Team #59

11-1245

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.

BRIEF OF APPELLEE-CROSS-APPELLANT STATE OF PROGRESS

On Appeal From The United States District Court

For The District of New Union

Civ. No. 148-2011(Remus, R)

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JURISDICTIONAL STATEMENT

Appellant and Cross-Appellee State of New Union ("New Union") filed a Complaint in the United States District Court for the District of New Union under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(2) (2006). New Union also alleges that the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2006) over their claim under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1976).

This appeal is from the Final Judgment entered by the district court on June 2, 2011, dismissing all of New Union's claims on summary judgment. (Order at 10-11). Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether New Union has standing under the *Massachusetts v. E.P.A.* standard.

II. Whether New Union has standing in its *parens patriae* capacity as protector of its citizens.

III. Whether the District Court of New Union properly found Lake Temp "navigable water" under the plurality opinion in *Rapanos* conferring jurisdiction on the COE to issue a Section 404 permit.

IV. Whether the District Court of New Union properly found Lake Temp "navigable water" under the "significant nexus" test from *Rapanos* conferring jurisdiction on the COE to issue a Section 404 permit.

V. Whether the District Court of New Union was correct in distinguishing the waters in *SWANCC* from Lake Temp based on its size and use in interstate commerce.

VI. If Lake Temp is "navigable water", whether, pursuant to *Coeur*, the District Court correctly found the COE's issuance of a § 404 permit was in accordance with properly conferred legislative authority because the material to be discharged was "fill material" and met the goal of zero discharge of pollutants contained in CWA 101(a)(1). 33 U.S.C. § 1251(a)(1).

VII. Whether the OMB's involvement was proper and the Administrator's decision not to exercise his veto power is reviewable by this Court.

STATEMENT OF THE CASE

This is an appeal from a final Order of the District Court for the District of New Union granting the United States' motion for summary judgment. (Order at 10-11). New Union sought review of a Clean Water Act ("CWA") Section 404 permit under 28 U.S.C. § 1331 and Section 702 of the Administrative Procedure Act ("APA"). The Secretary of the Army Corps of Engineers ("COE") issued the 404 permit to the Department of Defense (DOD) to discharge a slurry of spent munitions into Lake Temp. (Order at 3). New Union argued that any permits issued for the discharge plan must have been issued by the Administrator ("Administrator") of the U.S. Environmental Protection Agency ("EPA") under section 402 of the CWA. (Order at 3). New Union presented circumstantial evidence that any permitted discharge plan would affect the groundwater of the Imhoff Aquifer, which partially lies under the border of New Union. (Order at 4).

The Secretary filed a motion for summary judgment on the basis that (1) New Union lacked standing to appeal the issuance of the permit, (2) the Corp of Engineers ("COE") had jurisdiction to issue a section 404 permit because Lake Temp is a navigable water therefore a Section 404 rather than a 402 permit was proper, and (3) the participation in the decision to issue a Section 404 permit by the Office of Management and Budget ("OMB") was not in violation of the CWA. (Order at 5). New Union filed a cross-motion for summary judgment that (1) it had standing to appeal the permit issuance, (2) that Lake Temp is a navigable water, but (3) because the permit allows for the discharge of a primary pollutant, a 402 permit issued by the EPA is the proper permit, and (4) the OMB participation in the decision making process violated the CWA.

(Order at 5). The State of Progress ("Progress") has properly intervened in this case and also filed a cross-motion for summary judgment arguing (1) New Union does have standing to appeal, (2) Lake Temp is not a navigable water, thus not requiring a 402 or 404 permit, or (3) the proper permit is a 404 permit, and (4) OMB's participation was not in violation of the CWA. (Order at 5). The District Court granted the Secretary's motion finding (1) New Union lacked standing to appeal, (2) the COE had jurisdiction to issue a 404 permit because Lake Temp is navigable and the slurry is fill material, and (3) the OMB's participation did not violate the CWA. (Order at 10-11).

New Union appeals the District Court's grant of the Secretary's motion, and Progress supports New Union's appeal on the standing issue with this Court. (Order at 5). Progress currently seeks to reverse the District Court's decision that New Union lacked standing to appeal and that Lake Temp is not navigable; in the alternative, however, Progress seeks to uphold the District Court's ruling on all other issues. (Order at 5).

STATEMENT OF THE FACTS

The Department of Defense ("DOD") proposes to build a facility in the State of Progress for disposing of spent munitions. (Order at 4). The facility will be built on the shore of Lake Temp, an intermittent lake wholly contained within the state of Progress and adjacent to the border of the state of New Union. (Order at 3-4). Lake Temp covers 27 square miles during the rainy seasons in wet years, and shrinks significantly during dry years; the lake is completely dry once every five years. (Order at 3-4). Lake Temp has no surface outflows. (Order at 4). The lake is supplied by an 800 square mile watershed. (Order at 4). Lake Temp is situated over the Imhoff Aquiffer which is more extensive than the lake itself and extends slightly into New

Union. (Order at 4). The water within the aquifer is not potable. (Order at 4). Dale Bompers is a citizen of New Union and owns a working ranch situated above the aquifer. (Order at 4).

Lake Temp is located entirely within the confines of a DOD military reservation. (Order at 4). A Progress state highway runs alongside Lake Temp and through the military reservation, intersecting with roads leading into New Union. (Order at 4). The DOD has posted signs along the highway warning travelers that entry into the military reservation is illegal and dangerous. (Order at 4). The DOD erected no fences and took no other measures beyond the signs to prevent entry. (Order at 4). Migrating ducks use Lake Temp as a stopover when the lake holds water, attracting out-of-state and local duck hunters for the last hundred years. (Order at 4). There is clear evidence of foot traffic between the highway and Lake Temp over DOD land. (Order at 4).

The proposed DOD facility would dispose of spent munitions by separating the hazardous contents from the primarily metal solid components. (Order at 4). The hazardous materials would be mixed with chemicals to render them inert; the solid components would be ground. (Order at 4). The ground metals and the treated hazardous materials would then be mixed with water to form a slurry and then sprayed onto the dry bed of Lake Temp. (Order at 4). The slurry would be evenly distributed over the exposed bed, raising the Lakes level approximately six feet. (Order at 4). The slurry will eventually be covered by material carried by watershed flows. (Order at 5).

STANDARD OF REVIEW

In order for a Court to grant a motion for summary judgment, the Court, "viewing the evidence in the light most favorable to the nonmoving party, [must decide] whether there are any

genuine issues of material fact and whether the district court correctly applied the relevant substantive laws." *Laborers Health and Welfare Trust Fund for Northern California v. Westlake Development*, 53 F.3d 979, 981 (9th Cir. 1995). "A grant of summary judgment is reviewed *de novo.*" *Id.* Therefore, this Court has jurisdiction to hear and decide whether New Union has standing, whether the COE was proper in issuing the 404 permit, and whether the OMB's involvement in the decision violated the CWA.

SUMMARY OF THE ARGUMENT

The District Court erred in finding that New Union did not have standing to bring suit for review of the COE's issuance of a Section 404 permit to the DOD. As a sovereign state, New Union satisfies the relaxedstanding requirements articulated by the Supreme Court in *Massachusetts v. EPA*. The DOD's disposal of hazardous slurry in the vicinity of Lake Temp and the Imhoff Aquifer represents a concrete and imminent harm. The harm is traceable to the U.S. through its agents, the EPA and the COE. This Court may entirely redress this harm through invalidation of the COE-issued permit. New Union also has standing in its *parens patriae* capacity, as the owner and regulator of groundwater within its borders, and as the protector of its citizens who have an interest in the groundwater of New Union. The permitted disposal of slurry to the dry areas of Lake Temp will not only affect those waters, but also the Imhoff Aquifer below which extends beyond the borders of Progress into New Union.

Lake Temp is not "navigable water" as required by the CWA and therefore the district court erred in finding the COE had jurisdiction to issue a section 404 permit for the DOD's planned waste disposal. Despite being navigable in fact the proposed discharges occur on the watershed, not in the lake. This is fatal to the "navigable waters" standard under *Rapanos*, since it prevents the establishment of a continuous connection or a significant nexus between the

wetlands and the traditionally navigable water. Therefore Lake Temp fails to meet the Supreme Court's generously broad requirements for navigability.

The slurry covered by the DOD permit is properly characterized as fill material and the district court correctly found that the material was within the COE's permitting jurisdiction under CWA § 404. This Court is bound by the reasoning in *Couer Alaska* and therefore must find that the proposed slurry is within the statutory meaning of fill material. As fill material, the COE and not the EPA has jurisdiction over disposal permits.

Finally, the district court was correct in finding that the OMB properly exercised its authority as an arbiter for interagency disputes. The OMB is authorized by Executive Order 12088 to resolve disputes between the COE and the EPA arising out of CWA permit issuances. The correct administrative procedure was followed with the COE and EPA attempting resolution and then deferring the issue to the OMB. The OMB's issued directive in support of the issued permit does not directly compel action by the Administrator of the EPA. The Administrator exercised his own discretionary authority in declining to veto the COE permit issuance. As a discretionary exercise, the Administrator's decision is not reviewable by this court under the APA.

ARGUMENT

I. NEW UNION HAS STANDING TO SUE UNDER THE *MASSACHUSETTS v. E.P.A.* STANDARD OF STANDING

The traditional avenue for a State to attain standing is articulated in the Supreme Court's decision in *Lujan v. Defenders of Wildlife*. The Court found that "over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1991). The first element a plaintiff must

prove to gain standing is they "must have suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical . . . ." *Id.* at 560 (citing *Allen v. Wright,* 468 U.S. 737, 756, (1984). Second, "there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant . . . .'" *Id.* at 560-61 (citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Finally, the State must show that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

Recently, the Court relaxed the standing requirement set forth in *Lujan* by allowing "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Massachusetts v. E.P.A.*, 549 U.S. 497, 517-18 (2007) (citing *Lujan,* 504 U.S. at 573 n. 7 (1991)). The permit issued to the Department of Defense ("DOD") by the Secretary of the Army Corps of Engineers ("COE") allows for disposal of materials that signify an imminent particularized injury. Therefore, the State of New Union satisfies the requirements for standing under the *Massachusetts* standard.

A. If the 404 permits is granted, New Union will suffer a concrete and particularized injury that is actual and imminent.

New Union has presented evidence that contaminated water, from the addition of munitions to Lake Temp, will enter the Imhoff Aquifer due to the nature of the alluvial soil separating the lakebed and the aquifer. The Court has found that, "even a small probability of injury is sufficient to create a case or controversy . . .." *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). The DOD argues New Union's potential injuries are

susceptible to proof, that New Union has not developed or provided to establish New Union's injury. (Order at 6). Here, the Court cannot determine the probability of contamination due to actions of the DOD in preventing New Union from obtaining evidence that is entirely within the discretion of the DOD. New Union is willing to develop the proof necessary to establish the probability of harm by drilling and sampling from a grid of monitoring wells throughout the aquifer. (Order at 6). Additionally, they are willing to install and operate monitoring wells in the affected area. The DOD, however, will not grant access to the military reservation in order for New Union to develop the proof necessary to establish its injury. (Order at 6). This unwillingness of the DOD to approve New Union's requests to obtain evidence to prevent the groundwater contamination of Imhoff Aquifer directly contradicts Congress' goals for the Clean Water Act ("CWA"). 33 U.S.C.A. § 1251.

As for immediacy of the harm asserted, New Union does not need to meet the traditional standards for immediacy in order to establish standing to bring suit. "[A] litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,' . . . 'can assert that right without meeting all the normal standards for . . . immediacy[.]'" *Massachusetts v. E.P.A.*, 549 U.S. at 517-18 (citing *Lujan*, 504 U.S. at 573 n. 7). This case is analogous to *Massachusetts*, in that Congress has bestowed a procedural right upon New Union:

> Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311,1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such

> application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. §1369(b)(1). This statute is similar is similar in scope to 42 U.S.C. § 7607(b)(1) in which the *Massachusetts* court found a procedural right bestowed upon the states by Congress in the Clean Air Act. Here, the procedural right New Union seeks to protect is its right to challenge the EPA's decision to issue a 402 permit to allow for the filling of Lake Temp. Since this right was bestowed, New Union does not have to meet the normal immediacy standard of *Lujan*. New Union, has presented circumstantial evidence that contaminated water from Lake Temp will enter Imhoff Aquifer. However, this evidence cannot be confirmed due to the DOD's unwillingness to allow New Union to drill, sample and monitor wells on the military reservation. The DOD's actions here, again, are in direct contradiction of the Congressional goals of the CWA.

B. The contamination of Lake Temp is traceable to the United States, through the E.P.A and COE.

In order to show a causal link between the permitted disposal and the prospective harm, New Union must show under the *Massachusetts* standard that the United States' action, "[a]t a minimum, . . . 'contributes'" to the injury. *Massachusetts v. E.P.A.*, 549 U.S. at 523. Here, there is no question the government's actions, at a minimum, contribute to the contamination of the aquifer. In *Massachusetts,* the EPA argued that their regulation of greenhouse gases would not make a significant impact on overall global warming; however the Court found that argument unpersuasive. *Id.* at 517-18. The Court held that even "small incremental step[s]," of regulation can make a difference to the overall pollution bottom line. *Id.* at 524. New Union's argument is similar to Massachusetts' argument. At a minimum the DOD's proposal to fill Lake Temp will

contribute to the contamination of the Imhoff Aquifer and the waters of the United States. The permit issued by the COE to the DOD allows the dumping of known hazardous chemicals into Lake Temp. (Order at 4). These chemicals are certain to migrate into the Imhoff Aquifer and they are certain to contribute to the contamination of the water-body. Whether the DOD's contribution is significant enough to render the water hazardous is immaterial under the Court's decision in *Massachusetts*. The EPA and COE have a duty to at least take a small incremental step to prevent that contamination.

C. A decision rescinding the COE-issued permit will likely redress the harm to New Union and contamination of the Imhoff Aquifer.

The probable harm to New Union is redressable by this Court, thus satisfying the final requirement for standing under the *Massachusetts* standard. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Massachusetts v. E.P.A.*, 549 U.S. at 525 (citing *Larson v. Valente,* 456 U.S. 228, 244 n. 15 (1982)). As previously discussed, "even a small probability of injury is sufficient to create a case or controversy . . . provided of course that the relief sought would, if granted, reduce the probability" of injury. *Village of Elk Grove Village v. Evans*, 997 F.2d at 329. The source of contamination of the Imhoff Aquifer would be the material discharged into Lake Temp. In the absence of the additional discharged material the Imhoff Aquifer will remain intact. The Court here has the jurisdiction to remove authority from either COE or EPA based upon the characterization of Lake Temp. If the Court prohibits the issuance of a 404 permit the potential injury will be redressed, thus satisfying the third element.

II. NEW UNION HAS STANDING TO SUE IN ITS PARENS PATRIAE CAPACITY AS PROTECTOR OF ITS CITIZENS WHO HAVE AN INTEREST IN THE GROUNDWATER OF THE STATE

In general, a State is prohibited from suing the Federal Government "to protect her citizens from the operation of federal statutes [,]" however, a State has standing when it is "assert[ing] its rights under federal law . . .." *Massachusetts v. E.P.A.*, 549 U.S. at 520 n. 17. Here, New Union is not disputing that the CWA applies to its citizens; instead, New Union is seeking to assert its rights under the CWA. The right New Union is seeking to assert was granted upon it by 33 U.S.C. § 1369(b)(1), and affords New Union to have a "[r]eview of the Administrator's action . . . in issuing or denying any permit under section 1342" of the CWA. 33 U.S.C. § 1369(b)(1).

Additionally, a state has standing to sue the federal government if it "seeks to vindicate its 'quasi-sovereign' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" *Nebraska v. Wyoming,* 515 U.S. 1, 20 (1995) (citing to *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387, 393 (1938)) (quoting *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)). This court should extend the ruling in *Tennessee Copper* to include the water within a State's domain. Even though Dale Bompers ("Bompers") has a direct interest in the Imhoff Aquifer, due to the location of his ranch, New Union's interest far exceeds and is independent from Bomper's interests. New Union is acting strictly in its quasi-sovereign capacity to regulate its groundwater. This quasi-sovereign interest is further illustrated by *Rice v. Harken Exploration Co.* where the Court held groundwater was not under CWA protection, and thus left to the State to regulate. *Rice v. Harken Exploration Co.*, 250 F.3d

264, 269-270 (5th Cir. 2001). Because New Union has acted to protect the Imhoff Aquifer through a permitting system for withdrawal, it is reasonable to infer New Union would want to regulate any addition of pollutants to the Imhoff Aquifer.

III. LAKE TEMP IS NOT A NAVIGABLE WATER AS DEFINED IN *RAPANOS V. UNITED STATES*, 547 U.S. 715 (2006)

Lake Temp is not a relatively permanent, standing or flowing body of water and therefore not a "navigable water" under the tests articulated in *Rapanos v. United States. Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos")*. Since Lake Temp is not a "navigable water," the COE does not have jurisdiction to issue a permit under CWA Section 404(a). 33 U.S.C. § 1344(a).

A. In *Rapanos*, the United States Supreme Court Defined "Navigable Water" as it Relates to the CWA.

The term "navigable water," as used in the CWA, encompasses "waters of the United States" and expands the traditional use of the term to waters that may not be navigable in fact. *See U.S. v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159, 167 (2001) ("*SWANCC")*; *See also The Daniel Ball*, 77 U.S. 557 (1870). Waters found to be "navigable" fall under the jurisdiction of the EPA or the COE. *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 283 (4th Cir. 2011). However, what exactly constitutes "navigable water" has been subject to various interpretations. In *Rapanos*, the Court consolidated two cases and addressed how the statutory term "navigable waters" should be construed under the CWA. The Court failed to reach a definitive answer splitting 4-1-4, with Justice Scalia writing for the plurality, and Justice Kennedy concurring. *Precon Development Corp., Inc.*, 633 F.3d at 288 (quoting *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring)). Each

Justice articulated a different test, resulting in mixed application in circuit and district courts ever since. *Rapanos*, 547 U.S. at 758 ("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.") (citing *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Marks v. United States*, 430 U.S. 188 (1977)). However all agreed that "navigable waters" included "something more than traditional navigable waters." 33 U.S.C § 1344(g)(1); *Rapanos,* 547 U.S. at 731. Courts are not bound to one specific test, and can assert jurisdiction over "waters of the United States" by meeting either the legal standard established by Justice Kennedy or Justice Scalia. *U.S. v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) (citing *U.S. v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008)). However, Lake Temp fails to meet both the "navigable water" standards articulated in *Rapanos*.

1. The COE does not have Section 404 jurisdiction over the discharge under the plurality's test in *Rapanos.*

Justice Scalia looked to the plain language of the CWA and constructed a test using the dictionary as an interpretive tool for defining "navigable waters" which encompassed the term "waters of the United States." *Rapanos*, 547 U.S. at 732. As defined, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water "forming geographical features" such "lakes" and other "bodies" of water. Webster's Dictionary (2d. ed. 1954); *Rapanos*, 547 U.S. at 732. Most importantly though, "All of these terms connote continuously present, fixed bodies of water…" *Id.* at 732. Under this test, an examination of the body of water in question must first be found to be "navigable water," within the expanded or traditional meaning of the term. 33 U.S.C. § 1344(g)(1); *Rapanos*, 547 U.S. at 731. Only after establishing the body of water is "navigable water," the term may be extended to adjacent

wetlands with a continuous surface connection to the "navigable water." *Rapanos*, 547 U.S. at, 717. Thereby conferring regulatory jurisdiction on the COE over both the body of water and the wetlands.

The watershed at Lake Temp cannot be used to establish Lake Temp as a relatively permanent continuously flowing body of water. The proposed discharges at Lake Temp are to the dry lakebed, not into the lake itself. (Order at 4). Those discharges fall within the surrounding watershed or channels. Furthermore, even if Lake Temp is found to be a "navigable water," because of its historic use by hunters in canoes, the moniker cannot extend to otherwise protected adjacent wetland areas. (Order at 4); *Rapanos*, 547 U.S. at 717. Where there is a clear demarcation between an adjacent wetland and a "relatively permanent 'water of the United States,'" the necessary "continuous surface connection" is broken. *Rapanos*, 547 U.S. at 717. Here, the only connection that Lake Temp shares with the watershed is ephemeral and only flow intermittently when it rains. "The restriction…to exclude channels containing merely intermittent or ephemeral flow accords with the common sense understanding of the term." *Id.* at 734. Moreover, there is a clear demarcation point in the defined high water mark 100 feet from the State Highway. (Order at 4). Ephemeral streams that are ordinarily dry do not "connote a continuous flow of water in a permanent channel- especially when used in company with other terms such as… "lakes." *Rapanos*, 547 U.S. at 732. The broken connection between the watershed and Lake Temp prevent the watershed from being "navigable water." Therefore, regulation of the discharged material on the dry lakebed cannot sustain the COE's Section 404 jurisdiction under the concept of a continuously flowing body of water.

Here, "Lake Temp is an …*intermittent* body of water…much smaller during the dry season, and wholly dry approximately one out of five years." (Order at 3-4) (emphasis added).

However, in the event that Lake Temp is a standing body of water and therefore navigable, the proposed discharge site is located on dry land, not the body of water itself. Application of CWA Section 404 to discharges on dry land is an unwarranted expansion of the statutory language "discharge *into* navigable waters." 33 U.S.C. § 1344 (emphasis added). Therefore, the COE's 404 jurisdiction to include discharges on dry land which may eventually reach "navigable waters" by gradual, natural seepage is gratuitous. *D.E. Rice v. Harken Exploration Company*, 250 F.3d 264, 271-72 (5th Cir. 2001).

The district court erred in granting summary judgment based on an expansive interpretation of the "waters of the United States", which was not based on a permissible construction of the § 404 statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Surface water flows in the basin only exist to periodically recharge Lake Temp by in flow failing to establish the necessary continuously flowing connection. Furthermore, if the lake is a standing body of water, the discharges are not into the lake so COE jurisdiction is not warranted. 33 U.S.C. § 1344. Therefore, Lake Temp does not qualify as a "water of the United States" under Scalia's test for a relatively permanent, standing or flowing body of water.

2. Lake Temp is not a navigable water under the "significant nexus" test.

In his concurrence in *Rapanos*, Justice Kennedy's articulated a differing opinion on how wetlands obtained status as "navigable water." He argued that wetlands could only obtain "navigable water" status through a "significant nexus" of interconnected down stream flow to a "navigable in fact" body of water. *Rapanos*, 547 U.S. at 717, 759; *See also SWANCC*,, 531 U.S. 159 (2001). That nexus can be found if wetlands "significantly affect the chemical, physical, and

biological integrity" of other traditionally navigable waters located downstream. *Rapanos*, 547 U.S. at 759. However, when a "wetlands effects on water quality" are "insubstantial or speculative, it is not encompassed in "navigable waters." *Id.* at 759.

New Union argues contaminated water from the permitted activity will enter the Imhoff Aquifer. This argument is unsuccessful even though the first requirement of "navigability in fact" is met. It is undisputed that hunters have used Lake Temp with rowboats and canoes. (Order at 4). However, the "significant nexus" between the surrounding arid watershed and Lake Temp is less certain. Some jurisdictions have found that the connection of generally dry channels and creek beds to a traditionally navigable water will not create a "significant nexus" under the CWA simply because one feeds into the next during the rare times of actual flow. *U.S. v. Chevron Pipe Line Co.,* 437 F.Supp. 2d at 613. Alernativley, the court has found that tributaries flowing intermittently are "waters of the United States," and subject to the CWA. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). The Court in *Chevron Pipe Line* discussed, but declined to apply the tests in *Rapanos*. Yet it is still relevant in that it determined discharges *outside* of a "navigable water" do not fall within the jurisdiction of the CWA.

Even if this Court were to find a "significant nexus" between the watershed and Lake Temp, the affect on "the chemical, physical, and biological integrity" of the lake is speculative. *See Rapanos*, 547 U.S. at 718. "When…their effects on water quality are speculative…they fall outside the zone fairly encompassed by the term "navigable waters." *Id.* (discussing tributary's effects on navigable waters). New Union has not provided any evidence of harm to Lake Temp. However, they have provided circumstantial evidence of harm to the Imhoff aquifer. (Order at 5). Ultimately, this argument is unpersuasive since many courts have found that groundwater

falls outside of the scope of the CWA. *See Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.* 962 F. Supp. 1428 (1993) (holding that groundwaters are not "navigable waters" protected by the CWA, even if they are hydrologically connected to surface waters). Therefore, the impact of the watersheds runoff on Lake Temp is speculative and cannot sustain a significant nexus.

Lake Temp cannot be "navigable water" because it fails Justice Kennedy's "significant nexus" test. The lake is navigable in fact but the connection of the watershed to Lake Temp is ephemeral, possibly disqualifying it from being a "significant nexus." Even if the watershed is considered to have a "significant nexus" to Lake Temp there is no evidence that the project will harm the "chemical, physical, and biological" composure of the lake. Significantly, New Union only argues the Imhoff Aquifer will be affected. Furthermore, courts have found groundwater to fall outside of the jurisdiction of the CWA. *See Rice v. Harken Exploration Co*., 250 F.3d at 264 (finding that groundwater is not covered as a "water of the United States" and that it would be an unwarranted expansion to find that discharges onto land that only infrequently carried running water were discharges into navigable waters).

B. Lake Temp is analogous to *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, and likewise not a "navigable water" for the purposes of the CWA.

In *SWANCC*, the Supreme Court considered the validity of the COE's jurisdiction over ponds claimed to be "navigable waters" because of their use by migratory birds. *SWANCC*,, 531 U.S. at 171. The COE also argued that the "migratory bird rule" fell within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. *Id.* at 173. Both of

these arguments were rejected by the Supreme Court. *Id.* at 161. Lake Temp and *SWANCC* are factually and legally analogous, therefore Lake Temp is not a "navigable water."

1. The size of Lake Temp does not make it a "navigable water."

"Congress evidenced its intent to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 167 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)). The DOD and New Union argue that Lake Temp is significantly larger than the ponds in *SWANCC* implying that the size of a body of water determines navigability. (Order at 7). They are mistaken if they believe that the size of a body of water is relevant in determining "navigable waters" under the CWA. In *Minnehaha Creek Watershed District v. Hoffman*, the court found that Lake Minnehaha was navigable in fact, but it did not constitute "navigable waters of the United States" within the meaning of the act even though it was 22.5 square miles. *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979).

2. The changes to Lake Temp do not create "significant affects" on interstate commerce.

In *SWANCC* the Court declined to extend Congress' Commerce Clause powers to ponds that were remote, intrastate, non-navigable, and fed by ephemeral trenches because a "substantial affect" could not be found. *SWANCC*,, 531 U.S. at 173. In order to constitute a proper exercise of Congress' power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in aggregate, the class of activities in question has such an effect. *Perez v.*

United States, 402 U.S. 146 (1977). The changes to Lake Temp do not create a "significant affect" on interstate commerce; therefore, regulation of the activity is beyond the scope of the Commerce Clause.

The district court found that "Lake Temp is well within the description of water bodies that have traditionally been held navigable because of use by interstate travelers." (Order at 7). New Union and the COE argue that over a hundred years "perhaps thousands of duck hunters have used" the lake. (Order at 4). It is impossible to say with any certainty that the loss in hunters, and loss in travel from the nearby highway in aggregate will have a "substantial affect" on interstate commerce. In *SWANCC* and Lake Temp, the Constitution of the United States recognizes the difficulties in regulating land and water resources. These tasks are primarily the responsibilities of States, and rather than readjusting the federal-state balance, the Commerce Clause should not be extended to include Lake Temp because it would significantly impinge on these traditionally state recognized duties. *SWANCC*, 531 U.S. at 174; 33 U.S.C. § 1251(b).

IV. IF LAKE TEMP IS A "NAVIGABLE WATER," THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGEMENT FINDING THAT THE COE HAS JURISDICTION TO ISSUE A 404 PERMIT PURSUANT TO *COEUR ALASKA, INC. V. SOUTHEAST ALASKA CONSERVATION COUNCIL*

In *Coeur* the Supreme Court found that Congress had properly conferred the COE jurisdictional authority to issue section 404 permits for discharge of slurry qualifying as fill material into navigable waters. *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009). Here, the DOD plans to disperse slurry on only the dry portions of Lake

Temp, but not in the lake. The COE has proper jurisdiction to issue a 404 permit for the slurry since it is composed of spent munitions meeting the definition of "fill material" in the CWA. 40 C.F.R. § 2362.

A. *Coeur* is analogous to Lake Temp in all relevant respects.

In *Coeur*, the Supreme Court held that the discharge of slurry into a lake was fill material because it elevated and changed the bottom configuration of the lake. *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, 129 S.Ct. at 2459. The lake was a navigable water of the United States. *Id.* at 2464. The project required a section 404 permit for fill material and that the COE had been given jurisdictional authority by the legislature to authorize discharges under Section 404. *Id.* at 2468-69. Similarly the COE in Lake Temp has proper authority to issue a Section 404 permit because the slurry is fill material, which when discharged will have the affect of elevating the bottom of the lake. Additionally, discharging this material on the lakebed, and not into Lake Temp is consistent with the goal of CWA Section 101(a)(1) to achieve zero discharge of pollutants. 33 U.S.C. 1251(a)(1). The Supreme Court's decision in *Couer* is binding where navigable water receives discharged fill material. The District Court correctly recognized *Couer's* applicability to Lake Temp and determined the COE had jurisdiction to issue a Section 404 permit for the addition of fill material to Lake Temp.

1. The slurry the DOD plans to discharge is legitimate fill material.

Section 404(a) empowers the COE to "issue permits…for the discharge of…fill material," and the agencies joint regulation defines "fill material" to include "slurry" having the "effect of changing the bottom elevation of any portion of a water of the United States." *Id.* at

2460 (citing 40 C.F.R. § 232.2). Waters of the United States include intrastate lakes and playa lakes used by interstate travelers for recreation. 40 C.F.R. § 232.2

New Union argues that the material discharged in *Coeur* was crushed rock, an inert material that is more fill than pollutant, and that the material discharged in Lake Temp is more toxic pollutant than fill. (Order at 8). The distinction waged by New Union is irrelevant to the issuance of Section 404 and 402 permits. The slurry being discharged on the dry portion of Lake Temp and the lake in *Coeur* fits within the definition of both "pollutant" and "fill." (Order at 8). However, in both cases the slurry is "fill material" since it "has the effect of… [c]hanging the bottom elevation" of water of the United States." 40 C.F.R. § 232.2. It is uncontested that the final elevation change of Lake Temp is expected to be six feet. (Order at 4). As far as the toxicity of the fill material, the Court in *Coeur* determined that "[t]he EPA has regulated toxic pollutants under a separate provision, § 307 of the CWA, and the EPA's § 404(b) guidelines require the COE to deny a § 404 permit for any discharge that would violate the EPA's toxic-effluent limitations." *Coeur Alaska*, 129 S.Ct. at 2474 (citing 40 C.F.R. § 230.10(b)(2)). New Union's argument for preventing toxic discharge of material is already integrated into the Section 404(b) permitting process, which "does not allow toxic pollutants (as distinguished from other, less dangerous pollutants, such as slurry) to enter the navigable waters." *Id.* at 2474 (citing 40 C.F.R. § 230.10(b)(2)). The slurry discharged on to the dry portion of Lake Temp is not a toxic pollutant, but fill material falling within the guidelines of Section 404(b), conferring Section 404(a) authority on the COE.

2. Congress assigned the COE to be the permitting agency for fill material and is bound by that legislative decision.

The Court in *Couer* further determined that under the CWA Congress gave the COE, not the EPA, authority to issue Section 404 permits to discharge "slurry" defined as fill material *into* a lake. *Id.* at 2467- 2469. Additionally, section 404 permits cannot also be subject to EPA Section 402 standards. *Id.* "Even if there were ambiguity on this point, it would be resolved by the EPA's own regulation providing that discharges…of fill material…which are regulated under section 404 do not require EPA section 402 permits." *Id.* at 2460 (citing 40 C.F.R. § 122.3) (internal quotes and brackets omitted).

New Union claims that the COE made its decision in *Coeur* as a disinterested regulator, and that it has a duty to protect the public as a regulator. (Order at 8). Here, they argue that the COE is in a subordinate relationship to the DOD, creating a self-serving conflict of interest that eviscerates the COE's ability to protect the public. (Order at 8). To rectify the conflict, New Union proposed that the EPA issue a section 402 permit. (Order at 8). This argument cannot succeed because it is inconsistent "with the statute and regulations" of the CWA. *Coeur Alaska, Inc.*, 129 S.Ct. at 2474. When Congress drafted the CWA they conferred authority on the COE to issue permits for fill material, not the EPA. *Id.* at 2467- 2469. Furthermore, *Coeur* recognized that the COE has "significant expertise" in determining if "a discharge is in the public interest" based on "the effects of fill material on the aquatic environment." *Id.* at 2473 (citing 33 C.F.R. § 320.4(a)(1); 40 C.F.R. § 230.10). In any event, "[T]he EPA has enacted guidelines, pursuant to § 404(b) to guide the COE permitting decision." *Id.* at 2469 (citing 40 C.F.R. § 230). "Those guidelines do not strip the COE of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard." *Id.* However, 40

C.F.R. § 232.2 rectifies these conflicting statements. Where "under the agencies view…if the discharge is fill, the discharger must seek a § 404 permit from the COE." *Id.* (citing 40 C.F.R. § 232.2). Finally the EPA has the power to "veto" a permit under CWA § 404(c). *Id.* at 2467. Under the alleged conflict between the COE and the DOD, the EPA could have exercised its veto power if it believed Section 404 approval would cause unacceptable adverse effect on the environment. *James City County, Va. v. E.P.A.*, 12 F.3d 1330, 1336 (4th Cir. 1993). *Couer* rebuts New Unions arguments, finding that "[t]he regulatory scheme discloses a defined, and workable line for determining whether the COE or the EPA has permit authority." *Coeur Alaska, Inc.*, 129 S.Ct. at 2469. The CWA has integrated a system of checks and balances within Section 404 designed to prevent exactly the kind of malfeasance alleged by New Union. The COE is the proper, and indeed the only, agency that was conferred authority to issue permits for fill material by Congress.

3. Lake Temp is preventing the discharge of pollutants to other navigable waters, meeting the zero discharge of pollutants goal of CWA § 101.

The purpose of the CWA is outlined in CWA § 101(a)(1), setting the goal of maintaining the chemical, physical and biological integrity of the Nations waters by eliminating discharges of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1). This goal was echoed by the Court in *Coeur* when it relied on the EPA's reasonable interpretation of sections 306, 402, and 404 of the CWA. *Coeur Alaska, Inc.*, 129 S.Ct. at 2473-2474; *See Auer v. Robbins*, 117 S.Ct. 905 (1997); *See also U.S. v. Mead Corp.*, 121 S.Ct. 2164 (2001). The court justified the EPA's interpretation of these regulations because the EPA: 1) confined the scope of application to closed bodies of water, 2) the discharger had acted in good faith in not evading requirements where the material

in question will have more than an "incidental filling effect," 3) the COE has significant experience in determining what is in the public interest, 4) toxic pollutants are not allowed to be discharged, because 404(b) guidelines control, and 5) the EPA's construction rationally reconciled §§ 306, 402, and 404. *Coeur Alaska, Inc,*, 129 S.Ct. at 2473-2474.

New Union argues that in *Coeur* the lake served as a treatment pond that otherwise would have to be constructed, with greater environmental detriment. (Order at 8). Where here, Lake Temp is serving no treatment alternative. (Order at 8). This assessment incorrectly applies the courts finding in *Coeur*, granting reasonable deference to the EPA in implementing the CWA. *Coeur Alaska, Inc.*, 129 S.Ct. at 2473-2474. Having previously established that: Lake Temp is a closed body of water, the COE has significant expertise in determining what is in the public interest, and that Section 404(b) prevents the discharge of toxic pollutants, only one issue remains. Did the DOD act in bad faith and try to evade the requirements of a Section 402 permit? The answer is no. The proposed discharge will not be applied to the dry areas of the lakebed drying soon after contact. Record Page 4. Taking a literal approach to Section 404 would have lead the DOD to determine since the discharge was not "on or into" a water of the United States, a section 404 permit was unnecessary. *See* 33 U.S.C. § 1251 *et seq*. However, the Lake Temp project, "is not… a project that smuggles a discharge of EPA-regulated pollutants into a separate discharge of Corps-regulated fill material." *Coeur Alaska, Inc.*, 129 S.Ct. at 2473. Furthermore, the slurry discharge consists of "munitions", which fall within the definition of fill material in 40 C.F.R. § 232.2. Finally, since the discharge is going to have more than an incidental filling effect, raising the lake bed by approximately six feet, the DOD was required to apply for a section 404 permit and did so. *Id.* at 2473. At Lake Temp and in *Coeur* the COE used its expertise in determining how to discharge the fill material with the public interest in

mind. Here, the COE elected to discharge the slurry on the dry lakebed, since construction of a treatment pond similar to *Coeur* would have been more environmentally detrimental. The COE reached this conclusion because the amount of fill material required to raise a twenty-seven square mile lake six feet is enormous. (Order at 3). Since Lake Temp falls within all the criteria applied in *Couer*, it meets the goal of preventing the discharge of any pollutants into other navigable waters, and the COE properly issued the Section 404 permit.

V. THE DISTRICT COURT CORRECTLY FOUND THAT THE OMB'S INVOLVEMENT IN THE DISPUTE BETWEEN THE ADMINISTRATOR AND THE SECRETARY WAS PROPER AND THE ADMINISTRATOR'S DECISION NOT TO EXERCISE HIS VETO POWER IS NOT REVIEWABLE BY THIS COURT

The Director of the OMB issued an oral decision and directive in response to the disagreement here between the Secretary of the COE and the Administrator of the EPA. The District Court correctly found that the OMB's action in reviewing the circumstances and issuing a directive was proper. The OMB is mandated by Executive authority to act as arbiter for interagency disputes. Here, the OMB's issued directive to the EPA is not reviewable as an agency decision because the OMB has no authority either from the Executive or under the CWA to effect the issuance of a permit under §§ 402 and 404. The decision of the Administrator to forgo exercising his veto power under § 404 is wholly within his own discretion and is therefore beyond the courts jurisdiction. Therefore, this court cannot charge either the EPA or the OMB with error in resolving this interagency conflict.

A. The OMB properly intervened in the dispute between the EPA and the COE regarding the issuance of the section 404 permit to the DOD.

The OMB carries Executive authority to intervene in the present dispute between the Secretary of the COE and the Administrator of the EPA. Executive Order 12088 expressly confers onto the OMB the authority to intercede in interdepartmental disputes over the

enforcement of the Clean Water Act (CWA). Where there is a dispute between the Administrator and other agencies over enforcement of the CWA, and the Administrator and the disputing agency have made efforts to resolve the dispute, the Administrator "shall request the Director of the Office of Management and Budget to resolve the conflict." E.O. 12088 §§ 1-601, 1-602. After such a request, "[t]he Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator." E.O 12088 § 1-603. According to the black letter of the presiding Executive Order, the Administrator must involve the OMB and the OMB must consider the dispute whenever an interagency conflict appears.

Here, the Secretary of the Army, based on his authority under Section 404 of the CWA, issued a permit to the DOD to allow discharge of slurry into Lake Temp. (Order at 3) The EPA disagreed, arguing that the nature of the slurry did not comport with the meaning of fill material as contemplated under CWA Section 404. (Order at 9). The EPA particularly disagreed with the liquid and semi-solid portions of the spent munitions, arguing that they were pollutants covered by § 402 and their disposal into Lake Temp required a permit issued by the EPA. (Order at 9). This is an interagency dispute per Executive Order 12088. In response to the dispute and in accordance with E.O. 12088, the Administrator and the Secretary of the Army briefed the dispute to the OMB and the OMB presided over a meeting between the agencies in order to resolve the disagreement. (Order at 9 n.1). The subsequent issuance by the OMB of an oral decision is in keeping with E.O. 12088's mandate that the Director "shall consider unresolved conflicts." E.O. 12088 § 1-603.

At no point during the deliberation between the EPA and the COE did the OMB improperly involve itself. The OMB responded to its presidentially mandated role as an arbiter

between agencies in conflict. It would have been improper for the OMB not to involve itself under E.O. 12088 once the dispute arose between the EPA and the COE.

B. The OMB does not have the authority to either approve or veto the COE's grant of a § 402 permit to the DOD and therefore its directive does not function as an agency action under the APA.

The language of the CWA limits the OMB's involvement in the dispute between the EPA and the COE. The Administrator of the EPA, "except where otherwise provided," administers the CWA. 33 U.S.C. § 1251. The EPA's authority extends to the issuance of § 402 permits for the discharge of pollutants and is the sole decision-maker as to both the requirements for issuance and the conditions placed upon the resulting permit. 33 U.S.C § 1342(a)(1)-(2). CWA § 404 carves out an exception to the EPA's sole authority, allowing the Secretary of the Army to issue permits to discharge fill material into navigable waters. 33 U.S.C. § 1344(a); 33 U.S.C. § 1342(a)(1). However, the Administrator of the EPA still reserves the discretion to exercise his veto power and "prohibit the specification" of a dumping site, and to "deny or restrict the use of any defined area for specification." 33 U.S.C. § 1344(c). Although, the Administrator is required to publish its findings for review should it choose to exercise his authority under section 404(c), his authority is absolute. 33 U.S.C. § 1344(c). Neither section 404 nor section 402, covering permit issuances, establishes the authority for the OMB to either issue or condition permits. Therefore, the OMB does not have any authority either under Executive Order 12088 or the CWA to either issue or veto a disposal permit.

The OMB's mandated role under 12088 is that of arbiter, not decision-maker. In presiding over and issuing a directive in the dispute between the Administrator and the Secretary, the OMB neither issued nor vetoed a disposal permit for the DOD to utilize Lake Temp. The CWA Section 404 permit had already issued from the COE prior to the OMB's involvement.

Here the issue before the OMB at the meeting between the agencies was whether the EPA should exercise its veto power preserved under Section 404(c) to invalidate the DOD's permit. (Order at 9). The OMB directed the Administrator to act, but took no action itself. The OMB did not directly act to issue or deny a permit and therefore its directive to the agencies is not reviewable as an agency decision. The issued directive had no immediate effect on the EPA's exercise of its statutorily conferred authority because the OMB has no authority over the EPA in the issuance of permits. The Administrator exercised his own discretion in declining to exercise his veto power.

This Court's review, if applicable, is limited to the EPA's decision not to veto the COE's issuance of a permit, as that was a valid agency action supported by statutory authority under Section 404. The OMB's directive takes on the role of outside authority considered by the EPA in reaching its decision not to act. The existence of an outside directive neither supplants the Administrator's decision, nor relieves the Administrator from responsibility for his discretionary acts. Rather, "communications with persons outside the agency are permissible under the Administrative Procedure Act so long as the EPA can justify its rules entirely by reference to the record before it." *State of N.M. v. E.P.A.*, 114 F.3d 290, 295 (D.C. Cir. 1997).

C. The EPA's decision not to exercise its veto power under § 404(c) was a discretionary decision and therefore non-reviewable under the APA as a violation of the CWA

CWA § 404(c) confers the authority to review and veto the COE's granting of permits to the Administrator when the "discharge of such materials" will have an adverse effect "on municipal water supplies, shellfish beds and fishery areas . . , wildlife, or recreational areas." 33 U.S.C. § 1344(c). That authority is, however, discretionary as § 404(c) merely conveys the authority and refrains from creating a mandate. 33 U.S.C. § 1344(c) ("The Administrator is *authorized* to prohibit the specification . . . and he is *authorized* to deny or restrict the use of any

defined area for specification . . . .") (emphasis added). The Court has found that "the decision of the Administrator not to overrule the decision of the Army Corps is discretionary." *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 (11th Cir. 1996). "[T]he Administrator is authorized rather than mandated to overrule the Corps." *Id.* (citation omitted).

Purely discretionary agency acts, such as the Administrator's decision not to exercise his veto authority, are not reviewable by the court. The APA § 701(a)(2) exempts "agency action that is committed to agency discretion by law" from judicial review. 5 U.S.C.A. § 701(a)(2). In such circumstances, the Court has found that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In no uncertain terms, "the statute . . . can be taken to have 'committed' the decision making to the agency's judgment absolutely." *Id.* "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion'" and the decision is wholly within the discretion of the agency and unreviewable by the courts. *Id.*

The Supreme Court has found that in reviewing discretionary agency inaction, "the presumption is that judicial review is not available." *Id.* at 831. That presumption is overcome only where "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. This deference is based on the Court's findings that where an agency declines to act it "does not exercise its coercive power." *Id.* at 832. Inaction by itself does not "provide a focus for judicial review." *Id.* The Court analogized an agency's decision to refuse to institute a veto to "the decision of a prosecutor in the Executive Branch … which has

long been regarded as the special province of the Executive Branch … charged by the Constitution to 'take Care that the Laws be faithfully executed.' *Id.* (quotations and citations removed).

The statutory language of Section 404 is properly within the ambit of the Administrative Procedure Act. *See* 5 U.S.C. § 701(a)(2). The statute does not provide any meaningful guidance for the Administrator or for the court's to determine when the Administrator might abuse his discretion by failing to exercise his veto power. The statute provides that the Administrator's veto power should be exercised in instances where the COE's issued permit will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." 33 U.S.C. § 1344. The statute is drafted so broadly as to encompass every environmental feature controlled by the CWA itself. This cannot suffice for meaningful guidance since, if taken literally, the language would mandate that the EPA review every permit issued by the COE and would remove any discretion granted to the COE as a permit-granting entity. This construction directly contradicts with the black-letter meanings of section 404(a) and (b) which purport to give authority to the COE to issue permits for disposal into navigable waters. 33 U.S.C. § 1344(a)-(b). Inferring an EPA mandate also contradicts with the earlier language of Section 404(c) which expressly confers only an "authority" and conspicuously avoids mandatory language such as "shall" used earlier in CWA Section 402. 33 U.S.C. § 1342.

The instant statute is analogous to the court's review of Section 242 of the Economic Opportunity Act, which requires that the Director of the Office of Economic Opportunity "shall consider whether the [governor] vetoed program is fully consistent with the provisions and in furtherance of the purpose of the Act." *East Oakland-Fruitvale Planning Council v. Rumsfeld*,

471 F.2d 525, 532 (9th Cir. 1972) (citation and quotations removed). The court found that the legislatively intended standard of review to be applied by the Director in determining whether to overturn the governor's veto was "the 'wisdom or desirability' of the particular project as a means to further the purposes of the Act, in light of knowledge, information, and insights contributed by the governor." *Id.* at 533. The court found that the established standard "required the exercise of the Director's expert knowledge regarding the practicality and efficacy of experimental projects" and was therefore not subject to judicial review. *Id.*

The stated standard under CWA Section 404(c) follows a similar pattern. The language of the statute requires that the Administrator review the COE issued permit and determine whether it will have an "unacceptable adverse effect" without explicitly defining the contours of what would constitute an "unacceptable" or "adverse" effect. The Administrator's decision therefore must require the application of his own knowledge and experience to supplement the minimal statutory guidance. Similar to *Rumsfeld* above, the Administrator applied his experience and knowledge after reviewing and considering the positions of both the COE and the OMB. Such a decision is unreviewable as a legitimate exercise of discretion outside of the APA's purview.

D. In the instance where the Administrator's discretionary decision is reviewable, the record supports the Administrator's decision to deny exercising his statutory veto power and therefore did not violate the CWA

The COE's authority to grant the section 404 permit to the DOD is established by the Supreme Court's holding in *Couer Alaska*, and therefore the Administrator's decision not to exercise his statutorily conferred veto power was neither arbitrary nor capricious. This court's review of an agency decision is afforded the greatest deference. Judicial review must be "on the basis of the agency's *stated* rationale and findings. . . ." *Deukmejian v. Nuclear Regulatory*

Com'n, 751 F.2d 1287, 1325 (D.C. Cir. 1984) (emphasis in original), *aff'd in relevant part en banc*, 789 F.2d 26, 44-45 (D.C. Cir. 1986). The court owes deference to the agency's process because "the agency and not the court is the principal decision maker." *Id.* "[J]udicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court. . . ." *Id.* The court has held that the disclosure of intra-agency deliberations is inimical to the agency decision-making process. Public scrutiny of agency discussions has the "potential for dampening candid and collegial exchange between members of multi-head agencies." *Deeukmejian*, 751 F.2d at 1326.

Here, both the EPA and the COE are executive agencies imbued by Congress with certain authority and purview. The APA affords agency decisions an additional layer of discretionary protection. 5 U.S.C. § 701(a)(2) ("agency action is committed to agency discretion by law."). A reviewing court only has the authority to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). The Administrator's decision here is properly supported "so long as [the Administrator] abide[s] by the minimum procedural requirements laid down by statute, this court is not free to impose additional procedural rights if the agency did not choose to grant them." *Sierra Club v. Costle*, 657 F.2d 298, 391 (D.C. Cir. 1981) (citing *Vermont Yankee Nuclear Power Corp. v. N.R.D.C*, 435 U.S. 519, 523-25 (1978).

The Court's holding in *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council* controls the disposal of fill material into navigable waters. *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, 129 S.Ct. at 2459. The Court, in defining fill material, deferred to the broad definition articulated in the Code of Federal Regulations. 40 C.F.R. § 232.2 ("Fill material . . . has the effect of … [c]hanging the bottom elevation" of water of the United

States."). The Court found that where the COE has the authority to issue a Section 404 permit, the EPA lacks the authority to directly regulate the permitting except through exercise of its veto power. *Coeur Alaska*, 129 S.Ct. at 2468.

The proposed discharge of slurry into Lake Temp will result in a six-foot rise of the lake bottom. (Order at 4). This is certainly a "change" in the "bottom elevation" of the lake within the meaning of the federal regulations. The EPA's decision not to exercise its veto power "in effect deferred to the judgment of the Corps" for determining whether the proposed slurry discharge would have an adverse effect on Lake Temp. *Coeur Alaska*, 129 S.Ct. at 2465. "The [COE] has significant expertise" in determining the effect of discharges into navigable waters. *Id*. at 2473. The EPA's deference to the COE is within the statutory language of the Section 404(b). The Administrator is authorized to defer to the Secretary's determinations of the probable effects of the permitted activity and the consequences of proposed alternatives. Here, the Administrator has met the minimum statutory guidelines and the reasoning of the Court supports his decision. As a result, the Administrator's decision not to exercise his veto power was not an arbitrary or capricious act. Given the significant deference afforded the EPA in promulgating its administrative duties, the Administrator's decision to cede authority to the COE based on its expertise was not an abuse of discretion.

CONCLUSION

The District Court erred in granting the United States' motion for summary judgment on the issue New Union's standing. New Union has standing under both the Court's *Massachusetts* standard and through its *parens patriae* capacity as a sovereign state. New Union has a federally conferred right to protect the interests of its citizens and the groundwater within its borders.

The district court also erred in finding Lake Temp to be navigable water and therefore within the jurisdiction of the COE to grant the disposal permit. The evidence in the record shows that Lake Temp is ephemeral and cannot meet the Court's broad standards for navigability. Further, The COE's permit-granting capacity under section 404 is limited to disposal into the water itself. The DOD's proposed disposal site is not within Lake Temp itself, rather the DOD proposes to dispose of slurry on the dry exposed bank. This site is well outside of the COE's jurisdiction and the permit must therefore issue from the EPA.

The district court was correct in finding the OMB's involvement in the disagreement between the EPA and the COE was proper. The OMB has the express authority to arbitrate interagency disputes over enforcement of the CWA. The Administrator's decision to refrain from vetoing the COE's section 404 permit remains entirely within his discretion. Any issue of error therefore lies within the Administrator's action, which in this case is both unreviewable and properly supported by the record.

For the foregoing reasons, Progress requests that this Court REVERSE the district court's grant of summary judgment for the United States and review the COE's grant of the section 404 permit for lack of jurisdiction.

Respectfully Submitted,

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Counsel for State of Progress