Team No. 22

C.A. No. 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.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for UNITED STATES,
Appellee and Cross-Appellant

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331 (2010), federal district courts have original subject-matter jurisdiction over all civil actions arising under federal laws, including those brought under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* (2010).

The jurisdiction of United States Court of Appeals for the Twelfth Circuit over this appeal from a final decision of the United States District Court for the District of New Union is grounded in 28 U.S.C. § 1291 (2010).

The State of New Union, Plaintiff-Appellant, and the State of Progress, Plaintiff-Appellee, each filed a Notice of Appeal from the June 2, 2011 Order of the District Court on September 15, 2011.

This appeal is taken from the District Court's final Order granting summary judgment in favor of the United States, Defendant-Appellee, thereby disposing of all claims in this case.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court properly found that the State of New Union lacked standing, both in its sovereign and *parens patriae* capacities, to bring suit against the United States, because it failed to establish that it would suffer concrete and imminent, rather than merely speculative, injury fairly traceable to the discharge authorized by a § 404 permit issued under the Clean Water Act (CWA), 33 U.S.C. § 1344 (2010).

II. Whether the District Court properly found that Lake Temp ("Lake"), which has been used by thousands of duck hunters from both in and out of state for at least 100 years, constitutes a "navigable water" within the meaning of the CWA, thereby establishing the

jurisdiction of the United States Army Corps of Engineers ("COE") to issue a CWA § 404 permit to the United States Department of Defense.

III. Whether the District Court properly upheld the COE and the Environmental Protection Agency's (EPA) concurrence that the slurry to be discharged into the Lake constitutes fill material within the definition prescribed by the § 404 permit program regulations under the CWA.

IV. Whether the District Court properly held that the Office of Management and Budget's participation in the dispute resolution process with the EPA and the COE regarding the issuance of an individual § 404 permit, pursuant to 33 U.S.C. § 1344, for the discharge of a slurry fill material into the Lake did not violate the CWA.

STATEMENT OF THE CASE

Plaintiff, the State of New Union ("New Union"), brought suit against Defendant, the United States (U.S.), in the United States District Court for the District of New Union, pursuant to 28 U.S.C. § 1331 (2010) and the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2010). R. 3. New Union sought judicial review of an individual permit issued by the United States Army Corps of Engineers ("COE") to the United States Department of Defense (DOD) under § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, for the discharge of a slurry fill material into Lake Temp ("Lake"), located on a United States military reservation within the State of Progress ("Progress"). R. 3. New Union contests the appropriateness of the COE's issuance of a CWA § 404 permit, 33 U.S.C. § 1344, asserting that a CWA § 402 permit, 33 U.S.C. § 1342 (2010), from the Environmental Protection Agency (EPA) was more appropriate. R. 3. Progress, under its asserted interests over the land upon which the proposed activities are to take

place, intervened in the suit as Defendant. R. 3. Intervenor/Defendant Progress contends that the Lake is not a navigable water within the jurisdiction of the CWA, and thus is not subject to either a CWA § 402 or § 404 permit. R. 5.

Following the close of discovery, Defendant U.S. moved for summary judgment on the following grounds: (1) New Union lacked standing to seek judicial review of the issuance of the permit; (2) the individual § 404 permit issued by the COE was appropriate because (a) the Lake qualifies as a navigable water, and (b) the discharge of slurry fill material requires a § 404 permit under *Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 129 S. Ct. 2458 (2009); and (3) the Office of Management and Budget's (OMB) participation in the permitting process did not violate the CWA. R. 5.

New Union subsequently filed a cross-motion for summary judgment, contending that: (1) it did in fact have standing; and (2) the Lake is navigable within the meaning of the CWA; but (3) the material discharged was not fill requiring § 404 permit from the COE, rather, it was a pollutant requiring a § 402 permit from the EPA; and (4) OMB's input in the permitting process was in contravention of the CWA. R. 5.

Progress also moved for summary judgment on the basis that: (1) New Union had standing; and either (2) the Lake is not navigable under the meaning of the CWA, eliminating the need for a § 402 or § 404 permit; or (3) the § 404 permit issued by the COE was appropriate following *Coeur*; and (4) OMB's participation in the permitting process did not violate the CWA. R. 5.

On June 2, 2011, the District Court granted summary judgment in favor of the U.S., finding that: "(1) Plaintiff has no standing; (2) The COE had jurisdiction to issue a section 404 permit for the addition of fill to Lake Temp because Lake Temp is a navigable water and the

slurry is a fill material; and (3) OMB's dispute resolution between EPA and the COE did not violate the CWA." R. 10-11.

Following the District Court's Order, New Union and Progress both filed Notices of Appeal. R. 1. New Union contests the District Court's holding that: (1) it did not have standing to seek judicial review of the individual § 404 permit; (2) it is within the authority of the COE to issue a § 404 permit for the DOD's project; and (3) OMB's participation in resolving the dispute between the COE and the EPA was not in violation of the CWA. R. 1. Progress disagrees with the District Court's findings that the Lake is navigable under the CWA, allowing the COE to issue a § 404 permit. R. 1.

STATEMENT OF THE FACTS

Lake Temp ("Lake") is located within the State of Progress ("Progress"). R. 4. At its peak, the Lake is three miles wide by nine miles long and is entirely within the boundaries of Progress. R. 3-4. The Lake is at the bottom of a drainage base, and once every five years, it is not filled by the surrounding watershed but becomes a dry lakebed. R. 4. There are no rivers or streams flowing out from the Lake; it is a wholly contained water body and is not connected to any other body of water. R. 4. For the last 100 years, hundreds to thousands of hunters have used the Lake and the surrounding area to hunt ducks that stop over during the migratory season. R. 4. An average of twenty-five percent of the duck hunters travel from outside of Progress to the Lake for purposes of using it for duck hunting. R. 4.

Since 1952, the Lake has been utilized by the United States Department of Defense (DOD) as a military reservation. R. 4. Running along the edge of the military reservation, about 100 feet from the Lake's southern shoreline, is the state highway. R. 4. Although there is no fence restricting access from the highway to the military reservation, the DOD has posted signs

warning the public that entry is illegal. R. 4. Despite such warnings, trails and drag marks evidence that hunters and other members of the public continue to bring boats to travel over the lake. R. 4.

For the purpose of containing spent munitions, the DOD proposed to use its military reservation site to construct a facility designed to receive spent munitions and prepare them as fill material. R. 4. The facility will break down the munitions in the following manner: first, liquid, semisolid and granular contents will be mixed with chemicals to assure they are stable; second, separate solids that are primarily metals will be processed; and finally, the two groups will be mixed with water to create a slurry, a fill material, which will be deposited evenly over the lakebed during the dry season. R. 4. The DOD estimates that this one-time operation will raise the lakebed by six feet and expand its surface by two square miles. R. 4. The project "is preventing the discharge of any pollutants or wastewater to other navigable waters, in effect creating zero discharge of pollutants, the goal of the statute." R. 8 (citing 33 U.S.C. § 1251(a)(1)). The Lake will remain because there is nowhere else for the precipitation from the surrounding watershed to flow. R. 4. Furthermore, the United States Army Corps of Engineers ("COE") plans to grade the edges of the lakebed to insure the watershed runoff will continue to fill the Lake with no problems. R. 4. The runoff will return alluvial deposits and restore the Lake to its natural condition at a higher level. R. 4-5.

Approximately 1,000 feet below the Lake is the Imhoff Aquifer ("Aquifer"); ninety-five percent is located under the boundaries of the DOD's military reservation within Progress, and a mere five percent crosses over into the State of New Union ("New Union"). R. 4. The Aquifer, which is not currently used, contains high levels of sulfur and cannot be consumed nor utilized for agricultural purposes without treatment. R. 4. No citizen within New Union has the right to

access the Aquifer without obtaining a permit from the New Union Department of Natural Resources ("DNR"), and no such permits have been issued to date. R. 6-7. Above the small portion of the Aquifer located within New Union resides the owner and operator of a ranch, Dale Bompers. R. 4. This citizen alleges potential diminution in property value, however, he does not use the Aquifer nor has any definitive plans to do so in the future. R. 6. Moreover, no evidence has been offered to prove contamination of the Aquifer resulting from the DOD's project is imminent or will ever happen. R. 6.

In 2002, pursuant to the National Environmental Policy Act, 42 U.S.C. § 421-4370H (2010), the DOD prepared an Environmental Impact Statement (EIS) to which New Union neither commented nor objected. R. 6. New Union also failed to raise any concerns about the Aquifer when the DOD published its final EIS. R. 6. New Union is time-bared from raising any objections to the final EIS because the forty-five day public comment period and thirty day wait period, required by 40 C.F.R. § 1506.10 (2010), is over. R. 6. In accordance with § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, the DOD subsequently applied to the COE for an individual permit to discharge the fill material onto the dry lakebed. R. 3.

The COE reviewed and granted the DOD's application for an individual § 404 permit. R. 3. Consistent with standard procedure, the Environmental Protection Agency (EPA) reviewed the COE's determination. R. 9. The EPA and COE had a disagreement, at which time the United States Office of Management and Budget (OMB) was brought in to assist in resolving the issue. R. 9.

In accordance with standard procedures for reconciling disputes among executive agencies, the COE and the EPA provided the OMB with briefing papers on the issue and subsequently met to resolve the conflict. R. 9. Although New Union alleges that OMB

instructed the EPA to veto the COE's issuance of the § 404 permit, there is no evidence in support of these contentions, because the papers exchanged between the agencies are not in the record of this case. R. 9. The limited record, however, does establish that after due consideration of the facts, in addition to OMB's and COE's recommendations, EPA made an affirmative decision to allow the COE's § 404 permit to stand. R.10. Pursuant to its assessment and authority under the CWA, the EPA determined a § 404 permit was appropriate and a veto of the permit was not. R. 10.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of New Union properly granted the Defendant United States' motion for summary judgment for the foregoing reasons: (1) the State of New Union ("New Union") lacked standing; (2) Lake Temp ("Lake") is "navigable water" within the meaning of the Clean Water Act (CWA); (3) the United States Army Corps of Engineers ("COE") has jurisdiction to issue the permit under § 404 of the CWA; and (4) the Office of Management and Budget's (OMB) participation in the Environmental Protection Agency's (EPA) decision did not violate the CWA.

New Union has not established standing in either is sovereign or *parens patriae* capacity because it has not met the irreducible requirements of Constitutional Standing, nor the relaxed standing analysis set forth in *Mass. v. E.P.A.*, for failure to assert sufficient cognizable injury to either its sovereign or quasi-sovereign interests. New Union is also precluded from seeking judicial review under the Administrative Procedure Act (APA) because it has failed to prove that it was adversely affect or aggrieved by the COE's issuance of the § 404 permit under the CWA, and it is not within the zone of interest of the CWA.

The Lake is within the COE's jurisdiction under the CWA because the term "navigable water" as used in the CWA, was intended to include any water within the geographic area of the United States that may substantially affect interstate commerce, so long as such water is relatively permanent and has a navigable capacity. The Commerce Clause of the United States Constitution implicitly grants Congress the power to regulate navigable waters within legislation such as the CWA. Congress intended to expand the term "navigable water" under the CWA to the broadest definition of "navigable" possible, including intrastate waters that may affect interstate commerce. The Lake is navigable within the meaning of the CWA because it is navigable in fact. It has attracted and been used in its natural condition by interstate hunters and boaters for the past 100 years, thereby affecting interstate commerce.

The OMB's participation in the dispute resolution process between the EPA and the COE did not violate the CWA. The CWA grants the EPA final authority in all permitting decisions and allows the EPA to confer with other federal agencies for the purpose of reconciling any conflicting policy interpretations. The EPA's decision to uphold the COE's issuance of the § 404 permit to the DOD should be given deference because it was not arbitrary or capricious, or contrary to law or procedure and it is reasonable under a *Chevron* analysis.

Accordingly, the United States District Court for the District of New Union properly granted the Defendant's motion for summary judgment and should be affirmed.

STANDARD OF REVIEW

An appeal from a district court's grant of summary judgment affirming an agency decision is reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 584 (1988). Judicial review of an agency's interpretation of its own regulations is given substantial deference. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994). Broad deference is warranted even more

so "when . . . the regulation concerns 'a complex and . . . technical regulatory program' . . . [whose] 'criteria . . . require[s] . . . expertise and entail[s] the exercise of judgment grounded in policy concerns.'" *Id.* (internal citations omitted). Judicial deference is especially appropriate when a "decision as to the meaning or reach of a statute involve[s] reconciling conflicting policies, and a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge . . . ." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984).

Courts conducting judicial review of agency decisions under the Administrative Procedure Act (APA) may only set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2010). "[A] reviewing court" may not replace its own determination for that of the agency "if the agency's path may reasonably be discerned." *Alaska Dept. of Envtl. Conservation v. E.P.A.,* 540 U.S. 461, 497 (2004).

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE UNITED STATES WAS PROPER BECAUSE THE STATE OF NEW UNION LACKED STANDING.

A. The State of New Union improperly seeks judicial review of the United States Army Corps of Engineers' issuance of a § 404 permit to the United States Department of Defense in its sovereign and *parens patriae* capacities.

There are three ways a state may assert standing to bring suit – by alleging: (1) injury to its proprietary interests; (2) injury to its sovereign interests; and/or (3) injury to its quasi-sovereign, or *parens patriae* interests. Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation,* 52 B.C. L. Rev. 1065, 1076 (2011). The State of New Union ("New Union") improperly asserts standing to seek judicial review of the

United States Army Corps of Engineers' ("COE") issuance of an individual § 404 permit to the United States Department of Defense (DOD) under 28 U.S.C. § 1331, and/or the Administrative Procedure Act (APA), 5 U.S.C. § 702, based on its sovereign and *parens patriae* capacities.

1. *The State of New Union has failed to assert a cognizable injury to its sovereign interests.*

The term "sovereign interests" refers generally to a State's interests in its governing and regulatory powers. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 601 (1982). There are two general categories of "sovereign interests," either of which, if proven injured, gives way to a finding of standing under a State's sovereign capacity. *Id.* These interests are: (1) "the exercise of sovereign power over individuals and entities within the relevant jurisdiction," which involves a State's power to promulgate and enforce both civil and criminal laws within its jurisdiction; and (2) "the demand for recognition from other sovereigns," which "involves the maintenance and recognition of borders," as well as the protection of its regulatory jurisdiction from federal preemption. *Id.*

In the instant matter, although New Union asserts injury in its sovereign capacity as owner and regulator of the groundwater in the portion of the Imhoff Aquifer ("Aquifer") located within New Union, it fails to provide any factual support for its alleged injury; it does not even go as far as stating what the alleged injury is. New Union's power to promulgate and enforce laws within its jurisdiction has not been injured in any manner by the COE's issuance of the individual § 404 permit to the DOD, nor has the permit's issuance had the effect of compromising its sovereign recognition by other States. If New Union felt that its sovereign interests in regulating within its boundaries would be injured by the permit's issuance, it had ample time within the open comment period after publication of the Environmental Impact Statement (EIS) to involve itself in the process and raise objections.

2. *The State of New Union has not asserted sufficient injury to its quasi-sovereign interests to bring suit in its parens patriae capacity.*

To satisfy Article III Standing in *parens patriae* suits, a "State must articulate an interest apart from the interests of particular private parties . . . ; [it] must express a quasi-sovereign interest . . . that is sufficiently concrete to create an actual controversy between the State and the defendant." *Alfred,* 458 U.S. at 607. "[A] State has a quasi-sovereign interest in the health and well-being . . . of its residents," *Id.*, as well as "in all the earth . . . within its domain." *State of Ga. v. Tenn. Copper Co.,* 206 U.S. 230, 237 (1907). However, New Union has not asserted sufficient injury to its quai-soverign interest through the unsupported allegations of Dale Bompers, to bring suit in its *parens patriae* capacity. A State will not have standing to bring a *parens patriae* action if it merely acts to "represent the interests of particular citizens who . . . cannot represent themselves; [r]ather, to have such standing the State must assert" an injury to its "quasi-sovereign" interests. *Alfred*, 458 U.S. at 600-01. "More . . . than injury to an identifiable group of individual residents . . ." must be asserted to satisfy standing under *parens patriae*. *Id.* at 607.

B. The State of New Union failed to meet the irreducible minimum requirements of Constitutional Standing in both its sovereign and *parens patriae* capacities.

Before any plaintiff can bring an action in federal court, it must first satisfy standing under Article III of the United States Constitution by demonstrating the existence of a "case" and/or "controversy." U.S. CONST. art. III, § 2. To meet this threshold issue,

> a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

Satisfaction of the first prong requires a plaintiff to demonstrate that she has *personally* "suffered an 'injury in fact' – an invasion of a legally protected interest . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because injuries alleged must be "concrete and particularized," the Court has traditionally "declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 80 (1978). This is especially true where the generalized harm is "of an abstract and indefinite nature." *Fed. Election Comm'n v. Akins,* 524 U.S. 11, 24 (1998). Furthermore, the Court has held that "[a]llegations of possible future injury do not satisfy the requirements of Article III[,]" rather, "[a] threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990) (internal citations omitted). The party invoking federal jurisdiction carries the burden of proving its alleged injury is "real and immediate," *Id*. at 160; however, in limited instances, the Court has found future injuries to satisfy the "injury in fact" requirement where the plaintiff has proffered adequate evidence to demonstrate the alleged injury would happen immediately. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973).

Not every real and immediate injury satisfies Constitutional Standing; the injury alleged must be "fairly traceable" to the defendant's actions, and not "th[e] result [of] the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560. The final condition of standing is the element of "redressability – a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998). This requires plaintiffs to show that the "injury . . . is likely to be redressed by a favorable decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,*

454 U.S. 464, 472 (1982). The plaintiff must "personally . . . benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

In *Defenders of Wildlife*, a wildlife conservation group filed suit against the Secretary of the Interior contesting its interpretation of a section of the Endangered Species Act, claiming the provision as interpreted would have the effect of threatening certain species abroad. 504 U.S. at 562-63. In holding that plaintiffs did not have standing to seek judicial review, the Court noted the plaintiff's claims of "intent to revisit project sites at some indefinite future time, at which time they [would] presumably be denied the opportunity to observe endangered animals" were insufficient, because such claims fail to demonstrate an "imminent injury." *Id*. at 556. There was no hard evidence that any plaintiff members were actually going to revisit the project sites and suffer any injury at all; the alleged harm was merely speculative. *Id*.

New Union alleges it is an interested State that will be harmed because of contamination to the Aquifer resulting from the proposed discharge by the DOD of a slurry fill material into Lake Temp ("Lake"). The harm alleged by New Union, however, like that in *Defenders of Wildlife*, is merely speculative and does not establish injury in fact. To survive a motion for summary judgment, a plaintiff may not rely on "mere allegations" of harm to satisfy the injury requirement, but rather "must 'set forth' by affidavit or other evidence 'specific facts.'" *Id.* at 561. New Union has failed to present any evidence that the proposed activity will ever contaminate the Aquifer beneath its territory, and admittedly has not taken any necessary measures to produce such evidence. R. 6. Aside from the fact that only a mere five percent of the Aquifer is located within New Union's boundaries, the Aquifer has elevated levels of sulfur rendering it non-potable and unusable for agricultural purposes without treatment. R. 4, 6. New

Union does not presently hold a permit to access the Aquifer, it has never held such a permit in the past, nor has it manifested any intention of acquiring one at any point in the future. R. 6-7.

Even if the Court finds that New Union established injury-in-fact, New Union nevertheless lacks standing because the injury alleged – potential future contamination of the Aquifer below it – is not "fairly traceable" to the United States' actions – whether those actions are the COE's issuance of the § 404 permit to the DOD, or the DOD's future discharge of a slurry fill material over the dry lakebed. New Union admits that it is unknown whether any pollution will ever reach the portion of the Aquifer within its boundaries. R. 6. "The line of causation between [COE's conduct] … and … [New Union's alleged injury] is attenuated at best," and therefore does not establish the requisite nexus. *Allen v. Wright,* 468 U.S. 737, 757 (1984). While it may be possible to establish this causal connection between New Union's alleged injury and the DOD's proposed action, such a finding is nevertheless insufficient to meet the "irreducible constitutional minimum of standing" absent satisfaction of the other elements. *Defenders of Wildlife,* 504 U.S. at 560.

Finally, New Union has failed to establish that "a favorable decision" – grant of judicial review of the COE's issuance of a § 404 permit to the DOD – will "likely, as opposed to merely speculative[ly]" redress its alleged injury. *Id.* at 561. Even if the Court grants the judicial review sought by New Union, there is no certainty that it will result in a determination to set aside the DOD's § 404 permit, thereby preventing discharge of the slurry fill material into the Lake. Furthermore, regardless of whether the § 404 permit is set aside and a § 402 permit is subsequently issued by the EPA, the discharge that New Union seeks to prevent will inevitably be permitted anyway.

C. The relaxed standing analysis set forth in *Mass. v. E.P.A* is not applicable to the State of New Union; however, if it is, the State of New Union nevertheless lacks standing, because it fails to satisfy even this relaxed test.

In *Mass. v. E.P.A.,* environmental groups together with several States appealed to the EPA to promulgate regulations of greenhouse gas emissions in new cars, but the EPA declined to do so. 549 U.S. 497, 510-11 (2007). These groups sought review of the EPA's decision in federal district court. *Id.* at 514. The EPA contested that plaintiffs lacked standing to sue, but the Court determined that only one of the plaintiffs needed to have standing, and that Massachusetts was entitled to "special solicitude" in the standing analysis. *Id.*, at 520.

The Court, prior to determining that Massachusetts was entitled to "special solicitude" in the Constitutional Standing analysis, pointed out three significant factors upon which it relied in adopting relaxed standing for States bringing *parens patriae* actions: (1) a congressionally recognized procedural right; (2) status as a sovereign State; and (3) sovereign interest in preserving its territory. *Mass. v. E.P.A.*, 549 U.S. at 516-20. In discussing the weight to be accorded to the existence of procedural rights, the Court relied on a footnote in *Defenders of Wildlife*, stating that a "person who has been . . . [granted] a procedural right [by Congress] to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife,* 504 U.S. at 573 n. 7 (1992). The Court emphasized the significant impact of a plaintiff's status as a sovereign State, as opposed to a private individual, by pointing to the fact that the future injury alleged in *Defenders of Wildlife* was found to be "merely speculative," whereas the injury alleged by Massachusetts, although also prospective, was sufficiently "immediate" to satisfy standing because of Massachusetts' "sovereign interest in preserving its territory." *Mass. v. E.P.A.,* 549 U.S. at 517-19. The Court placed great significance on the fact that Massachusetts owned a "great deal of the territory

alleged to be affected," thereby "reinforc[ing] the conclusion that its stake in the outcome of [the] case [was] sufficiently concrete to warrant exercise of federal judicial power." *Id.* at 519.

New Union's status as a sovereign State, alone, does not entitle it to "special solicitude" in standing analysis under the narrow holding of *Mass. v. E.P.A.*. The existence of each of the factors discussed above are vital to the determination that a State bringing a *parens patriae* action against the federal government deserves "special solicitude" in the Constitutional Standing analysis. *Mass. v. E.P.A.* does not apply to New Union because: (1) New Union was not granted a procedural right to challenge the COE's issuance of the § 404 permit under any provision of the CWA; and (2) New Union's stake in the outcome is not substantial. However, even if it were applicable, New Union nevertheless lacks standing because it fails to meet even these diminished requirements.

Massachusetts demonstrated through "qualified scientific . . . research" that as owner of a "substantial portion of the state's coastal property," its interest in preserving its sovereign territory was injured because it had lost coastal land due to the change in global sea levels caused by global warming resulting in part from, "manmade greenhouse gas emissions," and it would continue to sustain further injuries absent agency regulation of greenhouse gas emissions. *Mass. v. E.P.A.,* 549 U.S. at 522-23. New Union, on the other hand, has a very small stake in the outcome. A trivial five percent of the Aquifer is within its territory, no citizen of the State owns a permit to access the Aquifer, the groundwater from the Aquifer is neither potable nor usable for agricultural purposes without treatment, and New Union has not indicated that any citizen has expressed an intention to use it in the future. R. 6. Furthermore, unlike Massachusetts in *Mass. v. E.P.A.*, New Union has not set forth any evidence that pollution will ever reach its portion of the Aquifer. For the same reasons that New Union was not able to meet the "irreducible

minimum requirements" of Constitutional Standing, it is not capable of satisfying the relaxed standing requirements under *Mass. v. E.P.A.*.

D. The State of New Union does not have standing to seek judicial review of the United States Army Corps of Engineers' issuance of the § 404 permit under the Administrative Procedure Act in either its sovereign or *parens patriae* capacity.

Section 10 of the APA, 5 U.S.C. § 702, limits "standing to obtain judicial review of agency action . . . [to] those who could show 'that the challenged action had caused them injury in fact, and where the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated." *SCRAP,* 412 U.S. at 686 (internal citations omitted). Plaintiffs seeking judicial review under the APA must: (a) satisfy the elements of Constitutional Standing; (b) demonstrate they are "adversely affected or aggrieved by agency action;" and (c) establish that the injury they assert "falls within the 'zone of interest' sought to be protected by the statutory provision whose violation forms the legal basis for [their] complaint[s]." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883 (1990). Furthermore, APA § 704, 5 U.S.C. § 704 (2010), provides that "when . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *SCRAP,* 412 U.S. at 686.

Pursuant to the general review provisions of the APA, New Union seeks judicial review of the § 404 permit issued by the COE to the DOD for the discharge of slurry fill material onto the Lake's dry bed. Because New Union has not established Constitutional Standing, it is not entitled to judicial review under the APA. However, in the unlikely event that the Court finds New Union meets the standing requirements of Article III, New Union still failed to demonstrate it has been affected or aggrieved by the issuance of the § 404 permit. Furthermore, New Union

has not proven that it is within the "zone of interest" of the CWA -- has been injured in a way that the statute was meant to protect against.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT LAKE TEMP IS "NAVIGABLE WATER" WITHIN THE MEANING OF THE CLEAN WATER ACT.

A. Congress's power to regulate Lake Temp as a "navigable water" within the Clean Water Act is an implied power granted under the Commerce Clause of the United States Constitution.

Under Article I of the United States Constitution, the Commerce Clause grants Congress the ability to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. In *Gibbons v. Ogden*, the Supreme Court held "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." 22 U.S. 1, 190 (1824). Early decisions of the Supreme Court limited Congress's authority to waters which were "navigable in fact." *See The Daniel Ball,* 77 U.S. 557 (1870) (asserting that only waters which may be used in "their ordinary condition…" for traveling across in a manner consistent with "customary trade and travel on water," (i.e. use by boat/ship) may qualify as being navigable in fact) (superseded by statute as stated in *Rapanos v. United States*, 547 U.S. 715 (2006)). This limitation on Congress's power was broadened in the twentieth century when the Supreme Court acknowledged that the power to regulate water-bodies under the Commerce Clause was not entirely reliant upon the water's navigable capacity; rather, Congress's ability to regulate extended to waters that affect interstate commerce. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

In 1972, Congress enacted the Clean Water Act (CWA) to protect the nation's waters from pollution by limiting the amount of material discharged into navigable waters. 33 U.S.C. §

1251. Section 301 of the CWA is the heart of the Act in which pollution is barred unless otherwise permitted under CWA §§ 404 or 402, 33 U.S.C. §§ 1344, 1342. 33 U.S.C. § 1251(b).

Section 404(a) of the CWA grants the United States Army Corps of Engineers ("COE") the power to issue a permit for "the discharge of dredged or fill material into the navigable waters . . . ." 33 U.S.C. § 1344(a). Within CWA § 502(7) the term "navigable waters" has been defined as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7) (2010). Following this definition, there has been confusion as to which water-bodies fall within the jurisdiction of the CWA and whether such water must also be navigable in the traditional sense of capacity.

B. Lake Temp is within the jurisdiction of the Clean Water Act because Congress intended, when drafting the Clean Water Act, to expand the term "navigable water" to the broadest definition of "navigable," including intrastate waters that may affect interstate commerce.

Within the Conference report for the CWA, it was stated: "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. REP. NO. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The definition of the term "navigable water" presented in CWA § 502(7) does not include a specific limitation to waters that have a navigable capacity. 33 U.S.C. § 1362(7). The original House Bill for the CWA included the word "navigable" within the definition of navigable waters; however, the word "navigable" was eliminated from the definition approved in the final Conference Bill. H.R. 11896, 92nd Cong. 502(8) (1972). The removal of the word "navigable" from the definition within the CWA together with the Senate Conference Report No. 92-1236, referenced and quoted above, should be understood as an intent by Congress to regulate beyond

waters that are navigable "in fact," and extend CWA jurisdiction to all waters that have an effect on interstate commerce.

The Court in *United States v. Ashland Oil & Transp. Co*., inferred from the language of the Senate Conference Report that Congress intended the CWA to regulate "all the waters of the United States in a geographical sense . . . [as opposed to navigable waters] in the technical sense . . . ." 504 F.2d 1317, 1323 (6th Cir. 1974) (internal citations omitted). Moreover, the Court proclaimed "there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government." *Id.* at 1323-24. Following the reasoning and inferences established by the Court in *Ashland Oil & Transp. Co.*, even though Lake Temp ("Lake") is within the State boundaries of the State of Progress ("Progress"), the COE has jurisdiction under the CWA to regulate the discharge of fill into the Lake because the Lake affects interstate commerce. Interstate hunters have, over the past 100 years, traveled to the Lake by interstate highways to hunt for seasonal game such as birds. R. 4. The use of the Lake by interstate hunters is therefor likely to have had a substantial effect on interstate commerce. Additionally, the Lake has been proven "navigable in fact" by the hunters' use of boats on the Lake in the course of tracking and hunting birds. R. 4.

C. Recent Supreme Court holdings support the assertion that Lake Temp is navigable within the meaning of the Clean Water Act, because it is a traditionally navigable water and has been used in its natural condition by interstate hunters and boaters for the past 100 years.

In 2001, the Supreme Court presided over the case of *Solid Waste Agency Of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). The Plaintiff, Solid Waste Agency of Northern Cook County ("Solid Waste"), challenged the COE's authority under the CWA to regulate isolated ponds formed from abandoned gravel pits on the plaintiff's land,

because such authority was based on the use of the ponds by migratory birds. *Id.* at 165-66. The COE had enacted the "Migratory Bird Rule" to expand jurisdiction of waters which were used by birds as a stop-over during the migratory seasons. *Id.* at 164. The Supreme Court, led by Chief Justice Rehnquist, held that the Migratory Bird Rule was not a valid expansion of Congress's ability to regulate navigable waters under the CWA. *Id.* at 174.

Although the Lake in Progress does function as a habitat for birds during the migratory seasons, the Lake is vastly different from the abandoned gravel pit ponds in *SWANCC*. *Id.* at 163. The ponds in *SWANCC* were originally found not to be within the COE's jurisdiction because there was *no* area that could "support 'vegetation typically adapted for life in saturated soil conditions.'" *Id.* at 164 (quoting 33 C.F.R. § 328.3(b) (1999)). Unlike *SWANCC*, the Lake in Progress *does* support such vegetation, as the Lake has been a relatively permanent body of water for more than 100 years. The Lake is greater in size and depth compared to the shallow gravel pits that occasionally filled with water in *SWANCC*. *Id.* at 163. Whereas in *SWANCC* a finding of jurisdiction over the ponds was based upon the presence of migratory birds, the COE's jurisdiction over the Lake in Progress was based upon the Lake's navigable capacity and effect on interstate commerce, not upon the use of the Lake as a seasonal stop-over by birds. Because the Lake and its jurisdictional grounds vary from the gravel pit ponds and the jurisdictional basis relied upon in *SWANCC*, the Supreme Court's decision to overrule the "Migratory Bird Rule" does not negatively impact the COE's jurisdiction over the Lake in Progress.

The Supreme Court later issued a plurality decision in 2006 where the Justices drafted five different opinion for *Rapanos v. United States*; the plurality decision resulted in there being no single opinion upon which to rely for a uniform interpretation of the CWA's jurisdictional limitations. *Rapanos*, at 758 (Roberts, J., concurring). *Rapanos* primarily addressed whether the

CWA provided for jurisdiction over wetlands. *Id.* at 729 (Scalia, J., plurality). However, within the process of determining wetland qualifications, Justice Scalia discussed what might constitute a "navigable water." *Id.* at 730-39. In order to determine what the CWA meant by the term "navigable water," Justice Scalia dissected the words of the CWA's definition to linguistically show how "the definite article ('the') and the plural number ('waters') . . . " was evidence that Congress intended a more expansive meaning of the term "navigable" than its traditional understanding. *Id.* at 732.

Although Congress intended something more than the traditional meaning of navigability, Justice Scalia limited CWA jurisdiction to: "only relatively permanent standing or flowing bodies of water." *Id.* Justice Scalia reinforced this limitation when he explained that the use of the term navigable comes from previous statutes and carries with it some of its traditional understanding, thereby limiting what a navigable water may be. *Id.* at 734 (citing *The Daniel Ball*, 77 U.S. at 563; *Appalachian Elec.*, 311 U.S. at 407-409; and *SWANCC*, 531 U.S. at 172). The Lake in Progress is a "relatively permanent" water body in that it runs dry merely once every five years. R. 4. During the time the Lake is filled with water, it is used as navigable water in the traditional sense by hunters with boats, and qualifies under Justice Scalia's test as a water within the COE's jurisdiction under the CWA.

In December 2008, the Environmental Protection Agency (EPA) joined the COE to develop a guidance memorandum following the Supreme Court's plurality decision in *Rapanos v. United States*. EPA & Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States, http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf (Dec. 2, 2008) (last visited Oct. 6, 2011). The Memorandum provides assistance to agencies in

making the determination of whether the agency is able to properly assert jurisdiction within the CWA over a body of water. The COE and EPA explicitly stated that they "will continue to assert jurisdiction over [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ." *Id.* at 4-5 (internal quotations omitted). The COE and EPA refer to 33 C.F.R. § 328.3(a)(1) (2010) and 40 C.F.R. § 230.3(s)(1) (2010), respectively, for details regarding what they hold to be navigable water. *Id.* at 5. In accordance with this Memorandum, the Lake is within the jurisdictional meaning of the CWA because it does have a navigable capacity, and does affect interstate commerce by means of the hunters who have traveled interstate to use the Lake over the last 100 years. R. 4.

III. THE LOWER COURT DECISION SHOULD BE UPHELD BECAUSE THE UNITED STATES ARMY CORPS OF ENGINEERS HAS JURISDICTION TO ISSUE THE PERMIT UNDER § 404 OF THE CLEAN WATER ACT.

A. Congress directly authorized the Environmental Protection Agency to administer the Clean Water Act pursuant to 33 U.S.C. § 1251(d).

The general purpose of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). In furtherance of this purpose, the CWA, in its provisions, sets forth limited circumstances and limited manners in which pollution may be discharged. 33 U.S.C. § 1251(b). Sections 404 and 402 of the CWA, 33 U.S.C. §§ 1344 and 1342, are such provisions. *Id.* Section 404 permits are administered by the United States Army Corps of Engineers ("COE") for the discharge of dredged or fill material. 33 U.S.C. § 1344. Section 402 permits, also known as National Pollutant Discharge Elimination System permits, are administered by the Environmental Protection Agency (EPA) and EPA-approved State programs for the on-going discharge of pollutants into the waters of the United States. 33 U.S.C. § 1342.

1. ***The discharge of any fill material requires a permit under § 404 of the Clean Water Act.***

Section 404 of the CWA, 33 U.S.C. § 1344, provides for the issuance of "permits [by the COE] for the discharge of dredged or fill material into the navigable waters" of the United States. Because the CWA does not expressly define "fill material," regulations have been developed by both the EPA, 40 C.F.R. § 232.2 (2010), and the COE, 33 C.F.R. § 323.2 (2010), similarly identifying fill material to "generally include[], without limitation, the following activities: . . . placement of overburden, slurry, and tailings . . . ."

Additional limitations to the issuance of § 404 permits are imposed by § 404(b)(1) which advises the COE to refer to guidelines set forth in 40 C.F.R. § 230.10(a) (2010). 33 U.S.C. § 1344(b)(1). These guidelines state that:

> (a) [e]xcept as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.
>
> (1) For the purpose of this requirement, practicable alternatives include, but are not limited to:
>
> (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;
>
> (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;
>
> (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

40 C.F.R. § 230.10(a).

Activities involving the discharge of dredged and fill material are regulated through a permit review process under CWA § 404. 33 U.S.C. § 1344. Section 404 permits fall into two categories: (1) general permits, which are issued for widespread categories of activities

involving discharges of dredged or fill material; and (2) individual permits, which are issued for activities that are specialized or may potentially have greater impact. 33 U.S.C. §1344(e).

Both the COE and the EPA define "fill material" as material used for the primary purpose of replacing an aquatic area with dry land. 33 C.F.R. § 323; and 40 C.F.R. § 232. The raising of a water body's bed by the addition of a fill material requires the issuance of a § 404 permit, because "the EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority." *Coeur*, 129 S. Ct. at 2467. The § 404 permit is implemented by the COE with EPA oversight. 33 U.S.C. § 1344. Non-recurring construction operations are typically regulated by dredge and fill permits; thus, a § 404 is not intended to regulate pollution discharges that reoccur for an extended or indefinite period of time. 33 U.S.C. § 1344(f).

The COE's individual permit process procedures require the COE to consider environmental consequences of a discharge under § 404 of the CWA. An individual § 404 permit is issued by the COE after a review of a § 404 individual application. 33 C.F.R. § 320.1(c) (2010). The individual permit application must have "a complete description of the proposed activity including drawing, sketches, or plans . . . the location, purpose and need for the proposed activity . . . which are reasonably related to the same project." 33 C.F.R. § 325.1(d) (2010). After determining an individual § 404 permit application is complete, the COE "will issue a public notice" of the application. 33 C.F.R. § 325.2(a)(2) (2010). The COE then solicits meaningful comments from the public with respect to the proposed activity. 33 C.F.R. § 325.3(a) (2010). The COE will "evaluate the application to determine" if a public hearing is necessary. 33 C.F.R. § 325.2(a)(5). The COE will then consider all relevant public interest issues pursuant to National Environmental Policy Act (NEPA) to make a determination as to

whether an individual permit application requires an Environmental Assessment or an Environmental Impact Statement. 33 C.F.R. § 325.2(a)(4).

Applications for an individual § 404 permit are reviewed on a case by case basis and require "a resource-intensive review that entails voluminous application materials, extensive site-specific research and documentation, promulgation of public notice, opportunity for public comment, consultation with other federal agencies, and a formal analysis justifying the ultimate decision to issue or refuse the permit." *Crutchfield v. Cnty. of Hanover*, 325 F.3d 211, 214 (4th Cir. 2003) (citing 33 C.F.R. §§ 320.4, 325.1-325.3 (2003). The record shows that the COE complied with all required NEPA procedures for public notice. R. 6. Necessarily, this demonstrates that New Union, as well as any other interested party, had ample notice of the proposal to voice any reservations or objections it may have had. Written notice is then issued detailing the public interest review and adherence to the guidelines pursuant to § 404(b)(1) documenting any decision to approve or deny and individual § 404 permit application. 33 C.F.R. § 325.2(a)(6). Upon review of the United States Department of Defense's (DOD) application, the COE issued an individual permit under § 404 of the CWA, 33 U.S.C. § 1334, for the discharge of slurry into Lake Temp ("Lake"). R. 3.

2. *Section 402 of the Clean Water Act governs the issuance of permits for the discharge of pollutants, and therefore is inappropriate.*

Unlike permits issued under § 404, § 402 permits require ongoing reporting and review because they are designed to address recurring discharges of pollutants, as opposed to non-recurring individual construction projects. 33 U.S.C. § 1342. The term "pollutant," as defined under 33 U.S.C. § 1362(6), "means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

B. The United States Department of Defense's project proposal was properly issued a § 404 permit by the United States Army Corps of Engineers.

Over the years there has been some incongruity as to when a § 404 permit applies over a § 402 permit where the contents of the discharge overlap, meaning the discharge could be considered both a fill material and a pollutant. A disagreement of this type was exhibited in the landmark case *Coeur*, 129 S. Ct. 2458. Defendant, Coeur Alaska, Inc., was a mining company that sought to dispose of crushed rock and water as slurry into a lake, which would raise the lakebed by fifty feet and increase the lake size. *Id.* at 2464. Plaintiff, Southeast Alaska Conservation Council, thought the slurry required an EPA § 402 permit as opposed to a COE § 404 permit. *Id.* at 2466. The matter was brought before the Supreme Court of the United States where a six to three decision was returned in favor of Coeur Alaska, Inc., holding that the COE's issuance of a § 404 permit was appropriate for the discharge of slurry into the lake. *Id.* at 2463. The Court emphasized that "[t]he EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority," and went even further to point out that "[e]ven if there were ambiguity on this point, the EPA's . . . regulations provide that '[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA' 'do not require [§ 402] permits' from the EPA." *Id*. at 2468 (citing 40 C.F.R. § 122.3 (2008)). Although Justice Ginsburg dissented on the grounds that the holding created a loophole, the majority of the Court disagreed. *Id.* at 2483 (Ginsburg, J., dissenting). Justice Breyer pointed out that the classification of the materials as a pollutant or fill material turns on a standard of "reasonableness." *Id.* at 2478-79 (Breyer, J., concurring).

C. Statistics show the United States Army Corps of Engineers has an impressive record, sound judgment, and is reliable for accurate determinations as to the issuance of § 404 permits under the Clean Water Act.

On average, the COE processes approximately 60,000 permit applications per year. United States Environmental Protection Agency, *Clean Water Act Section 404(q) Dispute Resolution Process*, http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf (last visited Oct. 19, 2011) (citing Corps permit data 1988-2010, U.S. Army Corps of Engineers Headquarters, Regulatory Branch). Since 1992, only a mere eleven permits have been subjected to a higher level of review by the EPA. *Id.* Moreover, EPA has only issued thirteen final veto determinations since 1972. United State Environmental Protection Agency, *Clean Water Act Section 404(c) "Veto Authority"*, http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf (last visited Oct. 19, 2011). In light of the rigorous individual § 404 permit application process discussed and these overpowering statistics, it is reasonable that the EPA would defer to the COE's sound judgment regarding the issuance of the permit to the DOD in this case, just as it deferred to the COE's judgment in *Coeur*. *Coeur*, 129 S. Ct. at 2465.

IV. THE LOWER COURT SHOULD BE AFFIRMED BECAUSE THE OFFICE OF MANAGEMENT AND BUDGET'S PARTICIPATION IN THE DISPUTE RESOLUTION PROCESS BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ARMY CORPS OF ENGINEERS DID NOT VIOLATE THE CLEAN WATER ACT.

A. The Clean Water Act grants the Environmental Protection Agency final authority in all permitting decisions.

Congress directly authorizes the Environmental Protection Agency (EPA) to administer the Clean Water Act (CWA). 33 U.S.C. § 1251(d). "Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law." *Envtl. Def*

Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986). Under its congressional authority, the EPA is therefore responsible for the development and interpretation of policy, and offers guidance in evaluating environmental criteria for § 404 permits. 33 U.S.C. § 1344(b)(1). Additionally, EPA has the authority to prohibit, restrict, deny and withdraw the use of any area used as a disposal site for dredged or fill material if the discharge "will have unacceptable adverse effects." 33 U.S.C. § 1344(c).

In effect, § 404 provides EPA final veto authority before a permit is applied for, while an application is pending, or after a permit has been issued. *Id.* Before making such a determination, however, EPA must consult with COE regarding any reservations it may have. *Id.* After conferring with COE, the EPA can either conclude that the COE's § 404 permit is proper, or make a final determination to veto the permit in the limited circumstances where it finds the discharge of such materials would result in a significant degradation on municipal water supplies, or loss or damage to fisheries, shellfishing, wildlife habitats or recreational areas. *Id*. In the event the EPA makes such a decision to veto, written public notice must be made setting forth reasons for its determination. *Id.*

B. The Clean Water Act requires the Environmental Protection Agency to confer with other federal agencies for purposes of reconciling conflicting policy interpretations.

When differences of interpretation between government agencies occur, as they often do, § 404(q) requires that EPA enter into agreements with other federal agencies to minimize delays in the issuance of permits. 33 U.S.C. § 1344(q). Over time, procedures have been developed to assure disputes are resolved swiftly, and the President has established methods for reconciling disputes within the executive branch through his executive powers. The United States Constitution provides that "executive Power shall be vested in [the] President." U.S. CONST. art. II, § 1, cl. 1. The President has a duty to "take Care that the laws be faithfully executed." U.S.

CONST. art. II, § 3. This has been understood to mean the power and duty includes the authority to resolve legal and policy disputes between executive agencies under him, within limitation. *Free Enter. Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3143 (2010). Therefore, "a certain degree of deference must be given to the authority of the President to control and supervise executive policymaking." *Thomas,* 627 F. Supp. at 570. Procedures for reconciling disputes regarding compliance with Pollution Controls within the executive branch were first executed in 1987, by Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1987).

One such procedure states, "if the EPA cannot resolve a conflict regarding an applicable pollution control standard, the EPA administrator shall request the Director of the Office of Management and Budget to resolve the conflict." 43 Fed. Reg. 47,707, 1-602. In reviewing the conflict, EPA provides United States Office of Management and Budget (OMB) with "technological judgment and [its] determination with regard to the applicability of the statutes and regulations." 43 Fed. Reg. 47,707, 1-603. OMB then makes a recommendation. The Executive Order makes clear that this conflict resolution procedure is in addition to, "not in lieu of, other procedures." 43 Fed. Reg. 47,707, 1-604.

EPA can enter into agreements with other federal agencies to evaluate specific cases in order "to minimize, to the extent practicable, duplication, needless paperwork, and delays" for the issuance of § 404 permits pursuant to § 404(q). 33 U.S.C. § 1344(q). Therefore, conferring with OMB and COE is within CWA guidelines for making sound decisions regarding any questions EPA may have concerning the issuance of a permit. Regardless of any OMB input, the EPA ultimately has a duty to take action to withdraw a permit if it determines the impact of a proposed permit activity is likely to result in significant degradation "of municipal water supplies (including surface or ground water) or, significant loss of or damage to fisheries, shellfishing,

wildlife habitat, or recreation areas." EPA, *Clean Water Act Section 404(c) "Veto Authority"*, http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf (last visited Oct. 19, 2011) (citing 33 U.S.C. § 1344(c)).

C. Deference must be given to the Environmental Protection Agency's decision to uphold the United States Army Corps of Engineers' issuance of the § 404 permit.

1. *The Environmental Protection Agency's decision must be maintained, because it was not arbitrary, capricious, or contrary to law or procedure.*

When EPA quantifiably asserts that it made a final determination, regardless of any other input, the decision is not "vulnerable unless it is arbitrary, capricious, contrary to law or procedure, or is insufficiently supported in the administrative record." Symposium, *Presidential Influence Over Administrative Action*, 79 Fordham L. Rev. 2487, 2535 (2011). OMB itself acknowledges that it does not have authority to prevent an agency from complying with statutory requirements. *Thomas,* 512 U.S. at 572. Senior EPA officials are required to have a final review of any OMB input. *Id.* at 571. EPA ultimately has final say under its § 404(c) veto authority. 33 U.S.C. § 1344(c). Consequently, any contention insinuated by the State of New Union ("New Union") that OMB made the final determination is without merit.

It was EPA, pursuant to the CWA, that made the final decision not to withdraw the § 404 permit after close consideration of several factors, including the COE's determination, any recommendations OMB may have made, and its own analysis of the individual permit application. EPA affirmatively concluded that the DOD project was consistent with the decision in *Coeur* and reasonably determined that the project would not result in unacceptable adverse effects. Furthermore, EPA's determination not to withdraw the § 404 permit evidences the conclusion that it found the COE's permit analysis to also be reasonable under the CWA.

2. *The Environmental Protection Agency's decision should be upheld, because it is reasonable under the Chevron test.*

The decisions of the EPA with regard to § 404 permits are not subject to review because "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2010). If, however, the EPA's decisions were subject to review, the court would limit its examination of the facts to whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because it was EPA that made the final determination, this Court shall review EPA's action under the *Chevron* analysis.

Under this analysis the Court will first look to see if Congress spoke directly to the precise question at issue. *Chevron,* 467 U.S. at 842. If the Court finds that Congress has done so and congressional intent is clear, the analysis is complete, and congressional intent prevails. *Id.* However, if the Court finds either that (a) Congress has not directly addressed the issue, or (b) there is ambiguity as to whether Congress has addressed the issue, the agency's interpretation of its own regulation will govern, so long as its construal is reasonable and not in conflict with congressional intent. *Id*. at 843-45. If an agency's decision has the effect of reconciling "conflicting policies that [are] committed to the agency's care by the statute," the Court "should not disturb it" absent a finding that its resolution is in contravention of the statutory purpose. *United States v. Shimer*, 367 U.S. 374, 382-83 (1961).

Under *Chevron,* so long as an agency's construction of a statute is reasonable, a court may not substitute the agency's analysis with its own reading; rather, it "must defer to the agency's interpretation even if the agency could also have reached another reasonable interpretation." *Am. Mining Cong. v. EPA,* 965 F.2d 759, 764 (9th Cir. 1992) (citing *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 134 (1985)). The EPA has congressional authority to make final determinations regarding the appropriateness of permit issuances pursuant to 33 U.S.C. § 1344. Following *Chevron*, the EPA's decision not to veto the COE's issuance of the § 404

permit to the DOD is controlling and must be upheld because: (1) the EPA's determination that a § 404 permit was appropriate for the DOD's proposal involving the discharge of "fill material" was reasonable; (2) the project prevents "the discharge of any pollutants or wastewater to other navigable waters, in effect creating zero discharge of pollutants, the goal of the [CWA;]" and (3) its finding was consistent with the holding in *Coeur*. R. 8.

The District Court's grant of summary judgment should be upheld because the EPA's determination cannot be found to have been arbitrary or capricious for the foregoing reasons: the EPA had the authority to make a determination as to the appropriateness of the § 404 permit, and its analysis in determining that the § 404 permit was appropriate pursuant to the CWA was reasonable.

CONCLUSION

For the aforementioned reasons, the United States District Court for the District of New Union's Order granting Defendant's motion for summary judgment and denying the Plaintiff's cross motion for summary judgment should be affirmed.