No. 18-790

In the Supreme Court of the United States

TIN CUP, LLC, PETITIONER

v.

ARMY CORPS OF ENGINEERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers permissibly determined that certain portions of petitioner's property contain wetlands, and that a permit is therefore required under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, for any discharge of certain materials.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 904 F.3d 1068. The opinion of the district court (Pet. App. B1-B28) is not published in the Federal Supplement but is available at 2017 WL 6550635.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2018. The petition for a writ of certiorari was filed on December 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the owner of a property in Alaska, sought a Clean Water Act (CWA) permit from the U.S. Army Corps of Engineers (Corps) in connection with a proposed construction project. Pet. App. A7; see 33 U.S.C. 1344(a). Petitioner and the Corps disagreed on the

methodology that should be used to determine the extent of wetlands on petitioner's property. Petitioner contended that appropriations statutes enacted for fiscal years 1992 and 1993 required the Corps to use specific provisions of a 1987 manual. The Corps instead used a supplement to the 1987 manual that contained wetlands-determination criteria tailored to Alaska. Pet. App. A8. The district court concluded that the Corps had permissibly relied on the Alaska supplement. *Id.* at B18-B27. The court of appeals affirmed. *Id.* at A1-A27.

1. a. The CWA generally prohibits "the discharge of any pollutant" without an appropriate permit. 33 U.S.C. 1311(a). As relevant here, the "discharge of" a "pollutant" means the "addition of any pollutant to navigable waters." 33 U.S.C. 1362(12). The term "pollutant" encompasses "dredged" or fill material such as gravel or sand, 33 U.S.C. 1362(6), and the term "navigable waters" includes "the waters of the United States," 33 U.S.C. 1362(7).

Permits "for the discharge of dredged or fill material into the navigable waters" may be issued by the Corps on behalf of the Secretary of the Army. 33 U.S.C. 1344(a); see, *e.g.*, *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001). The Corps has promulgated numerous regulations to govern the issuance of such permits. At the times relevant here, the Corps' regulations defined waters of the United States to encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1) (2014), and "[w]etlands adjacent" to traditional navigable waters, 33 C.F.R. 328.3(a)(7) (2014).

In addition to its regulations, the Corps has produced detailed manuals to assist its field personnel in

determining whether a particular area is a "wetland" for purposes of the CWA permitting requirement. Of particular relevance here, the Corps' 1987 *Wetlands Delineation Manual* (1987 Manual) identifies three key elements of wetlands: (1) the presence of hydrophytic vegetation (*i.e.*, vegetation adapted to saturated soil), (2) the presence of hydric soils, and (3) certain hydrology conditions, such as the saturation of soil "during the growing season." 1987 Manual 9-10. With respect to the third element (hydrology conditions), an appendix to the 1987 Manual defines a "growing season" as the "portion of the year when soil temperatures at 19.7" inches "below the soil surface" are higher than five degrees Celsius. Pet. App. A5.

The 1987 Manual recognizes that "[c]ertain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual," and that "such wetland areas may warrant additional research to refine methods for their delineation." 1987 Manual 5. In particular, the Manual identifies the third of the criteria, hydrology conditions, as "often the least exact of the parameters" for defining a wetland. *Id.* at 29. The Corps subsequently clarified that, "although the soil temperature factor noted in the appendix of the 1987 Manual was the 'primary' definition of growing season, 'local means of determining growing season may be more appropriate and can be used.'" Pet. App. A25 (Bea, J., concurring in the judgment) (citation omitted).

b. In 1989, a committee of federal agencies, including the Corps, adopted a new wetlands-delineation manual designed "to supersede the 1987 Manual." Pet. App. A4. That 1989 Manual "employed less stringent meth-

ods for delineating * * * wetlands than the 1987 Manual." *Id.* at A5. "In response to complaints from business groups and legislators," however, "Congress limited the use of the 1989 Manual in the" Energy and Water Development Appropriations Act of 1992 (1992 Budget Act), Pub. L. No. 102-104, 105 Stat. 510. Pet. App. A5. Specifically, the 1992 Budget Act "prohibited the use of funds to delineate wetlands under the 1989 Manual 'or any subsequent manual not adopted in accordance with the requirements for notice and public comment of the rulemaking process of the Administrative Procedure Act.'" *Ibid.* (quoting 105 Stat. 518). The 1992 Budget Act "also required the Corps to use the 1987 Manual to delineate any wetlands in ongoing enforcement actions or permit application reviews." *Ibid.*

The following year, Congress enacted the Energy and Water Development Appropriations Act of 1993 (1993 Budget Act), Pub. L. No. 102-377, 106 Stat. 1315. The 1993 Budget Act stated in pertinent part:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
>
> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted.

106 Stat. 1324.

c. In a separate 1992 enactment, Congress appropriated funds for a new scientific study to "analyze federal wetlands regulation." Pet. App. A6. The study,

which was published in 1995 by the National Research Council (NRC), recommended that "the 1987 Manual's approach to 'growing season' should either be abandoned altogether or replaced by region-specific criteria for wetland delineation." *Ibid.* (citation omitted). In response to the NRC study, the Corps developed a series of regional supplements to the 1987 Manual that "provide region-specific criteria for wetland delineation." *Ibid.*

In 2007, the Corps published its regional supplement for Alaska. See *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)* (2007) (Alaska Supplement). The Alaska Supplement identifies many characteristics unique to Alaska that are relevant to wetlands delineation, and it urges site-specific consideration to evaluate whether the wetlands-delineation criteria set forth in the 1987 Manual are satisfied. Of particular relevance here, the Alaska Supplement explains that the soil-temperature methodology for identifying a "growing season" is ill-suited to conditions in Alaska because of the presence of permafrost. *Id.* at 48. The Supplement states that, "in Alaska, the preferred approach to determine growing season dates involves direct observation of vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground." *Ibid.*

2. Petitioner "owns a 455-acre parcel near North Pole, Alaska," a city in the State's interior near Fairbanks. Pet. App. A7. Petitioner seeks to build a pipe fabrication and storage facility on the parcel. "The project will require the excavation and laying down of gravel material, which is a regulated 'pollutant' under the Clean Water Act," and therefore requires a permit

from the Corps. *Ibid.* (quoting 33 U.S.C. 1362(6)); see 33 U.S.C. 1344(a).

As relevant here, petitioner applied to the Corps for a permit in 2008. See Pet. App. A7.[1] The Corps "examined the extent of wetlands on the site and issued" a jurisdictional determination. *Ibid.* The Corps determined that petitioner's property contains wetlands that are part of a larger wetlands complex adjacent to the Tanana River. See *id.* at C4. Because that wetlands complex is "one of the very few large, undeveloped wetlands within the alluvial plain," it "has exceptional value as wildlife habitat." C.A. Supp. E.R. 51.

Petitioner pursued an administrative appeal of the Corps' jurisdictional determination. See Pet. App. A8. Petitioner contended that, under the 1987 Manual, "an area can only be considered a wetland if it has a growing season," and that "the 1987 Manual defines a growing season as the season in which soil temperature at 19.7 inches belowground level is at or above 5°C." *Ibid.* Petitioner "claimed that the 'discontinuous permafrost' on its property did not reach that temperature, and thus that there was no growing season." *Ibid.*

The Corps review officer "rejected" petitioner's "permafrost argument." Pet. App. A8. The officer explained that the Alaska Supplement to the 1987 Manual "recognizes the existence of permafrost and the need to rely instead upon locally or regionally developed methods to determine growing season dates . . . as well as by direct observation of vegetation." *Ibid.* The review officer concluded on that basis that "soil temperature at 19.7 inches below the surface is essentially irrelevant to determining the growing season in Alaska." *Ibid.*

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[1] The Corps had issued an earlier permit, but that permit expired before petitioner carried out the authorized work. Pet. App. A7.

The Corps subsequently issued an initial proffered permit that would have authorized petitioner to discharge a million cubic yards of fill into 118 acres of wetlands, as petitioner requested. See Pet. App. A8, D1. Petitioner again filed administrative objections contending that the areas in question were not wetlands under the growing-season provisions of the 1987 Manual. The Corps again rejected petitioner's arguments on the ground that the Alaska Supplement to the 1987 Manual recommends the use of more refined growing-season criteria appropriate to the Alaskan climate. The Corps observed that the "Alaska Regional Supplement and all other supplements now in use across every region of the U.S. and its territories * * * [have] abandon[ed] the original * * * definition of growing season" used in the 1987 Manual. C.A. E.R. 233. The Corps therefore concluded that observations of on-site growing conditions were adequate to establish wetlands hydrology, and it declined to alter the terms of the proffered permit. *Id.* at 233-234; see Pet. App. A8.

3. Petitioner filed suit in federal district court to challenge the Corps' proffered permit. Petitioner contended that the 1992 and 1993 Budget Acts required the Corps to use only the wetlands-delineation criteria established by the 1987 Manual, without considering the Alaska Supplement or any other supplementary material. See Pet. App. B14-B16. The district court rejected petitioner's argument. See *id.* at B18-B27. The court first held "that the operative language from both the 1992 and 1993 [Budget Acts] which prohibit the Corps from delineating wetlands under the 1989 Manual applies only to 'the funds in this Act'"—that is, to the funds appropriated by the 1992 and 1993 Budget Acts

themselves, and not to funds appropriated for future years. *Id.* at B18.

Petitioner also argued that the Corps' use of the Alaska Supplement was barred by the 1993 Budget Act's statement that "[f]urthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted." 106 Stat. 1324. In rejecting that argument, the district court explained that "Congress is not presumed in annual appropriations bills to enact language having permanent application to future appropriations unless Congress expressly indicates its intention to make such provisions permanent." Pet. App. B20. "To rebut the strong presumption that appropriations riders do not create a permanent change in substantive law," the court added, "typically requires that Congress include 'words of futurity.'" *Id.* at B21.

The district court was "unpersuaded that the [cited provision of the 1993 Budget Act] constitutes words of futurity sufficient to establish congressional intent to make the language permanent." Pet. App. B22. The court observed that the cited provision immediately followed a sentence "restricting the use of funds for implementation of the 1989 Manual" only for the funds appropriated in the 1993 Budget Act, "which makes it less likely the provision will be viewed as permanent." *Id.* at B23-B24. The court also observed that a different provision of the 1993 Budget Act "used the word 'hereafter' and explicitly indicated its intent to make [a] prohibition [on the use of funds] permanent by stating that it applied to 'subsequent Energy and Water Development Appropriations Acts.'" *Id.* at B24. The court explained that the absence of any "such clear statement

manifesting congressional intent that the Corps' use of the 1987 Manual extend permanently or indefinitely beyond fiscal year 1993" undermined petitioner's position. *Ibid.*

Finally, the district court held that the use of regional supplements is consistent with the 1987 Manual, which "lays the foundation for the regional supplements and their refinement of wetland delineation methods in non-traditional environments." Pet. App. B25.

4. The court of appeals affirmed. Pet. App. A1-A15. The court explained that "provisions of appropriations acts altering substantive law * * * are generally only in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law." *Id.* at A9 (citations and internal quotation marks omitted). The court traced that principle to this Court's holding in *Minis* v. *United States*, 40 U.S. (15 Pet.) 423 (1841), that a change to substantive law in an appropriations act should not be presumed to have permanent effect "unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." *Id.* at 445.

The court of appeals concluded that the key provision of the 1993 Budget Act "does not contain a clear statement of futurity," as would be required to give permanent effect to Congress's prohibition on the use of any wetlands delineation manual other than the 1987 Manual. Pet. App. A10. The court observed that, unlike other passages of the 1993 Budget Act, the provision at issue here "does not contain the word 'hereafter,'" which is "the most common word of futurity." *Id.* at A11. The court also rejected petitioner's argument that Congress's inclusion of the word "will," in the statutory phrase "the Corps of Engineers will continue to use the

[Corps'] 1987 Manual," 106 Stat. 1324, evinced an intent that the restrictions in the 1993 Budget Act would have lasting effect. The court explained that the provision instead "recorded Congress's understanding of the Corps' intention to delineate wetlands using the 1987 Manual," but "does not bind the Corps to using the 1987 Manual." Pet. App. A12. The court explained that, if Congress had intended the provision to have permanent binding effect, "it would have used the word 'shall.'" *Ibid.* Finally, because the 1993 Budget Act lacked "a clear statement of futurity in order to give permanent effect to a provision of an appropriations act," the court concluded that it "need not delve into legislative history to explain the 1993 Budget Act's provisions." *Id.* at A15.

Judge Bea concurred in the judgment. Pet. App. A15-A27. In his view, the language of the 1993 Budget Act indicated that Congress intended for the Corps to give the 1987 Manual continuing effect. See *id.* at A20-A23. He agreed that the district court's judgment should be affirmed, however, because he viewed the Corps' use of the Alaska Supplement as consistent with the 1987 Manual, which Congress expected the Corps to "amend and supplement" as necessary. See *id.* at A24. He explained that, when Congress enacted the 1993 Act, the Corps "was already allowed to use" some supplemental guidance beyond the 1987 Manual itself. *Id.* at A25. In Judge Bea's view, the Alaska Supplement "is nothing more than formal guidance regarding the 'local means' that were permitted under the 1987 Manual." *Ibid.* He accordingly concluded that the Corps' use of the Alaska Supplement to identify the wetlands at issue here was not foreclosed by the 1993 Budget Act. *Id.* at A27.

ARGUMENT

The court of appeals correctly held that the 1993 Budget Act does not impose continuing restrictions on the Corps' use of funds, because the statute lacks the clear statement of futurity that this Court has long required in order for an appropriations act to effect a permanent change in substantive law. Petitioner does not dispute that governing principle of statutory interpretation, but instead contests its application to the particular provisions at issue here. Petitioner's case-specific contentions are misplaced, and this Court's review would be unwarranted in any event. As Judge Bea explained in his concurrence, the Corps' use of the Alaska Supplement was permissible even if the 1993 Budget Act required the Corps to use the 1987 Manual, because the 1987 Manual contemplates development of supplements like the one the Corps employed. Pet. App. A20-A27.

Petitioner's suggestion that the decision below will have broad consequences for other statutes is unfounded. The decision below does not conflict with any decision of this Court or another court of appeals, and it is unlikely to have any far-reaching practical effect. Further review is not warranted.

1. The court of appeals correctly applied settled principles of statutory interpretation to the appropriations provisions at issue here.

a. This Court has long explained that a law providing for "special and temporary appropriation[s]" should not be presumed to "have a general and permanent application to all future appropriations" unless Congress has expressed that intent "in the most clear and positive terms, and where the language admits of no other reasonable interpretation." *Minis* v. *United*

States, 40 U.S. (15 Pet.) 423, 445 (1841); accord, *e.g.*, *Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 477-478 (1996) (per curiam); *United States* v. *Vulte*, 233 U.S. 509, 514-515 (1914). Applying that interpretive approach, the courts of appeals have uniformly adopted a "very strong presumption" that appropriations acts do not permanently change substantive law absent a clear statement of congressional intent to do so. *Building & Constr. Trades Dep't, AFL-CIO* v. *Martin*, 961 F.2d 269, 273 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992); see, *e.g.*, *Smithsfork Grazing Ass'n* v. *Salazar*, 564 F.3d 1210, 1216 (10th Cir. 2009); *Atlantic Fish Spotters Ass'n* v. *Evans*, 321 F.3d 220, 224 (1st Cir. 2003); *Auburn Hous. Auth.* v. *Martinez*, 277 F.3d 138, 146 (2d Cir. 2002); *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 304 (9th Cir. 1991); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1204 (11th Cir. 1989); *United States* v. *IBM*, 892 F.2d 1006, 1009 (Fed. Cir. 1989).

Congress has codified a similar clear-statement rule by providing, subject to exceptions that are inapplicable here, that an "appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation * * * expressly provides that it is available after the fiscal year covered by the law in which it appears." 31 U.S.C. 1301(c)(2). Likewise, the "Red Book"—a guide to federal appropriations published by the nonpartisan Government Accountability Office (GAO) and repeatedly cited as authority by this Court—explains that the presence of words of futurity is "the crucial factor" in determining whether the language of an appropriations act is permanent or temporary. GAO, *Principles of Federal Appropriations Law* 2-92 (4th ed. 2016) (Red Book); see, *e.g.*, *Salazar* v. *Ramah Navajo Chapter*, 567 U.S.

182, 190 (2012) (relying on the Red Book); *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (same). Of particular relevance here, the Red Book explains that "hereafter" is the "most common word of futurity." Red Book 2-86.

b. The court of appeals correctly applied those principles in construing the appropriations acts at issue in this case. After analyzing the text and structure of the key provisions in the 1993 Budget Act, the court held that the Act lacks the "clear statement of futurity" required to overcome the presumption that Congress did not intend to permanently require use of the 1987 Manual. Pet. App. A10. Relying on the Red Book, the court observed that the key provisions of the 1993 Budget Act do not contain the term "hereafter," which is "the most common word of futurity." *Id.* at A11. The court found the omission of such a word especially telling because many other provisions of that statute *do* use "hereafter" to signal their continuing effect. *Ibid.*; see 106 Stat. 1325, 1330, 1331, 1332, 1338, 1339, 1342, 1343. As the court explained, where Congress includes particular language in one part of a statute but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see Pet. App. A11.

The court of appeals drew a similar inference from the distinction between the 1993 Budget Act's directive that "[n]one of the funds in this Act *shall* be used" to delineate wetlands using the 1989 Manual, and its subsequent statement that "the Corps of Engineers *will* continue to use the" 1987 Manual "until a final wetlands delineation manual is adopted." 106 Stat. 1324 (emphases added). The court explained that this Court "has

distinguished descriptive 'will' statements from mandatory 'shall' statements," and that inferring such a distinction is appropriate here because other provisions of the 1993 Budget Act "use 'will' statements to describe the consequences of mandatory commands" rather than to *issue* mandatory commands. Pet. App. A12; see *id.* at A13. The court correctly concluded that the key paragraphs in the 1993 Budget Act "reasonably can be interpreted as complementary statements," with the first paragraph read as "a command about what the Corps could not do during fiscal year 1993, and the second paragraph [read a]s a description of what Congress expected it to do instead," not as a clear statement of futurity giving permanent effect to the substantive prohibition in the one-year appropriations act. *Id.* at A12.

c. Petitioner does not dispute the general principles of statutory interpretation that the court of appeals identified, but instead argues that the court erred in applying those principles to the 1993 Budget Act. Petitioner first contends (Pet. 11-16) that the court should have construed the word "until" to indicate futurity. As both the Red Book and Judge Bea's concurrence recognize, petitioner is correct that "until" *sometimes* indicates futurity. See Pet. App. A21 (relying on the Red Book to explain that "'until' can * * * be used to express futurity in certain contexts"). The most common word of futurity, however, is the word "hereafter," and Congress's omission of that word in the key provisions of the 1993 Budget Act is significant. See *id.* at A11. The meaning of "until" in a particular provision ultimately turns on statutory context, and the court of appeals discussed at length the contextual evidence that the statutory language at issue here—*i.e.*, that "the Corps of Engineers will continue to use the * * * 1987

Manual * * * until a final wetlands delineation manual is adopted," 106 Stat. 1324—is best read as "a description of what Congress expected" the Corps to do in 1993, rather than as a permanent directive. See Pet. App. A11-A12. That holding properly applies settled principles of statutory interpretation to the appropriations provisions at issue here. It does not, as petitioner suggests (Pet. 11, 13, 16), announce any blanket rule that the word "until" never indicates futurity.

Petitioner similarly contends (Pet. 16-17) that the court of appeals "fail[ed] to recognize that 'will,' like 'until,' is a word of futurity," and that this Court "has never held that 'will' statements are incapable of imposing a mandatory duty." That criticism of the decision below is misplaced. As with its interpretation of "until," the court of appeals did not suggest that "will" can *never* impose a mandatory duty. Instead, the court explained that the 1993 Budget Act used the terms "will" and "shall" in close proximity, and that the second paragraph using the term "will" provided a "descriptive clarification" of the effect of the first paragraph, but did not serve as "an independent provision establishing permanent law." Pet. App. A14. That context-specific approach will not have any implications—let alone "pernicious consequences," Pet. 21—for the interpretation of statutes that use "shall" or "will" alone.

Petitioner also contends (Pet. 21) that the court of appeals' interpretation of the 1993 Budget Act renders superfluous the statement that the Corps "will continue to use the * * * 1987 Manual * * * until a final wetlands delineation manual is adopted." 106 Stat. 1324. As explained above, however, that language simply reflects Congress's expectation that the Corps would use the 1987 Manual, rather than some other alternative to the

1989 Manual, during fiscal year 1993. See Pet. App. A12. In any event, petitioner's interpretation would create even more glaring linguistic superfluity. If the provision quoted above established a permanent requirement that the Corps use the 1987 Manual, the first paragraph prohibiting the Corps from using the 1989 Manual would serve no practical purpose. See *Microsoft Corp.* v. *I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011) (explaining that "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute'") (citation omitted).

Finally, petitioner suggests (Pet. 23-26) that the legislative history supports its reading of the statute. But as the court of appeals correctly explained, the legislative history cannot supply the required "clear statement of futurity" if the statutory text does not. Pet. App. A15. In any event, the legislative history does not support petitioner's reading. The Senate Report accompanying the 1993 Budget Act stated that "most of the problems with the current [Corps permit] program occur when policy decisions are made outside the normal notice and public comment process," and that the "Committee expects the Corps to adopt all policies implementing the * * * permit program in accordance with * * * notice and public comment." S. Rep. No. 344, 102d Cong., 2d Sess. 56 (1992). The Senate Report thus reflects an expectation that the Corps would use notice-and-comment procedures before adopting subsequent additions to the manual. The regional supplements that the Corps now uses, including the Alaska Supplement at issue here, are consistent with that expectation. See Pet. App. A17

(Bea, J., concurring in the judgment); C.A. Supp. E.R. 201-203.[2]

2. This Court's review is unwarranted for several additional and independent reasons.

a. Even if the 1993 Budget Act required the Corps to use the 1987 Manual for all wetlands delineation, the Corps' determination here would be lawful, because "the 1987 Manual itself allows the Corps to amend and supplement the 1987 Manual and the Alaska Supplement is consistent with that" provision. Pet. App. A23-A24 (Bea, J., concurring in the judgment). As Judge Bea explained, the "1987 Manual explicitly acknowledges that 'certain wetland types, under the extremes of normal circumstances, may not always meet all the wetland criteria defined in the manual.'" *Id.* at A25. Even before the 1993 Budget Act, the Corps relied on that language to make "alterations to the method for identifying hydrology and the 'growing season.'" *Ibid.* For example, the Corps issued guidance in 1992 "stating that, although the soil temperature factor noted in the appendix of the 1987 Manual was the 'primary' definition of growing season, 'local means of determining growing season may be more appropriate and can be used.'" *Ibid.* The "Alaska Supplement—including its definition of the 'growing season,' which is at issue here—is" thus "nothing more than formal guidance regarding the 'local means' that were permitted under the 1987 Manual and its subsequent guidance documents."

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[2] The 1993 Budget Act's statement that the Corps will use the 1987 Manual "until a final wetlands delineation manual is adopted," 106 Stat. 1324, also indicates that Congress contemplated an end to any obligation to use the 1987 Manual. It would make little sense to read that provision to foreclose the use of supplements adopted by the Corps that would form the basis of any final manual.

Ibid. Accordingly, "the 1993 Budget Act cannot be read to prohibit use of the Alaska Supplement," even if the Act is viewed as including sufficient references to futurity. *Id.* at A26; accord *id.* at B26.

Moreover, even if the Corps were required to use the precise form of the 1987 Manual that existed in 1993—a reading that no member of the panel below endorsed and that the statute does not support—the Corps' determination here would still be lawful because the administrative record supports the conclusion that petitioner's property displays wetland hydrology under the criteria established by the 1987 Manual. See C.A. Supp. E.R. 10-11. Throughout its multiple administrative appeals, petitioner failed to introduce any current evidence of soil temperature at the relevant depth to rebut the Corps' findings, relying instead on maps from 1970 that show "discontinuous permafrost" in the area. See C.A. E.R. 245-246. Although the courts below did not reach this issue, petitioner could not prevail even if the Court fully agreed with petitioner's interpretation of the 1993 Budget Act.

b. Petitioner suggests (Pet. 21-23) that the court of appeals' decision conflicts with a footnote in the Eighth Circuit's decision and the Corps' position in *United States* v. *Bailey*, 571 F.3d 791 (2009). No such conflict exists. In the footnote that petitioner cites, the Eighth Circuit summarily rejected a possible alternative argument that the "Corps' interpretation of wetlands in the 1987 Manual" was "unreasonable." *Id.* at 803 n.7. The court then stated that "Congress has mandated that the 1987 Manual be used until a final wetlands-delineation manual is adopted." *Ibid.* That footnote did not closely analyze the 1993 Budget Act, nor did it address the question whether the Corps could permissibly rely on

regional supplements, such as the Alaska Supplement in this case. The Eighth Circuit's statement, moreover, is fully consistent with the Corps' longstanding position that it *does* use the 1987 Manual to delineate wetlands, because the 1987 Manual contemplates the development of supplements to address local conditions. See Pet. App. A25 (Bea, J., concurring in the judgment). The footnote in *Bailey* accordingly does not conflict with the decision below.

c. Petitioner suggests (Pet. 8-9) that the decision below will have far-reaching effects on the interpretation of federal appropriations acts. As explained above, however, the court of appeals did not announce any general rule that would control the construction of appropriations statutes in future cases. Contrary to petitioner's suggestions (Pet. 11, 16), the Ninth Circuit did not hold that "until" or "will" can *never* constitute words of futurity. The court merely applied settled principles of statutory interpretation to the particular appropriations provisions at issue here. See pp. 11-15, *supra*. Petitioner does not identify any appropriations law that includes materially similar language in a materially similar context, and the Corps is not aware of any other decision that has interpreted the language of the 1993 Act.

Likewise, this case does not implicate what petitioner calls (Pet. 22) the "controversial and difficult" questions about the scope of the CWA that this Court has considered several times in recent years. The difficult interpretive issue in many of those cases was the meaning of the CWA term "waters of the United States." 33 U.S.C. 1362(7). This case, however, does not turn on the meaning of that term. Petitioner does not dispute that, if the areas of its property in question constitute wetlands as defined by the 1987 Manual, the

Corps has authority under the CWA to require a permit. Nor does petitioner dispute that the areas in question are properly classified as wetlands under the Alaska Supplement. The only disputed question is whether the Corps may use the Alaska Supplement or is limited to the 1987 Manual alone.

Contrary to petitioner's contentions, the Ninth Circuit's resolution of that question does not "exacerbate[] * * * uncertainty" or interfere with regulated parties' expectations. Pet. 26; see Pet. 23. The Corps has been using regional supplements for more than a decade, and no regulated entity other than petitioner appears to have disputed the propriety of that practice. The decision below therefore will not disrupt settled expectations, and the question presented here is unlikely to arise with any frequency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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