Team No. 34

No. 11-1245

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of New Union granting summary judgment to the United States, and denying summary judgment to New Union. This matter was properly before the district court pursuant to the court's original jurisdiction for federal questions under 28 U.S.C. § 1331 concerning New Unions's request for review pursuant to the Administrative Procedures Act (APA) 5 U.S.C. § 702 of an individual permit issued by the U.S. Army Corps of Engineers (COE) under the Clean Water Act (CWA) Section 404 33 U.S.C. § 1344.

The district court's order entered on June 2, 2011, is final and appealable as required by Fed. R. App. P. 4(a)(1)(B) and defined in Fed. R. App. P. 4(a)(7)(A)(i). Both New Union and Progress filed timely Notices of Appeal consistent with Fed. R. App. P. 3(a). This Court granted appeal on September 15, 2011, and also has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (APA), and 33 U.S.C. § 1344.

STATEMENT OF THE ISSUES

I. DOES NEW UNION HAVE STANDING, EITHER 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. IS LAKE TEMP NAVIGABLE WATER SUBJECT TO REGULATION UNDER CWA SECTIONS 301(a), 404(a), AND 502(7), 33 U.S.C. §§1311(a), 1344(a), AND 1362(7)?

III. DOES THE COE HAVE JURISDICTION UNDER CWA SECTION 404, 33 U.S.C. § 1344, RATHER THAN THE EPA UNDER CWA SECTION 402, 33 U.S.C. § 1342, TO ISSUE A PERMIT TO THE DOD FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP?

IV. DID EITHER THE OMB'S PARTICIPATION IN RESOLVING THE DISPUTE BETWEEN THE COE AND THE EPA OVER CWA JURISDICTION, OR THE EPA'S DECISION NOT TO VETO THE COE'S SECTION 404 PERMIT ISSUED UNDER 33 U.S.C. § 1344, VIOLATE THE CWA?

STATEMENT OF THE CASE

New Union sued the United States claiming that the Environmental Protection Agency (EPA), rather than the COE, has authority under the CWA to issue a permit for the Department of Defense's (DOD) request to discharge slurry into Lake Temp. (R. at 3.) New Union further argued that the Office of Management and Budget (OMB) violated the CWA by virtue of its participation in the decision-making process with the COE and the EPA concerning whether Section 402 or Section 404 of the CWA applied to the DOD's proposed project. (R. at 5.) Lake Temp is located in the neighboring State of Progress, who intervened (R. at 3.) arguing that if any permit is required, it is the Section 404 permit issued by the COE. (R. at 5.)

The United States filed a motion for summary judgment contending 1) that New Union lacks standing; 2) that the COE has the authority to issue the permit for the DOD's project; and 3) that neither the OMB's role in resolving the dispute between the COE and the EPA nor the EPA's decision not to veto the permit violated the CWA. (R. at 5.) New Union and Progress filed cross-motions for summary judgment. (R. at 5.)

STATEMENT OF FACTS

A. Lake Temp

Lake Temp is an oval-shaped body of water that is three miles wide by nine miles long during the rainy season (R. at 3.), and is wholly dry about one out of five years. (R. at 4.) Water flows into Lake Temp from the surrounding watershed of about eight hundred square miles. (R. at 3.) At its highest level, Lake Temp is entirely within Progress's borders. (R. at 4.) Ducks use the lake during their migration as a stopover and as a result, hundreds – maybe thousands – of duck hunters have used the lake for at least one hundred years. (R. at 4.) Roughly twenty-five percent of the duck hunters are not residents of Progress. (R. at 4.) There are visible trails from the state highway to the lake which show evidence of rowboats and canoes being dragged across the terrain. (R. at 4.) In 1952, Lake Temp became part of the military reservation. (R. at 4.) The DOD posted warning and no-entry signs on both sides of the highway about one hundred yards apart and twenty-five feet off the road, but did not enclose the property with fencing. (R. at 4.) Even though the DOD has knowledge that people frequently use the lake for hunting and bird watching, it has not taken steps prevent such use. (R. at 4.)

B. Imhoff Aquifer

Imhoff Aquifer is nearly one thousand feet below Lake Temp and, though the aquifer follows the general contours of the lake, the aquifer is much larger. (R. at 4.) Ninety-five percent of Imhoff Aquifer is in the State of Progress and the other five percent is located within the boundaries of New Union. (R. at 4.) Imhoff Aquifer is not potable or usable in agriculture without treatment due to high levels of naturally occurring sulfur. (R. at 4.) The land between Lake Temp and Imhoff Aquifer is primarily unconsolidated alluvial fill. (R. at 5.) New Union has a statute regulating the use of groundwater which requires a permit from the New Union

Department of Natural Resources (DNR) to withdraw groundwater. (R. at 6.) Additionally, under the statute, no one has rights in groundwater unless and until the DNR issues a withdraw permit. (R. at 7.)

C. DOD's Proposal

The DOD intends to construct a facility on the shore of Lake Temp to receive and prepare various munitions for discharge into the lake. (R. at 4.) The process would require separating the components, grinding and pulverizing the solids and mixing the liquids to stabilize them, and then combining both with water to make a slurry which will be evenly sprayed over the portions of the lake that are dry. (R. at 4.) Because of the arid location of Lake Temp, the slurry will dry out soon after contact. The lakebed is projected to rise several feet (R. at 4.) expanding the surface area of the lake by two square miles. (R. at 7.) This process will not be a recurring activity and Lake Temp will still remain in existence since it is at the low point of a drainage basin. (R. at 4.) It is anticipated that alluvial deposits will return the lakebed to pre-deposit condition over time. (R. at 5.)

D. Dale Bompers

Dale Bompers, a resident of New Union, owns a ranch that is located directly above a small portion of the Imhoff Aquifer in New Union. (R. at 4.) Bompers alleges the value of his ranch will decrease if the aquifer is contaminated, but he does not present concrete proof of diminution of property value. (R. at 6.) Moreover, Bompers has no definite plans to use the aquifer in the future and he has not applied for a permit to withdraw from the aquifer from the New Union DNR. (R. at 6.)

SUMMARY OF THE ARGUMENT

Standing

The doctrine of standing is an essential component to federal-court jurisdiction because, to be capable of judicial resolution, a party must be personally invested in the outcome. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Precedent has developed three elements to determine standing: (1) a plaintiff must demonstrate a "concrete and particularized" injury that is "actual or imminent", (2) the injury must be reasonably traceable to the defendant, and (3) a favorable decision will likely remedy the injury. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

To maintain an action under *parens patriae*, which literally means "parent of the country", the State must demonstrate it is more than just a nominal party. *Id*. at 607. New Union's injuries are based on pure speculation so they do not support a finding of standing based on quasi-sovereign interests. Bompers is unable to obtain standing because he cannot demonstrate a "concrete and particularized" injury that is "actual or imminent," *id*. at 517; therefore, New Union is unable to obtain standing based on its *parens patriae* capacity. *Id.* at 517.

Navigability

When Congress enacted what is now known as the CWA, it was motivated by the desire "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA prohibits the unpermitted discharge of pollutants into the "waters of the United States." 33 U.S.C. § 1311(a). Congress expressed its intent in committee reports that the CWA be interpreted broadly. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985).

The Supreme Court has recently interpreted the phrase "waters of the United States" to mean "relatively permanent, standing . . . bodies of water . . . that are described [generally] as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos v. United States*, 547 U.S. 715, 731 (2006). Even though a body of water may "dry up in extraordinary circumstances," it may still be considered navigable for purposes of the CWA. *Id.* at 733 n.5. Furthermore, though a lake may be situated entirely within a state's borders, if use of the lake affects interstate commerce, the CWA applies. *See, e.g.*, *State of Utah v. Marshall* (*Utah*), 740 F. 2d 799 (10th Cir. 1984).

Lake Temp, though it is located entirely in Progress, is a body of water that meets the *Rapanos* Court's definition of "waters of the United States" and affects interstate commerce by virtue of the considerable, long-term recreational use by people from out-of-state. Therefore, the CWA applies to any proposed discharges to Lake Temp.

Section 402 versus Section 404

The CWA provides two programs for permitting discharges to waters: one is administered by the EPA under Section 402 for the discharge of pollutants, and the other is administered by the COE under Section 404 for the discharge of dredged or fill material. 33 U.S.C. § 1342; 33 U.S.C. § 1344. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Supreme Court addressed whether slurry, which is a pollutant, could be fill. 129 S.Ct. 2458 (2009). Because both agencies define fill as anything that changes a lakebed, and because their definition is not "plainly erroneous or inconsistent with the regulation," the Court held the wording of the CWA gave permitting authority to the COE rather than the EPA. *Id.* at 2468.

All the parties here agree that the discharge proposed by the DOD will raise the lakebed of Lake Temp, thus *Coeur* controls, and it is the COE that has authority to issue a permit under Section 404.

OMB Participation

Pursuant to authority granted under Executive Order 12,088, the OMB conducted dispute resolution between the EPA and the COE regarding the proposed discharge. 43 Fed. Reg. 47707(Oct. 17,1978). This mediation was not in violation of the CWA because facts do not show the OMB instructed the EPA to abstain from vetoing. Further, OMB/CEQ Joint Memorandum of November 28, 2005 encouraged agencies involved in environmental issues to develop and engage in Environmental Conflict Resolution processes. Joshua Bolten &James Connaughton, Memorandum on Environmental Conflict Resolution, U.S. Institute for Environmental Conflict Resolution (Nov. 28, 2005), http://www.ecr.gov/pdf/OMB_CEQ_Joint_Statement.pdf. At the conclusion of the dispute resolution process the EPA did not veto the COE permit- an action that was fully in its discretion.

The CWA provides that the EPA may veto a Section 404 permit "whenever [it] determines . . . that the discharge . . . will have an unacceptable adverse effect . . . ." *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 8 (D.D.C. 2007). If the EPA has not abused its discretion, as is the case here, then the decision not to veto will be safe from judicial review. In the alternative, if this Court finds that the EPA's decision was not discretionary and is therefore subject to judicial review, the standard of review is that the decision was not arbitrary or capricious. The EPA's decision not to veto the COE's permit is not arbitrary or capricious for two reasons: (1) regardless of the OMB's participation, the EPA's decision is consistent with *Coeur* and (2) the President has all the executive power of the United

States and he is obligated to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §1, cl. 1.

ARGUMENTS AND AUTHORITIES

The District Courts grant of summary judgment to the United States should be affirmed because New Union does not have standing, Lake Temp is a navigable body of water, the COE has jurisdiction to issue a 404 permit, and OMB's participation in the dispute resolution between the COE and the EPA does not violate the CWA.

I. STANDARD OF REVIEW.

Appeals from summary judgment are reviewed *de novo*. *Great Lakes Dredge & Dock Co. v Tanker*, 957 F.2d 1575, 1578 (11th Cir.), *cert. denied*, 506 U.S. 981, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992). Summary judgment is granted when there are no legitimate issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). But agency actions are given wide deference. "Under the Administrative Procedure Act, a court shall set aside an action of an administrative agency where it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). The court shall not substitute its judgment for that of the agency." *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)).

II. DOES NEW UNION HAVE STANDING, EITHER 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?

A. Judicial economy requires all parties to a lawsuit to have a genuine stake in the outcome.

Federal-court jurisdiction is limited to "Cases" and "Controversies" through Article III of the Constitution. *Massachusetts*, 549 U.S. at 516. These parameters ensure that litigation is in an adversary context and is thus capable of resolution through the judicial process. *Id*. at 516. The

doctrine of standing is an essential component to federal-court jurisdiction because, to be capable of judicial resolution, a party must be personally invested in the outcome. *Baker*, 369 U.S. at 204. When both parties have a genuine stake in the outcome, the dispute will be resolved with an appreciation of the consequences of judicial action. *Massachusetts*, 549 U.S. at 517.

Precedent has developed three elements to determine standing: (1) a plaintiff must demonstrate a "concrete and particularized" injury that is "actual or imminent," (2) the injury must be reasonably traceable to the defendant, and (3) a favorable decision will likely remedy the injury. *Id*. at 517. Each of these elements are not mere pleading requirements but are an indispensable part of the plaintiff's case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. A state asserting quasi-sovereign interests must show an interest beyond the titles of its citizens in "all the earth and air within its domain."

The majority in *Massachusetts* noted that States are not customary litigants for the principle of invoking federal jurisdiction but a State can still bring suit for injury under its capacity as a quasi-sovereign. *Massachusetts*, 549 U.S. at 518. The majority held that a State's quasi-sovereign capacity gives the State an interest beyond the titles of its citizens in "all the earth and air within its domain" and thus gave States a relaxed standing test. *Id*. at 518. Four Justices dissented urging that a State asserting quasi-sovereign interests must still show that its citizens satisfy an injury which is "concrete and particularized" and is "actual or imminent." *Id*. at 538.

C. A State claiming *Parens patriae* must show an interest independent of its citizens.

Parens patriae literally means "parent of the country" and in American law, it does not cover a State stepping in to stand for the interests of a citizen who, "for whatever reason, cannot

represent themselves" when the State does not have a real interest of its own. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982). To maintain an action under *parens patriae*, the State must demonstrate an interest separate from the interests of the "particular private parties." In other words, the State must show a quasi-sovereign interest. *Id*. at 607. There are two general categories of evidence a State can use to make an independent interest showing. *Id*. at 607. First, the State has a quasi-sovereign interest in the physical and economic health and well-being of its residents so it must present convincing evidence that these interests will be compromised. *Id*. at 607. Second, a State has a quasi-sovereign interest in ensuring it is not excluded from the benefits of the federal system; however, this interest is limited by the requirement that the State must be more than just a nominal party. *Id*. at 608.

D. New Union does not have standing based on its quasi-sovereign capacity because the injury it alleges it will sustain is purely speculative.

New Union is unable to meet the requirements of the relaxed test the majority set forth in *Massachusetts*. The majority test in *Massachusetts* requires New Union to show a particular injury to the earth and air within its domain in order to maintain standing grounded in quasi-sovereign interests. Two instances of when the Supreme Court has previously found particular injury are for depletion of coastline due to global warming and raising sea levels in *Massachusetts*; and for a threat to forests, vegetable life, and the health of citizens from noxious gases discharged into the air that traveled over Georgia. *State of Ga. v. Tennessee Copper Co.*, 206 U.S. 230 (1907). By contrast, the Supreme Court did not find standing based solely on animal nexus and vocational nexus theories in *Lujan*. 504 U.S. at 555. In *Lujan*, the Court reasoned that the plaintiffs had not sustained a concrete injury; rather, they suffered a possible injury, possibly in the future with the possible ramifications unknown. *Id.* at 567. Procedural injury that is absent a physical injury is not enough to anchor standing. *Id.* Therefore, the

plaintiffs in *Massachusetts* are distinguishable from the plaintiffs in *Lujan*. The *Massachusetts* plaintiffs were able to show more than just procedural injury because if the EPA started to regulate carbon dioxide, the State's coastline would consequently be impacted. By comparison, the plaintiffs in *Lujan* were unable to show that their procedural injury was adequate because it was not imminent as they did not have definite or specific plans.

New Union is comparable to the plaintiffs from *Lujan* in that the alleged injury is based on mere speculation because there is no definitive proof of when, if at all, New Union will encounter the alleged injury. Allegations of an uncertain future injury do not support the injury required to satisfy the majority's relaxed standing test in *Massachusetts*. Without a definite injury, New Union cannot claim to be protecting the earth and air within its domain. The information needed to confirm a definite injury to New Union can be obtained by drilling and sampling from a grid of monitoring wells. New Union contends this will take considerable amount of time and by the time conclusive results have been obtained, the permitted activity will have already began. Yet New Union did not take the opportunity to object or even comment on the Environmental Impact Statement (EIS) that was completed on the project under proper procedures according to the National Environmental Policy Act. 42 U.S.C. §§ 4321-4370H. New Union did not raise issue with the EIS previously, so it cannot wait until now to do so. Because New Union is unable to show an actual or imminent injury, it is unable to support standing based on its quasi-sovereign capacities.

E. New Union does not have standing grounded in *parens patriae* because the citizen whom it alleges to protect does not have a definite injury to support standing of his own.

For New Union's standing based on *parens patriae* to be successful, it must be anchored to a valid standing in Bompers' own capacity. To establish standing, Bompers must show a

"concrete and particularized" injury that is "actual or imminent" which is caused by the State of Progress and can be redressed. *Massachusetts*, 549 U.S. at 517. Bompers alleges that the value of the ranch he owns and operates will decrease if Imhoff Aquifer is contaminated by the permitted discharge. While Bompers' injury is particularized, it is not concrete, actual, or imminent. Bompers alleges of uncertain future injury because if the Aquifer is polluted it will decrease his property value. However, the Aquifer is not potable or usable in agriculture because of the naturally occurring sulfur and Bompers has not expressed a specific plan to use the aquifer in the future. Bompers is essentially claiming the same injury as the plaintiffs in *Lujan*, which the Court specifically ruled was not enough to merit actual injury to permit standing. Additionally, a New Union statute requires that before withdrawing groundwater, a permit from the New Union Department of Natural Resources (DNR) must first be issued. The statute further states that no one has rights in ground water unless and until the DNR issues a withdraw permit. To date, there have been no permits issued with respect to Imhoff Aquifer.

Even if this Court finds that Bompers has a concrete and actual or imminent injury enabling him to obtain standing by himself, New Union still cannot maintain a *parens patriae* standing because it cannot establish an independent interest showing. First, New Union cannot establish an actual or imminent injury that will occur from allowing munitions to be dumped into Lake Temp. The evidence presented that the aquifer will become polluted is completely speculative. Without an actual or imminent injury, it is unable to show the physical and economic health and well-being of its residents are at stake. Second, New Union is only a nominal party because it is not personally vested in the outcome. No one has rights in ground water unless and until the DNR issues a withdraw permit. New Union has not obtained a permit

to withdraw water from the Aquifer and without other evidence of actual injury; there is no evidence to show that it will definitely be hurt by the discharge.

Lacking a concrete and particularized injury that is concrete or imminent, New Union is unable to successfully assert standing based on its quasi-sovereign capacity or in a *parens patriae* capacity.

In the event this court finds that New Union does have standing, the District Court's order granting summary judgment to the United States should still be affirmed for the reasons outlined below.

III. IS LAKE TEMP NAVIGABLE WATER SUBJECT TO REGULATION UNDER CWA SECTIONS 301(a), 404(a), AND 502(7), 33 U.S.C. §§1311(a), 1344(a), AND 1362(7)?

A. Congress intended that the CWA should be interpreted broadly to ensure achievement of pollution-control objectives.

Congress first addressed the problem of water pollution in 1948 when it enacted the Federal Water Pollution Control Act (FWPCA). Act June 30, 1948, c. 758, 62 Stat. 1155, now codified at 33 U.S.C.A. §§ 1251 et seq. Congress comprehensively amended the FWPCA in 1972, resulting in what is now commonly referred to as the Clean Water Act (CWA). Acts Mar. 1, 1972, Pub.L. 92–240, 86 Stat. 47. The stated goal of the sweeping amendments was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court discussed the underlying Congressional intent of the CWA:

> This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained." H.R.Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that

> discharge of pollutants be controlled at the source." S.Rep. No. 92-414, p. 77 (1972), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3742.

474 U.S. 121, 132-33 (1985).

To meet its goals, the CWA established that no pollutant could be discharged into the "waters of the United States" unless permitted or exempted by the CWA. 33 U.S.C. § 1311(a). "[A]ny addition of any pollutant to navigable waters from any point source" is considered a discharge of a pollutant. 33 U.S.C. § 1362(12)(A). "Pollutant" is broadly defined and encompasses "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).

A significant problem with the CWA revolves around determining which waters are governed thereby. In other words, how broadly should "navigable waters" be applied?

B. Though not without limit, the phrase "navigable waters" has been interpreted broadly.

The CWA simply defines navigable waters as **"**the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA bears primary responsibility for implementing and enforcing the CWA, 33 U.S.C. § 1251(d); however, the EPA shares authority with the COE under Section 404, 33 U.S.C. § 1344. Both agencies have defined "waters of the United States" very broadly to include "[a]ll other waters such as intrastate lakes . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. § 328.3(a)(3)(i); 40 C.F.R. § 230.3(s)(3)(i).

Initially, courts required that waters be navigable in fact. Navigable in fact was first defined in *The Daniel Ball*, as waters "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." 77 U.S. 557, 563 (1870). But since enactment of the CWA, the courts have moved away from such a rigid interpretation. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). And the Supreme Court, has affirmed time and again that "the meaning of 'navigable waters' in the [CWA] is broader than the traditional understanding of that term." *Rapanos*, 547 U.S. at 731. The *Rapanos* plurality continued:

> [T]he phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Id. at 739.

The Court said that the terms – streams, oceans, rivers, and lakes – tended to suggest "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 733. The plurality in *Rapanos* carefully noted, however, that "[b]y describing waters as 'relatively permanent,' [it did] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," *id.* at 733 n.5, and that "no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." *Id.* at 733 n.6. Still, *Rapanos* makes clear that "navigable waters" "at bare minimum, [require] the ordinary presence of water." *Id.* at 734.

The Supreme Court had previously considered the breadth of the phrase "navigable waters" in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*). 531 U.S. 159 (2001). In *SWANCC*, the COE exercised jurisdiction under the CWA based primarily on the presence of migratory birds pursuant to its own regulation clarification extending coverage of the CWA to habitats for migratory birds or other endangered species. 531 U.S. at 164-65. The Court held that the COE's expansion exceeded its authority under the CWA and determined that "nonnavigable, isolated, intrastate waters," *id.* at 171, with no connection to navigable waters, were not "waters of the United States." *Rapanos*, 547 U.S. at 726, (citing *SWANCC*, 531 U.S. at 167). The isolated ponds at issue in *SWANCC* had developed over time at an abandoned sand and gravel pit and comprised "over 200 permanent and seasonal ponds" which varied in size "from less than one-tenth of an acre to several acres" in surface area, and "from several inches to several feet in depth." 191 F.3d 845, 848 (7th Cir. 1999).

The Tenth Circuit Court of Appeals dealt with a case factually similar to the immediate case in *State of Utah v. Marshall* (*Utah*). 740 F.2d 799 (10th Cir. 1984). There, the State challenged federal authority to exercise jurisdiction under the CWA over a lake contained entirely within the state's borders and which had no navigable outlets extending beyond the state's borders. *Id.* at 801. The evidence demonstrated that the lake was used recreationally and that average use by non-residents was at the rate of two percent annually. *Id.* at 803. The finding of the lower court that the lake affected interstate commerce based upon, among other things, recreational use, was upheld. *Id.* at 801, 803-04. In *Utah*, though there were other factors supporting a finding that the lake in question affected interstate commerce, the court pointed out that recreational use had been deemed sufficient in and of itself in other cases. *Id.* at 804 (citing

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979); and *United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979)).

C. Lake Temp is navigable as defined in the CWA Section 502(7), 33 U.S.C. § 1362(7).

In the wake of *Rapanos*, courts have no easy task in adjudicating the limits of the CWA. Chief Justice Roberts stated in his concurring opinion: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758, (citing *Grutter v. Bollinger*, 539 U.S. 306, 325, (2003), and *Marks v. United States*, 430 U.S. 188, (1977)).

Rapanos, the most recent Supreme Court case to consider "navigable waters" and "waters of the United States," discussed at length the scope of the CWA and "navigable waters." But ultimately, the decision in that case turned on when the CWA could reach wetlands. The Rapanoses owned 54 acres of land with "sometimes-saturated soil conditions," and the nearest navigable water was 11 to 20 miles away. By contrast, the case at bar is an actual lake, rather than a wetland rely. Thus, the determination of Lake Temp's status as a navigable water needn't rely on the *Rapanos* court's analysis for bringing wetlands under the jurisdiction of the CWA or the proximity of other navigable waters.

The instant case is also vastly different from *SWANCC*. Lake Temp does support migratory bird populations, but that is where the similarity of the two cases ends. Lake Temp is a natural body of water, whereas the pits that turned into ponds in *SWANCC* were man-made. And Lake Temp is considerably larger at several square miles than any of the ponds in *SWANCC*. Lake Temp's relative permanence – present year-round approximately 80 percent of the time – fits precisely within the *Rapanos* plurality's definition of waters. Most importantly, Lake Temp

is used recreationally by people, including many from out-of-state. For more than one hundred years, hunters have used the lake and surrounding area to hunt and have traversed the lake in small watercraft. The evidence of canoes and row boats being dragged from the highway to lake demonstrates that the use must be on-going and regular. All of these factors together dictate a different result than *SWANCC*. In fact, these factors together compel a conclusion in line with that of the Tenth Circuit in *Utah.* At about 25 percent, the interstate recreational use of Lake Temp is considerably greater than the interstate recreational use in *Utah*.

IV. DOES THE COE HAVE JURISDICTION UNDER CWA SECTION 404, 33 U.S.C. § 1344, RATHER THAN THE EPA UNDER CWA SECTION 402, 33 U.S.C. § 1342, TO ISSUE A PERMIT TO THE DOD FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP?

A. The CWA gives authority to the COE for discharges of fill or dredged material.

The CWA provides a framework for awarding permits to allow activities that would otherwise be considered illegal discharges of pollutant. 33 U.S.C. § 1311. The Section 402 National Pollutant Discharge Elimination System administered by the EPA applies to discharges of pollutants from point sources. *Id.* at § 1342. Activities involving the discharge of fill or dredged material, however, are permitted by Section 404 administered by the COE. *Id.* at § 1344. The EPA and the COE jointly define fill material as "material place in waters of the United States where the material has the effect of . . . changing the bottom elevation of any portion of a water of the United States . . . [but] does not include trash or garbage." 33 C.F.R. Part 323.2; 40 C.F.R. Part 232.2.

The EPA does play a role in the Section 404 permitting process, though. First, the EPA establishes guidelines for the COE to consider in administering the program. *Id.* at § 1344(b)(1). Second, the EPA retains the discretionary authority to veto a permit issued by the COE if it finds

that the proposed discharge will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas." *Id.* at § 1344(c).

B. The Supreme Court's holding in *Couer* that the COE alone can issue permits for discharge involving fill is controlling.

In *Coeur*, the Supreme Court was faced with the same question presented here: whether the discharge of slurry requires a permit from the EPA under Section 402 of the CWA, 33 U.S.C. § 1342, or from the COE under Section 404 of the CWA, 33 U.S.C. § 1344. 129 S.Ct. 2458, 2463. Section 404(a) says that the COE shall have the authority to "issue permits . . . for the discharge of . . . fill material." 33 U.S.C. § 1344(a). Section 402 grants the EPA the power to issue permits for the discharge of pollutants but specifically excludes discharges covered by Section 404. 33 U.S.C. § 1342(a). Coeur Alaska proposed to discharge slurry from mining operations into a lake which would have the effect of raising the lakebed 50 feet and expanding the surface area by about 37 acres. *Coeur*, 129 S.Ct. at 2464. The Court found that the agencies' implementing regulations and practices concerning the processing of permits for discharges of fill were neither "plainly erroneous [n]or inconsistent with the regulation" and thus upheld them. *Id.* at 2468. Significantly, in *Couer*, the EPA deferred to the COE and did not veto the Section 404 permit even though it did not agree that the proposed discharge was the "environmentally preferable" solution. *Id.* at 2465.

Here, we have an identical proposal from the DOD to discharge slurry – both a pollutant and fill material – into a lake, which will have the effect of elevating and changing the lakebed. There, the Court found that the nature of the material as fill trumped the nature of the material as a pollutant under the CWA. Thus, COE was the proper agency to issue any permit. Because the result here of the discharge of slurry into Lake Temp by the DOD will have the effect of raising the lakebed, the slurry is fill irrespective of its ingredients, and only the COE has the authority

under the COE to issue a permit. And here, the unknown alternative might be worse – just like the alternative in *Couer*.

V. DID EITHER THE OMB'S PARTICIPATION IN RESOLVING THE DISPUTE BETWEEN THE COE AND THE EPA OVER CWA JURISDICTION, OR THE EPA'S DECISION NOT TO VETO THE COE'S SECTION 404 PERMIT ISSUED UNDER 33 U.S.C. § 1344, VIOLATE THE CWA?

A. Neither OMB's participation in resolving the dispute between the COE and the EPA, nor EPA's change in position, violated the CWA.

The Administrator of the EPA ("Administrator") bears the bulk of the responsibility for implementing the CWA. 33 U.S.C. § 1251(d). The Administrator must try to resolve any conflict concerning pollution control standards, and when unable to do so, must request the aid of the Director of OMB ("Director"). 43 FR 47707 at 1-602. The Director, in considering the conflict, must "seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations." *Id.* at 1-603. Thus, the Director's role is not to render a judgment and hand it down; instead, the process is collaborative and requires the Administrator's input and interpretation of the statutes and regulations at issue. If the Administrator is persuaded through the collaborative process that his position in the conflict should be changed, that decision made in his sole discretion. *City of Olmstead Falls v. U.S. E.P.A.*, 266 F. Supp. 2d 718, 723 (N.D. Ohio 2003).

When dispute resolution between executive agencies and the OMB is undertaken pursuant to EO 12,088, it is not the equivalent of the OMB administering the CWA. 43 FR 47707. The Director, at the conclusion of the dispute resolution, is not instructing the EPA what decision it should make, he is simply providing his opinion to try to help resolve the disagreement between the agencies so as to create a united front within the executive branch. This role is consistent with the President's Constitutional mandate to "take Care that the Laws be

faithfully executed." U.S. Const. art. II, § 3. Consistent with his Article II powers, the President can supervise and guide the officers of an agency in the execution of the laws. *Meyers v. United States*, 272 U.S. 52 (1926) (*overruled* based Sarbanes-Oxley Act's dual for-cause limitations on removal of members).

In a joint memorandum the OMB and Council for Environmental Quality (CEQ) encouraged agencies involved in environmental issues to develop and engage in Environmental Conflict Resolution processes. http://www.ecr.gov/pdf/OMB_CEQ_Joint_Statement.pdf. One of the main goals identified by the OMB and the CEQ in the memorandum was to create better outcomes by limiting "protracted and costly litigation…; unnecessarily lengthy planning processes; costly delays in implementing environmental protection measures…; and foregone investments when decisions are not timely." http://www.ecr.gov/Resources/FederalECRPolicy/ECRSurveyFindings.aspx. By establishing the intent to encourage conflict resolution, the OMB did not violate the CWA by simply acting as a mediator as set out in EO 12,088 and the OMB/CEQ Joint Memorandum.

New Union cites *Environmental Defense Fund v. Thomas* for the proposition that OMB's "directive" to the EPA not to veto the permit and the EPA's agreement are "incompatible with the will of Congress and . . . [un]sustainable as a valid exercise of the President's Article II powers." 627 F. Supp. 566 (D.D.C. 1986). But this case is distinguishable because *Environmental Defense Fund* dealt with the OMB's authority under an executive order for regulatory review, and the holding merely established that the OMB could not delay review of an agency's proposed regulations beyond the statutory deadline.

In the present case, the EPA and the COE disagreed about the type of permit that would be required for the DOD's proposal. As required by EO 12,088, the Administrator sought

assistance from the OMB to resolve the dispute and after both the COE and EPA sent briefing papers and attended a meeting with the OMB an agreement was reached. There is no evidence that the Director told the Administrator what to do. Rather, the OMB, consistent with its role in aiding the President to carry out his constitutional mandate to faithfully execute the laws of the United States, worked with both the COE and the EPA to resolve an inter-agency dispute. As a result of the collaboration, the EPA took no further action and the Administrator decided not veto the 404 permit issued. It is common for positions to change in a dispute resolution process; otherwise, the collaboration wouldn't bring about a resolution. Therefore, the OMB did not overstep its boundaries in helping to settle the dispute between the OMB and the EPA.

B. EPA's decision not to exercise its veto authority is discretionary and not subject to judicial review.

Congress specifically authorized the Administrator with the ability to veto COE decisions to issue Section 404 permits of the CWA. *Olmstead Falls*, 266 F. Supp. 2d at 723. However, there is nothing mandatory on the face of the statute which requires the Administrator to exercise this veto authority. *Id.* at 723. Therefore, the Administrator's power to veto under Section 404(c) is discretionary. *Id.* at 723. Discretionary actions by agencies are normally not subject to judicial review, with very limited exceptions such as when the decision is arbitrary or capricious. 5 U.S.C. § 701(a)(2) and § 706(2)(A).

Precedent has established that an agency's interpretation of the statutes it is charged with enforcing is entitled to deference, as long as, the interpretation is reasonable and does not in conflict with the expressed intent of Congress. *Riverside Bayview Homes*, 474 U.S. at 131. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established the framework for inquiring into an agency's interpretation of a statute which it administers. 467 U.S. 837 (1984). The Court reasoned that if the statute is not ambiguous, then any interpretation

which is inconsistent with the plain language of the statute must be rejected. *Id.* at 842-43. If the court finds the statute ambiguous, then the court must defer to the agency's reasonable interpretation. *Id.* at 842-43. The *Chevron* court determined such a framework is required because Congress delegates authority to agencies, and not the courts, based on their expertise. *Id.* at 843-44. Here, Congress' intent is clear, the CWA unambiguously provides that the EPA may veto a Section 404 permit "whenever [it] determines ... that the discharge ... will have an unacceptable adverse effect...." *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers,* 515 F. Supp. 2d 1, 8 (D.D.C. 2007). If the EPA has not abused its discretion then the decision not to veto will be safe from judicial review.

Here, through the collaborative process, the EPA decided to change its mind on exercising its veto authority. This is an action that was entirely within the discretion of the Administrator and there are no facts to establish that he abused his discretion in any way.

C. Even if EPA decision not to veto is reviewable, the standard is arbitrary or capricious, which is not met here. 5 U.S.C. § 706(2)(A).

In the alternative, if this Court finds that the Administrator's decision was not discretionary and is subject to judicial review, the role of this Court is only to ensure that the EPA has adequately considered and disclosed the "environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87 (1983). This standard of review is a very narrow one and normally the court is not authorized to substitute its judgment for that of the agency. *Citizens to Pres. Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). In the present case, the EPA's decision not to veto the COE's permit is not arbitrary nor capricious for two reasons: (1) regardless of the OMB's participation, the EPA's decision is consistent with *Coeur* and (2) the President has all the

executive power of the United States and he is obligated to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §1, cl. 1.

First, in issuing Section 404 permits, the COE has specific guidelines written by the EPA regarding the environmental consequences of the proposed discharge which the COE must consider for each permit it issues. *Coeur*, 129 S.Ct. at 2464. After the COE has decided to issue a permit, the Administrator has the ability to veto if the guidelines are not met. *Id.* at 2464. In *Coeur*, the Court concluded that even though the EPA did not agree with the COE about the "environmentally preferable" way to dispose of the discharge, in declining to exercise its veto, the EPA deferred its judgment to the COE. *Id.* at 2465. In the present case, consistent with Coeur, the EPA decided not to veto the COE permit and to defer the judgment of the environmental consequences to the COE. Perhaps the EPA did not agree with COE about the treatment of the discharge; however, just as in *Coeur*, the EPA decided to let the COE use their best judgment in making sure the permitted action complied with the guidelines established in Section 404(b). In *Coeur*, the discharge was likely to destroy a population of fish, *id.* at 2465, yet the EPA still did not did not exercise their authority to veto the permit. Here, there is no similar concrete projected destruction which further exemplifies why it is not unreasonable that the EPA did not veto the permit.

Second, the President has all the executive power of the United States and he is obligated to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §1, cl. 1. Additionally, the President also has the duty to ensure that all discretionary decisions made within the executive branch are in line with the Constitution and consistent throughout the Executive Branch as a whole. *Meyers, supra*. The OMB's participation in the EPA's decision did not violate the CWA because OMB performed the exact job it was delegated by the President in EO 12,088.

CONCLUSION

The United States respectfully requests this court to affirm the District Court's order for summary judgment because:

1. New Union has not presented a "concrete and particularized" injury that is "actual or imminent" to itself or its citizens and therefore it cannot obtain standing based either on quasi-sovereign interests or in its *parens patriae* capacity.

2. Significant out-of-state recreational use of Lake Temp renders it navigable because it affects interstate commerce.

3. Because the slurry to be discharged by the DOD will raise the lakebed, it meets the definition of fill, which only the COE can permit under the CWA.

4. The OMB, acting pursuant to Executive Order 12,088, is authorized to resolve disputes between the EPA and the COE and the OMB's participation does not violate the CWA because the EPA retains its statutorily delegated discretion.

Dated: November 29, 2011 Respectfully submitted,