **wetland** is adjacent to Channel C, which serves as a tributary to a non-**wetland** jurisdictional water, Chena Slough. *See* § 328.3(a)(1), (5), (7). 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**.

An agency's interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (internal quotation marks omitted). The **Corps** interpretation of § 328.3(a)(7) is not plainly erroneous. To the contrary, it is the most reasonable reading of the regulation's text. 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. § 328.3(a)(7).

\*2 To the extent that Plaintiff argues that all **wetlands** adjacent to other **wetlands** fall outside the **Corps** regulatory authority, regardless of their adjacency to a non-**wetland** water that would otherwise render them jurisdictional, we conclude that this reading is unsupported by the regulation's plain language. We also reject Plaintiff's argument that the subject **wetland's** adjacency to Channel C is defeated by a **wetland** situated between the subject **wetland** and Channel C. Although the **wetland** on Plaintiff's property does not immediately abut

Channel C, the **Corps** definition of “adjacent” permits “neighboring” waters to meet the adjacency requirement, even if separated from another jurisdictional water by a barrier, berm, or the like. *See* § 328.3(c).

Plaintiff's additional challenges are also unavailing. Plaintiff argues that it offers a “better” interpretation of the regulation, which would augment the limiting effect of § 328.3(a)(7)'s parenthetical language. Yet, a “better” interpretation would not make the **Corps** interpretation plainly erroneous, the standard under which we must evaluate the **Corps** interpretation. Under the proper standard, “an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.” *Decker v. Nw. Env'tl Def. Ctr.*, 568 U.S. 597, 613, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013). Moreover, for the reasons already discussed, we are not persuaded that Plaintiff's interpretation is in fact “better.”

Finally, we conclude that the **Corps** jurisdictional determination was not arbitrary or capricious. Applying its interpretation of § 328.3(a)(7), the **Corps** determined that the subject **wetland** is jurisdictional because it is adjacent to Channel C and sustains a significant nexus to Chena Slough. The record supports this conclusion. The record shows that the **wetland** on Plaintiff's property contributes “shallow subsurface flow” to Channel C. The record also demonstrates that the subject **wetland**—along with other **wetlands** in the area and Channel C—“perform[ ] a variety of hydrologic, physical, geochemical and biological functions critical to the integrity of Chena Slough,” such as filtering pollutants, supplying nutrients, and supporting organisms. These unchallenged factual findings are sufficient to support the **Corps** jurisdictional determination.

**AFFIRMED.**

**All Citations**

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Footnotes

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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