Team No. 1

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 11-1245

STATE OF NEW UNION,

Appellant and Cross-Appellee,

v.

UNITED STATES,

Appellee and Cross-Appellant,

v.

STATE OF PROGRESS,

Appellee and Cross-Appellant.

On Appeal from the Order of the United States District Court for the District of New Union, Civ. No. 148-2011, Date June 2, 2011.

BRIEF FOR THE CLAIMANT-APPELLANT-CROSS-APPELLEE

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STATEMENT OF THE CASE

I. Factual History

Lake Temp is an intermittent lake in the State of Progress (Progress), sitting completely within a United States Military Reservation. During wet years, the lake is up to three miles wide and nine miles long, and is dry approximately one out of five years. At its highest historical level, Lake Temp does not extend beyond the borders of Progress, although it is not far from the border of the State of New Union (New Union). Surface water flows into the lake from an eight hundred square-mile watershed of surrounding mountains located primarily in Progress, with a small portion located in New Union. There is no outlet from the lake. Approximately one thousand feet beneath Lake Temp is the Imhoff Aquifer, and the Lake and the Aquifer are separated by alluvial fill. The aquifer follows the general contours of the lake, but extends beyond the perimeter of the lake at its highest level. Ninety-five percent of the aquifer is located within Progress and within the military reservation; the remaining five percent is in New Union. New Union resident Dale Bompers owns a ranch that sits over a portion of the Imhoff Aquifer in New Union.

Historically, when the lake holds water during waterfowl migration seasons, ducks have used it as a stopover in their migration. Hundreds, perhaps thousands of duck hunters use the lake for hunting, and have done for at least one hundred years. Most of the hunters are from the State of Progress, but approximately one quarter of them are from out of state. Additionally, the lake is flanked on its southern side with a Progress state highway, which runs within one hundred feet of the lake's shore at its historic high. The highway intersects with several roads leading to New Union.

In 1952, the lake became part of the military reservation, and the Department of Defense (DOD) posted signs along both sides of the highway at one-hundred-foot intervals and twenty-

five feet from the edge of the road. The signs warn of danger and state that entry is illegal, but there is no fence. There are visible trails carved between the Lake and the highway from the public dragging rowboats and canoes to the Lake. DOD knows of the continued use for hunting and bird watching, but has not taken measures beyond its signs to restrict public entry.

DOD proposes to build a facility on the shore of Lake temp to receive and prepare a wide variety of munitions for discharge into the Lake. The preparation for discharge will include emptying munitions of liquid, semi-solid, and granular contents, and mixing them with other chemicals to assure they are not explosive. The mixture includes many chemicals on the Clean Water Act (CWA) § 311 list of hazardous substances. The remaining solids, primarily metals, will be ground and pulverized. Finally, water will be introduced to both sets of waste to form a slurry, which will be sprayed from a movable multi-port pipe. The current plan is to spray only the portions of the Lake that are dry, and due to the aridity of the location, the slurry will dry soon after contact. The pipes will be continually moved to deposit the slurry evenly over the entire lakebed, resulting in the entire lakebed being raised by several feet. DOD estimates that when the operation is complete, the Lake will rise approximately six feet higher than the historic high water mark, increasing the surface area by about two square miles. The discharge process will take several years, but will not be recurring once finished.

The Army Corps of Engineers (COE) will continually grade the new lakebed so that runoff from the surrounding mountains will flow unimpeded into it. Because the Lake has no outlet for the watershed, the Lake will remain largely unchanged. COE anticipates that over time, alluvial deposits from precipitation falling on the mountains and flowing into the basin will cover the lakebed again, returning it to its pre-operation condition, albeit at a higher elevation. COE does not project that the Lake would intrude on New Union territory under any of the

scenarios studied for the project.

II. Proceedings Below

DOD applied for a CWA Section 404, 33 U.S.C. § 1344, permit and the Secretary of the Army, acting through the Corps of Army Engineers (COE), granted the individual permit. The State of New Union sought review under the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2010), and 28 U.S.C. § 1331 (2010). New Union argued that the discharge permit must be issued by the Administrator of the United States Environmental Protection Agency (EPA) under CWA Section 402, 33 U.S.C. § 1342 (2010), because the munitions slurry is a pollutant. The State of Progress intervened under Rule 24 of the Federal Rules of Civil Procedure.

After discovery, each party moved for summary judgment. The Secretary of the Army moved for summary judgment on the basis that (1) New Union lacks standing to appeal the permit issuance; (2) COE has jurisdiction to issue a permit for the discharge of fill under section 404 because: (a) Lake Temp is navigable water; and (b) *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), concluded that a section 404 permit is required in this situation rather than a section 402 permit; and (3) the participation by the Office of Management and Budget (OMB) in the decision that a section 404 permit rather than a section 402 permit should be issued did not violate the CWA.

New Union filed a cross-motion for summary judgment that (1) it has standing to appeal the permit issuance; and (2) Lake Temp is navigable water; but (3) COE lacks jurisdiction to issue a permit under section 404 because the materials at issue are primarily pollutants rather than fill material, requiring a permit from EPA under section 402; and (4) participation by OMB in the permitting process violated the CWA.

Progress also filed a cross-motion for summary judgment asserting that: (1) New Union

does have standing; and either (2) Lake Temp is not within the jurisdiction of the CWA and the activity requires no permit under either section 402 or 404 because Lake Temp is not navigable water; or (3) COE has jurisdiction to issue the permit under section 404 pursuant to *Coeur Alaska*; and (4) OMB's participation in the permitting process did not violate the CWA.

The district court granted the Secretary of the Army's motion for summary judgment on all counts, and denied New Union's motion. The district court found that: Plaintiff has no standing; COE had jurisdiction to issue a section 404 permit for the addition of fill to Lake Temp because Lake Temp is a navigable water body and the slurry is a fill material; and the OMB's dispute resolution between EPA and COE did not violate the CWA.

Following the issuance of the Order of the District Court, the State of New Union and the State of Progress each filed a Notice of Appeal. New Union challenges the decision of the lower court with respect to its holding: that New Union lacked standing to challenge the permit issued by COE to the DOD pursuant to the CWA Section 404 to fill Lake Temp; that COE has jurisdiction to issue the permit under CWA Section 404; and that the OMB did not violate the CWA when it resolved a dispute between COE and EPA over whether COE had jurisdiction to issue the permit under CWA Section 404, or EPA had the jurisdiction to do so under CWA Section 402. The State of Progress takes issue with the decision of the lower court with respect to its holdings that COE had jurisdiction to issue the permit under CWA Section 404, because Lake Temp is not navigable water.

JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The district court had jurisdiction pursuant to Section 505(a) of the Clean Water Act and 28 U.S.C. § 1331 (2010). The district court granted the United States' motion for summary

judgment. This appeal seeks review of that decision.

II. Jurisdiction on Appeal

On June 2, 2010, the district court granted the United States' motion for summary judgment, and dismissed New Union and Progress's claims. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2010).

STATEMENT OF ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 301(a), 404(a), and 502(7), 33 U.S.C. § 1331(a), 1344(a), 1362(7).

III. Whether COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or EPA has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the decision by OMB that COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. §1342, to issue a permit for DOD to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STANDARD OF REVIEW

A court reviews a grant of summary judgment *de novo*. *Butler v. City of Prairie Vill.*, 172 F.3d 736, 745 (10th Cir. 1999). The facts are to be examined and reasonable inferences drawn in a light most favorable to the non-moving party. *Id*. If no genuine issue of material fact exists, the reviewing court determines whether the lower court correctly applied the substantive law. *Id.*

SUMMARY OF THE ARGUMENT

The CWA provides COE and EPA with permitting powers for particular types of discharge. COE has authority to issue a permit for discharge of fill material, while EPA has the

authority to issue permits for discharge of pollutants. The lower court erred when it granted summary judgment in favor of the United States. First, under the doctrine of *parens patriae*, and under the relaxed test for sovereign states, New Union has standing to sue to enforce the protection of its citizens under the CWA. Second, COE's decision that Lake Temp is navigable should be upheld, because the Lake falls within the traditional definition of navigable-in-fact. Further, the intermittent nature of the Lake is not sufficient to bar CWA jurisdiction, and allowing COE to assert jurisdiction does not stretch its commerce powers or infringe on state sovereignty. Third, the munitions slurry in this case is a pollutant, not a fill material, therefore EPA has the authority to issue a 402 permit and COE does not have the authority to issue a 404 permit. Finally, the OMB violated the CWA when it directed EPA not to exercise its statutorily granted veto power over the 404 permit because the OMB has no legal authority to make decisions regarding CWA permits.

ARGUMENT

I. NEW UNION HAS STANDING TO BRING THIS SUIT UNDER BOTH FEDERAL AND CASE LAW

New Union has standing to challenge the issuance of the permit granted to the United States Department of Defense. As the Court noted in *Massachusetts v. EPA*, the standard for a State to establish standing is quite relaxed. 549 U.S. 497 (2007). The district court erred when it granted summary judgment denying New Union standing because it misapplied *Massachusetts*, and failed to recognize the sovereign rights of New Union. New Union easily establishes standing under the *Massachusetts* standard. Even if the relaxed standard does not apply, the injuries suffered by New Union are more than sufficient to establish standing under the typical standard. And finally, New Union has standing to enforce its procedural rights under the CWA.

A. Under *Massachusetts*, New Union is "Entitled to Special Solicitude in… [the] Standing Analysis"

The *Massachusetts* court said that a state protecting its quasi-sovereign interests is entitled to "special solicitude in … standing analysis." 549 U.S. at 520. The Court has "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518. In another case, the Supreme Court stated that, "a state's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae,* represents on behalf of its citizens." *S. Carolina v. N. Carolina*, 130 S.Ct. 854, 867 (2010).

In *Massachusetts*, the Court quotes Justice Holmes, saying that a state in its *quasi*-sovereign capacity "has an interest independent of and behind the titles of its citizens . . . [i]t has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." 549 U.S at 518-19. The Court recognized, "there is a critical difference between allowing a 'State to protect her citizens from the operation of federal statutes . . .' and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. 497 at footnote 17. The Court further distinguished, "Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; rather, it seeks to assert its rights under the Act." *Id.* Further, the "State has an interest in securing observance of the terms under which it participates in the federal system . . ." and in this context, it must ensure that "the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Alfred L. Snapp & Son, Inc. v. P.R., ex rel., Barez*, 458 U.S. 592, 607-08 (1982).

In this case, New Union possesses the same interests in protecting its citizens from violations of the Clean Water Act. As a sovereign state, New Union seeks to protect its citizens' rights under federal law against poisoning of a recreational area, and EPA's failure to prevent such

pollution. Each state maintains its sovereign police power to protect its citizens from injury and danger to their environment. New Union does not argue that the Clean Water Act ought not apply; rather, New Union wishes to provide for its citizens full protection afforded under the Act—namely, permitting carried out by the appropriate expert, EPA.

The munitions are pollutant in nature, and not simply fill material. Thus, permitting jurisdiction under the Act must belong to EPA.[1] DOD intends to dump harmful chemicals in a Lake that is enjoyed and used by people and wildlife. The chemical slurry being dumped into Lake will contaminate the water, the plant life and the wildlife that feeds on the plant life. New Union is concerned about the risks of exposure to such chemicals to boaters, hunters, birdwatchers, and wildlife that frequent the Lake. Because the munitions contain chemicals that are pollutants and are not merely fill material, the appropriate agency to issue a permit is EPA. New Union, therefore, is subject to the same "special solicitude" that was granted the state in *Massachusetts*.

Further, the sovereign prerogatives that New Union surrendered upon joining the union "are now lodged in the Federal Government, and Congress has ordered EPA to protect [States] by prescribing standards applicable to . . . pollution which may reasonably be anticipated to endanger public health and welfare." *Mass.*, 549 U.S. at 520. Here, EPA has failed to carry out those responsibilities to protect New Union citizens, and therefore New Union is granted special solicitude to establish standing in their effort to sue.

B. Even if the relaxed *Massachusetts* standard does not apply, New Union can establish standing under the traditional test

"[A]ny citizen may commence a civil action on his own behalf . . . against the Administrator

[1] The issue about the material being categorized as a pollutant is discussed in depth later in the brief.

where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." *See* 33 U.S.C. § 1365(a) (2010). "Citizen" is defined under 33 U.S.C. § 1365(g) as "a person or persons having an interest which is or may be adversely affected." New Union has standing to sue and challenge the issuance of the permit on behalf of its citizens (New Union may assert claims on behalf of its citizens under *parens patriae*, even if the lower *Massachusetts* standard does not apply). To establish standing, New Union must show first, "injury in fact" that is "concrete and particularized" and "actual or imminent;" second, "there must be a causal connection between the injury and the conduct complained of;" and third, a favorable decision must be likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

"Citizen" is defined under 33 U.S.C. § 1365(g) (2010) as "a person or persons having an interest which is or may be adversely affected." Here, New Union and its citizens would be injured in several ways. First, the chemicals dumped into the lakebed would leach into the aquifer and contaminate the water source. This contamination is likely to occur because of the permeability of the alluvial fill between Lake Temps and the Imhoff aquifer. Given this permeability, the question is not if, but when the leaching will occur. Second, New Union citizens have used the Lake for duck hunting and bird watching for many years, and contamination of the Lake would likely kill countless migratory birds. Even if the spent munitions were limited to lead from small arms, the threat would still be significant, but these military grade munitions contain even more toxic chemicals, such as, 3-Dintrobezene, 2,4-Dinitrotoluene, and Hexachloroethane. *See* Envtl. Prot. Agency, EPA NO. 822-R-93-022, *Overview of the Health Effects of Selected Munitions Chemicals* (Nov. 1993); Envtl. Prot. Agency, EPA OSWER #9285.7-37, *TRW Recommendations for Performing Human Health Risk*

Analysis on Small Arms Shooting Ranges (March 2003). EPA has focused on these chemicals specifically because of the harmful effects such chemicals have on humans and wildlife. *Id.* Further, due to the intermittent nature of the Lake, the pollutants will dry up on the surface of the lakebed during dry seasons, which would likely result in spreading of the pollutants by wind to surrounding areas, including New Union (other intermittent lakes, like Owens Lake in California for example, harm neighboring populations due to high levels of particulate matter laced with other pollutants). *See generally* Duane Ono, et al., *Quantifying Particulate Matter Emissions from Wind Blown Dust Using Real-time Sand Flux Measurements*, EPA (last visited Nov. 24, 2011), *available at* http://www.epa.gov/ttnchie1/conference/ei12/fugdust/ono.pdf.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, members of Friends of the Earth suffered several injuries (an industrial facility discharged pollutants into the water body, which disrupted fishing, swimming, bird watching, and other recreational activities). 528 U.S. 167 (2000). Because members of Friends of the Earth could show particularized injury in fact caused by *Laidlaw* and redressability by the court, Friends of the Earth established standing to sue. *Id.* at 182-83.

New Union citizens will suffer similar injuries to those in *Laidlaw*. The hazardous substances in the slurry would kill countless ducks and migratory birds, and could be harmful to those hunting and boating on the Lake. Further, the contaminants would likely penetrate through the alluvial fill into the Imhoff Aquifer, likely rendering the water untreatable. There is no question that the injuries here would be caused by the discharge by DOD, and allowing EPA to monitor or disallow the discharge would redress the imminent injury. Therefore, New Union can establish standing under the typical criteria.

C. New Union has Suffered a Procedural Injury as "Persons" Under the Clean Water Act, and Because of the Administrator's Failure to Act with Regards to Permitting Procedure

As has been mentioned, 33 U.S.C. § 1365(a) states that a civil action may be commenced against the Administrator for failure to perform a non-discretionary act or duty. Here, New Union claims a procedural injury caused by the EPA Administrator's failure to act regarding the permit as required by CWA § 402. That section clearly states that the Administrator may issue a permit only "after opportunity for public hearing." 33 U.S.C. § 1342(a)(1) (2010). Further, since DOD plans to discharge hazardous substances, Section 402 applies, and the EPA administrator *must* act by making the permit decision—this is not discretionary. Section 402 applicability is discussed elsewhere in this brief; nevertheless, the Court has stated that when a statute requires certain procedures, the "citizen-suit provision creates a 'procedural right'… so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct . . . procedure." *Defenders of Wildlife*, 504 U.S. at 572.

Furthermore, the Court goes on to state that, "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at footnote 7. A person potentially injured by a proposed project has the right to challenge the permitting process, "even though he cannot establish with any certainty that [a successful challenge] . . . will cause the license to be withheld or altered, and even though [the project] . . . will not be completed for many years." *Id*. Therefore, even though New Union's challenge to the permitting procedure may not result in non-issuance of the permit by EPA, New Union maintains the procedural right to sue. And, "When a litigant is vested with a procedural right, that litigant has standing if there

is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518.

For the foregoing reasons, New Union has standing. Because the proposed discharge of munitions slurry would devastate the waterfowl population and likely contaminate the Imhoff Aquifer—harming New Union citizens—New Union is subject to a relaxed standing analysis under *Massachusetts*. However, even if the *Massachusetts* "special solicitude" standard is not afforded, New Union can show injury, causation, and redressability under the *Defenders of Wildlife* framework to establish standing. And finally, because the CWA mandates that permitting decisions regarding pollutants be made by EPA, and EPA failed to act, New Union has suffered a procedural injury; therefore, New Union has standing because there is a possibility that EPA's reconsideration would redress the injury to New Union.

II. THE DECISION THAT LAKE TEMP IS NAVIGABLE IS REASONABLE

In the present case, COE determined that Lake Temp is navigable water, subject to the jurisdiction of the CWA. (R. 7). This decision is ripe for review and the issue of jurisdiction is currently decided on a case-by-case basis. New Union argues the decision that Lake Temp is navigable is reasonable because (1) Lake Temp is navigable in fact, (2) jurisdiction over the Lake does not stretch COE's commerce clause powers and (3) Lake Temp is not sufficiently intermittent to bar COE from exercising its CWA jurisdiction.

COE's decision that Lake Temp is navigable is ripe because it is fit for judicial decision, and the parties would experience hardship without a court decision. *See Abbott Lab. v. Gardner*, 387 U.S. 136 (1967). Such harm is characterized as creating adverse effects "of a strictly legal kind." *Ohio Forestry Ass'n. Inc., v. Sierra Club*, 523 U.S. 726, 733 (1998). These effects may include granting, withholding, or modifying "any formal legal license, power, or authority;"

subjecting "anyone to any civil or criminal liability;" and "creating legal rights or obligations." *Id*. The decision that Lake Temp is navigable is the basis for issuing a CWA permit. 33 U.S.C. § 1344(a) (2010). A CWA permit is a formal legal license, subjecting violators to criminal liability and creating legal rights and obligations. *See* 33 U.S.C §§ 1319(c) (2010), 33 U.S.C. § 1344(s) (2010).

The decision that Lake Temp is navigable is subject to judicial review under the APA, 5 U.S.C. § 704 (2010). The scope of review is limited to whether COE 's decision was "arbitrary and capricious." 5 U.S.C. § 706(2)(A) (2010). Where a statute is "ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.*at 844. COE's decision that Lake Temp is navigable is reasonable and should be afforded considerable deference.

Jurisdiction over navigable waters is currently decided on a case-by-case basis. Brian W. Blaesser & Alan C. Weinstein, *Federal Land Use Law and Litigation* § 8:14 (2011). The CWA gives COE the authority to permit discharge of fill or dredge material into "navigable waters." 33 U.S.C. § 1344(a). Navigable waters are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2010). COE has interpreted this phrase broadly to include traditional "navigable in fact waters," but also "interstate waters, including interstate wetlands[,]" and "waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes . . . ." 33 C.F.R. § 328.3 (a)(1); 33 C.F.R. §

328.3 (a)(2), 33 C.F.R. § 328.3 (a)(3)(i) (2011).

Until recently, lower courts have upheld COE's interpretation of "navigable waters." *Rapanos v. United States*, 547 U.S. 715, 726 (2006). However, three Supreme Court cases present an unclear picture of the status of COE's interpretation. In *United States v. Riverside Bayview Homes, Inc.*, wetlands adjacent to navigable bodies of water fell under the jurisdiction of COE. 474 U.S. 121, 135 (1985). However, in *Solid Waste Agency of N. Cook County v. U.S. Army*, the court refused to extend jurisdiction over "abandoned sand and gravel pits" based solely on their use as a stopover for migratory birds. 531 U.S. 159, 167 (2001). Most recently, in the plurality decision *Rapanos*, the court bluntly attacked COE's expanding definition of navigability, arguing that it included virtually the "entire land area of the United States[.]" 547 U.S. at 722. These cases have left "the jurisdictional issue to be decided on a case-by-case basis." *Federal Land Use Law* § 8:14.

A. **Lake Temp falls within the traditional definition of navigability in fact**

The traditional rule states that waters are "navigable in fact when they are used, or susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ." *Utah v. United States*, 403 U.S. 9, 10 (1971) (quoting The Daniel Ball, 10 Wall. 557, 563). COE states: "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." 33 C.F.R. § 209.260(e)(1) (2011). In *Utah v. United States*, the United States argued that Great Salt Lake was not used frequently enough to qualify as a highway for commerce, and that the "level of the lake had so changed . . . that navigation was not practical." 403 U.S. at 12. Only "nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands" and there was "one boat used by an

outsider who carried sheep to an island for the owners . . . ." *Id*. at 11. In spite of Great Salt Lake's limited uses for commerce, and that it sometimes became too shallow to navigate, the Court found the Lake met the test for navigability in fact. *Id*. at 12. The Court has applied a liberal navigable-in-fact test in other cases as well. *See Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 490 (1988) (holding that "navigable bodies of water include the non-navigable areas at their boundaries"); *United States v. State of Utah*, 283 U.S. 64, 83-85 (1931) (holding that "susceptibility" to use for commerce, rather than actual use was the true test, despite the fact that the rivers at issue were "torturous" in places and contained "impediments" to navigation such as logs, debris, sand bars, shallow depths and rapids).

In the present case, Lake Temp not merely susceptibly, but actually used as a highway for commerce. "[O]ver at least the last one hundred years . . . hundreds, perhaps thousands of duck hunters," both interstate and intrastate, have used Lake Temp. (R.4). There are "clearly visible trails" showing "signs of rowboats and canoes being dragged between the highway and the lake" evidencing frequent recreational use, and actual navigability in the customary mode of travel on water. (R.4). Compared to the small numbers of intrastate users of Great Salt Lake in *Utah v. United States*, the hundreds, perhaps thousands of interstate duck hunters that have used Lake Temp over at least the past one hundred years easily dwarfs the "nine boats" used from "time to time" on Great Salt Lake. 403 U.S. at 11. Further, Lake Temp is actually navigable, as shown by the recreational boating that occurs on the lake.

"[T]orturous rivers" that contained "impediments" to navigation, like dangerous rapids, sand bars, shallow waters, floating logs and debris still met the test for navigable in fact waters because they were susceptible to use for interstate commerce, regardless of the feasibility of such use. 283 U.S. at 83-85. Lake Temp is "up to three miles wide and nine miles long" and is

actually navigable. (R.4). There is no evidence that the Lake contains any "rapids" or is "torturous" to navigate. It is not likely that rowboats or canoes could be used on the Lake if the conditions were such. (R. 3-4). Thus, because Lake Temp is used for recreationally for navigation by boaters and is also used extensively by both in and out of state duck hunters, it meets the traditional test for navigable in fact waters.

B. COE is well within its commerce clause jurisdiction and is not infringing on state sovereignty by exercising jurisdiction over Lake Temp

In both *Rapanos* and *SWANCC*, the Court took issue with the Corps expanding interpretation of navigable waters because it resulted in a "significant impingement" on state sovereignty and stretched the "limits of Congress's commerce power." 547 U.S. 715, 716 (2006); 531 U.S. 159, 174 (2001). In *SWANCC*, the "navigable" waters at issue were "abandoned sand and gravel pit[s] . . ." that eventually turned into a "scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)." 531 U.S. at 163. COE initially declined to extend its jurisdiction over the abandoned mine. *Id*. at 164. After being told that "a number of migratory bird species had been observed at the site," COE asserted jurisdiction based on the "Migratory Bird Rule" because of the impact of migratory birds on interstate commerce. *Id.* The Court refused to allow COE to rely solely on the impacts of migratory birds on commerce to exercise jurisdiction over water-filled gravel pits. *Id*. at 167.

Similarly in *Rapanos*, COE could not extend CWA jurisdiction over "saturated fields" that were eleven to twenty miles from anybody of navigable water. 547 U.S. at 720. Justice Scalia criticized COE's interpretation of navigable as including any piece of ". . . land containing a channel, or conduit . . . through which rainwater or drainage may occasionally or intermittently flow . . . ripples of sand in the desert that may contain water once a year, and lands that are

covered by floodwaters once every one hundred years." *Id.* at 722. Despite this, the Court recognized that the "meaning of navigable waters in the CWA is broader than the traditional understanding of the term." *Id.* at 731. Scalia defined "waters of the United States" as those "only *relatively* permanent, standing or flowing bodies of water" such as "streams, oceans, rivers, [and] lakes." Further, he states "[a]ll of these terms connote . . . fixed bodies of water, as opposed to *ordinarily* dry channels through which water occasionally flows[] . . . [and] [n]one of these terms encompasses transitory puddles or ephemeral flows." *Id.* at 732-33 (emphasis added).

In this case, COE is not "stretch[ing] the limits" of its commerce power, and infringing on state sovereignty because it is not desperately relying on the "Migratory Bird Rule" as a basis for jurisdiction. In addition to its use as a stopover for migratory birds, Lake Temp is used for interstate hunting and recreation, such as boating and bird watching. (R.4). Also, COE did not initially decline to extend jurisdiction over the Lake, as they did in *SWANCC*, and then later hungrily assert jurisdiction over man-made puddles. This is because Lake Temp is far from being a "scattering" of man-made "abandoned gravel pit[s]." Lake Temp is a full size lake, a relatively permanent body of water, "up to three miles wide and nine miles long." (R.4).

The Lake is not an "ordinarily dry channel" that occasionally collects rainwater; it is an oval-shaped lake that is the drainage basin for an eight hundred square mile watershed. (R.3-4). Also, Lake Temp is not a "saturated field," or a "transitory puddle" miles from navigable water. Lake Temp is navigable in the ordinary sense of the term. People canoe and boat on the Lake. Due to the frequent use for interstate commerce and the Lake's actual navigability, the Lake easily falls under virtually any definition of navigable water. Thus, COE can confidently assert jurisdiction over the Lake and stay well within the bounds of their commerce clause power.

C. The intermittent nature of Lake Temp is not sufficient to bar COE from asserting CWA jurisdiction

Progress argues that the intermittent nature of Lake Temp bars COE from asserting CWA jurisdiction. The *Rapanos* decision is the basis for Progress's argument but Progress mischaracterizes the decision. Nowhere in *Rapanos*, does the court say, "intermittent bodies of water are not navigable." (R.7). The Court's holding is far narrower than Progress asserts because the intermittent waters that are the heat of the debate in *Rapanos* are "drainage ditches," "ephemeral streams" or "tributaries" that *lead* to navigable waters. *Rapanos v. United States*, 547 U.S. 715, 725-26 (2006) (emphasis added). Also, *Rapanos* does not overturn *Riverside*, in which the court held that "wetlands adjacent to other bodies of water" reasonably fell within COE's jurisdiction. 474 U.S. 121, 135 (1985).

In *Rapanos*, Justice Scalia distinguished the wetlands in *Riverside*, arguing that there was a "significant nexus" between the wetlands and the navigable water; they actually buttressed each other. 547 U.S. at 726. Thus, the court leaves *Riverside* intact and does not bar CWA applicability to non-navigable waters as long as there is a sufficient nexus to navigable waters. Both *SWANCC* and *Rapanos*, are concerned with limiting COE's jurisdiction over stagnant puddles or ditches that lead to nowhere, and are not at all navigable.

Lake Temp is does not fall under the court's current interpretation of intermittent, and thus does bar COE from asserting CWA jurisdiction. Lake Temp does not remotely resemble a puddle, a ditch, an ephemeral stream or even a wetland "adjacent to" a navigable water. Thus, Progress's argument fails. Lake Temp is navigable in the ordinary sense of the term because people boat and canoe on the Lake. It is far larger than a puddle or a stream and is aptly called a "lake." It is only dry one out of every five years. Eighty percent of the time, Lake Temp is, in fact, a lake. The intermittent bodies discussed in *Rapanos*, were characterized as "ordinarily dry

channels" that occasionally had rainwater running through them. This is the antithesis of Lake Temp, which is ordinarily wet, and dries up twice in a decade. The holding in *Rapanos* does not bar all intermittent water bodies from being characterized as navigable as Progress asserts. Lake Temp is a large body of water that is navigable in fact, used for interstate commerce, and is not the sort of drainage ditch or manmade puddle that the Court removed from COE's CWA jurisdiction. Finally, if the decision that "wetlands adjacent to" navigable water bodies is reasonable, surely it is reasonable for COE to assert jurisdiction over a large, navigable lake. Thus, the intermittent nature of the Lake does not prevent COE from asserting CWA jurisdiction.

Lake Temp is navigable in fact. COE is not stretching its commerce clause jurisdiction by asserting jurisdiction over a lake, and the intermittent nature of the Lake is not sufficient remove the Lake from inclusion into "navigable water." Thus, COE's decision that Lake Temp is navigable is reasonable and should be afforded considerable deference.

III. THE ARMY CORP OF ENGINEERS LACKS JURISDICTION TO ISSUE A PERMIT UNDER SECTION 404 OF THE CLEAN WATER ACT

EPA, not COE, has jurisdiction under Section 402 of the CWA to regulate DOD's activity of discharging pollutants into Lake Temp. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2010). According to the CWA, under the National Pollutant Discharge Eliminations System (NPDES), all discharges of any pollutants into navigable water require a permit. 33 U.S.C. § 1342 (2010). Regulation of the discharge of pollutants is exclusively delegated to EPA, not COE. In this case, the district court erred in three ways when it held COE had jurisdiction to issue a Section 404 Permit for DOD's discharge of munitions slurry into Lake Temp. First, EPA, not COE, has authority to regulate the discharge of pollutants into the Nation's waters. Second, the district court's ruling expands COE's jurisdiction beyond the bounds intended under

the CWA. Third, the district court erroneously concluded the munitions slurry is a "fill material." (R. 8). Finally, the district court mistakenly relied on the holding in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council* as controlling, even though this case is distinguishable from it.

A. EPA, not COE, has authority to regulate the discharge of pollutants into the Nation's waters

Congress declared the purpose of the CWA to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To accomplish this purpose, the CWA set the goal to eliminate all discharges of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1) (2010). Under the CWA, EPA was charged with eliminating discharge of pollutants into navigable waters. 33 U.S.C. §1251(d) (2010). To accomplish this, EPA has the authority to regulate all point source discharge of pollutants into the Nation's waters under Section 402 of the CWA, the NPDES. 33 U.S.C. § 1342. Under the NPDES program, EPA is mandated to regulate all point sources of pollutants. 33 U.S.C. § 1342 (f) (2010). COE was given exclusive control over the discharge of dredge and fill material into any waters of the United States, under Section 404 of the CWA. 33 U.S.C. §1344 (2007). Both of these agencies were delegated different areas of stewardship because of their expertise in their respective fields. 33 U.S.C. § 1361(a) (2010); 33 U.S.C. § 1344(a) (2010).

The CWA defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, *munitions*, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362 (6) (2010) (emphasis added). Congress specifically identifies munitions as a pollutant. *Id.* Munitions are considered a pollutant because munitions contain a host of hazardous chemicals, such as 1,3-Dintrobezene,

2,4-Dinitrotoluene, and Hexachloroethane, all of which are classified as toxic waste under the Resource Conservation and Recovery Act (RCRA). Envtl. Prot. Agency, EPA No. 822-R-93-022, *Overview of the Health Effects of Selected Munitions Chemicals* (Nov. 1993); 40 C.F.R. § 261.30 (2011).

Under the CWA, EPA has the authority to set the effluent limits of the discharge of pollutants into navigable bodies of water. 33 U.S.C. § 1342 (f); 40 C.F.R. § N (2011). Munitions and all of its derivatives are pollutants under the CWA. Because munitions are pollutants within the means of the CWA, EPA has authority to regulate the DOD's munitions slurry. 33 U.S.C. § 1342. EPA has authority to regulate any discharges of pollutants under the NPDES program. 33 U.S.C. § 1342 (a)(1). Because munitions and its derivatives are considered pollutants under the CWA and DOD munitions disposal facility is a point source discharge of a pollutant, EPA has authority to regulate the discharge of munitions slurry into Lake Temp.

B. The district court's ruling expands COE jurisdiction beyond the bounds intended under the CWA

COE was delegated authority over discharge of fill material to preserve the navigability of the Nation's waters, not to prevent the discharge of pollutants. 67 Fed. Reg. 31129, 31134 (May 9, 2002). COE was given exclusive control over the discharge of dredge and fill materials into navigable waters, under Section 404 of the CWA. 33 U.S.C. §1344. COE's statutory and regulatory authority under the CWA is limited in three important ways. First, Congress specifically limited the jurisdiction of COE under the CWA. Second, COE's own regulations, publications, and past conduct limit its authority to a narrow category of activities. Lastly, the extension of the definition of "fill material" to munitions slurry is an unreasonable interpretation of COE's regulations.

1. Congress purposefully limited COE's jurisdiction under the CWA

COE only has jurisdiction over a narrow category of activities under the CWA. COE was delegated exclusive control over the discharge of fill material into waters of the United States. 33 U.S.C. § 1344. The CWA does not define the either "fill material" or the "discharge of fill material." *Id.* This gap is filled by COE's regulations. "[F]ill material" is defined as "[r]eplacing any portion of a water of the United States with dry land; or [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2011). This definition of "fill material" is connected to the importance of preserving navigability and was delegated to COE because of its expertise in this area. *Id.* "[F]ill material" includes materials such as: rocks, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. 33 C.F.R. § 323.2(e)(2) (2011). Congress and COE's own regulations limit its authority only to "fill material" and the "discharge of fill material." *Id.*; 33 U.S.C. § 1344.

Congress did not delegate to COE jurisdiction to regulate pollutants. EPA, not COE, has the authority to regulate the discharge of all pollutants into waters of the United States. 33 U.S.C. § 1342. Under 33 U.S.C. § 1362(6), munitions are identified as a pollutant that requires an NPDES permit from EPA to be discharged into the waters of the United States. 33 U.S.C. § 1342. Section 404 forbids COE from exercising permitting authority that is delegated to the EPA. *Id.* A slurry that is composed of pulverized munitions is a pollutant, not a "fill material" under the CWA. DOD argues the broad definition of "fill material" encompasses munitions slurry because it has the effect of changing the elevation of the lakebed. However, this argument fails because courts have hinged the determination of fill material on how the "fill material" is

generated. *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S.Ct. 2458 (2009); *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). In this case, the slurry was generated by treating spent army munitions with chemicals to render them inert and pulverizing the remaining metals. (R. 4). This activity is not related to mining, excavation or construction and is therefore outside the scope of COE's power. The munitions slurry is not generated from an activity within COE's nexus of authority; therefore, it is not a "fill material" under COE's current regulations.

Allowing the district court's ruling to stand renders the regulation of pollutants under the CWA meaningless. If a polluter wanted to avoid regulation under the EPA's NPDES permit program all it would have to do is add sand or gravel to form a "fill material" that changes the elevation of a navigable water body. Read literally, an inch difference in elevation due to the addition of sand would allow the polluter an end run around EPA's 402 permitting scheme. This undermines the ultimate purpose of the CWA and would potentially allow large amounts of contaminants into the nation's waters. This result is unacceptable. Munitions and any derivative are considered pollutants under the CWA thus; EPA has permitting authority, not COE. 33 U.S.C. § 1362(6) (2010); 33 U.S.C. § 1342 (2010). Congress gave COE jurisdiction only over 'fill material." Therefore, COE has no authority to grant a permit for the discharge of a munitions slurry that is a pollutant under the CWA.

2. COE's own regulations, publications, and past conduct limits its authority

COE's own regulations, publications, and past conduct limits its authority. In *Am. Fed'n of Gov't Emp., AFL-CIO, v. Freeman*, past interpretations by GSA of its governing statute was determinative of the court's reading of the GSA's regulatory duties. 498 F.Supp. 651, 656 (D.C. Cir. 1980). On May 9, 2002, COE published the revision to its regulations (2002 fill rule) that

defined "fill material" and the "discharge of fill material." 67 Fed. Reg. 31129 (May 9, 2002); 33 C.F.R. § 323 (2011). In the preamble of the 2002 fill rule, COE and EPA specifically stated that they were not changing their existing approach to regulating pollutants and fill material. 67 Fed. Reg. at 31135.

Before the final rule was published in the Federal Register, COE put out a news release on May 3, 2002, stating the purpose of the 2002 fill rule was to remove ambiguities between COE and EPA's CWA regulations and to enhance the environmental protection of wetlands and streams. Office of United States Army Corps of Engineers, *Corps and EPA Clarify Clean Water Act Definition; New Environmental Improvement also to be Made in Appalachian Mining Rules New Release* (2002). The 2002 final fill rule was codified in 33 C.F.R. § 323. This new release clarifies that the 2002 fill material rule was created to regulate the placement of dirt and rock from mountaintop coal mining (overburden) in streams in the Appalachian Mountains. *Id.* The agency's main purpose for creating the 2002 fill rule was to allow for the mountaintop coal-mining that caused the discharge of rocks and dirt into mountain streams and to allow COE to regulation this discharge of "fill material." *Id.* When interpreting and applying the 2002 fill rule, the circumstances surrounding its creation need to be examined. The context of the 2002 fill rule was meant to address "fill material" only in a mining context. *Id.*

COE and EPA promulgated the rule for a narrow purpose and interpretations of the rule that go beyond that purpose violate the central tenets of the CWA. *Id.*; 33 U.S.C. § 1251(d) (2010); *Sierra Club v. EPA*, 294 F.3d 155, 162 (D.C. Cir. 2002). COE and EPA also released a joint fact sheet on the definition of "fill material" rule that highlighted the 2002 fill rule was to address mining activities in the Appalachian Mountains. *See EPA/Corp of Engineers Definition of "Fill Material" Rule FACT SHEET* (last visited Nov. 24, 2011), http://www.usace.army.mil-

/CECW/Pages/reg_fill.aspx. COE's past conduct shows it has only exercised its authority over a narrow category of activities. Since the passage of the CWA, COE has only exercised its jurisdiction over "fill materials" generated by construction, infrastructure projects, mining, excavation, and the building of dams and dikes. 33 C.F.R. § 323 (2011); *Coeur Alaska*, 129 S. Ct. 2458 (2009) (dealt with a mining slurry made up of rock and mining waste water.); *Riverside*, 474 U.S. 121 (1985) (addressed that fill material in the construction context.); *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (examined overburden from coal mining and whether it is a fill material.); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (2009) (addressed whether mining overburden from coal mining is a fill material.) Therefore, COE's publications, regulations, and past conducted are a strong indication of the limits on COE's jurisdiction under the CWA.

3. COE's extension of the definition of "fill material" to munitions slurry is an unreasonable interpretation of COE's regulations

COE's extension of its 2002 fill rule to include munitions slurry does not deserve deference by the courts. The attempt of COE to expand the definition of "fill material" to include DOD's munitions slurry is "arbitrary and capricious" under the APA. 5 U.S.C. § 706(2)(A) (2010). Its interpretation is also inconsistent with *Bowles v. Seminole Rock & Sand Co.*, and exceeds COE's statutory authority under the CWA. 325 U.S. 410 (1945); 33 U.S.C. § 1344 (2010). Under *Seminole Rock*, the Supreme Court held when a case involves a controversy over an interpretation of a regulation, deference is given to the agency, unless the interpretation is plainly erroneous. 325 U.S. at 413-14.

In this case, COE's interpretation of "fill material," to include munitions slurry, is inconsistent with its regulations. The main purpose of the CWA is to preserve and maintain the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a)

(2010). Furthermore, one of the central goals of the CWA is to eliminate the discharge of all pollutants in the Nation's waters. *Id.* The regulations that were subsequently promulgated by COE reflected this purpose and goal of the CWA. 33 C.F.R. § 323; 33 U.S.C. § 1344 (2010). COE's extension of the 2002 fill material rule to include DOD's munitions slurry violates the purpose of the CWA, and thus is an impermissible construction of its regulations. Therefore, COE's interpretation does not get deference under *Seminole Rock*.

In *Coeur Alaska*, the Supreme Court examined the discharge of mining waste called slurry. 129 S.Ct. 2458 (2009). This discharge of mining slurry meant the "discharge of fill material" because it was one of the activities listed in COE's regulations. 33 C.F.R. § 232.2(f). Similarly in *Kentucky Riverkeeper, Inc. v. Midkiff*, the court held the placement of mine tailings, known as overburden, into mountain streams was a "discharge of fill material" under COE's regulations. 2011 WL 2789086 (E.D. Ky. 2011). Furthermore, in *Riverside* the Supreme Court held material related to construction was a "discharge of fill material." 474 U.S. 121, 123 (1985). As the above cases illustrate, activities related to construction, mining or excavation activities are considered a "discharge of fill material" under the related regulatory framework.

The disposal of munitions does not fall within this narrow category of activities. The disposal of munitions is neither related to construction, mining nor excavation activities. Because the disposal of munitions does not fall within those activities, the discharge of munitions slurry is not "discharge of fill material" under the governing statutory and regulatory regime. Therefore, COE does not have jurisdiction to issue a 404 permit for DOD's discharge activities.

C. This case is distinguishable from *Coeur Alaska* so its holding is not controlling

Coeur Alaska is not controlling because the facts in this case are distinguishable. In *Coeur*

Alaska the Supreme Court held that COE not EPA had jurisdiction to issue a permit over the discharge of mining slurry. 129 S.Ct. 2458. The district court held that *Coeur Alaska* was similar to this case in all regards. (R.7). This case is similar to *Coeur Alaska* in that both cases address the conflict of between Section 404 and 402, but the facts in this case are fundamentally different from *Coeur Alaska* in three ways. First, *Coeur Alaska* addressed the conflicts of Section 404 and 402 in the mining context. Second, the lake in *Coeur Alaska* had an outlet from which any discharge downstream was regulated by Section 402. Lastly, *Coeur Alaska* did not address the issue of potential contamination of an aquifer.

1. *Coeur Alaska* examined the discharge of mining slurry, not toxic munitions

The Supreme Court examined *Coeur Alaska* in the context of mining activities. As explained *supra* certain discharge activities that generate "fill material" fall under the exclusive jurisdiction of COE. 33 U.S.C. § 1342 (2007). Under the CWA, COE has limited authority to regulate all activities related to "fill material" and the "discharge of fill material." *Id*. The nexus of the "discharge of fill materials" revolves around construction, mining, and excavation related activities. *Coeur Alaska*, 129 S. Ct. 2458 (2009); *Riverside*, 474 U.S. 121 (1985); *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003); *Aracoma Coal*, 556 F.3d 177 (2009).

The *Coeur Alaska* case focused on the discharge of slurry generated from gold mining operations. 129 S.Ct. 2458, 2464-2465. The "discharge of fill materials" related to mining activities falls under COE's permitting authority. In this case, the proposed "discharge of fill material" is not related to any such activities. Munitions slurry is not mining waste.

The slurry at issue in this case contains discarded munitions that have been crushed and mixed with chemicals. (R. 4). This type of discharge is more akin to waste disposal than the mining waste. Had the district court examined this fact it would have concluded that *Coeur*

Alaska was not applicable. This is because COE's statutory authority is limited to narrow group of categories that constitute legal "discharge of fill material" into the waters of the United States. Therefore, the district court erred when it held that *Coeur Alaska* was controlling in this case because the fundamental facts of this case are distinguishable from those found in *Coeur Alaska*.

2. Lake Temp is fundamentally different from the body of water in *Coeur Alaska*

Lake Temp differs from the lake in *Coeur Alaska* in three critical ways. First, the lake at in *Coeur Alaska* is considerably smaller than Lake Temp, measuring 800 feet wide and 2000 feet long. Lake Temp is up to three miles wide and nine miles long. (R. 4). Second, Lake Temp is a terminal lake whereas the lake in *Coeur Alaska* was not. (R. 4). Lastly, Lake Temp is an intermittent body of water unlike *Coeur Alaska*'s lake. (R. 4).

These fundamental differences between Lake Temp and the lake in *Coeur Alaska* are a material in distinguishing this case from *Coeur Alaska*. The unique topography and hydrology of Lake Temp is a significant factor in assessing environmental harm to Lake Temp. Because the of the terminal and intermittent nature of Lake Temp the pollutant load is likely to intensify during the dry season as the water level drops. As the water level decreases, the concentration of pollutants will increase. The concentrated levels of pollutants will result in adverse effects on both humans and wildlife that rely on the Lake Temp.

3. The Imhoff Aquifer presents more serious problems than the lake in *Coeur Alaska*

The presence of the Imhoff Aquifer beneath Lake Temp is unique to this case and this fact was not addressed in *Coeur Alaska*. The district court ignored the presence of the aquifer. In *Coeur Alaska* the case revolved around the use of a small lake as a tailings pond. Also, the outflow from lake was regulated by EPA under its NPDES permit program. This case includes the presence of an aquifer which was un-examined by the Supreme Court in *Coeur Alaska*.

The presence of an aquifer creates unique questions of law that did not arise in *Coeur Alaska* that need to be addressed, such as the applicability of the federal law, property rights, and common law issues. None of these issues of law has yet been addressed, so whether these laws and rights are applicable to this case remain unanswered. Because of the unique questions of law that the Imhoff Aquifer brings into the picture, this case is distinguishable from *Coeur Alaska*. Therefore, the district court erred when in failed to distinguish this case from *Coeur Alaska*, and it was mistaken when it held that *Coeur Alaska* was controlling in this case.

IV. THE OMB'S INSTRUCTION TO EPA NOT TO VETO THE 404 PERMIT IS UNLAWFUL BECAUSE (A) THE OMB HAS NO STATUTORY AUTHORITY TO DECIDE CWA PERMITTING ISSUES (B) THE PLAIN LANGUAGE OF THE ORDER GIVES DISPUTE RESOLUTION AUTHORITY TO THE EPA

The OMB's decision is subject to judicial review under 5 U.S.C. § 706(c) as a final adjudication that was in "excess of statutory jurisdiction." OMB does not have the power to interpret the CWA. *See* 33 U.S.C. § 1251(d) (2010). Therefore, their decision shall be afforded no deference by this court. *See Chevron*, 467 U.S. 837 (1984).

A. The OMB has no statutory authority to govern the issuance of permits under the CWA. Allowing the OMB to arbitrate the outcome of CWA permit is a violation of the separation of powers

"[A]n executive order cannot supersede a statute . . . ." *Marks v. Cent. Intelligence Agency*, 590 F.2d 997, 1003 (D.C. Cir. 1978). OMB is a governed by 31 U.S.C. § 501 *et seq*. and is responsible primarily for "financial management of the United States government." 31 U.S.C. § 502(c) (2010); *See also* 31 U.S.C. § 503(a) (2010); 31 U.S.C. § 504 (2010). The only authorities charged with issuing permits under the Clean Water Act, are EPA and COE. See 33 U.S.C. § 1342; 33 U.S.C. § 1344. In *Am. Fed'n of Gov't Emp., AFL-CIO v. Freeman*, the court refused to allow OMB to direct the General Services Administration (GSA) to regulate an activity that was statutorily left to its discretion. 498 F.Supp. at 658-59. In *AFL-CIO*, the GSA promulgated

parking regulations imposing parking fees on government employees pursuant to the OMB's orders. 498 F.Supp. at 654. The fees were designed to discourage car travel, thus reducing energy consumption. *Id.* The applicable statute governing energy conservation was the Energy Policy and Conservation Act. *Id.* at 656. OMB's governing statute did not prescribe any responsibilities "relate[d] to energy conservation" nor did it allow OMB to "exercise the discretion granted to GSA" by its governing statute. *Id.* at 658. Finally, the court said the GSA imposed parking fees because it was "directed to do so by the OMB. That, of course, is not an exercise of discretion at all." *Id.* at 659.

In this case, OMB directed EPA not to exercise its discretionary power to veto a 404 permit, a power provided by 33 U.S.C. § 1344(c) (2010). OMB does not have any statutorily granted powers under the CWA, and nothing in its governing statute is related to water quality permitting. *See* 31 U.S.C. § 501 *et seq*. (2010). OMB is responsible primarily for "financial management of the United States government." 31 U.S.C. § 502(c); *See also* 31 U.S.C. § 503(a); 31 U.S.C. 504 (2010). EPA is delegated broad authority to regulate under the CWA. *See* 33 U.S.C. § 1251(d), 1311(a), 1344(c), 1342. Allowing OMB to order EPA not to exercise its statutory authority, amounts to a "substantive change in the statutory delegation." Erik D. Olsen, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 Va. J. Nat. Resources L. 1, 22 (1985). OMB should not be allowed to tell EPA how to exercise its statutory discretion because that is "no discretion at all." Even if OMB has some lawful input on the issuance of CWA permits due to financial reasons, it has not relied on those reasons here. Still, it is unlikely that OMB can unilaterally order EPA how to exercise its discretion, because that essentially gives OMB CWA permitting authority—a power not granted it by Congress. In *AFL-CIO*, OMB

directed the GSA to implement a parking fee plan, a financial measure, and the court found it had no authority to do so. 498 F.Supp. at 658. In this case, the issuance of an NPDES permit relates to water quality, and is properly determined by the agency with the appropriate expertise, EPA.

One could argue that the outcome in this case is consistent with the holding of *Coeur Alaska* because COE had jurisdiction over the discharge of "slurry" that was deemed "fill material." *Coeur Alaska*, 129 S.Ct. at 2460. EPA agreed with COE in *Coeur Alaska*, because the nature of the discharge at issue was considered "fill material" to which EPA performance standard does not apply. *Id.* at 2463. COE and EPA agreed that the slurry met their definition of fill material. The Court recognized EPA's veto power and noted that EPA did not exercise this power. *Id.* at 2465. In this case, EPA planned to veto COE's 404 permit "but the OMB instructed EPA not to do so." (R. 9). The OMB was not involved in the EPA's decision in *Coeur Alaska*. EPA found the slurry in this case "significantly different" than the slurry in *Coeur Alaska*, therefore requiring a 402 permit. (R. 9). Thus, the type of slurry in this case requires a different result from *Coeur Alaska*. The OMB acted without statutory authority when it exercised the discretion lawfully given to the EPA. Thus, the OMB decision is illegal and should be nullified by this Court.

1. Allowing the OMB to exercise powers not granted to it by Congress is unconstitutional

The use of an executive order by one agency to "impose substantive changes" on another agency's decision is "incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers." *Envtl. Def. Fund v. Thomas*, 627 F.Supp. 566, 570 (D.C. Circ. 1986). The President's "supervisory powers must conform to legislation enacted by Congress" and directives cannot "permit agencies to transgress boundaries set by Congress." *Id.*

(internal citations omitted). In *Thomas*, Executive Order No. 12291 directed executive agencies "to submit all proposed and final rules to OMB for prepublication review[.]" *Id.* at 567-68. The Court emphasized that the OMB should not be permitted to use the Order "improperly" by withholding approval until the regulations met "certain content" because doing so would raise constitutional issues. *Id.* at 570. Congress "delegates to the expert judgment of EPA administrator the authority to issue regulations" after "years of study and deliberation" on environmental issues. *Id.* Thus, allowing the OMB to withhold approval until EPA regulations met certain content would "encroach[] upon the independence and expertise of the EPA." *Id.* Further, the Order itself preserved statutory duties: "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law." *Id.* at 568 (internal citations omitted).

In this case, allowing the OMB to step in and exercise its authority over EPA when it has no statutory authority to do so encroaches on the expertise of EPA and is incompatible with the will of Congress. Courts have a "prudential desire not to needlessly reach constitutional issues…." *SWANCC*, 531 U.S. 159, 172 (2001). Like the Order in *Thomas*, Executive Order 12,088 reserves the veto power statutorily granted to EPA when it states: "[t]hese . . . procedures are in addition to, not in lieu of, other procedures . . . for the enforcement of applicable control standards." Exec. Order No. 12,088, 3 C.F.R. 245 (1979). Further, the Order preserves existing law by stating "nothing in this Order . . . shall be construed to revise or modify any applicable pollution control standard." *Id.* Thus, the EPA retains its veto power granted by Congress in § 1344(c) and OMB cannot direct decisions regarding CWA permits because it has no statutory authority to do so. The Order preserves existing law and should be construed narrowly to prevent an agency from transgressing the boundaries set by Congress. Allowing the OMB to

unilaterally direct EPA not to veto a CWA permit, when it has statutory authority to do so, is unconstitutional. Thus, the district court erred when it found the OMB intervention did not violate the CWA.

B. The OMB improperly read the plain meaning of the Order

The OMB's reliance on Executive Order No. 12088 (hereinafter "the Order) as the source of its authority to order EPA not to exercise its statutorily granted veto power is misplaced. The order confers dispute resolution powers to EPA, not OMB. *See* Exec. Order No. 12,088, 3 C.F.R. 243-46 (1979). A plain reading of the Order reveals EPA is vested with the power to settle interagency disputes and to ensure federal entities are complying with pollution control laws. *See* 3 C.F.R. 244-45. The Order places OMB as subordinate to EPA, and leaves existing enforcement procedures granted by law intact. For example, § 1-201 says, "[e]ach Executive Agency shall cooperate with the Administrator of the EPA . . . ." § 1-202 requires agencies to "consult with EPA . . . concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution." *Id.* at 244. §1-3 gives EPA the authority to provide technical advice, ensure compliance and conduct inspections. *Id.* The EPA, is given dispute resolution authority in § 1-6 which reads: "[t]he Administrator shall make every effort to resolve conflicts regarding such violation between Executive agencies, and on request of any party . . . ." *Id.* at 245. The Order says dispute resolution techniques are "in addition to, not in lieu of, other procedures . . ." for enforcement of pollution control standards. *Id.* OMB is only authorized to resolve conflicts "at the request of the Administrator" and must do so with the "Administrator's technical judgment." *Id.*

Thus, nothing in the Order gives OMB the power to control EPA, or arbitrarily step in and resolve disputes. The Order confers considerable more power to EPA, and makes OMB

subordinate to EPA in dispute resolutions. Further, the Order leaves EPA's veto power intact because it is a procedure for enforcing pollution control standards. Section 1344(c) allows the EPA, upon determination that a discharge "will have an unacceptable adverse effect . . ." on the environment. The reliance placed on the Order by OMB is misplaced, for a plain reading reveals no such powers with OMB, and in fact, the majority of the power, including dispute resolution, is vested with EPA. This construction is in line with the organic acts governing EPA and OMB because the Order confers powers on each agency that Congress has already provided to them. Such a reading should be favored over the construction OMB gives it because it is in line with Congressional intent and does not violate separation of powers.

CONCLUSION

For the foregoing reasons, this Court should find that (1) New Union has standing under the doctrine of *parens patriae*, under the relaxed test for sovereign states under *Massachusetts* to sue to enforce the protection of its citizens under the CWA, and a procedural right to sue; (2) COE's decision that Lake Temp is navigable should be upheld because the Lake falls within the traditional definition of navigable-in-fact; (3) DOD's munitions slurry is a pollutant, not a fill material; therefore, EPA has the authority to issue a 402 permit and COE does not have the authority to issue a 404 permit; and (4) OMB violated the CWA when it directed EPA not to exercise its statutorily-granted veto power over the 404 permit because the OMB has no authority to make decisions regarding CWA permits. If the Court does find that New Union has standing, the Court should remand the case to the district court with the instructions to: (1) reaffirm that Lake Temp is a navigable body of water; (2) find that EPA is the proper permitting authority and not COE; and (3) hold that OMB exceeded its statutory authority when it directed EPA not to contest COE's permitting authority.