IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER THORSON, MANAGED INVESTMENTS INC., CONSTRUCTION MANAGEMENT, INC. and GERKE EXCAVATING INC.,

Defendants.

OPINION AND ORDER

03-C-0074-C

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This is a civil action for injunctive and monetary relief in which the United States contends that defendants Peter Thorson, Managed Investments, Inc., Construction Management, Inc. and Gerke Excavating, Inc. violated 33 U.S.C. § 1319(b) and (d) of the Clean Water Act by discharging pollutants into waters of the United States without a permit. Plaintiff asks the court to (1) permanently enjoin defendants from discharging pollutants into the waters of the United States without a permit; (2) require defendants to remedy the damage caused by their unlawful activities at their own expense; and (3) impose civil penalties pursuant to 33 U.S.C. §1319(d). Defendants have asserted a counterclaim,

in which they seek a declaratory judgment that the site of the discharge (1) does not meet the necessary criteria for wetlands set out in the United States Army Corps of Engineers "Wetlands Delineation manual" and (2) is not subject to jurisdiction under the Clean Water Act. The case is before the court on plaintiff's motion for partial summary judgment. Jurisdiction is present. 28 U.S.C. § 1331.

Plaintiff's motion for partial summary judgment will be granted with respect to defendants Thorson, Managed Investments and Gerke Excavating. Plaintiff has proved that these defendants discharged pollutants into the waters of the United States. Defendant has not shown why the court should not give deference to the Army Corps of Engineers's standards for wetlands, including wetland hydrology. It was proper for plaintiff to rely on that method in determining that the site constitutes a wetland. Further, the clear statutory text of the Clean Water Act is not violated by the Corps's regulation, which applies to wetlands adjacent to tributaries of navigable waters. Finally, I reject defendants' argument that the regulation exceeds congressional authority under the commerce clause of the United States Constitution. Congressional authority to regulate channels of interstate commerce extends beyond the regulation of those activities affecting a channel's suitability for transporting goods and persons.

Plaintiff is not entitled to summary judgment with respect to defendant Construction Management. Although plaintiff bears the burden of proof, it has not proposed any facts

showing defendant Construction Management's involvement in the discharge. At most, the evidence shows that defendant Construction Management submitted a permit application for a building project on the site two years before the acts that gave rise to this lawsuit.

Defendants are not saved by any of the four affirmative defenses they pursue. They contend that plaintiff has failed to state a claim on which relief may be granted, but the contention is not meritorious. Defendants' last three "affirmative defenses" are not true affirmative defenses; they simply restate defendants' denial of the underlying violation. Finally, defendants' counterclaim seeking a declaration that the site is not a "water of the United States" will be dismissed with respect to the filled portion of the site. In determining that plaintiff is entitled to summary judgment, I have already concluded that the site of the discharge is a "water of the United States." However, the claim survives this motion to the extent that defendants seek a declaration regarding the status of the unfilled portions of the site. The Administrative Procedure Act allows persons aggrieved by agency actions to sue for non-monetary relief and the Corps has not made a fact-specific determination of its jurisdiction over the entire site.

From the parties proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff is the United States of America. Defendant Managed Investments, Inc. is a real estate development corporation. Defendant Construction Management, Inc. is a general contracting and development corporation. Defendant Thorson is the president of both defendant Managed Investments and defendant Construction Management. Defendant Gerke is an excavating corporation. All defendants are located in Tomah, Wisconsin or reside there.

A. The Site

The incidents giving rise to this cause of action took place on an undeveloped 5.8 acre tract of land owned by defendant Managed Investments in Tomah, Wisconsin. The eastern border of the tract abuts Superior Avenue; Jefferson Street runs along the tract's southern border. A private residential driveway runs along the north side; the western border abuts a drainage ditch, which runs to Deer Creek, which flows from west to east approximately seventy-five feet north of the residential driveway. Deer Creek is a soft water, alkaline, clear stream that flows into the south fork of the Lemonweir River.

B. Application for Permit to Fill Site

Under the Clean Water Act, the Army Corps of Engineers is authorized to regulate

the disposal of dredged and fill material into the waters of the United States. In 1999, the Corps made a preliminary determination that the site at issue was within its jurisdiction under the Act. The drainage ditch, Deer Creek and the south fork of the Lemonweir River are all part of the Mississippi River's surface water tributary system. The Lemonweir River flows into the Wisconsin River, which is used in interstate commerce and is navigable in fact from Tomahawk, Wisconsin, down to its confluence with the Mississippi River near Prairie du Chien, Wisconsin. The Mississippi River is navigable in fact and used in interstate commerce. The residential driveway on the northern edge of the site is not a barrier to surface water flow from the site to Deer Creek because of two culverts, one on each end of the driveway.

On February 10, 1999, George Schleicher, the owner of the lot at the time, received a letter from the Corps advising him that part of the site was covered in wetlands that could not be manipulated without first obtaining a permit. On or about February 18, 1999, defendant Managed Investments submitted to plaintiff a joint state and federal application for water quality certification, a copy of which was received by the Wisconsin Department of Natural Resources on February 22, 1999. The application included a letter from Schleicher, stating that defendant Managed Investments had offered to purchase the lot if the Corps and the department would issue permits approving the proposed plan to fill parts of the site. In the application, defendant Managed Investment described its plan to

construct a retail and service business complex. The department's fee application was signed by defendant Thorson and dated February 19, 1999.

By letter dated April 9, 1999, defendant Managed Investments' agent, Lawrence Feddersen, revised the plans for the site because of certain water quality concerns raised by the Corps and the Wisconsin Department of Natural Resources. At some point that same month, defendant Thorson hired an outside consultant, Ayres Associates, to assist with the permit application. On or about April 23, 1999, Ayres Associates sent a letter to the Wisconsin Department of Natural Resources, asking that defendant Construction Management be substituted for defendant Managed Investments as the permit applicant. In the letter, Ayres provided additional environmental information about the site, including a delineation of the plants, soils and hydrology.

On May 24, 1999, the Wisconsin Department of Natural Resources denied water quality certification because defendant Construction Management had not provided reasonable assurance that the project would comply with wetland quality standards. On June 8, 1999, the Corps followed the lead of the Wisconsin Department of Natural Resources and denied the application without prejudice. Defendant Construction Management petitioned the Wisconsin Department of Natural Resources for a contested case hearing on June 22, 1999, but sent the petition to the wrong location and did not discover the error until the time for filing had expired. On January 12, 2000, after the petition was routed to the proper

office, the department denied the request because it had not been filed within the requisite time period or at the proper location.

C. Development of the Site

In January 2001, the United States Supreme Court decided Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001). The Corps had defined its jurisdiction under the Clean Water Act to regulate the discharge of pollutants into "navigable waters" as extending to intrastate waters that provide habitat for migratory birds. In invalidating this regulation, the Court made it clear that isolated intrastate waters cannot be subject to the Corps's jurisdiction under the Act. After learning of this decision, defendant Thorson, acting in his capacity as president of defendant Managed Investments, offered to purchase the site for the reduced price of $55,000 from Schleicher, who accepted. (The original offer price in 1999 had been $80,000). In February 2001, defendant Thorson contacted Bruce Norton, a biologist and the Corps's initial point of contact in Monroe County, Wisconsin. Norton expressed his understanding that the wetlands on the site were "adjacent" to Deer Creek under the Corps's definition of that term so that defendant Thorson would need a permit for any mechanized clearing of the wetlands. Defendant Thorson did not apply for a permit after having this conversation with Norton.

In February or March 2001, defendant Thorson hired contractor defendant Gerke Excavating to place fill material and perform other grading activities on the site. At some point in March, defendant Thorson contacted defendant Gerke's president and project coordinator to tell them to go ahead with the project even without permits because of a recent United States Supreme Court opinion. Defendant Thorson gave them a two-week time frame in which to complete the project. On March 23, 2001, the parties officially entered into an agreement for performance of these grading services.

On March 27, 2001, defendant Gerke removed stumps and topsoil and began to fill and grade the site with a sand-based fill product. Defendant used a bulldozer and trucks to haul material and a broom to keep fill material off the road. That same day, defendant Thorson attempted unsuccessfully to contact Norton at his office. He then contacted the Corps's district office, seeking a jurisdictional determination whether the wetlands on the site were "adjacent" to waters within the Corps's jurisdiction. The regional officer told defendant Thorson that the site could be filled if it were actually isolated, but the officer did not make any final determination that the wetlands on the site were either "adjacent" to navigable waters or isolated. Later in the day, defendant Thorson left Norton a voicemail message indicating that he believed that his site was isolated because of the advice he had received from the regional officer and that he would proceed to fill the site.

After receiving defendant Thorson's voicemail message the following morning, Norton

attempted to reach him without success. Norton learned from a Tomah city official that the city had "red flagged" the project because defendant Thorson had not obtained the necessary city permits and that defendant Gerke had been hired to perform the work. Norton then contacted Ron Parish of defendant Gerke Excavating and asked him whether he was aware of the wetland issues in the project. Parish told Norton that defendant Thorson had said that he had taken care of everything and that defendant Gerke had started work on the project the previous morning (March 27, 2001). Norton told Parish that he would need a permit to fill the wetlands and advised him of the penalties for filling the site without one. Parish agreed to stop work at the site. At some time on March 28, 2001, defendant Gerke and defendant Thorson executed a written contract for the excavation and filling services. (It is unclear whether the contract was executed before or after the conversation between Norton and Parish or the conversation between Norton and defendant Thorson.) The contract includes the following clause: "Gerke Excavating, Inc. will not bear responsibility for any fines or penalties assessed by government agencies for any reason prior to completion, owner shall pay for all work completed." Later that day, defendant Thorson contacted Norton and accused him of threatening defendant Gerke and forcing a work stoppage. Norton informed defendant Thorson that the Corps was preparing a cease and desist order.

On March 28, 2001, the Corps issued cease and desist orders to defendants Thorson,

Construction Management and Gerke. At the site the following day, Norton hand-delivered the orders to defendant Thorson and defendant Gerke's president, Richard Gerke. In response, defendant Thorson and Gerke indicated that no filling had taken place after Norton's phone calls the day before. By this time, dredged stumps, roots and other spoil material was piled on the west, north, east and southeast of the fill area. These piles remain on the site.

D. Ecological Conditions on the Site

The Corps's 1987 wetland delineation manual lays out three wetland criteria: wetland hydrology (soil saturation), wetland soil (hydric soil) and wetland vegetation (hydrophytes). According to the manual, an area must satisfy all three criteria in order to qualify as wetlands. The manual provides various methods and standards for determining whether these criteria are satisfied. Recent disturbances or normal seasonal variations may create atypical situations in which one or more of the three criteria may be lacking or obscured.

Obligate wetland plants are those found in wetlands more than 99% of the time, faculative wetland plants are those found in wetlands between 67-99% of the time, and faculative plants are those found in wetlands between 33-67% of the time. According to the 1987 manual, the hydrophytic vegetation criterion is met when more than 50% of the plant

species in an area fall into these three categories. The hydrophytic vegetation requirement was met at 28 of the 34 sample points on the site at issue.

Hydric soils are those formed under conditions of saturation, flooding or ponding for periods long enough to create anaerobic conditions during the growing season. The anaerobic conditions cause changes in soil elements, such as iron and manganese, producing soil colors and other characteristics that indicate hydric soils. Hydric soils were found at 23 of the 24 sample points surrounding the fill area and at all six sample points beneath the fill.

The wetland hydrology criteria is satisfied if the soil is saturated "within a major portion of the root zone (usually within 12 inches of the surface)" for at least 5% of the growing season. The 1987 manual provides that the starting and ending dates of the growing season may be estimated from air temperatures over a ten-year span. Specifically, the last and first date on which the air temperature reaches 28° Fahrenheit or lower five years out of ten mark the start and end of the growing season. Applying this method, the estimated start and end dates of the growing season at the site are April 29 and October 5 respectively. This is a 159-day period, 5% of which is 8 days. At all six locations tested, the soil was saturated to within 12 inches from the surface for more than 8 days during the estimated growing season in 2003.

(I note that plaintiff has proposed voluminous additional scientific data that would tend to show that the soil hydrology criteria have been satisfied under one of the other

methods outlined in the manual. However, in its brief in support of its motion for summary judgment, plaintiff relies exclusively on the 12 inch soil saturation method described above. See Plt. Br., dkt. # 77, at 14-15. Thus, these other data are immaterial for purposes of resolving this motion.)

OPINION

The Clean Water Act makes it unlawful for any person to discharge a "pollutant" from a "point source" into "navigable waters" unless the discharge is authorized by a permit or an exemption. 33 U.S.C. §1311(a); 33 U.S.C. § 1362(12); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers, 335 F.3d 607, 612 (7th Cir. 2003). The Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress has charged the Army Corps of Engineers with regulating the permit process under § 404 of the Act. 33 U.S.C. § 1344; Home Builders, 335 F.3d at 612. Individual permits are issued on a case-by-case basis after the Corps conducts site specific examination, provides an opportunity for a public hearing and public interest review and makes a formal determination. 33 C.F.R. §§ 320.4, 323. See also Home Builders, 335 F.3d at 612. The Corps may not issue a § 404 permit unless an applicant has first obtained certification or waiver from the state in which the discharge originates,

indicating that the activity will not damage water quality impermissibly. See 33 U.S.C. § 1341(a).

§ 309 of the Act authorizes civil actions for "appropriate relief, including a permanent or temporary injunction" for violations of § 301. 33 U.S.C. § 1319(b). In addition, the Act authorizes district courts to impose civil penalties, not to exceed $25,000 a day for each violation. 33 U.S.C. § 1319(d). A plaintiff must prove that the defendants (1) discharged a "pollutant" (2) from a "point source" (3) into "navigable waters." 33 U.S.C. § 1311. If a plaintiff proves these three elements, the defendants' actions constitute a § 301 violation unless authorized by a permit. In this case, defendants concede that they did not have a permit for their activities.

A. Discharge of a Pollutant

Defendants do not deny that their actions constitute a discharge of a "pollutant," which is defined under the Act to include dredged spoil, solid waste, rock and sand. 33 U.S.C. § 1362(6). Defendant Gerke piled dredged stumps, roots and spoil on the site. In addition, defendant deposited sandy fill material that it had trucked in and began grading portions of the site.

Although defendants do not raise the issue, it is not clear from the facts proposed by plaintiff how the discharge can be attributed to defendant Construction Management. The

discharge can be attributed to defendant Managed Investments because it owns the site, defendant Thorson because he directed and oversaw the discharge and defendant Gerke because it did the discharging. United States v. Lambert, 915 F. Supp. 797, 802 (S.D. W.Va. 1996) ("The CWA imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work.") At most, the facts show that defendant Construction Management was the substituted named applicant for a building permit at the site approximately two years before the discharge. Although plaintiff proposes extensive facts about defendant Thorson's role in arranging for the discharge, there is no indication that he was acting in his capacity as defendant Construction Management's president at the time. Absent any other information about the involvement, I cannot conclude that plaintiff has proved the discharge element with respect to defendant Construction Management, notwithstanding defendants' failure to raise this issue. Plaintiff bears the burden of proving a violation. It has not met this burden with respect to defendant Construction Management. (Throughout the remainder of the opinion, the term "defendants" will refer to defendants Thorson, Managed Investments and Gerke).

B. From a Point Source

Defendants concede that the discharge was made from a point source. A "point source" is "any discernible, defined and discrete conveyance" 33 U.S.C. § 1362(14).

Bulldozers, tractors, backhoes and dump trucks qualify as "point sources." United States v. Pozsgai, 999 F.2d 719, 726 n.6 (3d Cir. 1993) ("Courts have consistently held that dump trucks and bulldozers . . . qualify as 'point sources.'") (citations omitted); Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810, 815 (9th Cir. 2001) (bulldozers, tractors and backhoes); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes). Defendants used trucks to haul fill material to the site and bulldozers to push dredged materials into piles. Thus, the point source element is satisfied.

C. Navigable Waters

The primary debate in this case is whether the filled portions of the site constitute "navigable waters" under the Act. Congress defined the term "navigable waters" to mean "the waters of the United States." Initially, the Corps construed the Act to cover only waters that were navigable in fact. Riverside Bayview, 474 U.S. at 123. In 1975, it redefined the term to extend to the non-navigable tributaries of those waters and to the freshwater wetlands adjacent to other covered waters. Id. In Riverside Bayview, 474 U.S. 121, the Supreme Court found, in light of the statute's language, purpose and history, that the "waters of the United States" could be construed reasonably to include certain wetlands, even though wetlands are not navigable in the traditional sense. Id. There are two primary

disputes: first, does the filled portion of the site qualify as a wetland and second, if it does, are the wetlands subject to jurisdiction under the Act?

1. Status as a wetland

"The term wetlands means 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. § 328.4(b). The Corps uses three physical characteristics to determine the existence of a wetland: (1) hydrophytic vegetation; (2) hydric soil; and (3) wetland hydrology. Waterways Experiment Station, Department of the Army, Corps of Engineers Wetlands Delineation manual (1987).

Defendants do not deny that the hydrophytic vegetation criteria has been met or that the site meets the hydric soil criteria. Their only challenge is to plaintiff's conclusion that the site's hydrology is that of a wetland. As to this conclusion, they do not challenge the accuracy of plaintiff's data supporting its visual observation under the soil saturation method of determining a site's hydrology. Instead, they argue that their expert's "transpiration" theory is a better method of determining hydrology. Plaintiff makes a number of objections to the evidence on which defendants rely, pointing out that defendants did not reveal their expert's method until they filed their brief in opposition to plaintiff's motion for partial

summary judgment and arguing that the expert's theory flunks the Daubert test. It is not necessary to address these points. However valid defendant's expert opinions are, they do not establish that the Corps's method of determining hydrology is "plainly erroneous."

The 1987 manual lists several methods for determining an area's hydrology, ranking them by reliability. Id. at 31-34. The most dependable method is using recorded data on water levels, flooding, and soil saturation followed by field data. Id. at 31-32. Among the various methods for establishing wetland hydrology using field data, "visual observation of soil saturation" is listed in the manual as the second most reliable. Id. at 32. Using this method, the wetland hydrology criterion is satisfied if the soil is saturated "within a major portion of the root zone (usually within 12 inches of the surface)" for at least 5% of the growing season. Id. at 30-32.

The relevant issue is whether defendants' expert's testimony is sufficient to overcome the presumption that agency standards and measures are appropriate. As a general matter, regulations of an agency charged with enforcing a statute are entitled to deference when there is no clear statutory language on point. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). In applying deference under Chevron, courts are to apply an agency's interpretations unless they are unreasonable. Id. However, "'interpretations such as those in opinion letters — like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, all of which lack the force of law —

do not warrant Chevron-style deference.'" Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003) (quoting Christensen v. Harris County, 529 U.S. 576, 586-88 (2000)) (emphasis added). Plaintiff has not demonstrated that the manual has been subjected to the rigorous review normally required in formal agency rule making. See 5 U.S.C. § 553 (Administrative Procedure Act provision mandating notice, comment and consideration in agency rule making). See also Reno v. Koray, 515 U.S. 50, 61 (1995) (internal agency guideline not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference") (internal quotation marks omitted)).

However, even when Chevron deference is not warranted, agency interpretations may be entitled to some degree of deference. Matz v. Household International Tax Reduction Investment Plan, 265 F.3d 572, 574 (2001). Under Auer v. Robbins, 519 U.S. 452 (1997), an agency's interpretation of its own regulations is entitled to a relatively high level of deference. Christensen, 529 U.S. at 588. A court must accept the interpretation unless it is "'plainly erroneous or inconsistent with the regulation.'" Auer, 519 U.S. at 461 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). (Although the Court of Appeals for the Seventh Circuit has noted the unliklihood of giving deference to an agency's interpretation of its own regulation contained only in a brief, Keys, 347 F.3d at 993, plaintiff's temperature-based method has been published in the Corps's Delineation Manual for approximately ten years.)

In a case involving a nearly identical issue, the Court of Appeals for the Fourth Circuit applied a relatively high level of deference to the 1987 manual. In United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), the defendants in a § 301 civil action challenged the 1987 manual's method for establishing soil hydrology. The defendants argued that soil must be saturated to the surface and not merely within twelve inches of the surface for 5% of the growing season in order to establish the requisite hydrology. Id. at 712-13. The court rejected this argument, noting that "[i]f the [defendants] want to argue that the 'within twelve inches' criterion is inappropriate, they must argue that the manual is a *flawed* interpretation of the regulation defining wetlands." Id. at 173. The court reasoned that it was bound to defer to the manual interpretation, particularly because it deals in a complex scientific field, unless defendants gave it reason to believe the manual to be "'plainly erroneous or inconsistent with' the regulatory definition of wetlands." Id. (citing Bowles, 325 U.S. at 413-14).

In essence, defendants argue that their expert's transpiration method determines the actual onset of the growing season with greater accuracy than plaintiff's temperature method. See Dfts.' Br., dkt., 90, at 27 ("The *more appropriate* method for determining when the growing season commenced in a particular year is to examine the data that shows when the plants actually began to grow."). The most critical remark their expert makes in his affidavit is characterizing as "arbitrary" the results of the temperature-based method. However, he

fails to identify any arbitrariness beyond that inherent in any estimation. He does not assert that the onset of warmer air and ground temperatures does not correlate with the start of plant growth or that the 28° Fahrenheit cut-off point is somehow inappropriate. Even if I were to assume that defendant's expert is correct when he says that his method results in a more accurate estimation of the growing season, his testimony does not show that the Corps's interpretation is "plainly erroneous."

Defendants do not address the issue of deference. They seem to assume that none is due. Their approach would burden courts with evaluating competing scientific methods, a practice that courts are not qualified to perform. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) (deference particularly appropriate when agency administers "complex and highly technical regulatory program."). If a court were to disregard the scientific standards set by the agency charged with enforcing an Act whenever it found another standard more appropriate, it would effectively usurp the agency's expressly delegated authority, violating fundamental separation of powers principles. See id. ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.")

Defendants argue that the hydrology requirement cannot be met because of the developments around the site, such as road construction and accompanying drainage ditches (all prior to 2001), which prevent ground water flow to the site from surrounding areas.

This argument is a *non sequitur*. It is not logically sound to argue that soil saturation measurements are inaccurate or misleading because saturation levels may have been higher in the past. Part of the confusion may have been caused by defendants' overly broad reading of their expert's testimony at his deposition, where he states that "because of these modifications, *local soil survey data* should not be used as *a secondary indicator* of wetlands hydrology." Straw Dep., dkt. #93, at ¶ 23, p. 7-8 (emphasis added). Plaintiff is not relying on such data as a secondary indicator. It relies exclusively on the *primary indicator* of "visual observation of soil saturation" for purposes of summary judgment. See Plt.'s Br., dkt. #77, at 14-15. It is immaterial that plaintiff collected and submitted data that could be used to establish hydrology using some other method, such as local soil surveys. In the portion of the affidavit defendants cite in support of their argument, their expert does not suggest that the site modifications have any bearing on the reliability of visual observation of soil saturation data on which plaintiff is relying.

Defendants raise two other objections to plaintiff's method of determining hydrology. The first focuses on soil saturation. They assert that the soil must be saturated to the surface rather than within twelve inches of the surface for 5% of the growing season. The entirety of their argument is as follows:

> In its analysis, the Corps appeared to have taken the position that the 1987 manual mandates the usage of "a major portion of the root zone" (usually 12 inches). It does not! This reading

> of the 1987 manual is incorrect. Instead, the 1987 manual provides for six field hydrologic indicators, which can be used to assess the criterion of hydrology. The 'root zone' language falls under paragraph 2 of the "Field Data Section" of the 1987 manual where there is a description of what to do when engaging in visual observation of soil saturation. It states, "For soil saturation to impact vegetation, it must occur within a major portion of the root zone (usually within 12 inches of the surface) of the prevalent vegetation."

Dfts.' Br., dkt. #90, at 28-29. I cannot understand why defendant are arguing that the twelve-inch standard should apply only to the visual observation method described in subsection two when plaintiff does not contend that it should apply to any other method. Plaintiff is relying on the subsection two visual observation method; thus, application of the twelve inch standard is appropriate. A nearly identical challenge was raised and rejected in Deaton, 332 F.3d at 713, in which the court noted that "[t]he 'within twelve inches' indicator is spelled out in the manual."

Finally, defendants challenge plaintiff's "reliance" on reed canary grass as a secondary indicator of wetland hydrology. Plaintiff has never suggested that it relied on reed canary grass as a secondary indicator of wetland hydrology at the site. Plt.'s Br., dkt. # 77, at 14. To the extent that plaintiff cites other secondary indicators of hydrology, it is barred from relying on them because it did not refer to them until its reply brief. Arguments made for the first time in a reply brief are waived. Nelson v. La Crosse County Dist. Atty. (State of Wisconsin), 301 F.3d 820, 836 (7th Cir. 2002).

2. Adjacency

Although I conclude that the site in this case qualifies as a "wetland," this is not the end of the inquiry. Not every "wetland" is subject to regulation under the Clean Water Act. 33 C.F.R.. § 328.3 (1993) (only interstate wetlands and those wetlands adjacent to other covered waters are subject to Act). The Corps's regulations define the waters subject to jurisdiction under the Act as including:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
> (I) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
> . . .
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
> . . .
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Id. "Adjacent" is defined to mean "bordering, contiguous or neighboring." 33 C.F.R. §

328.4(c).

Plaintiff argues that defendants' wetlands are subject to the Act because they are adjacent to a drainage ditch running to Deer Creek, a tributary flowing into the south fork of the Lemonweir River, which is a tributary of the Wisconsin River, which is navigable in fact and is used in interstate commerce and a tributary of the Mississippi River, which is also a navigable in fact interstate waterway used for interstate commerce. In short, plaintiff contends that the wetlands are subject to the Act because they are hydrologically connected to other covered waters. See Plt.'s Br., dkt. # 77, at 15. Defendants raise three arguments in opposition: (1) the text of the Act is clear in limiting jurisdiction to only those wetlands *immediately* adjacent to waters that are navigable in fact; (2) even if the regulation is warranted under the statutory text, the regulation should be disregarded because it raises serious constitutional questions; and (3) if the Act does permit plaintiff's hydrological connection standard, it exceeds Congress's authority under the commerce clause. For the reasons stated below, I do not find defendants' arguments convincing and I find that the adjacency element has been satisfied.

a) "Adjacency" under the statutory text

Defendants argue that plaintiff has exceeded its authority under the Clean Water Act in extending the Act's coverage to include wetlands that are not immediately adjacent to

waters that are actually navigable. They note that the Corps is charged with regulating the discharge of fill material into "navigable waters" and argue that extending coverage to wetlands with only a hydrological adjacency to traditionally navigable waters is unwarranted jurisdictional bootstrapping. Defendants argue that this conclusion is mandated by the Supreme Court's holding in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and its later ruling in SWANCC, 531 U.S. 159.

As defendants note, Congress charged the Corps with regulating discharges of fill material in "navigable waters," 33 U.S.C. § 1344(a), but "navigable waters" is defined in the Act as "the waters of the United States," 33 U.S.C. § 1362 (7). In Riverside Bayview, 474 U.S. 121, a unanimous Court held that in light of the Act's policies, language and legislative history, it was reasonable to construe "waters of the United States" to extend to at least some wetlands, even though they were not navigable in fact. Id. at 131-35. The Court observed that the Act was part of a "comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" Id. at 132 (quoting 33 U.S.C. § 1251). It noted Congress's recognition that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for 'water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" Id. at 132-33 (quoting S. Rep. No. 92-414, p. 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

Next, the Court reasoned that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of *limited import*." Id. at 133 (emphasis added). Finally, the Court concluded that Congress had acquiesced in the administrative construction. Id. at 136. After the wetlands regulation was adopted, critics introduced a House Bill that would have limited the Act's coverage to waters navigable in fact. Id. (citing H.R. 3199, 95th Cong., 1st Sess., § 16 (1977)). Although the bill passed in the House, it was defeated after a lengthy debate in the Senate. Id. at 136-37. The effort to narrow the definition of "navigable" under the Act was finally defeated when the Conference Committee adopted the Senate's approach. Id. at 137 (citing 123 Cong. Rec. 39209 (1977)). Accordingly, the Court concluded, "a definition of the 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'" Id. at 135.

In SWANCC, 531 U.S. at 167-72, the Court addressed another regulation interpreting "waters of the United States" as including any water used as a habitat by migratory birds, even if it was otherwise wholly isolated. The Court invalidated the so-called "Migratory Bird Rule" because it would have had the effect of reading the word "navigable" out of the statute entirely. Id. It reasoned:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said

> in Riverside Bayview Homes that the word "navigable" in the statute was of "limited import" and went on to hold that § 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever.

Id. at 172.

Courts are split over the question whether the inevitable conclusion of SWANCC is that the Act's coverage extends only to those wetlands immediately adjacent to navigable waters or whether a surface level hydrological connection may be sufficient. Recently, the United States Supreme Court has denied three petitions for certiorari addressing this issue. United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), cert. denied, __ U.S. __, 2004 WL 71792 (Apr. 5, 2004) (No. 03-701); United States v. Rapanos, 339 F.3d 447, 453 (6th Cir. 2003), cert. denied, __ U.S. __, 2004 WL 717207 (Apr. 5, 2004) (No. 03-929); Treacy v. Newdunn Associates, LLP, 344 F.3d 407 (4th Cir. 2003), cert. denied, __ U.S. __, 2004 WL 71790 (Apr. 5, 2004) (No. 03-637).

The Court of Appeals for the Fifth Cir cuit has held the "any hydrological connection" standard to be unsustainable after SWANCC. In re Needham, 354 F.3d 340, 345 (5th Cir. 2003) (citing Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001)). See also FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers, 239 F. Supp. 2d 509, 516 (D. N.J. 2003) (holding that SWANCC barred hydrologic standard). The Court of Appeals for the Fifth Circuit reads SWANCC as holding that the Act's coverage

extends to only those wetlands that are "truly adjacent" to navigable waters. In re Needham, 354 F.3d at 345-46 ("under SWANCC 'a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of water'") (quoting Rice, 250 F.3d at 269).

In Deaton, 332 F.3d 698, the Court of Appeals for the Fourth Circuit upheld adjacency jurisdiction over wetlands connected to the navigable waters of the Chesapeake Bay through a "winding thirty-two mile path." Id. at 702. The Court of Appeals for the Sixth Circuit has also upheld the hydrological-based definition of adjacency. Rapanos, 339 F.3d at 453. In doing so, the court relied heavily on the reasoning in Deaton. Id. at 452. A majority of district courts addressing the issue have construed SWANCC more narrowly than the Court of Appeals for the Fifth Circuit. See North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC., 278 F. Supp. 2d 654, 671 (E.D.N.C. 2003) (finding the reasoning in Deaton persuasive on "adjacency" issue); Northern California River Watch v. City of Healdsburg, No. C01-04686WHA, 2004 WL 201502, at *9 (N.D. Cal. Jan. 23, 2004) ("the Ninth Circuit seems to have read SWANCC as only invalidating the migratory-bird rule as applied to isolated waters") (citing Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001)); American Canoe Ass'n, Inc. v. District of Columbia Water and Sewer Authority, 2004 WL 385660, at *8 (D. D.C. 2004) ("However, SWANCC did not purport to reinterpret the general scope of the CWA. Rather, the Court found that

a rule promulgated by the Army Corps specifically exceeded the scope of 33 U.S.C. § 1344(a)."); United States v. Jones, 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003) ("a complete reading of SWANCC reveals that the Supreme Court actually had no intention of defining 'navigable waters' as narrowly as courts have done in cases such as Needham and F D & P Enterprises."); United States v. Interstate General Co., 152 F. Supp. 2d 843, 847 (D. Md. 2001) (rejecting defendants' invitation to read SWANCC to restrict wetlands covered by Act to those immediately adjacent to traditionally navigable waters and holding that because Court reviewed only migratory bird rule in SWANCC, it is improper to extend ruling further).

Although the Court of Appeals for the Seventh Circuit has not ruled on the issue, it has indicated its understanding that the opinion in SWANCC did not even address the adjacency issue, let alone decide it. United States v. Rueth Development Co., 335 F.3d 598, 604 (7th Cir. 2003) (defendant's argument that its wetland's connection to navigable waters was too attenuated because connection ran through series of tributaries "simply raises the question of what 'adjacency' means, *which SWANCC did not address at all*") (emphasis added). The court cited with approval the Fourth Circuit's ruling in Deaton, 332 F.3d 698. Rueth, 335 F.3d at 604.

As defendants note, Rueth did not involve an enforcement action under the Clean Water Act, but the enforcement of a consent decree, under which the defendants conceded

that their wetlands were subject to jurisdiction under the Act. Although the court's statements about adjacency in Rueth were dicta and therefore not binding, I agree that the reasoning in Deaton (and Rapanos) is persuasive and that SWANCC does not forclose the hydrological connection standard for determining adjacency.

"[SWANCC], of course, emphasizes that the Clean Water Act is based on Congress' power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones." Rapanos, 339 F.3d at 452 (quoting Deaton, 332 F.3d at 709) (internal punctuation omitted). See also Dfts.' Br., dkt #90, at 11 (noting the Court's observation in SWANCC, 531 U.S. at 172, that "navigable" had "at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been made navigable in fact or which could reasonably be so made.") Unlike the "migratory bird rule," however, the regulation in this case uses waters that are traditionally navigable as its reference point. 33 C.F.R. § 328.3(7). The regulation subjects wetlands to coverage under the Act *because of* their connection with waters that are navigable in fact. Far from reading the word "navigable" out of the statute entirely, as the migratory bird rule would have done, traditionally navigable waters are the starting point for determining whether a wetland is subject to jurisdiction under the regulation at issue in this case. Thus, the textual concerns guiding the Court's opinion in SWANCC are not implicated.

In concluding that SWANCC requires immediate adjacency with waters that are navigable in fact, the Court of Appeals for the Fifth Circuit relies on the following language from that opinion: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." Rice, 250 F.3d at 269 (quoting SWANCC, 531 U.S. at 168). The court appears to have assumed that immediacy was implied in the word "adjacent" and that navigability was implied in the phrase "open waters." Defendants highlight three passages from the portion of the SWANCC opinion summarizing the Court's earlier holding in Riverside Bayview in support of this narrow reading of the word "adjacent": The Court noted in SWANCC that (1) the specific wetlands involved in Riverside Bayview "*actually* abutted on a navigable waterway;" (2) the Court found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably bound up* with the waters of the United States'"; and (3) that it was the "*significant nexus* between wetlands and 'navigable waters' that informed [its] reading of the [Clean Water Act]." See Dfts.' Br., dkt. #90, at 11-12; SWANCC, 531 U.S. at 167 (citing and quoting Riverside Bayview, 474 U.S. at 134).

The "actually abutted" language simply recounts the specific factual circumstances in Riverside Bayview, 474 U.S. at 135. Defendants attempt to read an actual abutment requirement into the Riverside Bayview, but the Court declined expressly to decide whether

adjacency was required in that case. Id. at 131, n.8. Moreover, the Court used the "inseparably bound up" and "significant nexus" language to refer to the hydrological connection between wetlands and adjacent waterways. See id. at 134 (wetlands and adjacent waters "inseparably bound up" when part of the same aquatic system). Even if these phrases did not refer to an aquatic connection, I am not persuaded that in summarizing an earlier holding in which the adjacency issue was avoided expressly, the Court has somehow not only addressed the matter but decided what "adjacency" means.

Moreover, I see no need to read the term "open waters" as meaning waters that are navigable in fact. The term "open waters" is not defined in SWANCC, Riverside Bayview, or in the regulations construing the Act. However, in Riverside Bayview, the Court observed that "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not *wholly aquatic* but nevertheless fall far short of being dry land." Id. at 132 (emphasis added). Certainly, not every wholly aquatic body of water is navigable in fact. Further, in reiterating the importance of the "significant nexus" found in Riverside Bayview, the Court placed "navigable waters" in quotation marks, indicating that it was likely referring to the phrase's statutory meaning. SWANCC, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading . . . ."). Accordingly, I disagree with defendants that under the statutory text in light of the Court's ruling in SWANCC, it was impermissible for the Corps

to assert jurisdiction over wetlands adjacent to tributaries of traditionally navigable waters.

b) Adjacency under the commerce clause

Defendants' last two arguments are interrelated. Defendants invoke the principle that courts must disregard agency regulations pushing the outer limits of congressional authority unless Congress has expressed its clear intent. In addition, they argue that the Clean Water Act exceeds Congress's authority under the commerce clause if it is construed to extend to wetlands adjacent only to the non-navigable tributaries of traditionally navigable waters. Specifically, defendants argue that congressional authority to regulate the channels of interstate commerce "may only be exercised over activities that affect a water's susceptibility to use as a channel of interstate commerce." Dfts.' Br., dkt. #90, at 17. They say they have a heightened concern that the regulation exceeds congressional authority because the regulation would disrupt the federal-state framework by usurping local land use planning authority over millions of acres. Dfts.' Br., dkt #90, at 16. As the Court of Appeals for the Seventh Circuit has noted, an Act does not violate the Tenth Amendment's reservation of non-enumerated powers to the states if it reflects a valid exercise of Congress's authority to regulate interstate commerce. Gillespie v. City of Indianapolis, 185 F.3d 693, 706 (7th Cir. 1999) (citing New York v. United States, 505 U.S. 144, 156 (1992) ("[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any

reservation of that power to the States")). Accordingly, both arguments turn on whether the regulation invoked the outer limits of congressional commerce clause authority. Therefore, I will consolidate the discussion.

In SWANCC, 531 U.S. at 172-73, the Court referred to the principle against reading federal agency regulations expansively, especially those that encroach upon areas of traditional state power, when it noted that even if it had not found the migratory bird rule to be impermissible under the clear statutory text, it would not have accorded the regulation Chevron deference. This principle stems in part from a "prudential desire not to needlessly reach Constitutional issues." Id. at 172. The Corps had argued that the migratory bird rule was authorized pursuant to Congress's power to regulate those activities that have a substantial effect on interstate commerce. Because it is unclear that discharging pollutants into isolated waters used as a habitat for migratory birds would have a "substantial affect" on interstate commerce, the Court reasoned that upholding the rule would necessitate constitutional analysis under the framework laid out in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000). SWANCC, 531 U.S. at 173.

In Deaton, 332 F.3d at 705-07, the Court of Appeals for the Fourth Circuit considered a challenge similar to the one raised by defendants. First, the court noted that the reluctance to read regulations expansively applies only when a regulation in question

raises a "grave and doubtful" constitutional question. Id. at 705 (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991)). See also SWANCC, 531 U.S. at 173 ("where an otherwise acceptable construction of a statute would raise *serious* constitutional problems, the Court will construe the statute to avoid such problems . . . .") (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988)) (emphasis added). The court went on to hold that this regulation did not raise the kind of serious constitutional issue "'that would lead [it] to assume Congress did not intend to authorize [the regulation's] issuance'" because the regulation fell under Congress's broad authority to regulate the channels of interstate commerce. Id. (quoting Rust, 500 U.S. at 191). See also Lopez, 514 U.S. at 558 (congressional commerce clause authority includes power to regulate channels of interstate commerce, instrumentalities of interstate commerce and those activities having a substantial effect on interstate commerce).

I agree with the Court of Appeals for the Fourth Circuit that Congress's authority to regulate the channels of interstate commerce extends to this regulation subjecting waters to jurisdiction because of their relationship to traditionally navigable waters. See SWANCC, 531 U.S. at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). Defendants argue, without citing any authority, that the regulation would be impermissible

because under Congress's channels power "Congress may only regulate activities that impact a navigable water's suitability to transport goods and persons in interstate commerce." Dfts.' Br., dkt. #90, at 18. (Defendants have cited Calvert G. Chipchase, The Clean Water Act: What's Commerce Got to Do With It?, 33 E.L.R. 11075 (2003), for the simple proposition that navigable interstate waters are deemed "channels" because of their capacity to move persons and goods across state and national borders, but this does not support defendants' construction of the extent of Congress's authority to regulate these channels of commerce.)

In arguing that congressional authority to regulate the channels of interstate commerce empowers Congress to regulate only those activities threatening the channel's suitability to transport goods, defendants advocate a construction that contravenes long-standing commerce clause precedent. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained and is no longer open to question." Caminetti v. United States, 242 U.S. 470, 491 (1917) (upholding Mann Act which outlawed transporting women across state lines for purpose of making them mistresses even though such activity is non-commercial), cited with approval in Lopez, 514 U.S. at 558. See also United States v. Schaffner, 258 F.3d 675, 680 (7th Cir. 2001) (Congress "may forbid or punish the use of channels to promote dishonesty or the spread of any evil or harm across state lines") (citing Brooks v. United States, 267 U.S. 432, 436 (1925)). Other"[e]xamples of activity falling within [the channels] category [] include

the shipment of stolen goods, kidnapped persons, prostitutes and guns." Id. Just as Congress may regulate the flow of drugs and guns in interstate commerce, it may regulate the flow of pollutants through the channels of interstate commerce, even if the pollutants do not threaten the capacity of the channel to serve as a conduit in interstate commerce.

Defendants suggest that in Riverview Bayside, the Court approved the Act's extension of jurisdiction to wetlands immediately adjacent to navigable waters only because of the wetland's "obvious effect" on the navigability of those waters. Dfts.' Br., dkt. #90, at 18. They do not explain how they derived this result from the opinion, but instead quote a passage indicating the Court's reliance on the Corps's conclusion that pollutant discharges in certain wetlands can harm the "aquatic environment" of navigable waters. Id. (citing Riverview Bayside, 474 U.S. at 134.) Defendants do not argue that tributaries are incapable of transporting pollutants that could harm an aquatic environment simply because they are not large enough to transport goods and persons. As the Court noted in Riverside Bayview, 474 U.S. at 135, n.9,

> [t]hat the [Corp's definition of waters of the United States] may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps's definition is in fact lacking in importance to the aquatic environment—or where it is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Defendants' unsupported and unprecedented view of Congress's authority to regulate the channels of interstate commerce does not present the kind of grave and serious constitutional question that would prevent a court from giving the Corps's regulation the deference normally accorded to agency interpretations. See Rust, 500 U.S. at 191; Deaton, 332 F.3d at 705-07 ("The power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters."). Moreover, this argument does not provide a sound basis for invalidating the regulation or the Act for exceeding the scope of Congress's commerce clause authority.

Finally, defendants argue that "[e]ven if Congress had enacted the Clean Water Act pursuant to its broader power over activities that 'substantially affect' interstate commerce, federal jurisdiction in this case would still exceed Congress'[s] commerce power." I need not reach this argument. The Supreme Court has indicated that it believes that the Act was enacted pursuant to Congress's channels of commerce authority, SWANCC, 531 U.S. 172.

D. Affirmative Defenses

Plaintiff has proved that without first obtaining a permit, defendants (1) discharged a pollutant; (2) from a point source; (3) into "navigable waters" as that term has been construed permissibly by the agency charged with enforcing the Clean Water Act.

Accordingly, plaintiff has established a § 301 violation for which defendants will be held liable unless they can establish that they may avoid liability under an affirmative defense. Defendants Thorson, Managed Investments and Construction Management assert nine "affirmative defenses" in their answer; defendant Gerke Excavating has asserted twelve. (Most of these affirmative defenses overlap.) In their brief in opposition to plaintiff's motion for summary judgment however, defendants discuss only the first four affirmative defenses raised by defendants Thorson, Managed Investments and Construction Management. Defendants' failure to mention the remaining affirmative defenses indicates that they no longer intend to pursue these theories. Accordingly, I will address only those four "affirmative defenses" and the counterclaim and consider the remainder waived. Dey v. Colt Const. & Development Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (defendant bears burden of persuasion on affirmative defenses).

For their first affirmative defense, defendants allege that plaintiff has not stated a claim on which relief can be granted. Plaintiff argues that this defense has no merit; the complaint alleged facts that if proved would establish a violation of § 301 of the Clean Water Act. Plt.'s Br., dkt. #77, at 20. In response, defendants say only that they have adequately raised the failure to state a claim argument. Dfts.' Br., dkt. #90, at 29-30 (citing Fed. R. Civ. P. Form 20 for proposition that defendant need only assert that complaint fails to state claim to invoke defense; defendant need not flesh out issue further). Defendants' argument

does not respond to plaintiff's charge; a defense is not meritorious simply because it has been asserted adequately. In the complaint, plaintiff alleged that defendants discharged fill material (¶¶ 36, 37) onto the site, which contained wetland (¶ 26) adjacent to the tributaries of navigable waters (¶ 27) and did so without a permit (¶ 38). Compl., dkt. #2, at 5-8. These allegations are sufficient to state a viable claim under § 301 of the Clean Water Act. Therefore, I will dismiss this defense.

As their second, third and fourth "affirmative defenses," defendants assert that "plaintiff improperly applied or has failed to follow its own rules, regulations or guidance," Dfts.' Ans., dkt. #4, at 8; the site is not a "water of the United States"; and the site is not adjacent to a "water of the United States." Id. Plaintiff argues that none of these constitutes an affirmative defense. In response, defendants assert that there are disputed material facts governing these affirmative defenses that preclude dismissal. Dfts.' Br., dkt. #90, at 31.

An affirmative defense is "[a] defendant's assertion raising *new facts and arguments* that, if true, will defeat the plaintiff's . . . claim, *even if all of the allegations in the complaint are true*." Black's Law Dictionary 430 (7th ed. 1999) (emphasis added). In their second, third and fourth "affirmative defenses" defendants merely reiterate their denial of various elements of plaintiff's claim. They have not raised true affirmative defenses. Moreover, I have already concluded that plaintiff properly relied on the methods in the 1987 manual and that the wetlands constitute "waters of the United States" because they are adjacent to traditionally

navigable waters. Accordingly, defendants' second, third and fourth "affirmative defenses" will be dismissed.

E. Counterclaim

Finally, defendants assert a counterclaim for a declaratory judgment; they seek a determination that the site does not constitute a "water of the United States" either because it is not a "wetland" under the wetland delineation manual or alternatively, because it is not immediately adjacent to a navigable water. Ans. of Dfts. Thorson, Managed Investments, and Construction Management, dkt. #4, at 9-10; Dft. Gerke's Ans., dkt. #6, at 5-6. Plaintiff seeks dismissal of this counterclaim.

First, plaintiff argues that the issues raised in defendants' counterclaim, at least with respect to the filled portions of the site, must be decided in the course of deciding the summary judgment motion. Plaintiff is correct. Because I have already concluded that the portion of the site in which fill material was deposited is "wetland" under the wetland delineation manual and that it is a "water of the United States" because it is hydrologically connected to navigable waters, defendants will not be entitled to a declaratory judgment with respect to this portion of the site.

However, defendants' counterclaim does not appear to be limited to only those portions of the site in which fill material was deposited. Ans. of Dfts. Thorson, Managed

Investments, and Construction Management, dkt. #4, at 9-10; Ans. of Dft. Gerke, dkt. #6, at 5-6. Plaintiff contends that even if defendants counterclaim is not mooted by the court's decision on plaintiff's claim, defendants have failed to identify any waiver of sovereign immunity that would allow them to bring this counterclaim against the United States. Although defendants did not address this issue in their response brief, § 702 of the Administrative Procedure Act waives sovereign immunity for a suit seeking relief other than monetary for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C.A. § 702. Denial of a § 404(a) permit qualifies as an "agency action" under the Administrative Procedure Act. See, e.g., SWANCC, 531 U.S. at 165.

Alternatively, plaintiff argues that to the extent that defendants seek a declaration that the unfilled portion of the site is not a "water of the United States," the counterclaim seeks pre-enforcement review. In support of this argument, plaintiff cites a case in which a party was barred from seeking to enjoin the Army Corps from enforcing a cease-and-desist order. Fiscella & Fiscella v. United States, 717 F. Supp. 1143, 1145 (E.D. Va. 1989). The court reasoned that the claim was an impermissible pre-enforcement action because the enforcing agency had not had a full opportunity to conduct a factual inquiry or make a definitive determination about its jurisdiction over the site. Id. at 1147 ("The Court finds, however, that the existence of the Corps' jurisdiction in the case at bar is a factual issue

properly left to the expertise of the agency. In the instant case, the Corps should be given the initial opportunity to consider the adjacency issue and develop a record for judicial review."). In that case, however, the Corps's issuance of the order was based on its conclusion that a particular parcel of land *might* be subject to jurisdiction under the Act. Id. at 1145. In this case, according to the facts proposed by plaintiff, the Army Corps has already made a fact-specific determination regarding its jurisdiction over the entire site; it denied the 1999 application for development of the site. See Plt.'s PFOF ¶ 17 (site is 5.8 acres); ¶ 76 (1999 application "sought approval to fill 5.8 acres"); ¶ 97 (Corps denied application), dkt. # 78, at 4, 14 and 18. Cf. SWANCC, 531 U.S. 159 (claim challenging Corps's permit denial not regarded as pre-enforcement). Thus, the claim is not an impermissible pre-enforcement action.

Defendants have asserted a claim for declaratory judgment over the entire site. The claim is not barred by sovereign immunity and it does not seem to be a pre-enforcement action. Resolution of plaintiff's motion for summary judgment resolves this claim only insofar as it extends to the filled portions. Accordingly, the claim survives this motion insofar as defendants seek declaratory judgment regarding Clean Water Act jurisdiction over the non-filled portions of the site. However, defendants should be aware that they will bear the burden of proof at trial on this issue. E.g. Indianapolis Union Railway, Co. v. Baltimore & O. R. Co., 570 F.2d 171, 186 (7th Cir. 1978).

ORDER

IT IS ORDERED that

(1) Plaintiff United States of America's motion for partial summary judgment on its claim that defendants violated 33 U.S.C. §1311(a) of the Clean Water Act is GRANTED with respect to defendants Peter Thorson, Managed Investments, Inc. and Gerke Excavating, Inc.;

(2) Plaintiff's motion for partial summary judgment is DENIED with respect to defendant Construction Management, Inc.;

(3) Defendants' counterclaim for a declaratory judgment is DISMISSED insofar as it seeks a declaration regarding the filled portions of the site; and

(4) This case will proceed to trial on plaintiff's claim under 33 U.S.C. § 1311(a) against defendant Construction Management and defendants' declaratory action with respect to the non-filled portions of the site.

Entered this 6th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge