MEASURING BRIEF

Team 65

C.A. No. 11-1245

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION
Appellant,
v.

THE UNITED STATES
Appellees,
v.

STATE OF PROGRESS
Intervenor-Appellee.

On Appeal from The United States District Court
For The District of New Union

BRIEF FOR APPELLEE,
THE UNITED STATES

ORAL ARGUMENT REQUESTED

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Jurisdictional Statement

This appeal arises from the final order of the United States District Court for the District of New Union where the court had jurisdiction because it involved federal questions, (R. 3); specifically, standing under Article III of the United States Constitution, the Clean Water Act ("CWA"), and the Administrative Procedure Act ("APA") are at issue on appeal and are all matters of federal question. 28 U.S.C. § 1331 (2006). The State of New Union now appeals the district court's order granting the United States and State of Progress' motion for summary judgment on the issues of navigability, the type of permit issued, and the Office of Management and Budget participation. (R. 10, 11). New Union and Progress now appeal the district court's order granting the United States' motion for summary judgment on the issue of New Union's standing. (R. 10). This court has jurisdiction over this case under 28 U.S.C. § 1291 (2006), which grants jurisdiction over all final decisions of the lower courts.

Statement of Issues Presented for Review

I. Whether New Union has standing to challenge the section 404 permit for the discharge of slurry into a lake wholly within the territory of Progress.

II. Whether Lake Temp was correctly classified as a navigable waters under 33 U.S.C §§ 1311(a), 1344(a), 1362(7).

III. Whether the COE appropriately issued a permit under 33 U.S.C. § 1344 for the discharge of slurry into Lake Temp.

IV. Whether the OMB properly assisted the COE and EPA in resolving a dispute and if their opinion ultimately leading to EPA's discretionary decision to not veto the Section 1344 permit was arbitrary and capricious or and abuse of discretion.

Statement of the Case

This is an appeal from a final order of the United States District Court for the District of New Union. (Order Granting Mot. Sum. J., June 2, 2011). The State of New Union instituted an action against the Secretary of the Army, acting through the U.S. Army Corps of Engineers

("COE"), for review under 28 U.S.C. section 1331 and the APA 5 U.S.C. section 702, of an individual permit issued pursuant to the CWA 33 U.S.C. section 1344 ("section 404") to the U.S. Department of Defense ("DOD") for the discharge of slurry into Lake Temp. (R. 3). Specifically, New Union asserts standing to challenge the permit issued by the COE; argues that Lake Temp is navigable; seeks a declaration that the section 404 permit issued by the COE is invalid and argues that the Administrator of the U.S. Environmental Protection Agency ("EPA") has the authority to issue the permit under CWA 33 U.S.C. section 1342 ("section 402"); and argues that the Office of Management and Budget ("OMB") violated the CWA when it resolved the dispute between the COE and EPA. (R. 1, 3). The United States argues that New Union does not have standing; Lake Temp is navigable; the COE has the jurisdiction to issue the permit; and OMB's actions did not violate the CWA. (R. 1, 2). The State of Progress, as an intervener, argues that New Union has standing; the COE does not have jurisdiction to issue the section 404 permit because Lake Temp is not navigable water; and that the OMB's actions were not improper. (R. 1, 2). Progress argues, in the alternative, if Lake Temp is navigable, the COE has jurisdiction to issue the permit. (R. 2).

The district court granted the United States' motion for summary judgment, finding that New Union lacked standing; the COE and not the EPA has jurisdiction to issue the permit under section 404 to fill Lake Temp, because it is a navigable water and the slurry is fill material; and that the OMB properly resolved a dispute between the agencies. (R. 1). As a result of these decisions, New Union and Progress seek review.

Statement of the Facts

The COE issued a section 404 permit to the DOD for the temporary discharge of slurry onto the dry portions of Lake Temp, an intermittent body of water located within an arid military reservation in Progress. (R. 3-4). Lake Temp, a nine by three mile oval lake, has historically

been utilized by ducks as a migratory stopover. (R. 4). The seasonally consistent presence of migratory ducks has attracted interstate duck hunters and watchers for the past 100 years. (R. 4). Additionally, recreational boaters utilize the lake via Progress' highway, which runs closely along the lake and intersects with many roads leading to New Union. (R. 4).

Lake Temp receives surface water flows from an 800-square mile watershed and has no surface outflow. (R. 4). Approximately 1000 feet below Lake Temp, following the general contours of the lake, is the Imhoff Aquifer ("Aquifer"), of which ninety-five percent is located within Progress. (R. 4). The Aquifer is neither potable nor suitable for agricultural use because of high levels of sulfur. (R. 4). Dale Bompers, a citizen of New Union, owns and operates a ranch above New Union's five-percent of the Aquifer, but does not currently use, or have definite plans to use, the Aquifer. (R. 4, 6).

The DOD's slurry will consist of water and munitions of liquid, semi-solid and granular contents, which have been treated to reduce volatility, and pulverized metals. (R. 4). The slurry, as it is evenly deposited, will raise the dry portions of the lakebed by several feet. (R. 4). The edges of the lake will be graded so as to promote unimpeded flow from its surface water sources. (R. 4). Upon completion of DOD's project, the natural precipitation of alluvial deposits will return the lake to its pre-operation condition. (R. 4-5).

The COE prepared an Environmental Impact Statement ("EIS") and issued the permit pursuant to its congressionally-mandated authority under section 404. (R. 4, 10). There is no evidence pertaining to the strength of the pollution or whether it will reach New Union's portion of the Aquifer. (R. 5-6). After a dispute between the COE and EPA, the OMB facilitated a dispute resolution process. After the resolution process, the EPA did not exercise its veto power. (R. 10). New Union and Progress appeal the district court's grant of summary judgment in favor of the United States. (R. 1).

Summary of the Argument

New Union does not have standing, either in its sovereign capacity, or *parens patriae* capacity, to challenge the section 404 permit issued for the discharge of slurry into a lake owned by the United States within the territory of the State of Progress because it failed to establish the Article III "cases and controversies" jurisdictional predicate required for seeking redress within the limited jurisdiction of Federal courts.

Characterizing Lake Temp as a navigable water is consistent with a broad interpretation of the CWA as prescribed by Congress and the Court. Although wholly intrastate and periodically dry, Lake Temp, nonetheless, qualifies as a relatively permanent body of water. The historical usage of Lake Temp for interstate ducking hunting and recreational boating, in the aggregate, substantially affect interstate commerce, and thus, subject Lake Temp to the CWA.

The United States, New Union, and Progress all agree that the discharge of the slurry will result in raising the lakebed of Lake Temp. Therefore, the COE and EPA fill definition is met, a 404 permit is the only permit that can be issued, and the COE properly issued a 404 permit. The EPA is banned under the CWA from issuing a 402 permit because the slurry will raise the elevation of the Lake Temp's bed.

The OMB has authority, under the President's delegated Constitutional duties, to ensure that the laws of the United States are faithfully executed. The OMB, in fulfilling the execution duty, merely issued an opinion, that was compatible with the CWA and the will of Congress, about how the dispute should be resolved. The EPA acted within its discretionary authority when it chose to accept the OMB's recommendation and not exercise its CWA Section 404(c) veto power. Thus, the action is not subject to judicial review. Even if the action is reviewable, the EPA did not act arbitrarily or capriciously because it did not rely on factors outside the Congressional mandate, offered a rational connection between the facts and judgment, and the

facts support the notion that the EPA underwent an in depth analysis of the project. Therefore, the COE and EPA acted properly and the lower court decision should be affirmed.

Standard of Review

A court reviews a grant of summary judgment *de novo*. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). Summary judgment is appropriate only when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a),(c) (2010). Although an appellate court reviews a lower court's grant of summary judgment *de novo*, it should affirm the lower court's decision when there is no legal error, and may do so on other grounds provided the record supports it. *Nat'l Wildlife Federation v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). In applying a *de novo* standard of review an appellate court "view[s] the evidence in the light most favorable to the nonmoving party" and must review the pleadings and record using the same summary judgment standard as the district court. *Citizens for Better Forestry,* 341 F.3d at 969.

Apart from the standing issue, which is a threshold question of law governed by the *de novo* standard of review articulated above, *Id.*, the claims in this case, also, involve a challenge to the permit issued by the Secretary of the Army, acting through the United States Army Corps of Engineers (COE), to the Department of Defense (DOD) pursuant to the Clean Water Act (CWA) Section 404, 33 U.S.C. § 1344, which is a final agency action subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 702. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C.Cir. 2005). "A court conducting judicial review under the APA does not resolve factual questions, but instead determines 'whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Ohio Valley Envtl. Coalition v. Hurst*, 604 F.Supp.2d 860, 879 (S.D.W.Va.

2009) (citation omitted). Thus, the standard set forth in Fed. R. Civ. P. 56(a),(c) is inapplicable "'because of the limited role of a court in reviewing the administrative record.'" *Id.* In this context, summary judgment becomes the 'mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Id.*

Argument

I. The State of New Union lacks Article III standing; it neither has standing in its sovereign capacity as owner and regulator of the groundwater in the state nor in its *parens patriae* capacity to seek review of the permit issued by the COE to the DOD to discharge a slurry of spent munitions into Lake Temp, an intermittent lake wholly within a military reservation owned by the United States in the State of Progress.

A. The State of New Union Lacks Substantive Article III Standing.

The decision granting the United States summary judgment, with respect to its contention that New Union lacked standing to appeal the permit issuance, was proper because New Union failed to establish the Article III "cases and controversies" jurisdictional predicate required for seeking redress within the limited jurisdiction of Federal courts. *See* U.S. CONST. Art. III; *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-cv-00037-RB-LFG, 6:09-cv-00414-RB-LFG, 2011 WL 3924489, at *2 (D.N.M. Aug. 3, 2011). Article III of the Constitution restricts the role of federal courts "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law" and "courts have no charter to review and revise legislative and executive action" aside from what is "necessary in the execution of that function." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). To establish Article III standing a party must satisfy not one, but all of the "three immutable elements of constitutional standing: (1) injury in fact, (2) causation, and (3) redressability." *Amigos Bravos*, 2011 WL 3924489, at *2. As further explained by Justice Scalia in *Lujan v. Defenders of Wildlife*, standing requires that:

First, the plaintiff must have suffered an injury in fact – an invasion of a legally

> protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of some the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. 555, 560-61 (1992) (quotations, ellipsis, brackets, and citations omitted). Thus, for New Union to have standing to appeal the permit issuance it must demonstrate that it meets these threshold requirements for federal jurisdiction. This task is considerably more difficult "when the plaintiff is not himself the object of the government action or inaction," as is New Union's position here, because it seeks review of a permit issued by COE to the DOD for use wholly within the territorial boundaries of another State, Progress. *See id.* at 562. (R. 3).

1. Injury-in-fact

New Union has failed to carry its burden of establishing that it will be harmed by the discharge authorized by the permit at issue because any potential injury is hardly concrete or particular, and its likelihood of occurring is speculative at best. The discharge at issue is intended for Lake Temp, a lake wholly within the boundaries of the State of Progress and owned by the U.S. government. (R. 4). New Union argues that the discharge will contaminate the water of the lake, which, by seeping through the primarily unconsolidated alluvial fill between it and the Aquifer, will contaminate the five percent portion of the Aquifer that is within the borders of New Union. (R. 5). However, New Union has only presented circumstantial evidence that contaminated water will reach the Aquifer and has presented no evidence as to when or if it will reach the portion of the Aquifer beneath New Union, nor has it presented evidence of the strength of any potential contamination that may reach its portion of the Aquifer. (R. 5-6).

In *Massachusetts v. EPA,*[1] the Court found that a future threat of sea-level rise posed by

[1] The relaxed standing requirements granted there will be addressed in part I(A)(4) *infra*.

global warming to the coastal property of Massachusetts was sufficiently significant for it to assert an imminent and particularized injury, the severity of which was only predicted to increase. 549 U.S. 497, 521-23 (2007). However, the injury there was supported by numerous unchallenged affidavits supporting that sea-level *had already* risen ten to twenty centimeters as a result of global warming and by "'qualified scientific experts involved in climate change research'" who predicted many dire consequences related to global warming. *Id.* at 521-22. Here, New Union neither supports its asserted injury with scientific evidence nor supplies this court with affidavits demonstrating the severity of potential contamination to its portion of the Aquifer. (R. 5-6). New Union itself admits that the timing and severity of the pollution's impact and rate of flow of groundwater are presently unknown. (R. 6). Even after *Massachusetts,* Federal courts have repeatedly held that abstract, potential future injuries do not satisfy the injury-in-fact prong required by *Lujan*. *See, e.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C.Cir. 2009) (A party's assertion that "significant adverse effects … 'may' occur at some point in the future … does not amount to the actual, imminent, or 'certainly impending' injury required to establish standing."); *Amigos Bravos*, 2011 WL 3924489, at *6 (D.N.M. Aug. 3, 2011) ("Without any factual support or basis in scientific observation, Declarants statements are pure conjecture … [and] are insufficient to confer standing."); *see also Ringo v. Lombardi* 2011 WL 3584476, at *8 (W.D.Mo. Aug. 15, 2011); *Gulf Restoration Network v. Nat'l Marine Fisheries Serv.,* 730 F.Supp.2d 157, 167 (D.D.C. 2010).

For "cases alleging environmental harm due to an agency's improper decision making" the Tenth Circuit "has broken down the injury-in-fact prong" into the following two-part test:

> '(1) the litigant must show that in making its decision without following [proper procedure], the agency created an increased risk of actual, threatened, or imminent environmental harm; and (2) the litigant must show that the increased risk of environmental

> harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.'"

Amigos Bravos, 2011 WL 3924489, at *5 (D.N.M. Aug. 3, 2011) (quoting ***Comm. to Save the Rio Hondo v. Lucero***, 102 F.3d 445, 449 (10th Cir. 1996)). Here, New Union has not adequately explained why the decision to allow COE to issue the permit, rather than EPA, will increase their risk of actual, threatened or imminent environmental harm. (R. 3-6). Unlike the plaintiffs who successfully established the requisite harm for standing in *Ohio Valley Environmental Coalition v. Hurst,* largely because the court was concerned that the COE's general permit did not provide for an environmental review or opportunity to challenge permitted activities, New Union did have the opportunity to comment and object to a National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370H EIS for this individual permit, but failed to do so. 604 F.Supp.2d 860, 876 (2009). (R. 6). Thus, New Union does not satisfy the first prong of the Tenth Circuit's test.

New Union also fails to satisfy the second prong of the Tenth Circuit's test because it has not adequately demonstrated its use of Lake Temp. In *Amigos Bravos,* the plaintiffs' general assertions that they lived near to, and recreated on BLM land with oil and gas wells was insufficient to show a geographical nexus to the site of agency action, because they did not specifically identify their use of, or near vicinity to, the particular BLM land for which the permits for oil and gas leases were contested. 2011 WL 3924489, at *9. New Union's generalized grievance that its five percent of the Aquifer will be contaminated as a result of the permitted activity, like the general assertions not found to confer geographical nexus in *Amigos Bravos,* similarly does not establish a geographical nexus because New Union neither uses water from the Aquifer, nor has it established a given proximity from their portion of the Aquifer to the permitted site to convey a geographical nexus. (R. 4-7). In any case, as the petitioning party, New Union bears the burden of proof, and it is up to New Union to present record evidence

establishing standing. *See Texas Indep. Producers and Royalty Owners Ass'n v. E.P.A.* ("*Texas Indep. Producers*"), 410 F.3d 964, 973 (7th Cir. 2005). New Union's failure to present evidence demonstrating its portion of the Aquifer's close geographical position and failure to collect relevant data to establish that water will actually move from Lake Temp to New Union's portion of the Aquifer is fatal and precludes a finding of standing. (R. 4-7).

2. Traceability

New Union's contention that it will be injured as a result of Aquifer contamination inherently provides its own chain of causation, but does not confer standing because the alleged contamination to New Union's portion of the Aquifer is merely speculative. (R. 5). The traceability prong for standing requires a plaintiff to "demonstrate a 'substantial likelihood' that the defendant's conduct caused the injury." *See Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3rd Cir. 1990). *See also Ky. Riverkeeper v. Midkiff*, 2011 WL 2789086, at *13 (E.D.Ky. 2011); *New Manchester Resort & Golf v. Douglasville Dev.*, 734 F.Supp.2d 1326, 1333-34 (N.D.Ga. 2010); *Native Village of Kivalina v. ExxonMobile Corp.*, 663 F.Supp.2d 863, 878 (N.D.Cal. 2009). Demonstrating a "substantial likelihood" to establish traceability in CWA cases requires a showing that:

> a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Amigos Bravos, 2011 WL 3924489 at *12 (quoting *Powell Duffryn* 913 F.2d at 72).

At present, it is impossible to ascertain whether the DOD will violate its permit and discharge fill material, or pollutants, in concentrations greater than allowed. In *Texas Indep. Producers,* the Seventh Circuit made it clear that "establishing a discharge does not establish an injury" because the EPA may issue permits for discharging pollutants in certain circumstances.

410 F.3d at 974. There, the court determined an environmental organization lacked substantive standing to challenge general permit regulations proposed by the EPA because it failed to offer specific facts as to how water bodies would be affected by projects authorized under the permit, and the only potential injury to the organization's members would be one occurring in the future if a contractor were to violate the terms of the permit. *See id.* at 972-76. New Union is similarly seeking to prevent future contamination from a source that has neither violated the terms of its permit, nor even begun discharging alleged contaminants. (R. 5-6). Thus, "it would be illogical to hold that a petitioner has standing to challenge a … permit … because a discharger *may* in the future violate the terms of the permit, where the [ ] Court has held that a citizen lacks standing to sue for *actual* violations of a permit where the discharger corrects the violation within the sixty-day notice period." *Id.* at 975 (emphasis in original). It is also unknown when or if the pollutants will ever reach New Union's portion of the Aquifer. (R. 5-6). New Union's complaint, like the environmental organization's complaint in *Texas Indep. Producers,* does not establish substantive standing because it similarly relies on potential hypotheticals. *Id.* at 975-76.

Furthermore, "plaintiffs must show that they 'use the area affected by the challenged activity and not an area roughly in the vicinity of' a project site." *Summers*, 555 U.S. at 499. New Union has not shown how the contamination will injure it nor describes any use of the Aquifer's water, and only avers that it will be injured if the Aquifer is contaminated. (R. 5, 7).

3. Redressability

New Union's underlying assumption, that a permit issued by the EPA under section 402 would prevent the contamination it alleges will occur if the permit issued by the COE under section 404 remains effective, is flawed because it fails to specify how a section 402 permit would mitigate the contamination alleged to occur, and thus, does not present this court with the ability to redress New Union's concern. (R. 3-10). As mentioned above, to satisfy the

redressability prong of standing, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. New Union asserts that a permit issued by the EPA would resolve what it characterizes as a "classic conflict of interest," that the COE, which is part of the DOD, by essentially issuing a permit to itself is acting in its own and not the public's interest. (R. 8). However, this suspicion alone, without more evidence that a section 404 permit would cause contamination while a permit issued under section 402 would not, does not elevate New Union's allegation beyond the realm of speculation.

4. Relaxed Standing Requirement for a State after *Massachusetts v. E.P.A.*

New Union erroneously asserts that it should be subjected to a more favorable, or relaxed, standing test following *Massachusetts*. (R. 5). In *Massachusetts*, the Court granted Massachusetts standing to petition EPA for rulemaking related to greenhouse gas regulations because, after affording Massachusetts "special solicitude" for standing analysis purposes, it found the State had been injured in its quasi-sovereign capacity by its loss of land due to the rise in sea-level associated with greenhouse gas emissions and global warming. *See* 549 U.S. at 520-23. However, as noted by the D.C. Circuit, "[t]his special solicitude does *not* eliminate the state petitioner's obligation to establish concrete injury." *Del. Dep't of Natural Res. & Envtl. Control v. Fed. Energy Regulatory Comm'n*, 558 F.3d 575, 579 n.6 (D.C.Cir. 2009). As discussed, New Union has failed to establish an injury in fact, and subsequently cannot wriggle its way into federal court by citing to *Massachusetts*.

Additionally, New Union has not provided this court with reason to believe that contamination will not occur if the EPA issues a permit, rather than the COE. (R. 5-6). The Seventh Circuit recently determined in *Michigan v. United States Environmental Protection Agency*, that a state could not achieve standing under the *Massachusetts* "special solicitude" theory simply because it preferred a different procedural vehicle for redesignation under the

Clean Air Act than the one used by the EPA. *See* 581 F.3d 524, 529 (7th Cir. 2009). While the state's alleged injury there was of a different nature than here (Michigan alleged an economic injury), the basic concept is similar here, a particular EPA permitting decision was made contrary to the preferred choice of the complaining state. *See id.* at 528-29. This court should similarly reject New Union's claim for "special solicitude" to confer relaxed standing requirements because, like in *Michigan*, New Union has provided no reason for this court to think its preferred method of permitting would mitigate the alleged harm. *See id.* at 529.

B. The State of New Union does not have derivative standing under a parens patriae *theory.*

A state may not use *parens patriae* to recover for the benefit of individuals or in a suit against the federal government; even if more than one citizen's interests are allegedly being harmed, a state must still establish that a quasi-sovereign interest exists. *See Mass.*, 549 U.S. at 519-20; *Okla. ex rel Johnson v. Cook*, 304 U.S. 387, 393-94 (1938); *Citizens Against Ruining the Env't v. E.P.A.* ("*C.A.R.E.*"), 533 F.3d 670, 676 (7th Cir. 2008). *Miccosukee Tribe of Indians of Fla. v. U.S.*, 680 F.Supp.2d 1308, 1314-15 (S.D.Fla. 2010). New Union does not have derivative standing under a *parens patriae* theory because it cannot satisfy the test involving the nature and scope of the interest and thus, has not established the existence of a quasi-sovereign interest. While the doctrine of *parens patriae* permits a state to vindicate an injury to it in its capacity as quasi-sovereign, *Mass.*, 549 U.S. at 518-19, the doctrine does not permit a state to "resort to [federal] jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares enforcement to be a matter of state policy." *Cook*, 304 U.S. at 394; *see also Miccosukee*, 680 F.Supp.2d at 1315 ("An essential characteristic of a quasi-sovereign interest is that it is more than a sovereign's proprietary interest or the interest of a private party that the sovereign wishes to pursue."). Here, New Union asserts that its *parens patriae* interest is in "its capacity as protector

of its citizens who have an interest" in the state's groundwater, but only presents one purportedly affected citizen, Bompers. (R. 1, 6). The blatant absence of any other potentially affected New Union citizens reveals the weakness of New Union's *parens patriae* claim. (R. 3-7).

Furthermore, even if one affected citizen of a state were to confer *parens patriae* standing, that citizen would have to be harmed in some way, and New Union has not carried its burden in showing that Bompers has suffered, or will imminently suffer, an injury. (R. 6). "[A] specific, concrete, and particularized allegation of a reduction in the value of property owned by [a] plaintiff is sufficient to demonstrate injury-in-fact." *See Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 898 (9th Cir. 2011) (citing *Lujan*, 504 U.S. at 560). As correctly noted by the lower court, New Union nor Bompers "present[ed] [any] proof of a loss in property value" following the COE's issuance of a section 404 permit to discharge fill into Lake Temp. (R. 3-10).

New Union's claim that its quasi-sovereign interest is in protecting the groundwater for all citizens does not cure their defective *parens patriae* standing argument because the contamination of the groundwater is speculative, no use of the groundwater has been demonstrated, and the permits issued by New Union for the withdrawal of groundwater relate to the quantity withdrawn and not to contaminants therein. (R. 1, 6-7). As noted above, the potential contamination of the small portion of the Aquifer within New Union is speculative. Moreover, if Bompers does not use, nor intends to use water from the Aquifer anytime soon, then whose rights is New Union protecting? New Union has not pointed to any other affected citizens. (R. 7).

New Union's *parens patriae* standing theory also fails because "[a] state may not bring a *parens patriae* suit against the federal government … because there the United States, and not the state, represents the people's interests." *C.A.R.E.,* 533 F.3d at 676 (citing *Mass. v. Mellon*, 262 U.S. 447, 485-86 (1923)); *see also Mich.*, 581 F.3d at 529. As opposed to the general

interests of the people in *C.A.R.E.*, relaxed standing requirements were permissible in *Massachusetts* because the state was "assert[ing] its rights under federal law" as opposed to protecting its citizens "from the operation of federal statutes," and that the state itself was being harmed, in a clear manner due to sea level rise. 533 F.3d at 676. The reasoning behind limiting the application of *parens patriae* in this manner is that the federal government already occupies the field of protecting its citizens through the CWA, and thus, New Union's citizens are already protected by the decisions made by the EPA and COE in this matter. *See Mich.*, 581 F.3d at 529 (explaining the reasoning in a parenthetical following the citation to *Mass. v. Mellon*, 262 U.S. 447 (1923)).

Lastly, to assert standing by using a *parens patriae* theory a state must demonstrate that it seeks to vindicate a quasi-sovereign interest, which New Union has not done here.

> "A quasi-sovereign interest exists when the interest (1) involves 'the health and well-being-both physical and economic-of its residents in general,' or involves a sovereign's 'interest in not being discriminatorily denied its rightful status within the federal system,' and (2) 'articulate[s] an interest apart from the interests of particular private parties' that affects 'a sufficiently substantial segment of its population.'"

Miccosukee, 680 F.Supp.2d at 1314 (quoting *Alfred L. Snapp & Son, Inc. v. P.R.*, 458 U.S. 592, 607 (1982). Here, New Union has only alleged harm to one particular citizen's interest and has not shown any other citizens that may be remotely affected by the permitted discharge. (R. 4-7). Moreover, New Union has neither demonstrated that the potential injury it seeks to remedy is apart from Bomper's interest, nor that the contamination of the very small portion of the Aquifer in New Union will affect a substantial segment of its population. (R. 4-7). Thus, absent a demonstrable quasi-sovereign interest, New Union's *parens patriae* theory fails, and this court should affirm the lower court's granting of summary judgment for the standing issue.

II. Lake Temp is a "water of the United States" as defined by the CWA, Federal Regulation, and the Supreme Court of the United States.

The lower court correctly granted the United State's motion for summary judgment deciding that the COE has jurisdiction to issue a section 404 permit for the "discharge of dredged or fill material into navigable waters" such as Lake Temp, a "water of the United States." *See* 33 U.S.C. § 1344. The CWA's defines "navigable waters" as "the waters of the United States, including the territorial seas." *See* 33 U.S.C. § 1362(7).

A. To successfully meet the purposes and goals of the CWA, a broad interpretation of "water of the United States" has been mandated by the United States Supreme Court and Congress.

"Waters of the United States" should be interpreted broadly as dictated by the Court and the legislative history of the CWA. *See U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133 (1985) (holding that protection of aquatic ecosystems demanded broad federal authority and thus, the COE's jurisdiction reaches wetlands that abut navigable waters and their tributaries); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) (affirming the CWA protects "virtually all bodies of water"). *See also* Sen. Rep. 92-1236, at 144 (1972) ("The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by any agency determinations which have been made or may be made for administrative purposes."). A broad interpretation is necessary to meet Congress' goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's water." *See* 33 U.S.C. § 1251(a). In pursuit of this goal, the COE has defined the types of waters that qualify as "waters of the United States" as, for example, "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. § 328.3 (a)(1). Significantly here, COE regulations also encompass broadly "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation or destruction of which could affect interstate or foreign commerce including such waters which

are or could be used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. § 328.3(a)(3) (punctuation omitted). The COE claims CWA jurisdiction over these waters even though the "waterbody may be entirely within a state" and a "physically navigable connection across a state boundary" is lacking. 33 C.F.R. § 329.7.

B. Lake Temp qualifies as an "other water" under 33 CFR Section 328.3(a)(3) because the use, degradation, or destruction of Lake Temp affects interstate commerce.

The historical and consistent usage of Lake Temp by interstate hunters, recreational boaters, and migratory birds, taken together in the aggregate, subjects Lake Temp to federal jurisdiction under the CWA, because "the use, degradation or destruction of [it] could affect interstate . . . commerce." *See* 33 C.F.R. § 328.3(a)(3). (R. 4). Congress has the authority to "regulate the use of the channels of interstate commerce[;] . . . to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities[;] . . . [and] the power to regulate those activities having a substantial relation to interstate commerce." *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995).

Lake Temp is an intrastate lake, (R. 4, 7), and as such, the federal government's ability to regulate activities there under the CWA is dependent on a determination that the activities at Lake Temp have a substantial relation to interstate commerce. *Id.* The Court has held that even if an activity is local and "may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . [regardless] of whether such effect [may have] earlier . . . been defined as 'direct' or 'indirect.'" *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942). *Wickard* established the commonly known "aggregation principle," that Congress may "reach a 'class of activities' that have a substantial impact on interstate commerce when those activities are aggregated with all similar and related activities – even though the activities within the class may be themselves trivial and

insignificant." 317 U.S. at 125; *Fla. v. U.S. Dep't Health and Human Services*, 780 F.Supp.2d 1256, 1280 (N.D.Fla. 2011) (*citing Maryland v. Wirtz*, 392 U.S. 183 (1986)). The aggregation principle of *Wickard* was further solidified and recently stretched in *Gonzales v. Raich*, where the Court held that the wholly intrastate cultivation and use of an illegal substance was within the power of Congress to regulate, because, similar to the facts in *Wickard*, the production of a fungible commodity meant for home consumption still had a substantial effect on "an established, albeit illegal, interstate market." 545 U.S. 1, 18 (2005).

While the activities at Lake Temp are admittedly not related to cultivation of a commodity, they are individual activities, which taken in the aggregate, do substantially affect interstate commerce if degradation of the lake were to occur. The unpermitted or unregulated discharge of pollutants into Lake Temp would likely cause degradation or destruction to the lake, thereby impinging on the ability of hunters, recreational boaters, and migratory birds to use the lake. It is undisputed that hundreds, if not thousands, of duck hunters, a quarter of which come from out of state, have been using Lake Temp for the last hundred years. (R. 4). If the lake's habitat no longer supported the ducks migratory stopover, then the thousands of duck hunters that spend their resources to engage in this activity would be prevented from doing so. Similarly, the recreational boaters and bird watchers, of whom presumably a similar percentage come from out of state because of the close proximity of the lake to the border of New Union, (R. 4), would also cease to expend their resources engaging in those activities. Collectively, the degradation of Lake Temp would cause a multitude of economic activities to cease, and would likely impact not only local commerce, but interstate commerce, because of the lake users originating from out of state. For example, in *Division of Parks and Recreation v. Marsh*, the Tenth Circuit held that Congress was empowered under the commerce clause to regulate the discharge of dredged or fill material into a wholly intrastate because the lake was used by interstate travelers for public

recreation, it supported a commercial fishery that market products out-of-state, and was on a flyway of several migratory species protected under international treaties. 740 F.2d 799, 803-04 (10th Cir. 1984). The Tenth Circuit noted there that they had upheld COE's jurisdiction rooted in commerce power on much fewer facts, even when the only interstate commerce hook was the use of non-navigable creek for irrigation for products that were sold in interstate commerce. *See id.* at 804 (citing *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979). Here, interstate commerce is supporting not one, but three different activities, which certainly in the aggregate, meet the broad power conferred to Congress under the Commerce Clause to regulate activities causing water pollution. *Id.*

Additionally, that Lake Temp became part of a military reservation in 1952, and DOD prohibited access to the lake, is of no consequence because the DOD did not erect a fence, it has knowledge that the public continues to use the lake for hunting, boating, and bird watching, and government authority to regulate vis-à-vis commerce power exists even when the target activity is illegal. *See Raich*, 545 U.S. at 18. (R. 4).

For the foregoing reasons degradation or destruction of Lake Temp would inhibit interstate commerce, and thus, it fits within the definition of section (a)(3) "other waters" and is subject to federal regulation under the CWA. 33 C.F.R. § 328.3(a)(3).

C. Lake Temp Is Distinguishable From SWANCC And Meets The Rapanos Plurality Definition.

The lower court correctly concluded that *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.*, ("*SWANCC*") is distinguishable from the case at bar due to Lake Temp's vastly different size and historical usage in the "highway of interstate commerce." 531 U.S. 159, 165 (2001). (R. 7). *SWANCC* is distinguishable for two reasons. First, the holding in *SWANCC* is limited to COE jurisdiction under the COE's Migratory Bird rule and, thus leaves no doubt as to the validity COE's remaining regulations. Second, while both areas are intrastate in

nature, Lake Temp is physically distinguishable from the sand and gravel pits in *SWANCC* and meets the tests set forth in *Rapanos v. U.S. Army Corps of Eng'rs*. 547 U.S. 715, 732 (2006); *SWANCC*, 531 U.S. at 165.

1. *SWANCC* is limited to COE jurisdiction under the COE Migratory Bird rule

In *SWANCC*, the Court held that the COE jurisdiction did not reach an "isolated, abandoned sand and gravel pit with seasonal ponds which provided migratory bird habitat" based on the COE's "Migratory Bird Rule." *Id.* The holding in *SWANCC* is limited to prohibiting the COE to confer jurisdiction over "isolated ponds" based solely on the presence of migratory birds. *Id.* at 165, 171-172. Progress correctly asserts that the presence of migratory birds, standing alone, is not a permissible connection to confer CWA jurisdiction under *SWANCC*. Progress' argument, however, is flawed, as it does not account for the use of Lake Temp by interstate hunters. That Lake Temp is a migratory bird stopover is not the linchpin for CWA jurisdiction, rather Lake Temp is under CWA jurisdiction because of its historic use by "hundreds" or "thousands" of interstate duck hunters and recreational row boaters and canoeists. (R. 4). Moreover, Lake Temp is an "intrastate lake," a class of waters that the COE maintains jurisdiction over; whereas, the site in *SWANCC*, scattered ponds which were formed from old excavation activities, does not fit into a recognized jurisdictional body of water. *See* 33 C.F.R. § 328.3(a)(3). The limited nature of the Court's narrow holding neither overturns the COE's regulations nor does it preclude a jurisdictional determination based on affects on interstate commerce. *See Draft Guidance on Identifying Waters Protected by the CWA*, 76 Fed. Reg. 24,479 (proposed Apr. 27, 2011).

2. Lake Temp, a nine-mile long and three-mile wide body of water, is physically distinguishable from the sand and gravel pits in SWANCC and meets the plurality definition of "waters" in *Rapanos*.

At issue in *SWANCC* was a series of sand and gravel pits left over from old mining excavation trenches which is physically distinguishable from Lake Temp, a nine by three mile

lake. 531 U.S. at 163. Therefore, unlike the relatively small range of a potential discharge in SWANCC, the sheer magnitude of Lake Temp invokes a much larger range and a greater concern for pollution. Although the sand and gravel pits in *SWANCC* eventually evolved into seasonal and permanent ponds where "approximately 121 bird species had been observed at the site," Lake Temp is a "relatively permanent standing…bod[y] of water." 531 U.S. at 164; *Rapanos*, 547 U.S. at 732. Unlike *SWANCC*'s site, Lake Temp receives surface water flows "from an eight hundred square mile watershed of surrounding mountains." (R. 4). Additionally, Lake Temp feeds into the extensive Aquifer, located one thousand feet below Lake Temp. (R. 4).

In *Rapanos*, the court could not reach a majority, thus, two separate tests were fashioned; the plurality's test applies broadly to define "waters of the United States" while Kennedy's test remains specifically applicable for a jurisdictional determination over an isolated wetland. *See Rapanos*, 547 U.S. at 715; *See also Sierra Club v. City & County of Honolulu*, 2008 U.S. Dist. LEXIS 64262, *20 (D. Haw. 2008) (Reliance on "significant nexus" test was misplaced where isolated wetlands were not at issue). Under the plurality, "the waters [of the United States] refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," and thus, includes "only relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732. Lake Temp, a relatively permanent lake, is precisely the type of water body the plurality envisioned. Progress' unsupported position that Lake Temp is not a navigable body of water, incorrectly states the plurality position in *Rapanos* and mischaracterizes the "intermittent" nature of Lake Temp. The *Rapanos* plurality does not confer jurisdiction over "intermittent flows." *Id.* at 732. Unlike "ordinarily dry channels through which water occasionally or intermittently flows," Lake Temp is a large body of water, and the occasional, and rare, dry periods occurring approximately twice a decade is of little consequence. *Id.* at 733; (R. 4). Crucially, *Rapanos* notes that a lake that dries up in "extraordinary

circumstances" or "seasonally" is not necessarily excluded and is, therefore, still a "water of the United States." *Id.* at 733 n. 5.

Recognizing the critical ecological role wetlands play in the integrity of water quality, the test espoused by Justice Kennedy requires "a significant nexus between the wetlands in question and navigable waters." *Id.* at 779-780 (Kennedy, J., concurring in the judgment). Wetlands are not subject to CWA jurisdiction if the "wetlands' effects on water quality are speculative or insubstantial." *See id.* at 780. The test is particularly tailored and solely applicable for a jurisdictional determination of isolated wetlands that are not adjacent to navigable water. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 290(4th Cir. 2011). Thus, while the plurality's definition remains applicable, Kennedy's significant nexus test is "irrelevant and inapplicable." *See City & County of Honolulu*, 2008 U.S. Dist. LEXIS 64262 *20 (Reliance on "significant nexus" test was misplaced where isolated wetlands were not at issue.)

Therefore, Lake Temp is a navigable because activities occurring on the lake, such as interstate duck hunting and recreational boating, affect interstate commerce and, the lake is a "relatively permanent" body of water. *Rapanos*, 547 U.S. at 732; *SWANCC*, 531 U.S. at 163

III. The COE has jurisdiction to issue a 404 permit under CWA 404 because the DOD's discharge will raise the bottom elevation of Lake Temp, and as a result, the fill material definition is met and the EPA is prohibited from issuing a 402 permit.

The CWA is a water quality statute that is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1977). Congress deemed the use of U.S waters for waste disposal as unacceptable under the CWA. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1043 (9th Cir. 1978); Sen. Rep. 92-414, at 7 (1971). When there is a proposal to discharge material governed by the CWA, Congress authorized the COE to issue permits for the discharge of dredged and fill materials and authorized EPA to issue permits for the discharge of all other pollutants. *See* 33 U.S.C. §§ 1342; 1344. Thus, the

determination of which agency authorizes a permit is contingent upon whether the discharged material is defined as fill material under the COE and EPA regulatory definitions. *See Coeur Ala., Inc. v. Se. Ala. Conservation Council*, - U.S. -, 129 S. Ct. 2458, 2469 (2009); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Kentuckians),* 317 F.3d 425, 447 (4th Cir. 2003).

A. The CWA is clear and unambiguous that the COE has authority to issue a 404 permit if the material meets the agencies' fill definition.

When provisions of a statute conflict, agencies are expected to make substantive choices and interpret the regulation. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). A court can only set aside an agency interpretation of a regulation if it is "'clearly erroneous or inconsistent with the regulation.'" *See Kentuckians*, 317 F.3d at 446-47 (quoting *Auer v. Robbins*, 519 U.S. at 461).

Pursuant to the CWA section 402(a), Congress limits the EPA's authority to issue permits for the discharge of pollutants by allowing it to issue permits for all discharges of pollutants, "*except* as provided in section[ ] . . . 1344," 33 U.S.C. § 1342(a) (emphasis added). In fact, the Court in *Coeur*, ruled that "[s]ection 402 [expressly and unambiguously] forbids the EPA from exercising permitting authority" over material that meets the definition of fill. 33 U.S.C. § 1342(a); 129 S. Ct. at 2467. Hence, the regulatory scheme created a threshold question that must be answered to determine which agency will issue a discharge permit, of whether a substance to be discharged meets the agencies' definition of fill material. *See Coeur Ala.*, 129 S. Ct. at 2469; *Kentuckians*, 317 F.3d at 447.

Furthermore, the EPA and COE have a reasonable, "long-standing[,] and consistent division of authority" that is not "'plainly erroneous or inconsistent with the regulation'" where if the fill definition is met, then the COE's authority to issue the permit trumps that of the EPA. *See Coeur Ala.*, 129 S. Ct. at 2468 (*quoting Auer*, 519 U.S. at 461); *Kentuckians*, 317 F.3d at

445-446. The EPA also confirmed its understanding of the CWA by expressly declaring in its own regulations that "discharges of dredged or fill material into the waters of the United States which are regulated under section 404 of CWA" do not require a section 402 permit. *See* 40 C.F.R. § 122.3(b). As a result, both the legislative statute and executive agency regulations support the notion that if material meets the definition of fill then the COE's authority to permit the activity trumps that of the EPA.

Furthermore, the Court, in *Coeur,* accepted the interpretation and found that the EPA's interpretation was essentially restating the statute and it was reasonable and consistent with the CWA. 129 S. Ct. at 2468. Thus, the doctrine of *stare decisis*, requires this court to first address the threshold question and put the slurry, here, up against the definition of fill to determine whether in fact it is fill. *See Shepard v. U.S.*, 544 U.S. 13, 23 (2005) (Finding that the Court adheres more strictly to the doctrine of *stare decisis* in the area of statutory construction than in the area of constitutional interpretation because amendment is much more difficult.).

B. The discharge of the slurry here is fill material because it meets the elevation test.

The CWA does not clearly define or suggest limits to the definition of fill material. *See* 33 U.S.C. §§ 1251-1387; *Coeur Ala.*, 129 S. Ct. at 2469. *See also Kentuckians*, 317 F.3d at 441-42, 444. If a statute is clear about the definition of a term, then that is the end of the matter, Congress' interpretation applies, and the agency interpretation or regulation does not apply. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984). However, when a statute is unclear or ambiguous, an agency may interpret the statute if Congress delegated the authority to define the term to the agency and if the agency's definition is "based on a permissible construction of the statute." *See U.S. v. Mead*, 533 U.S. 218, 226 (2001); *Chevron*, 467 U.S. at 843; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

Here, Congress did not clearly define the term "fill" in the statute and did delegate authority

to the COE and EPA to "prescribed such regulations as are necessary to carry out [the] functions under this chapter." *See* 33 U.S.C. § 1361(a). Accordingly, the EPA and COE have defined fill to mean any "material placed in waters of the U.S. 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," including, but not limited to sand, clay, plastics, construction debris, overburden from mining, and contaminants. *See* 33 C.F.R. § 323.2; 40 C.F.R. § 232.2; 67 Fed. Reg. 31,130 (May 9, 2002).

In effect, the agencies in promulgating the fill definition created an elevation test that must be applied to determine the appropriate permit. *See Coeur Ala.*, 129 S. Ct. at 2464-65, 69 (The Court and all parties to the case agreed that a wet sand like slurry was well within the confines of the fill definition primarily because of the effect of it would be to raise the lakebed.); *Kentuckians*, 317 F.3d at 432 (finding that slurry was fill and a 404 permit was appropriate where the fill had the effect of filling over six miles of streams because the effect of the fill was to temporarily replace portions of water with dry land). The test is based on the physical characteristics of the navigable water where material is fill if it either has the effect of replacing a portion of the water with dry land or elevating the bottom of the water body.[2] *See* 67 Fed. Reg. at 31,131; *Kentuckians*, 317 F.3d at 432. Here, it is undisputed that the discharge will "elevate and change the bottom elevation of Lake Temp," and thus, section 404 applies because the elevation test is met, thereby classifying the material as fill. (R. 8).

Equally important, the CWA does not distinguish between fill material by the type of material that it is made out of unless it is trash or garbage that originates from the household and

[2] The agencies previously used a purpose test where the threshold question was what the primary purpose of the discharge was. *See Kentuckians*, 317 F.3d at 433. The agencies expressly rejected the purpose test as the threshold question because the purpose test did not "negate the difficulties" and confusion that the agencies had encountered in applying it in the past and the new effects would result in more consistent results. *See* 60 Fed. Reg. at 31,132 -133.

"creates physical obstructions that alter the natural hydrology of waters and may cause physical hazards as well as other environmental affects," such as "debris, junk cars, used tires, discarded kitchen appliances, and similar materials." *See* 33 C.F.R. § 323.2(e)(2), (3); 40 C.F.R. § 232.2(3); 67 Fed. Reg. at 31,134. Here, the slurry is from the production of weapons from a governmental building and not a household, and thus, is not trash or garbage. (R. 4).

There are no additional categorical exemptions to the fill material definition, such as waste disposal, because to include it would have made the category over-broad and exempt discharges that consist of material similar to traditional fill such as soil and earth. *See* 67 Fed. Reg. 31,133. Moreover, some waste has the effect of fill and likewise, is "undistinguishable either upon discharge or over time" from trash or garbage. *See id.* As a result, if a substance is waste and has the effect of fill, it satisfies the fill definition and CWA section 404 controls. *See id.*

Despite, the test being met, New Union argues that here the slurry is inherently different than the slurry in *Coeur Alaska* and *Kentuckians* because there they were made out of rock and water, whereas here they are made out of water, rock, chemicals, and ground metals, and therefore, the elevation test should not be applied and a 402 permit is more appropriate. *See Coeur Ala.*, 129 S. Ct. at 2459; *Kentuckians*, 317 F.3d at 430. (R. 8). While the contents of the slurry here may be different than those in *Coeur Alaska* and *Kentuckians*, this case does not present the issue of whether filling US waters with certain types of slurry is desirable or wise. This case presents the issue of who the proper agency to issue the permit is. The issue of whether the CWA should or should not be amended from its current form to consider more than the elevation test is an issue for the legislature to resolve through the legislative process and not this court. *See* U.S. Const., art. I, § 1; art. III, § 1. The relevant test that this court must apply narrowly asks whether the water is replaced with dry land or the lakebed bottom is elevated. *See Coeur Ala.*, 129 S. Ct. at 2464, 2467, 2470 (The Court found that a 404 permit was appropriate

because the fill was going to raise the fifty feet lakebed and increase the surface area by thirty-seven acres.). Thus, New Union's argument is misplaced and irrelevant.

Furthermore, the Court, in *Coeur*, expressly stated that "performance standards do not apply to discharges of fill material because the chemical … and biological integrity of the lake" are not a factor in determining whether the definition is met. *See* 33 U.S.C. § 1251(a); 33 C.F.R. § 323(f); 40 C.F.R. § 232; 129 S. Ct. at 2470. Even if the definition did consider "the chemical [ ] and biological integrity of the lake," there is no evidence here that the DOD's project will adversely impact "the chemical … and biological integrity" of Lake Temp permanently, and thus, the slurry would still meet the fill definition and require a 404 permit. *See* 33 U.S.C. § 1251(a); 33 C.F.R. § 323(f); 40 C.F.R. § 232; 129 S. Ct. at 2470. (R. 3-11).

Additionally, in *Coeur Alaska*, the Court noted that a 404 permit was appropriate in part because once the mining operations were complete, the mining company was going to take measures to reclaim the lake and turn it into a more emergent body of water for fish and vegetation than it was before the project, and therefore, there was no permanent loss to the Nation's waters. 129 S. Ct. at 2465. Thus, the Court implied that some temporary losses do not frustrate the purpose of the CWA, while permanent losses are more likely to frustrate the purpose. *See id.* Additionally, in *Kentuckians*, a 404 permit was appropriate because the discharge of slurry was going to temporarily have the effect of replacing portions of the water with dry land, but long-term the water would be returned to its original state. 317 F.3d at 431. Similarly, here, once the DOD project is complete, the lake will be raised, made into a larger surface, and ultimately returned to its "pre-operation condition." (R. 4, 5). Consequently, the DOD's project resulting in no permanent loss of Lake Temp coupled with the slurry meeting the fill definition, necessarily means that a 404 permit is appropriate.

New Union also argues that in *Coeur* the Court stated that some discharges that may raise

the elevation of the water could be classified as outside the realm of the fill definition. 129 S. Ct. at 2468-69. However, the Court was certain to note that such a determination would be within the COE's discretion and not that of the judicial branch because that would be making law which is beyond the court's reach. *See* U.S. Const. art. III, § 1; 129 S. Ct. at 2468.

Hence, the slurry is fill material because it will raise the elevation of Lake Temp and temporarily replace portions of the lake with dry land, and thus, the "EPA lacks authority" to issue a 402 permit and the COE acted properly in issuing a 404 permit. *See Coeur Ala.*, 129 S. Ct. at 2464, 2467. (R. 4, 5). Therefore, this court should affirm the lower court's ruling.

IV. The OMB had the authority under the President's Constitutional Duty to resolve the dispute between COE and EPA; and therefore, OMB acted properly and is not subject to judicial review. Furthermore, the EPA's discretionary veto power is insulated from judicial review or, alternatively, the EPA did not act arbitrarily and capriciously.

A. *The Executive Branch has the power to oversee and control all agency actions to "the extent permitted by law" to ensure that the laws of the U.S. are faithfully executed.*

1. Presidential Power

The White House, here, in merely providing direction, not a mandated order, to the COE and EPA about how to resolve a dispute did not go beyond the "extent permitted by law" because the CWA does not have a dispute resolution provision. *See* 33 U.S.C. §§ 1251-1387. (R. 9-10). Under the doctrine of Separation of Powers the legislative, executive, and judicial branches must be kept distinct in order to prevent abuse of power. *See U.S. Const. art. I.* § 1, cl. 1; *art. II*, § 1, cl. 1; *art. III*, § 1. The President of the United States ("President" or "White House"), as the "principal officer [of] each of the executive departments[,]" is fully vested with all the power to "take care that the laws [are] faithfully executed" without any limits throughout the entire executive branch. *See id.* at *art. II*, §§ 2, cl.1; 3. The framers of the Constitution designed the executive branch to be a unitary executive where the President manages the entire

branch by "'appointing, overseeing, and controlling those who execute the laws'" including subordinate officers and agency heads. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. - , 130 S. Ct. 3138, 3152 (2010) (*quoting* 1 Annals of Cong. 463 (1789) (statement made by the primary writer of the Constitution, James Madison, at the First Congress)). Hence, in order to fulfill his or her executive duties the President can perform management and administrative acts over all executive branch entities through directives or advise, as long as the internal management does not go beyond the "extent permitted by law." *See Free Enter. Fund*, 130 S. Ct. at 3146; *Bowsher v. Synar*, 478 U.S. 714, 725 (1986); *Youngtown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). *See also Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981); *Pub. Citizen v. Burke*, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988).

Furthermore, the President may "prod[ ]" an agency to make a certain decision as long as the agency makes the final decision and that discretionary decision has "requite factual support." *See Costle*, 657 F.2d at 407-08 (An undisclosed Presidential prodding that directs a different outcome than if the White House did not get involved during the post-comment period of an informal rulemaking process did not violate ex parte communications rules because the Clean Air Act nor due process were not violated). Otherwise, "[t]he president cannot 'take care that the laws be faithfully executed' if he [or she] cannot oversee the faithfulness of the officers who execute them." *See Free Enter. Fund*, 130 S. Ct. at 3147 (*quoting U.S. Const. art. II*, § 3).

The President has the duty to ensure that the COE and EPA "take care that the laws [are] faithfully executed." *See U.S. Const. art. II*, §§ 2, cl. 2; 3. Thus, the President and his or her representatives, as the "principal officer" of both agencies can manage them through directives or advise as long as the internal management does not go beyond the "extent permitted by law." *See id.* at *art. II*, § 2, cl. 1; *Free Enter. Fund*, 130 S. Ct. at 3146. *See also Env't Def. Fund v. Thomas*, 1985 U.S. Dist. LEXUS 13791, *12-13 (D.D.C. 1985) (The President did not have

oversight authority to impose substantive requirements on EPA rulemaking because the mandates delayed the procedural rulemaking deadlines set by Congress.).

As mentioned above, the CWA does not have a dispute resolution provision, and thus, the President acted within the bounds of his powers. Furthermore, section 511 of the CWA, states that the act does not "limit the authority and functions of any other officer or agency of the United States under any other law or regulation not inconsistent with this chapter," indicating that the White House may exercise its authority to "'oversee[ ] and control[ ] those who execute [the CWA] laws.'" *See* 33 U.S.C. § 1371(a); *Free Enter. Fund*, 130 S. Ct. at 3152 (citation omitted). Thus, here it was proper, and likely required, for the White House to step in and ensure that the laws were faithfully executed. *See U.S. Const. art. II*, §§ 2, cl. 2; 3. (R. 9-10).

New Union argues that, under *Thomas*, the OMB's directive and EPA's aquiesence is not a valid exercise of the President's Article II, Section 2 powers because the directive was incompatible with the will of Congress. (R. 9). *Thomas* is distinguishable from the case at bar because there, the OMB's actions impeded upon the non-discretionary action of the EPA by halting further agency action until the EPA complied with what the OMB mandated, whereas here, the OMB's directive did not halt the EPA's action, was not mandatory, pertained to a discretionary action, and ultimately led to the "laws [being] faithfully executed." S*ee U.S. Const.* at *art. II*, § 2, cl.1. (R. 9, 10).

2. OMB's Authority

The OMB was created as a direct subordinate to the President to ensure "consistency with Presidential priorities . . . and offer a dispassionate 'second opinion' on agency actions." *See* 74 Fed. Reg. 8,819 (Feb. 26, 2009). The *Meyer v. Bush* and *Thomas* courts, articulated that the President can delegate his or her power to oversee and control those who execute the laws to the OMB in order to ensure that the government "function[s] effectively and rationally." *See*

Morrison v. Olson, 487 U.S. 654, 680-82 (1988); *Meyer v. Bush*, 981 F.2d 1288, 1290 (D.C.Cir. 1993) (a Task Force within the OMB had authority to issue policy advice and require inter agency coordination because it was a direct subordinate to the OMB and the OMB was a direct subordinate to the President); *Costle*, 657 F.2d at 406 ("Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."). *See also Thomas*, 1985 U.S. Dist. LEXUS at *12-13. As a result, the OMB has broad internal authority to speak on behalf of the President and engage in management and administrative activities to ensure that the government "function[s] effectively and rationally." *See Wilcox v. McConnel*, 38 U.S. 498, 513 (1839); *Kendall v. U.S.*, 37 U.S. 524, 610 (1838); *Thomas*, 1985 U.S. Dist. LEXUS at *12-13. It follows then, that the OMB has authority, and quite possibly a duty, to ensure that disputes between agencies are resolved quickly and efficiently, albeit through a directive, so that the laws can be faithfully executed. *See Free Enter. Fund*, 130 S. Ct. at 3152. (R. 9).

Although, New Union argues that the OMB improperly resolved a dispute between COE and EPA because pursuant to Executive Orders 12,866 and 13,563 it cannot resolve a dispute that involves an independent agency and the EPA is an independent agency, the argument is improper. *See* E.O 13,563 (Jan. 18, 2011); E.O. 12,866 (Oct. 4, 1993). The purpose of the executive orders are to "improve the internal management of the Federal Government" during the administrative regulatory rulemaking process when agencies are writing rules, not executing rules. *See* E.O 13,563 § 10; E.O. 12,866. The EPA and COE, here, were not acting under the confines of the Executive Orders because the agencies were merely executing the CWA as Congress wrote it. (R. 9, 10). Thus, the OMB did not act improperly in assisting in resolving the dispute between the COE and EPA.

B. *The participation by OMB did not render EPA's decision arbitrary and capricious because EPA maintains the ultimate authority to decide whether to exercise its 404(c) veto power.*

1. EPA's discretionary veto power is not subject to judicial review.

"Any person 'adversely affected or aggrieved' by agency action, including a 'failure to act,' is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court.'" *See* 5 U.S.C. §§ 704, 706; *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Judicial review "applies … except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *See* 5 U.S.C. § 701(a); *Heckler*, 470 U.S at 828. The latter exception applies where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and, essentially, the "statute can be taken to have 'committed' the decision making to the agency's judgment absolutely." *See Heckler*, 470 U.S. at 830. (Affirming the "no law to apply" standard in *Citizens to Preserve Overton Park*, 401 U.S. at 410.)

The CWA section 404(c) gives the EPA discretionary power to veto the issuance of a section 404(a) COE permit "*whenever [the Administrator] determines*… 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) (emphasis added). "The decision of the Administrator not to overrule the decision of the Army Corps is discretionary" and, thus, insulated from judicial review. *See Pres. Endangered Areas of Cobb's History v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996) (Noting that the EPA's regulations, 40 C.F.R. § 231.3(a), also views this power as discretionary.). *See also Heckler*, 470 U.S. at 830 (Reasoning that the preclusion of judicial review when there is "no meaningful standard against which to judge the agency's exercise of discretion … avoids conflict with the 'abuse of discretion' standard of review; moreover, it "satisfies the principle of statutory

construction…by identifying a separate class of cases which [Section] 701(a)(2) applies."). Similarly here, because EPA's decision to not exercise its veto power is discretionary, it cannot be made subject to judicial review under section 701(a)(2). To find otherwise would lead to the absurd result of subjecting the EPA's inaction to judicial review every time the COE issued a 404(a) permit in contravention to section 701(a)(2).

Finally, when the President is executing the laws, another branch cannot intrude upon any direction, advice, or management of the branch unless there is a Constitutional violation. *See U.S. Const. art. I*, § 7; *Bowsher*, 478 U.S. at 726-27 (Congress overstepped its authority violating the Separation of Powers Doctrine when it passed a statute managing the spending of a President's subordinate because it was effectively performing an executive duty). Here, the scope of judicial review is limited by the Separation of Powers Doctrine, and thus, this court cannot rule on whether the EPA should have vetoed the permit because it would exceed their jurisdictional bounds and intrude upon the executive powers. *See U.S. Const. art. I*, § 7; *Bowsher*, 478 U.S. at 726-27.

2. Even if EPA's discretionary veto power was subject to judicial review it would not be arbitrary and capricious because the outcome is consistent with *Couer*.

Assuming *arguendo*, if EPA's veto power is neither discretionary nor insulated from judicial review, the decision would, nonetheless, not be arbitrary and capricious. Under the arbitrary and capricious standard, "a court is not to substitute its judgment for that of the agency" and EPA must provide a "satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

The reviewing court is limited to determining whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See*

Overton Park, 401 U.S at 416. The relevant factors are whether the agency: 1) "has relied on factors" outside of the Congressional mandate; 2) "failed to consider an important aspect of the problem;" 3) explanation is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise;" and 4) "offered an explanation for its decision that runs counter to the evidence before the agency." *See State Farm*, 463 U.S. at 43.

First, the EPA did not rely on factors outside the Congressional mandate, and there is no evidence to prove otherwise. New Union incorrectly asserts that the EPA was influenced by OMB's directive to not veto the permit. (R. 9). New Union has no basis to speculate that EPA was directed by OMB not to veto the permit merely because OMB resolved an agency dispute.

Next, under the second prong and third prong, it cannot be asserted that EPA did not consider "an important aspect of the problem" or that EPA's explanation is "implausible" where the EPA properly conformed with *Coeur*. Unlike the decision in *State Farm*, where the agency "failed to offer [a] rational connection between facts and judgment," here, EPA declined to exercise its veto authority and "deferred to the judgment" of the COE which is consistent with *Coeur*. *State Farm*, 463 U.S. at 56; *Coeur Ala.*, 129 S. Ct. at 2463; (*see* Section III *infra*). Moreover, under *Coeur*, the EPA is forbidden "from exercising permitting authority that is provided [to the Corps] in 404." *Id*. at 2466. Thus, if the COE has the authority to issue a fill permit, EPA no longer maintains the authority to issue a 402 permit. *See id*.

Finally, contrary to New Union's assertion, the very fact that EPA took the time to compare and analyze the request for a permit here with the permit issued in *Coeur*, negates a finding that their ultimate decision not to veto the permit "runs counter to the evidence before it" because it shows that its final determination was made after considering the evidence. *See State Farm*, 463 U.S. at 43. That EPA argued to OMB that the discharge here was significantly different than the discharge in *Couer*, merely demonstrates the depth of the analysis undergone by EPA prior to

making its final decision not to veto the permit. *State Farm*, 463 U.S. at 43. (R. 9). "[T]he fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so." *See FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 529 (2009). Furthermore, the EPA seldom uses its veto power and has only done so on thirteen occasions. *See* ***Robert V. Percival et al., Envt'l Regulation: Law, Science, and Policy***, 751 (6th ed. 2009).

New Union's argument that EPA's decision not to veto was essentially made by the OMB and prohibits proper interpretation using *Chevron* is without merit. (R. 9). EPA's decision not to veto was made solely by EPA; even if OMB resolved the dispute and influenced EPA in a manner that was contrary to the CWA, the decision will still be subject to the same standard of judicial review as described above. *See* 5 U.S.C. § 706(2)(A); ***see Pub. Citizen Health Research Group v. Tyson***, 796 F.2d 1479, 1481, 1483 (D.C. Cir. 1986) (OSHA decision to carry out OMB directive was overturned because it was not supported in the administrative record). The EPA, therefore, in conformance with *Coeur*, the APA, and the CWA, did not act arbitrarily and capriciously when it decided to not exercise its veto authority.

Conclusion

This court should affirm the lower court's decision because New Union lacks standing in both its sovereign and *parens patriae* capacity; Lake Temp's characterization as a navigable water is consistent with a broad interpretation of the CWA and the activities on the lake, in the aggregate, substantially affect interstate commerce; the COE correctly issued a 404 permit because the slurry would raise the bottom elevation of Lake Temp, and thus, qualifies as fill material which precludes EPA from issuing a 402 permit; OMB properly resolved a dispute between the agencies under its delegated presidential duty to ensure that the laws are executed; and EPA acted within its discretionary power in not vetoing the permit.