Team No. 50

C.A. No. 11-1245

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,
Petitioner – Appellant – Cross-Appellee,

v.

UNITED STATES,
Respondent – Appellee – Cross-Appellant ,

v.

STATE OF PROGRESS,
Intervenor – Appellee – Cross-Appellant.

On Appeal From a Judgment of the United States District Court
For the District of New Union
Civ. No. 148-2011, Dated June 2, 2011

BRIEF OF PETITIONER – APPELLANT – CROSS-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Other Authorities

JURISDICTIONAL STATEMENT

I. Jurisdiction Below

The district court had jurisdiction pursuant to 28 U.S.C. § 1331(2006) and Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006). The State of New Union (New Union) sought review of a decision by the U.S. Army Corps of Engineers (COE) to issue a Clean Water Act (CWA) Section 404 permit, 33 U.S.C. § 1344, to the U.S. Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp.

II. Jurisdiction on Appeal

On June 2, 2011, the district court granted United States motion for summary judgment, partially granted the State of Progress' (Progress) motion for summary judgment for its CWA claims, and dismissed New Union's suit. Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether 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. §§ 1311(a), 1344(a), 1362(7).

III. Whether COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the 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.

STATEMENT OF THE CASE

New Union filed suit in the United States District Court for the District of New Union seeking a ruling that a permit issued by COE to DOD to discharge a slurry of spent munitions into Lake Temp is invalid. COE was acting under authority granted it by Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. After filing of the suit, Progress obtained status as an intervener in accordance with Rule 24 of the Federal Rules of Civil Procedure.

On June 2, 2011, the District Court rendered its decision granting United States' motion for summary judgment, partially granting Progress's motion for summary judgment on its CWA claims, and dismissing New Union's claim for lack of standing. New Union and Progress both filed appeals with the United States Court of Appeals for the Twelfth Circuit, which has granted certiorari to review the issues raised.

STATEMENT OF THE FACTS

Lake Temp is located entirely within a military reservation in Progress. (R. at 3). During the rainy season, Lake Temp is up to three miles wide and nine miles long. (R. at 4). Surface water flows into Lake Temp from surrounding mountains located primarily in Progress, with a small portion located in New Union. (R. at 4). Although there is no outflow from the lake, the Imhoff Aquifer is located beneath it with primarily unconsolidated alluvial fill between the water bodies, thus allowing the water in the lake to percolate down into the aquifer. (R. at 4, 5). Five percent of the Aquifer is located within New Union. (R. at 4).

The Lake is known to be used by migratory waterfowl, and thousands of duck hunters, many being from out of state. (R. at 4). The lake is also used for recreational purposes, evidenced by visible trails that show signs of rowboats and canoes being drug to the lake from the adjacent state highway. (R. at 4). Even though DOD has owned the reservation since 1952

and is aware of the use of Lake Temp for recreation, DOD has taken no measures beyond posting signs to restrict public entry. (R. at 4).

DOD plans to construct a facility next to Lake Temp to gather a wide variety of spent munitions and prepare them for discharge into the lake. (R. at 4). The munitions will include liquid, semi-solid and granular contents, which contain many chemicals on the list of hazardous substances in Section 311 of the CWA. (R. at 4). These contents will also have to be mixed with more chemicals to ensure they do not explode. (R. at 4). Ultimately, solid munitions, mostly metals, will be ground and pulverized, and combined with the other contents and water, forming a slurry. (R. at 4). DOD proposes to spray this slurry onto portions of the Lake that are dry, but will continue until eventually the entire lakebed has been covered, raising it several feet. (R. at 4). DOD estimates that when the project is finished, the slurry will raise the lake's top water elevation approximately six feet and increase the size of its surface area by two square miles. (R. at 4).

COE issued a CWA Section 404 permit to DOD, approving its plans to discharge the slurry of spent munitions into Lake Temp. New Union contests the validity of the 404 permit claiming the discharge of pollutants must be regulated by the Environmental Protection Agency (EPA) pursuant to the CWA Section 402, 33 U.S.C. § 1342 (2006), rather than by the COE under section 404. New Union also claims that the Office of Management and Budget (OMB) violated the CWA when it resolved the dispute between COE and EPA as to what agency should issue the permit. OMB resolved the dispute between the COE and EPA concerning who would issue a permit for the discharge of a slurry by the DOD. (R. at 10). OMB found that COE has jurisdiction to issue a CWA Section 404 permit for the discharge of slurry by the DOD. (R. at 10). EPA then took no action after this decision. (R. at 10).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing New Union's claim that the CWA Section 404 permit issued by COE is invalid. The district court's decision was improper because New Union has standing. New Union will suffer injury in fact, demonstrates a causal connection between New Union's injury and DOD's discharge of slurry, and the injury will be redressed by the relief requested. Lake Temp is within the CWA and its regulations because it is a navigable water. It supports the migration of birds, provides opportunity for recreation for interstate persons, and is connected to an interstate aquifer.

The district court erred in its decision that COE has jurisdiction to issue a section 404 permit. This holding is improper because COE unlawfully decided that a slurry of spent munitions is a "fill material." All pollutants that do not constitute "fill material" are appropriately regulated by EPA under CWA Section 402. A slurry of spent munitions is not fill material because it is actually "trash or garbage," an exception to the COE and EPA joint regulation defining "fill material." Even though the slurry would raise the bottom elevation of Lake Temp, the joint regulations did not expand the definition of "fill material" to encompass a hazardous waste. Further, even if this Court finds that a slurry of spent munitions constitutes "fill material," this hazardous pollutant is still subject to EPA performance standards under section 402 of the CWA. The internal memorandum interpreting the conflict between CWA sections 402 and 404 did not sanction the use of a 404 permit to allow hazardous pollutants to be classified as "fill material" in order to avoid application of strict performance standards.

The district court erred in finding that the OMB did not violate the CWA when it resolved a dispute between COE and EPA. The OMB did not seek and give deference to the EPA as mandated by executive order. Moreover, EPA violated the CWA when it did not use its

veto powers authorized by the CWA to veto the permit by the COE. EPA's inaction is arbitrary and capricious because they did not give reasoning for not vetoing COE permit.

STANDARD OF REVIEW

Review of a district court's decision regarding agency action is de novo. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) cert. granted, 528 U.S. 926 (1999). Since the CWA does not state the standard for reviewing EPA or COE decisions, the court should look to the Administrative Procedure Act (APA). *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983). Under Section 706(2)(A) of the APA, a court may set aside an agency's decision only if that decision is "arbitrary, capricious, a abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) (2006). While an agency is normally entitled deference in its construction of its enabling statute, this deference does not extend to the "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

ARGUMENT

I. NEW UNION HAS STANDING IN ITS SOVEREIGN CAPACITY AS OWNER AND AS A REGULATOR OF THE GROUNDWATER IN THE STATE AND IN ITS *PARENS PATRIAE* CAPACITY AS PROTECTOR OF ITS CITIZENS WHO HAVE INTEREST IN THE GROUND WATER IN THE STATE.

The district court erred when it granted the United States' motion for summary judgment, holding that New Union does not have standing to seek judicial review of COE's decision to issue a CWA Section 404 permit to DOD. New Union has standing because it has suffered an injury in fact, there is a causal connection between the injury and DOD's discharge, and this injury will be redressed by the relief requested. The U.S. Supreme Court has adopted a three part test to determine whether a party has standing to seek judicial review of an agency action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Court stated that to have standing a

party must (1) "have suffered an injury in fact," (2) show a causal connection "between the injury and the conduct complained of," and (3) show that it is likely "that the injury will be redressed by a favorable decision." *Id.*

Recently, the Court carved out an exception to the injury in fact requirement. *Massachusetts v. EPA*, 549 U.S. 497, 518-21 (2007). The Court held in *Massachusetts v. EPA* that a party has suffered an injury in fact '"when they have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issue upon which the court so largely depends for illumination."' *Id.* at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court recognized that states have a ceded right to protect themselves from federal impact because of their vulnerability and dependency on the federal government. *Id.* at 519. Moreover, states are the parent of the father land, and therefore, they must be given the right to protect that land. *Id.* If the state owns and controls territory affected by the agency action, it has sovereign interests. *Id.* at 519–20. Because of these unique concerns, states are given special solicitude in standing analysis. *Id.* at 520.

Further, in *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 182–84 (2000), the U.S. Supreme Court expressed a special concern for water and determined that parties only need to show the agency's actions cause the plaintiff a reasonable fear of injury. *Id.* This relaxed requirement comes from the Court's realization that water is a critical limited resource and individuals must be allowed to protect it. *Id.* The Court has also recognized that underground water is part of larger integrated system of water in which one individual's use can directly affect another's use. *Sporhase v. Nebraska*, 458 U.S. 941, 949 (1982). In *Sporhase*, the Court understood that states have a significant interest in conserving and preserving this diminishing resource. *Id.* at 953–54. Moreover, the U.S. Supreme Court held plaintiffs adequately allege

injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." *Lujan*, 504 U.S., at 562–563.

The United States contends *Massachusetts v. EPA* does not apply because four of the Justices dissented from the majority's view. This decision is binding law, however, and courts must adhere to its reasoning. New Union concedes this case should be applied in limited context where a state is a party and its standing is being contested. That exact circumstance exists here. New Union has been injured in its sovereign capacity with regard to the part of the Imhoff Aquifer located within New Union and its *parens partriae* capacity with regard to its citizens possible injury by the contamination of the aquifer. New Union is vested with the responsibility to protect its underground water.

A. New Union will suffer an injury in fact.

The United States argues New Union cannot sufficiently establish that the discharge authorized by the EPA will cause injury to the state or its citizens to support standing. Although, in *Massachusetts v. EP*A, even though risk of injury to Massachusetts was remote, the U.S. Supreme Court still found an injury through this imposed risk. 549 U.S. at 521–23. The Court focused on the extent of the harm. *Id.* Other courts have followed suit, as the Fifth Circuit has held that a non-profit group may object to the construction of an airport on wetlands. *Save Ourselves, Inc. v. U.S. Army Corps of Eng'rs*, 971 F.2d 1155 (5th Cir. 1992). In *Save Ourselves*, the government contested the group's standing, but the court found that harm to aesthetic, environmental, or recreation interest is sufficient to confer standing; the injuries don't need to be

large and "an identifiable trifle will suffice." *Id.* at 1161. The court also stated that the plaintiffs did not have to show with scientific certainty that their harm was caused by defendant's action alone. *Id*

New Union is in a situation analogous to *Massachusetts v. EPA*. Although, the United States believes the threat is seemingly minute, when closely examined it becomes clear that the implications of COE's action could be catastrophic to New Union's underground water. The United States also argues that the occurrence, timing and severity of New Union's harm is completely speculative. While New Union cannot show with exact certainty that harm will occur, this does not prevent it from satisfying *Lujan*. The land between the lake bed and the aquifer is primarily unconsolidated alluvial fill. Contaminated water from the permitted activity by DOD will enter the Imhoff Aquifer, which will affect New Union's underground water. Similar to *Save Ourselves*, simply because New Union cannot show with scientific certainty the extent or timing of this harm, this does not prohibit it from having an injury in fact.

In addition, New Union has *parens patriae* standing as a representative of its citizens. Dale Bompers owns and resides on a ranch in New Union above the Imhoff Aquifer and the value of his ranch will be diminished if the Imhoff Aquifer is contaminated by the permitted discharge. (R. at 6). New Union is an arid state, and the availability of water is key to the value of such ranches. No permits have yet been issued with respect to the Imhoff Aquifer. Yet, because Bompers lives above the aquifer and owners of land above the ground water can withdraw from the Aquifer, injury due to the contamination would occur. In addition, New Union's citizens continually use Lake Temp to hunt ducks and for other recreational purposes. Therefore, its citizens will suffer and injury in fact because DOD's discharge will lessen these aesthetic and recreational values.

B. New Union demonstrates a causal connection.

A party must also prove causation to be awarded standing. In order to satisfy this prong, the injury has to be "fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. In *Massachusetts v. EPA*, the U.S. Supreme Court concluded that even if failure to regulate contributes insignificantly to the injuries, there is still causation because regulation always proceeds in small steps. 549 U.S. at 523–25. Incremental changes do not bar causation. When New Union finds the negative effects the pollution is having on the Imhoff Aquifer this will be directly linked to the DOD's discharge of slurry spent munitions into Lake Temp. Therefore, the injury New Union is facing is caused by the United States' action and the second prong is satisfied.

C. A favorable decision by the Court will redress the injury.

The final prong under the *Lujan* test is redressability, which means it must "be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560. New Union claims any permit for the discharge must be issued by the Administrator of the EPA in accordance with the Clean Water Act. First, New Union believes if the EPA issued the permit instead of the Corps, EPA, as an unbiased party would not issue the permit because of the injury it would cause to New Union. In addition, the procedures the DOD must comply with under the CWA Section 402 permit differ from the processes under CWA Section 404. Under section 404 no performance standards apply allowing less oversight of the DOD discharge and a greater risk of contamination. A performance standard is;

> [A] standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where

practicable, a standard permitting no discharge of pollutants.

33 U.S.C. § 1316 (2006). These performance standards create a heightened pollution control standard for the discharge by the DOD under a CWA Section 402 permit. Performance standards would ensure New Union would bear little to no injury

Moreover, In *Massachusetts v. EPA* this Court stated that even if an agency can't reverse global warming, courts are not without jurisdiction to decide whether EPA has authority over its action. Massachusetts could not conclusively show that by regulating emissions from new vehicles would prevent rising sea levels and protect the Massachusetts coastline. Yet, the Court still found Massachusetts satisfied the redressability prong. Similarly, New Union cannot conclusively show a 402 permit issued by the EPA will prevent New Union's underground water from being polluted. However, water is part of an integral system in which pollution in a part of the system will undoubtedly affect another part of the system. Therefore, even if the permits won't ultimately reverse the effect the pollution will have on New Union's underground water, New Union still satisfies the redressability prong.

New Union, as a state, has displayed an injury in fact. The pollution to its underground water system, specifically the Imhoff Aquifer, has major implications. This pollution will be caused by the Army's pollution of the Lake Temp which is connected the Imhoff Aquifer. Finally, this injury will be redressed by EPA issuing a section 402 permit, rather than the COE issuing a section 404 permit. The relief New Union is seeking will be redressed through the COE not issuing a permit and the DOD complying with performance standards in a section 402 permit. Therefore, New Union has standing in its sovereign capacity as owner and as a regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have interest in the ground water in the state.

II. COE HAS JURISDICTION TO ISSUE A PERMIT UNDER CWA SECTION 404 BECAUSE LAKE TEMP IS A NAVIGABLE WATER.

Congress enacted the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *Id.* § 1251(b) (2006). The CWA is authorized to regulate "the waters of the United States, including the territorial seas." *Id.* at § 1362(7). The U.S. Supreme Court has stated that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features." *Rapanos v. United States*, 547 U.S. 715, 725 (2006).

A. Lake Temp satisfies the Migratory Bird Rule and provides opportunity for interstate recreation.

A COE Final Rule for Regulatory Programs, clarifies that "waters of the United States" includes waters that "would be used as habitat by birds protected by Migratory Bird Treaties . . . or would be used as habitat by other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41,206 (Nov. 13, 1986). The Supreme Court recognized this Migratory Bird Rule in *Rapanos*, explaining that the broad interpretations of waters of the United States include habitats of migratory birds. 547 U.S. at 725. Further, the Court recognized that the determination of the meaning "navigable water" is a case by case analysis, which can lend too many different outcomes. *Id.* at 718. Moreover, both the Ninth and Seven Circuit have recognized the importance of protecting migratory birds by stating, '"[t]hroughout North America, millions of

people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds."' *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395-96 (9th Cir. 1995) (quoting *Hoffman Homes v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993)).

B. Lake Temp is connected to interstate water bodies.

The State of Progress relies on *Solid Water Auth. of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), to support its contention that Lake Temp is not a navigable water. In *Rapanos*, however, the Court recognized that "[e]ven after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions" of waters of the United States. 547 U.S. at 726. Despite *SWANCC* striking down certain portions of COE's interpretation of navigable waters, COE has still successfully defended such theories of navigability in the courts. *Id.* at 728. A lower court distinguished *SWANCC* on the ground that "a molecule of water residing in one of these pits or ponds [in *SWANCC*] could not mix with molecules from other bodies of water." *United States v. Rueth Dev. Co.*, 189 F.Supp.2d 874, 877–78 (N.D.Ind. 2002). Whereas, in the case before it, "water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies," and "[a] drop of rainwater landing in the Site is certain to intermingle with water from the [nearby river]." *Id.* Further, the Supreme Court recognized, "[t]he Corps' enforcement practices vary somewhat from district to district because the definitions used to make jurisdictional determinations are deliberately left vague. *Id.* at 727 (internal citations omitted).

Further, the Ninth Circuit found that a pond was a navigable water because underneath the pond was an unconfined aquifer. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993,

997–98 (9th Cir. 2007). The Tenth Circuit found that discharge of dredged or fill material into a lake located entirely in one state could be regulated by Congress because of the substantial economic effect it had on interstate commerce. *State of Utah Div. of Parks & Recreation v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984). Specifically, the lake provided recreational opportunities, which encouraged interstate movement of travelers, and therefore, the water was within the meaning of water of the United States. *Id.*

Lake Temp is a navigable water pursuant to the CWA. Unlike *SWANCC*, where the molecules from the separate water bodies would not connect, here the water in Lake Temp is certain to intermingle with water in the Imhoff Aquifer. In addition, during migration season, ducks use the Lake as a stopover in their migration from the Arctic to southern climes and back. Hundreds, even thousands of duck hunters have used Lake Temp and about of quarter of them have been from out of state. There are clearly defined visible trails leading from the state highway, which intersects with several roads that lead into New Union, to the lake. These trails show signs of rowboats and canoes being drug between the highway and lake. The DOD has taken no measures beyond a few warning signs to restrict public entry and are aware that people continue to use the lake for hunting and bird watching. Therefore, due to the effects the lake has on the interstate commerce through its recreational opportunities and migratory birds, Lake Temp fits well within the definition of navigable waters, and can be regulated by the CWA.

III. COE DOES NOT HAVE JURISDICTION TO ISSUE A 404 PERMIT FOR THE DISCHARGE OF SLURRY INTO LAKE TEMP, AS THIS JURISDICTION IS VESTED IN EPA UNDER CWA SECTION 402.

The district court improperly held that a discharge of a slurry of spent munitions into Lake Temp is regulated by COE under section 404 of the CWA, rather than by the EPA under section 402. The COE does not have jurisdiction because a slurry of spent munitions is not a

"fill material," and even if this Court finds that it constitutes "fill material," then it is still subject to EPA performance standards. In furtherance of Congress' goal in enacting the CWA to protect our nation's waters, section 301 prohibits "the discharge of any pollutant by any person," unless the discharge complies with a permitting program of the CWA. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). A "pollutant" is defined in the CWA 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).

Section 402 of the CWA regulates the discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES) permit program. 33 U.S.C. 1342(a). Specifically, section 402 gives EPA authority "to issue a permit for the discharge of any pollutant, or a combination of pollutants" into navigable waters. *Id.* While a section 402 NPDES permit is needed for the discharge of "any pollutant," an exception exists for discharges of "fill material" regulated under section 404 of the CWA. *Id.* Section 404(a) gives COE authority to issue permits "for the discharge of dredged or fill material into the navigable waters," with oversight by EPA. 33 U.S.C. 1344(a), (b). Thus, the CWA established two major permitting programs for the discharge of pollutants into navigable waters, but it did not define "fill material" to elucidate when a section 404 or section 402 permit was necessary.

Prior to 2002, COE and EPA had conflicting definitions of "fill material," which caused confusion in the courts regarding the agencies' division of responsibility. *See, e.g., Res. Investments, Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1168–69 (9th Cir. 1998); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 924–25. As a result, on April 20, 2000, the

agencies proposed revisions to their respective regulations in order to adopt a uniform definition of "fill material." 65 Fed. Reg. 21,292. On May 9, 2002, COE and EPA published their joint final rule, defining "fill material" as "material placed in waters of the United States where the material has the effect of" either "replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water." 67 Fed. Reg. 31,129, 31,130 (codified at 33 C.F.R. 323.2 and 40 C.F.R. 232.2). The new rule also incorporates examples of "fill material" to "include, but are not limited to: rock, 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." *Id.* Finally, the joint definition "does not include trash or garbage." *Id.*

The U.S. Supreme Court has recently made clear that if any material meets this joint agency definition of "fill material," then COE, and not EPA, has authority to regulate its discharge under section 404 of the CWA. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2468 (2009). In *Coeur Alaska*, the U.S. Supreme Court held that COE lawfully issued a permit for the discharge of slurry from "froth-flotation" gold mining operations into a lake in southeast Alaska. *Id.* at 2469. The slurry was comprised of 30 percent crushed rock and 70 percent water, resembling wet sand. *Id.* at 2464. The Court agreed with COE that the slurry met the definition of "fill material" under the 2002 joint final rule. *Id.* at 2468. Further, the Court rejected the environmental organizations' argument that COE does not have authority to issue permits under section 404 if the fill material is subject to an EPA new source performance standard. *Id.* at 2474. Writing for the Court, Justice Kennedy stated this issue was "addressed and resolved in a reasonable and coherent way" in an EPA internal memorandum written by Diane Regas in May 2004. *Id.* at 2473. Justice Kennedy deferred to the Regas

Memorandum's finding that EPA performance standards do not apply to the discharge of a slurry of crushed rock into the lake. *Id.* at 2474.

This case is distinguished from *Coeur Alaska* because unlike a slurry of crushed rock, a slurry of spent munitions is not "fill material." COE unlawfully determined that the slurry of spent munitions was regulated under CWA Section 404. Further, even if this Court finds that a slurry of spent munitions constitutes "fill material," it is still subject to EPA performance standards because the EPA Regas Memorandum did not sanction COE regulating toxic pollutants.

A. COE unlawfully determined that a slurry of spent munitions constitutes "fill material" within the joint agency definition.

The question presented to this Court is whether COE has jurisdiction to issue a permit under CWA Section 404 for the discharge of a slurry of spent munitions into Lake Temp. The United States and State of Progress will most likely argue that the U.S. Supreme Court's holding in *Coeur Alaska* is controlling on this issue because both cases contain the discharge of slurry that has the effect of raising the bottom elevation of a lake. While this would seemingly satisfy the agencies' joint definition of "fill material," there are crucial distinguishing facts between *Coeur Alaska* and this case. These distinctions justify why COE had jurisdiction over the discharge of slurry in *Coeur Alaska*, but does not have jurisdiction here. The DOD's discharge of a slurry of spent munitions into Lake Temp is not subject to a CWA Section 404 permit for two reasons. First, a slurry of spent munitions constitutes "trash or garbage" under the agencies' joint regulations. Second, even though it will raise the bottom elevation of Lake Temp, the joint regulations did not expand the definition of "fill material" to include toxic wastes.

i. <u>A slurry of spent munitions is not "fill material" because it constitutes "trash or garbage" under the COE and EPA joint regulations.</u>

A discharge of a slurry of spent munitions into Lake Temp is not regulated under section

404 of the CWA by COE because it meets the definition of "trash or garbage" within the agencies' joint regulations. In the 2002 joint final rule, COE and EPA made clear that "a party may not obtain a section 404 permit to dispose of trash or garbage in regulated waters." 67 Fed. Reg. 31,129, 31,134 (codified at 33 C.F.R. 323.2(e)(3) and 40 C.F.R. 232.2). A general rule in questions of regulatory interpretation is that "a regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunter Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692 (9th Cir. 2004); *Diamond Roofing Co., Inc v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). The *Merriam-Webster Dictionary* defines "trash" as "something worth little or nothing," and "garbage" as "discarded or useless material." MERRIAM – WEBSTER DICTIONARY, 299, 762 (11th. 2004).

The agencies recognize that trash and garbage are not suitably used as fill material because their discharge "results in adverse environmental impacts to waters of the U.S." 67 Fed. Reg. at 31,134. The 2002 joint final rule provides that "trash or garbage" includes such things as "debris, junk cars, used tires, discarded kitchen appliances, or similar materials." *Id.* Since trash and garbage are not appropriately used as "fill material," their discharge is properly subject to CWA Section 402. 33 U.S.C. § 1342(a)(1). The agencies affirm that trash and garbage are properly regulated under section 402 because they are clearly "pollutants." *Id.*; 33 U.S.C. § 1362(6) ("The term 'pollutant' means . . . solid waste . . . garbage . . . .").

A slurry of spent munitions falls within the plain meaning definitions of "trash" and "garbage." These are munitions that have been expended and discarded by DOD because they have performed their purpose and have little value spent. Similar to used tires, cars, or kitchen appliances that have all been exploited and considered junk, spent munitions are no longer useful for military operations. Unlike the slurry of crushed rock and water in *Coeur Alaska*, DOD plans

to discharge into Lake Temp a slurry of spent munitions that includes "a wide variety of munitions" that consist of hazardous chemicals, including more chemicals added to keep the munitions from exploding. R. at 4. Further, in conformance with the 2002 joint final rule, the slurry of spent munitions is not "fill material" because its hazardous chemicals will cause environmental harm to fish, wildlife, and vegetation, in and around Lake Temp. Therefore, EPA is the appropriate agency to regulate this pollutant under CWA Section 402.

ii. A slurry of spent munitions is not "fill material" because the COE and EPA joint regulations did not expand the definition of "fill material" to include hazardous wastes.

Even if this Court finds that a slurry of spent munitions is not "trash or garbage," the simple fact that it will raise the bottom elevation of Lake Temp does not qualify it as "fill material." Prior to 2002, COE defined "fill material" with a purpose-based test; that is "any material for the primary purpose of . . . changing the bottom elevation of a waterbody." *Res. Investments*, 151 F.3d at 1166 (citing 33 C.F.R. 323.3(d)(1)). The former COE regulations specifically stated that "fill material" does not include pollutants discharged into water "primarily to dispose of waste, as that activity is regulated under section 402 of the [CWA]." *Id.* In the 2002 joint final rule, the agencies changed COE's definition to an effects-based test, to conform to the EPA definition. 67 Fed. Reg. at 31,133. The new joint definition defines "fill material" as material that "has the effect of . . . changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. 323.2(e)(1); 40 C.F.R. 232.2. Accordingly, it can be interpreted that if material will have the effect of "fill," then it is subject to CWA Section 404, even if the primary purpose is to dispose of waste. *See Coeur Alaska*, 129 S.Ct. at 2469.

While it appears that the 2002 joint final rule has broadened the definition of "fill material" to encompass all waste discharges, the agencies avow that the new rule "does not

expand the types of discharges that will be covered under section 404." 67 Fed. Reg. at 31,133. COE and EPA confirm that the new rule is "generally consistent with current agency practice" and it does not open up our nation's waters "to be filled for any waste disposal purposes." *Id.* The agencies clarify that they did not opt for a categorical exclusion of all waste because some wastes, such as mining overburden, are similar to "traditional" fill material because they contain rock, soil, and earth, and are used for creating land for development. *Id.* COE and EPA codified the discharge of mining waste in their joint definition of "discharge of fill material" to make clear it is regulated under CWA Section 404. *Id.* The new joint definition of "discharge of fill material" includes:

> Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; . . . placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement of overburden, slurry, or tailings or similar mining-related materials . . . .*

33 C.F.R. 323.2(f); 40 C.F.R. 232.2 (emphasis added). Thus, the agencies state that CWA Section 404 is the appropriate permit program for regulating mining wastes as they are similar to the other construction activities already regulated by COE. 67 Fed. Reg. at 31,135.

Most notably, the agencies make clear that eliminating the exclusion of waste from the joint definition of "fill material" does not change the regulation of pollutant discharges that are traditionally subject to CWA Section 402. *Id.* at 31,135. The agencies recognized that even though some discharges, such as suspended solids, "can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants," they do not deem such pollutants to be "fill material." *Id.* By changing to the effects-based test, removing the exclusion of waste from the definition of "fill material," and including mining activities in

the definition of "discharge of fill material," the 2002 joint final rule was intended to benefit the mining industry. Sam Evans, *Voices from the Desecrated Places: A Journey to End Mountaintop "Removal Mining*, 34 Harv. Envtl. L. Rev. 521, 549-50 (2010) (discussing the changes made in the 2002 joint final rule).

A slurry of spent munitions is not "fill material" because even though it will have the effect of raising the bottom elevation of Lake Temp, it is a toxic waste that is not intended to be regulated under CWA Section 404. The U.S. Supreme Court's reasoning in *Coeur Alaska* is significantly distinguishable at this juncture. The Court pointed to the agencies' inclusion in the joint regulations of "slurry, or tailings or similar mining-related materials" to determine that the slurry of crushed mining rock was a "fill material." 129 S.Ct. at 2468. The Court also pointed to the examples of "fill material" in the regulation "includ[ing] but not limited to: rock, sand, soil, clay . . . overburden from mining," to show that the slurry clearly met the definition. *Id.* (citing 40 C.F.R. § 232.2). The Court's determination that this slurry meets the definition of "fill material" is also consistent with the agencies' purpose for eliminating the exclusion of waste from the regulations; it is similar to tradition forms of "fill."

On the contrary, a slurry of spent munitions is not mining waste and is not similar to the other forms of "fill" traditionally regulated under CWA Section 404. The slurry will not serve to construct a structure or infrastructure, create land for site-development, nor is it being used to construct a solid waste landfill. It is evident from the list of examples of "fill material" given in the joint regulation, that a slurry of spent munitions does fit within the enumerated list. Unlike the slurry consisting of rock and earth materials in *Coeur Alaska*, the slurry here is made up of discarded metals, and other liquid, semi-solid, and granular substances that include hazardous chemicals. R. at 4. Further, while DOD plans to deposit the slurry on the dry portions of the

lake, it states that the entire lakebed will be covered. R. at 4. Unless Lake Temp dries up for an ample period of time, this toxic waste will be mixed with the lake water and will be a suspended pollutant. Therefore, the 2002 joint regulations did not expand the type of discharges subject to CWA Section 404. The regulations did not subject our nation's navigable waters to become waste disposals, and thus a slurry of spent munitions is appropriately regulated by EPA under CWA Section 402.

B. Even if this Court finds that a slurry of spent munitions constitutes "fill material," it is still subject to CWA Section 306 new performance standards regulated by EPA under CWA Section 402.

The district court erred when it held that if a slurry of spent munitions is "fill material" and a "pollutant," then it is subject to a section 404 permit. Even if this Court finds that a slurry of spent munitions constitutes "fill material," the discharge of this pollutant is still subject to water quality standards regulated by EPA's NPDES program under section 402 of the CWA. The U.S. Supreme Court held in *Coeur Alaska* that when a permit is needed for the discharge of pollutants, either a section 404 or a section 402 permit is necessary, not both. 129 S.Ct. at 2474. Section 306 of the CWA mandates that any new source that discharges a pollutant is required to meet applicable performance standards. *See* 33 U.S.C. § 1316. Specifically, section 306 states that "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." *Id.*

These new source performance standards are implemented by EPA and the states through the NPDES permitting program under CWA Section 402. *Id.* at § 1342. In contrast, section 404 does not administer the NPDES program, but implements EPA guidelines. *Id.* at § 1344. It would seem simple then to find that "EPA performance standards are subject to EPA's administration and receive permits under the NPDES," not by COE under section 404. *Coeur*

Alaska, 129 S.Ct. at 2483 (Ginsburg, J. dissenting). Yet, the U.S. Supreme Court held that if a discharge qualifies as "fill material," then the section 306 new performance standards do not apply. *Id.* at 2476. The Court asserted that the CWA and the COE and EPA regulations are ambiguous as to whether section 306 applies to "fill material" under section 404. *Id.* at 2471–72. The Court resolved the issue by looking to the 2004 Regas Memorandum. *Id.* at 2473.

The Regas Memorandum states that because the slurry of crushed rock is regulated as a "fill material" under section 404, EPA's new source performance standards to do apply. *Id.* The Court gave five reasons for deferring to the Memorandum: (1) it "preserves a role for EPA's performance standard," in the discharge of water from the lake into the downstream creek; (2) it admits that this is not a case that "smuggles a discharge of EPA-regulated pollutants" by labeling them "fill material;" (3) it "preserves the Corps' authority to determine whether a discharge is in the public interest;" (4) it does not interpret the CWA to allow the discharge of toxic pollutants; and (5) it is a "sensible and rational construction that reconciles §§ 306, 402, and 404, and the regulations implementing them." *Id.*

A discharge of a slurry of spent munitions is clearly a pollutant. As stated above, the CWA's definition of "pollutant" explicitly lists "munitions." Unlike *Coeur Alaska*, the project proposed by DOD does not preserve a role for EPA to regulate this pollutant by setting water quality standards. Surface water flowing into Lake Temp does not leave except for what percolates into the Imhoff Aquifer, as there is no surface outflow. R. at 4. Under a COE section 404 permit, DOD would never be subject to the section 306 new source performance standards and would effectively be smuggling pollutants under the definition of "fill" to evade the strict water quality requirements. Further, the contents of the slurry include pollutants on the CWA Section 311 list of hazardous substances. R. at 4. Distinguishing from the slurry in *Coeur*

Alaska, many of these pollutants in the slurry of spent munitions could be toxic.

Thus, the very reasons that the U.S. Supreme Court decided that new performance standards to not apply to section 404 discharges are not satisfied here. The district court improperly found that because a slurry of spent munitions also constitutes a "fill material," that it is subject to section 404 and not the water quality standards in section 402. The 2002 joint regulations should not be interpreted to condone cheap waste disposal, polluting our nation's waters.

IV. OMB VIOLATED THE CWA WHEN IT DECIDED THAT COE HAD JURISDICTION TO ISSUE A CWA SECTION 404 PERMIT AND THAT EPA DID NOT HAVE JURISDICTION TO ISSUE A CWA SECTION 402 PERMIT, AND EPA VIOLATED THE CWA WHEN IT ACQUIESCED IN OMB'S DECISION.

The district court erred in holding that OMB did not violate the CWA when it resolved a dispute between COE and EPA over whether COE had jurisdiction to issue a permit under CWA Section 404. OMB violated the CWA because it did not act within the authority granted it by Executive Order 12,088 and by failing to carry out the purposes of the CWA. Also, EPA violated the CWA when it acquiesced in OMB's decision and failed to exercise its veto power under section 404(c) of the CWA. EPA's inaction is arbitrary and capricious because if did not given an explanation for these decision.

A. OMB violated the CWA when it resolved a dispute between COE and EPA.

OMB was called upon by the Administrator to resolve the dispute between COE and EPA in determining which agency should regulate the discharge of slurry by DOD into Lake Temp.

i. OMB violated the CWA when it resolved a dispute between COE and EPA because it did not act within the authority granted to it by Executive Order 12,088.

Pursuant to authority under Executive Order 12,088, OMB resolved the conflict between COE and EPA concerning who would issue a permit for DOD slurry discharge. Exec. Order No.

12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). The Order states in pertinent part that:

> If the Administrator [of the EPA] cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

Id. The language of the Executive Order indicates that the Director shall seek the judgment of the Administrator. *Id.* The word "shall" generally denotes a mandatory duty. *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001). Because the CWA's substantial water quality standards used to protect our nation's water are administered and enforced by EPA, and its analysis of pollution issues should control. *See Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

Here, the Administrator of EPA questioned COE's authority to administer a section 404 permit for DOD's discharge. The Administrator of EPA has knowledge and expertise beyond COE. As a result of this knowledge and expertise, the Administrator's interpretation of the CWA's statutory language should be respected by the Director of OMB. When resolving the conflict between EPA and COE, the Director should have sought and given deference to the judgment of the Administrator. OMB should have found that EPA had jurisdiction to issue a Section 402 permit. By not doing so the OMB violated the CWA.

Unlike COE, EPA will not have a conflict of interest in administering a permit for the DOD's slurry discharge. The Administrator, through the agency, has the vast technical judgment and expertise as it relates to determination of CWA permits and interpretation of statutes. No other party before the Director possessed the sheer amount of knowledge concerning application of the CWA to real world situations. Therefore, it should not be seen as a conflict of interest. OMB violated the CWA when it did not seek and give deference to the judgment and determination of the Administrator. If there is a conflict of interest, a presumption of good faith

should fall to EPA, the agency administering the bulk of the CWA. EPA has the knowledge and experience to objectively evaluate the situation and not act as an interested party.

Furthermore, the Constitution of the United States charges the President with a duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This duty ensures that all decisions made by the executive branch are faithful to the Constitution. EPA was not acting in contravention of this duty. EPA saw fit to order a Section 402 permit be used in the slurry discharge by DOD and OMB should have deferred to this decision. EPA was acting in accordance with the objective of the CWA in protecting our nation's waters against discharges of pollution. OMB violated the CWA when it did not seek the Administrators technological judgment and determination when examining which permit would control the DOD discharge.

ii. OMB violated the CWA when it resolved a dispute between COE and EPA because it failed to analyze the purpose of the CWA.

The objective 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). "Administrator of the Environmental Protection Agency to administer 33 U.S.C. §§ 1251 et. seq. Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency . . . shall administer this act." *Id.* § 1251(d).

Congress expressed intent to protect the environment on multiple fronts. *Id.* § 1251(a). Similarly, Congress expressly conveyed power to enforce the CWA to the EPA. *Id.* § 1251(d). "[A]ny court faced with a problem of statutory construction should endeavor to interpret the statute in question in light of the purposes that Congress sought to serve by its enactment." *Ram v. Blum*, 533 F. Supp. 933, 948 (S.D.N.Y. 1982). Substantial deference to an agency's interpretation of a statute is afforded when the agency administers and promulgates rules under the statute and the agency's interpretation is not unreasonable. *Johnston v. Office of Pers.*

Mgmt., LEXIS, 96-3231, at *10, (Fed. Cir. Oct. 22, 1996).

OMB was asked to resolve a dispute between the COE and the EPA at the request of the EPA Administrator. OMB was directed to seek the determination of the EPA Administrator in the situation. The clear and expressed intention of Congress in enacting the CWA was to protect multiple facets of the environment. This intent is final and unwavering. Congress chose EPA to administer the CWA and gave EPA rulemaking and adjudication authority in the statute. While OMB is not a court, the Administrator's opinion should have been given deference to EPA as it was interpreting its own statute. The EPA Administrator is additionally given authority to administer the CWA in many other sections of the CWA.

The one section where the Administrator does not have primary authority, Section 404, the Administrator still retains the power to veto a permit by COE. As the Administrator has primary administration powers over many areas of the CWA and a secondary power in the instance where the Administrator does not have primary power, the intent of Congress to allow the Administrator to administer the CWA is conclusive. OMB violated the CWA when it did not seek the Administrators technical judgment and convoluted the essence of Congressional intent.

B. EPA violated the CWA when it acquiesced in the decision of OMB that COE has jurisdiction to issue a permit for the discharge of slurry into Lake Temp by DOD.

The district court erred in finding that EPA's decision not to veto COE's issuance of a section 404 permit was not arbitrary and capricious. The Administrator retains the power of denial or restriction of a permit issued by COE. 33 U.S.C. § 1344(c). The power to deny or restrict a section 404 permit is discretionary. *City of Olmstead Falls v. EPA*, 266 F. Supp.2d 718, 723 (N.D. Ohio 2003). "But this discretion is not a roving license to ignore the statutory text." *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp.2d 121, 140 (D.D.C. 2009) (citing *Massachusetts v. EPA*, 549 U.S. at 533). A Section 404(c) veto action by

the Administrator is appropriate when she believes "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." 33 U.S.C. 1344(c).

i. EPA violated the CWA by not exercising its veto power under section 404(c) of the CWA.

EPA's acquiescence of OMB's decision violated the CWA. Both EPA and COE agree that the slurry will elevate and change the bottom elevation of Lake Temp. Both permits require navigable water before a permit will be issued. The only question is whether the slurry is fill material or hazardous pollutant. The EPA believes that a Section 402 permit best fits the situation. The instant case is distinguishable from *Coeur Alaska,* where the fill material was crushed rock, an inert material. 129 S.Ct. at 2464. The difference in the slurry materials is at the core of this issue. Spent munitions to be used in the DOD slurry are hazardous pollutants requiring a Section 402 permit. The slurry would constitute a threat to the lake and aquifer below which a section 404 permit would not regulate. The slurry of spent munitions will have an effect on water supplies, fisheries and wildlife, and recreational areas, thus necessitating a veto by EPA.

In accordance with the objectives of the CWA, EPA must use its power to veto COE's permit and regulate DOD's discharge of hazardous pollutants under section 402. A section 402 permit was needed to uphold Congress's goal in establishing the CWA and protect the nation's waters. By failing to carry out its responsibilities pursuant to the CWA, EPA violated the CWA.

ii. EPA violated the CWA because *Coeur Alaska* does not control.

In *Coeur Alaska*, the EPA chose not to exercise its veto, in effect deferring to the Corp's judgment on whether a Section 402 or Section 404 permit was needed. 129 S.Ct. at 2466. *Coeur Alaska,* however, is distinguishable. Whereas in *Coeur Alaska,* the material included in the

slurry was crushed rock, an inert material. Here, the spent munitions to be discharged in the slurry are not inert materials, but hazardous substances. (R. at 4). Moreover, in *Coeur Alaska*, the section 402 and section 404 permits were issued for two different activities. In the present situation, both EPA and COE want to issue a permit for the exact same activity, the slurry discharge by DOD. In *Coeur*, it was determined that EPA "performance standards" do not apply to Section 404 permits. *Coeur*, 129 S. Ct. at 2470. A performance standard would subject the DOD to stricter controls of discharge subject to EPA enforcement. In issuing a Section 404 permit, the COE would subject the slurry to more lenient standards. A stricter standard for placement of slurry and less damage to water resources would be available through a section 402 permit.

iii. EPA violated the CWA because it did not offer an explanation for failing to veto the COE permit.

The decision by EPA to follow *Coeur Alaska* and not challenge COE jurisdiction under Section 404 is arbitrary and capricious under section 706(2)(A). 5 U.S.C. § 706(2)(A). A decision by an agency is arbitrary and capricious if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Ins., 463 U.S. 29, 43 (1983). The decision by EPA is arbitrary and capricious because EPA did not offer an explanation as to why it did not challenge COE's jurisdiction and the inaction is implausible.

A section 402 permit was needed to correctly regulate the slurry material and to mitigate adverse effects of the slurry being deposited onto the bed of Lake Temp. After the decision by OMB that COE had jurisdiction and EPA did not, EPA did not give a reason for not invoking its

Section 404(c) rights. Without a showing of substantial evidence to explain EPA's decision not to veto the COE permit, the goal of the CWA was ultimately defeated. To concede that COE had jurisdiction and allow an activity without regulations that apply water quality performance standards, is contrary to the will of Congress and the administration of the CWA. As such, the decision not to use section 404(c) powers by the EPA was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should find that (1) New Union has standing to bring suit in its sovereign capacity and *parens patriae* capacity as protector of groundwater; (2) COE has jurisdiction to issue a permit under CWA Section 404 because Lake Temp is a navigable water; (3) EPA has jurisdiction to issue a CWA Section 402 permit and the COE does not have jurisdiction to issue a CWA Section 404 permit for the discharge of a slurry into Lake Temp; (4) and that OMB and the EPA violated the CWA when OMB decided that COE had jurisdiction to issue a permit for slurry and EPA did not have jurisdiction EPA acquiesced in that decision. Accordingly, New Union respectfully requests this Court to reverse the holding of the lower court.