Team Number 23

C.A. No. 11-1245

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

_____

STATE OF NEW UNION
Appellant and Cross-Appellee

v.

UNITED STATES OF AMERICA,
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 Appellee And Cross-Appellant
THE STATE OF PROGRESS

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment entered by the United States District Court for the District of New Union. Federal district courts have original jurisdiction over all civil actions arising under the laws of the United States. 28 U.S.C. § 1331 (2006). This case includes claims arising out of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006), the Administrative Procedure Act (APA), 5 U.S.C. §§ 500-596 (2006), and the United States Constitution. Because all claims involved questions of federal law, the district court had original jurisdiction.

All parties filed a timely appeal from a final judgment disposing of all parties' claims. Accordingly, the United States Court of Appeals for the Twelfth Circuit has jurisdiction over the case. 28 U.S.C. § 1291 (2006).

ISSUES PRESENTED

I. Whether New Union has sufficient constitutional standing in either its sovereign capacity or its *parens patriae* capacity to bring its claim against the United States.

II. Whether Lake Temp is a navigable water subject to the Clean Water Act.

III. Whether the discharge of slurry into Lake Temp constituted a fill material under the Clean Water Act.

IV. Whether the Office of Management and Budget's participation violated the Clean Water Act by resolving the jurisdictional dispute between the Environmental Protection Agency and the U.S. Army Corps of Engineers.

STATEMENT OF THE CASE

The state of New Union brought suit in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331 and the APA of an individual permit issued to the U.S. Department of Defense (DOD). (R. at 3). The permit was issued by the U.S. Army Corps of Engineers (COE) under § 404 of the CWA pursuant to a ruling by the Office of

Management and Budget (OMB). (R. at 3, 9). New Union alleged that the § 404 permit was invalid because the U.S. Environmental Protection Agency (EPA) should have jurisdiction under § 402 of the CWA. (R. at 3). Additionally, New Union argued that the OMB's participation was improper. Progress intervened, as the entire project takes place within its borders. (R. at 3).

The Secretary of the Army filed a motion for summary judgment, and New Union and Progress each filed cross-motions for summary judgment. (R. at 5). On June 2, 2011, the district court issued an order and held that: (1) New Union had no standing to seek review of the issuance of the permit; (2) the COE had jurisdiction to issue the § 404 permit because Lake Temp is a navigable water and the slurry is a fill material; and (3) the OMB's involvement in permitting process did not violate the CWA. (R. at 10, 11).

New Union and Progress both filed a timely appeal of the district court's order. (R. at 1). Progress appeals the district court's ruling that New Union lacked constitutional standing to seek review of the permit. (R. at 1). Additionally, Progress appeals the district court's holding that Lake Temp is a navigable water under the CWA. (R. at 1). In the alternative, Progress urges that if a permit is required under the CWA, then the § 404 permit is proper. (R. at 1). Lastly, Progress requests that this court affirm the district court's ruling that the OMB's participation was not improper. (R. at 1-2).

STATEMENT OF THE FACTS

Since 1952, the military has owned a reservation within the state of Progress. (R. at 4). This reservation includes a small intermittent body of water known as Lake Temp. (R. at 4). Although the lake is close to the border of Progress and New Union, it remains wholly within the boundaries of Progress even at its highest level. (R. at 4). Lake Temp has no outlet, and it receives its water from runoff from the surrounding watershed. (R. at 4). During the dry season,

the lake becomes much smaller, completely drying up one out of every five years. (R. at 4). During migration season, ducks use Lake Temp as a stopover. (R. at 4). In the past, duck hunters, mostly from Progress, would travel to Lake Temp. (R. at 4). When the DOD established the military reservation at Lake Temp, it prohibited this activity by posting clear signs prohibiting trespassing around the lake. (R. at 4). Despite these signs, there is evidence that hunting and bird watching occasionally still takes place at Lake Temp, albeit illegally. (R. at 4).

Under Lake Temp lies the Imhoff Aquifer, which extends into the state of New Union. (R. at 4). A potential source of groundwater for New Union, the water from the aquifer would require treatment for use due to its high level of sulfur. (R. at 4). Dale Bompers, a New Union resident, owns and operates a ranch above the Imhoff Aquifer. (R. at 4). The New Union Department of Natural Resources requires a permit to withdraw water from any groundwater source. (R. at 6). No permit for groundwater withdrawal has been issued for the Imhoff Aquifer. (R. at 7).

The DOD proposed to build a facility on the shore of Lake Temp to process spent munitions. (R. at 4). The munitions will be stabilized, pulverized, and mixed with water to form a slurry. (R. at 4). The slurry will be sprayed evenly onto the dry parts of Lake Temp, eventually raising the water elevation of Lake Temp by six feet. (R. at 4). After completion, Lake Temp will remain wholly within Progress. (R. at 4). The DOD completed the required procedures under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (2006), including notifying the public and completing an environmental impact statement (EIS). (R. at 6). New Union is evaluating the potential contamination of the Imhoff Aquifer as a result of the DOD project. (R. at 4, 6).

Before a permit for the project was issued, the EPA asserted that it believed a § 402 permit was required under the CWA. The COE contended that only a § 404 permit was required. (R. at 9). The COE and the EPA sent briefing papers on the matter and attended a meeting with the OMB. (R. at 9). The OMB gave the EPA and COE an oral decision on the jurisdictional matter and directed that a § 404 permit should be issued rather than a § 402 permit. (R. at 9). The EPA took no further action following this decision. (R. at 9-10).

SUMMARY OF THE ARGUMENT

The district court erred in holding that New Union lacked standing to seek review of the § 404 permit. New Union satisfies constitutional standing requirements in both its *parens patriae* capacity as protector of the state's citizens and in its own sovereign capacity. *Parens patriae* requires a quasi-sovereign interest and harm to that interest, which New Union sufficiently established by showing that the project increased the risk of future harm to New Union's natural resources. In its own sovereign capacity, New Union demonstrated an injury in fact through the increased risk of future harm that the project would cause the state as well as the interference the permit had on New Union's ability to regulate its own groundwater. Moreover, this harm is directly caused by the issuance of the COE's permit to the DOD. Finally, a favorable judgment would redress New Union's harm by invalidating the permit. New Union can establish standing because state litigants require leniency by the court in analyzing Article III standing.

Although New Union can establish standing, the DOD project does not require a permit under the CWA. Lake Temp does not constitute a navigable water for purposes of the statute. The lake is wholly located within the geographical boundaries of Progress, and the activities on Lake Temp have no effect on interstate commerce. Holding otherwise would run counter to the stated policy of the CWA.

In the alternative, should this court find that Lake Temp is subject to the CWA, the district court correctly held that the COE had jurisdiction to issue the § 404 permit. The discharge material in this case falls under the regulatory definition of a fill established by the EPA and the COE. Because the agency directly interpreted the statute in defining a fill material, this court must give deference to that interpretation. Because the material was a fill rather than a pollutant as defined by the agencies, the COE had the jurisdiction to issue a § 404 permit.

Lastly, the district court correctly held that the OMB's participation was not improper because the President has the authority to resolve dispute among executive agencies and Congress did not intend to preclude directive authority in the CWA. Regardless of which type of permit OMB decided should apply, the Administrator independently chose not to exercise her right to veto the DOD's § 404 permit. The Administrator's decision not to veto the § 404 permit is not reviewable because it is committed to agency discretion by law. If it is reviewable, the Administrator's decision not to veto the § 404 permit was not arbitrary, capricious, or an abuse of discretion because the record before the district court supports her decision and presidential influence is not an impermissible factor for the Administrator to consider.

STANDARD OF REVIEW

Appellate courts must review a district court's grant of a motion for summary judgment de novo. Fed. R. Civ. P. 56; *see also Croft v. Perry*, 624 F.3d 157, 163 (5th Cir. 2010). Under a de novo review of a judgment dealing with an administrative agency, the appellate court must view the case from the same viewpoint as the district court. *See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003). The APA governs the review of agency action and its interpretation of the CWA. *See Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir.

2000). If the appellate court determines that the action or interpretation was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it will not set the action or interpretation aside. 5 U.S.C. § 706(2)(a) (2006); *see also Wilderness Soc'y v. U.S. Fish and Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003).

ARGUMENT

I. The District Court Erred in Holding that New Union Lacked Standing to Seek Review of the Issuance of the Permit.

Even though New Union is a state litigant, it still must establish standing to bring suit. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). Article III of the U.S. Constitution restricts judicial power of federal courts to "cases and controversies." U.S. Const. art. III, § 2, cl. 1; *see Flast v. Cohen*, 392 U.S. 83, 94 (1969). This constitutional threshold question ensures that all litigants, even states, have standing to bring the suit. *See Baker v. Carr*, 369 U.S. 186, 204 (1962). In other words, a litigant must have a concrete stake in the outcome of the matter to initiate a judicial proceeding in federal court. *See id.* The state standing analysis depends upon which role the state is playing when it litigates a case. *See Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000). A state can satisfy standing in either its *parens patriae* capacity, its sovereign capacity, or its personal capacity. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); *Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009). New Union satisfies the requirements for standing in both its *parens patriae* capacity and in its sovereign capacity as owner and regulator of the groundwater.

A. New Union Has Standing in Its *Parens Patriae* Capacity.

Courts have long recognized the ability of states to sue under the doctrine of *parens patriae*. *See, e.g., Kansas v. Colorado*, No. 105, 1997 WL 33796878, at *39 (U.S. Sept. 9, 1997); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907). Although *parens patriae* does not confer a separate cause of action upon a litigant, it does provide an avenue for states to establish standing. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 n.30 (10th Cir. 2006). Under *parens patriae*, a state must first assert an injury to a quasi-sovereign interest. *Alfred L. Snapp*, 458 U.S. at 607. Secondly, the state must be more than a nominal party to the suit. *See id.* Finally, the state

must demonstrate an injury to a "substantial segment of its population." *Massachusetts v. Bull HN Info. Sys.*, 16 F. Supp. 2d 90, 96 (D. Mass. 1998). New Union must have satisfied each element to have standing in its *parens patriae* capacity.

1. The Increased Risk of Future Harm Caused by the § 404 Permit Is a Valid Quasi-Sovereign Interest.

Quasi-sovereign interests focus on the state's concern for the welfare of its citizens. *Alfred L. Snapp*, 458 U.S. at 602. Courts have evaluated whether an interest is quasi-sovereign on a case-by-case basis rather than providing a precise inclusive definition. *See id.* at 609. The physical and economic health and well-being of the citizens of a state has consistently been recognized as a quasi-sovereign interest. *See id.* at 607; *Kansas v. Colorado*, 206 U.S. 46 (1907); *Tenn. Copper Co.*, 206 U.S. at 237. Moreover, this interest has been interpreted broadly. *Bull HN Info. Sys.*, 16 F. Supp. 2d at 97. New Union has an authentic quasi-sovereign interest in protecting the health and well-being of its citizens from the effects of the contamination of the Imhoff Aquifer. A portion of the state water supply is clearly a health and public safety concern for New Union and its citizens. Protecting resources, particularly water resources, falls within a state's quasi-sovereign role. *See, e.g., Kansas*, 206 U.S. at 99; *California v. United States*, 180 F.2d 596, 601 (9th Cir. 1950), *cert. denied*, 340 U.S. 826. Thus, New Union asserted a valid quasi-sovereign interest.

2. New Union Is More than a Nominal Party to the Suit.

The state must have an interest in the suit, rather than merely asserting an interest on behalf of a private individual. *Alfred L. Snapp*, 458 U.S. at 602. However, if a state asserts a valid quasi-sovereign interest, the state is more than a nominal party by definition. *See id.* Because New Union is asserting a valid quasi-sovereign interest, it is more than nominal party to the suit.

3. The Injury to the Quasi-Sovereign Interest Affects a Substantial Segment of Its Population.

Establishing standing via *parens patriae* also requires the state to show injury to a substantial segment of its population. *Id.* at 607. However, there is no specific proportion of the population that must be injured before a state can establish standing. *Id.* More than just an injury to a specific group of citizens must be alleged to satisfy standing, but all indirect effects stemming from the injury must be considered. *Id.* In determining if a state has satisfied this element, courts should look at "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* New Union would undoubtedly regulate contamination of groundwater and aquifers within the state if possible, just as other states have addressed this issue through legislation. *See, e.g.*, Ark. Code Ann. § 15-22-902 (West 2011); N.M. Stat. Ann. § 72-12-18 (West 2011); R.I. Gen. Laws Ann. § 46-12-28 (West 2011). The threatened risk of future harm is one that affects all citizens of the state, not merely Dale Bompers. Although no permits have been issued for the use of the aquifer, the protection of natural resources within New Union is a right of all citizens. *See California*, 180 F.2d at 601. Thus, New Union has demonstrated that the injury affects a substantial segment of its citizens.

Because New Union was able to show injury to a valid quasi-sovereign interest that affected a substantial portion of its populace, *parens patriae* standing was established. Thus, the district court erred in concluding that New Union lacked standing to seek review of the issuance of the permit.

B. New Union Has Standing in Its Sovereign Capacity as Owner and Regulator of the State's Groundwater Supply.

A state litigant may also establish standing to bring suit in its sovereign capacity. *See Massachusetts v. EPA*, 549 U.S. at 518. A state sues in its sovereign capacity when it seeks to

exercise its rights as a sovereign, such as adjudicating boundary disputes or water rights. *See, e.g., Cahill*, 217 F.3d at 97. When a state sues in this role, it must establish standing through the traditional Article III analysis. Under the traditional test articulated in *Lujan v. Defenders of Wildlife*, a plaintiff must demonstrate a particularized and concrete injury in fact that is actual or imminent, that is fairly traceable to the defendant's alleged conduct, and that is redressable by a favorable court action. 504 U.S. 555, 560-61 (1992). In addition to the constitutional requirements for standing, a litigant must also satisfy a prudential element of standing. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). More specifically, a plaintiff must show that its complaint is within the zone of interest of the statute. *Id.*

Recently, state litigants have been given leniency in the Article III standing analysis when suing to protect sovereign interests. *See Massachusetts v. EPA*, 549 U.S. at 520. The test requires satisfaction of the same elements, but lenience is given in the rigor of establishing the elements. *Id.* Thus, if New Union can demonstrate that traditional Article III standing requirements have been established, particularly in light of the lenience given to state litigants, then the district court's erred in concluding New Union lacked standing.

1. The Issuance of the Permit Interfered with New Union's Sovereign Right to Regulate Its Groundwater as well as Increasing the Risk of Future Harm, thus Establishing an Injury in Fact.

An injury in fact requires that the injury be concrete and particularized, as well as actual or imminent, rather than hypothetical. *See Lujan*, 504 U.S. at 560-61. An injury in fact occurs when a legally protected interest is invaded. *Id.* The injury must be analyzed by looking at the damage to the environment, rather than the plaintiff state. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). (emphasizing that the correct analysis for standing in the environmental context is injury to the plaintiff, not injury to the

environment). With environmental harms in particular, an increased risk of future harm satisfies the injury in fact requirement. *See, e.g., Laidlaw*, 528 U.S. at 181; *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007). The issuance of the permit increased the risk of future harm to the aquifer. (R. at 6-7). The fact that the Imhoff Aquifer has suffered no contamination and might not ever be affected by the fill activity is irrelevant to the inquiry of whether New Union has suffered an injury in fact. Rather, the inquiry is whether New Union has suffered injury in its sovereign capacity, and the issuance of the permit increased the risk of harm to the environmental resource. The injury is specific to the aquifer owned and regulated by New Union. Rather than a generalized grievance, this case contains a particularized dispute unique to New Union that would ensure the adversity that Article III requires.

Secondly, the issuance of the permit by the COE interferes with New Union's sovereign ability to regulate contamination of its groundwater resources. (R. at 6). Even if New Union wanted to enforce a legal code for this contamination, federal regulation has preempted the state's sovereign right to do so. Interference with a state's sovereign right is a legally recognized injury in fact. *See Wyoming ex rel. Crank*, 539 U.S. at 1242. Accordingly, New Union has sufficiently demonstrated an injury in fact.

Although the injuries set out above demonstrate sufficient injuries in fact, New Union still must be granted leniency in establishing the Article III requirements. *See Massachusetts v. EPA*, 549 U.S. at 518; *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007). In *Massachusetts v. EPA*, the majority opinion of the Supreme Court authorized a lenient form of standing when the litigant asserting a claim is a sovereign state. *Massachusetts v. EPA*, 549 U.S. at 518. A key factor in the Court's ruling was the fact that Massachusetts owned the land involved in the dispute. *Id.* at 519. The analysis of the

future harm to the Massachusetts' coastline demonstrates that the imminent nature of the injury in fact is where special consideration should be given. *Id.* at 522. The Court had already analyzed actual harm to Massachusetts in a previous paragraph, and the Court specifically noted that Massachusetts had satisfied "the most demanding standards of the adversarial process," indicating that Massachusetts's standing was based on a traditional *Lujan* analysis. *Id.* at 521. The sole reason to include the future harm in the opinion was to demonstrate that the Court intended a relaxed standard for the imminent harm requirement.

New Union, through no fault of its own, cannot demonstrate that the contamination to its aquifer is imminent. (R. at 6). However, the future harm here is much more particularized and concrete than in *Massachusetts v. EPA*. New Union can show stronger causation and a direct impact on its sovereign interest in the Imhoff Aquifer. (R. at 6). The court urged that New Union's injury was far more speculative than *Massachusetts v. EPA*. (R. at 6). New Union, though, has shown that the issuance of the permit and the discharges directly increased the risk of future harm, a recognized concrete injury in fact. (R. at 6). The only speculative issue in New Union's claim for standing is demonstrating the imminent nature of the harm. (R. at 6). Applying the special solicitude to this element, New Union satisfies the injury in fact requirement.

2. The Injury in Fact Was a Direct Result of the Issuance of the Permit by the COE.

Article III standing requires the litigant to show that the defendant's conduct must have caused the injury. *See Lujan*, 504 U.S. at 560-61. The wrongful issuance of the permit directly allows the military base to initiate the harmful actions, and this issuance alone caused the increased risk of future harm to New Union's portion of the Imhoff Aquifer. Additionally, the permit issuance directly interfered with New Union's ability to regulate groundwater contamination within its borders. (R. at 4-6). As discussed in the following section, had the

correct permit been issued, the injury would not have occurred. *See* 33 U.S.C. § 1342(a)(1). The district court did not address causation, and the United States does not challenge this element on appeal. Nevertheless, the issuance of the permit by the defendant directly caused the injury.

3. The Issuance of the Permit Can Be Redressed by This Court.

Redressability of the injury must also be established. *See Lujan*, 504 U.S. at 560-61. Should New Union prevail on the merits, the court would be able to fashion a remedy by granting an injunction to invalidate the issuance of the § 404 permit. If the § 404 permit is redacted, the military base will be forced to apply to the EPA for a § 402 permit. *See* 33 U.S.C. § 1342. The more rigorous requirements of a § 402 permit would lessen the significant increase of the risk of future harm, making the claim redressable. *See Mass. v. EPA*, 549 U.S. at 525 (quoting *Larson v. Valente*, 456 U.S. 228, 244, n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury"). Specifically, a § 402 permit is required to comply with other sections of the CWA, including the effluent limitations and the source performance standards. *See* 33 U.S.C. § 1342(a)(1). Compliance with these additional standards gives New Union greater protection from groundwater contamination. Thus, a favorable court decision would redress the injury to the state. Neither the district court nor the United States take issue with the redressability prong of New Union's standing because the state can clearly satisfy this element.

4. The Interest in Protecting Groundwater Contamination Falls Within the Zone of Interest of the CWA.

A plaintiff asserting a cause of action under the APA must additionally establish that the interest asserted is within the zone of interest of the applicable statute. *See Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153. Under the APA, a plaintiff satisfies the zone of interest

requirement if the plaintiff is "aggrieved by agency action within the meaning of a relevant statute." *Id.* Here, the CWA was enacted to protect water quality of the United States. *See* 33 U.S.C. § 1251. New Union is asserting an injury to that water quality because of a wrongfully issued permit. (R. at 4-7). This is clearly within the zone of interest of the CWA.

Because New Union satisfies all three elements of the traditional Article III standing analysis and one prudential standing requirement, New Union can has standing in this suit to protect its own sovereign interest as well as in its *parens patriae* capacity.

II. The District Court Erred in Ruling that the COE Had Jurisdiction to Issue a § 404 Permit.

Under § 404 of the CWA, the COE only has jurisdiction to issue permits allowing the discharge of dredge or fill material into navigable waters. 33 U.S.C. § 1344 (2006). The CWA defines navigable waters as the waters of the United States. *Id.* § 1362. While this definition begs for further clarification, it is clear that Lake Temp is not a water of the United States.

As a preliminary matter, the fact that Lake Temp is wholly inside a U.S. military reservation does not automatically qualify it as a water of the U.S. It is true that Congress has plenary power over federal land. However, this plenary power does not extend to the surface water inside of federal lands. *Kansas v. Colorado*, 206 U.S. at 93-94. Instead, the federal government's power over the surface water depends on the connection of that water to interstate or foreign commerce. *Id.*

Lake Temp does not have a sufficient connection to interstate or foreign commerce to justify COE jurisdiction. First, Lake Temp does not qualify as a water of the United States under the COE's regulatory definition. Second, water bodies such as Lake Temp are beyond the scope of the stated policy of the CWA. Because Lake Temp is not a water of the United States, the COE did not have jurisdiction to issue the § 404 permit.

A. Lake Temp Does Not Meet the COE's Definition of Water of the United States.

The COE has issued a regulation to clarify what constitutes a water of the United States under the CWA. 33 C.F.R. § 328.3 (2011). A portion of this definition was deemed unconstitutionally broad as it applied to intrastate water bodies that were not navigable in fact and had no connection to interstate waters. *Rapanos v. United States*, 547 U.S. 715 (2006). However, Lake Temp is navigable in fact in its own right. (R. at 7). Portions of a regulation that do not depend on the unconstitutional segment remain effective. *See New York v. United States*, 505 U.S. 144, 186 (1992); *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 936 F. Supp 633, 642-43 (D. Minn. 1996). Thus, 33 C.F.R. § 328.3 still provides guidance as to whether Lake Temp is a water of the United States. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2010); *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, No. 4:09-CV-01023-RBH, 2011 WL 2746232, at *1 (D.S.C. July 12, 2011).

Recognizing that Congress has limited jurisdiction, the COE limited its definition to water bodies that have a sufficient connection to interstate or foreign commerce. 33 C.F.R. § 328.3. As a result, the regulation deems that three categories of water bodies have a sufficient connection to interstate commerce to support the COE's permitting jurisdiction. *Id.* If Lake Temp meets the qualifications of any one of the three categories, then the COE had jurisdiction to issue a § 404 permit.

1. Lake Temp Is Not, Has Not, and Cannot Reasonably Become Susceptible for Use in Interstate Commerce.

The first category of water body deemed to fall within the COE's jurisdiction is "[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.* § 328.3(a)(1). Categorization under this subsection requires that the water body itself be used for interstate or foreign commerce. *Id.* The impact that any use

on the water body may have on interstate of foreign commerce is not considered, as it is a factor under a later categorization discussed below. *Id.* § 328.3(a)(3). Thus, Lake Temp itself must be, have been, or be susceptible to use in interstate or foreign commerce to fit under this category.

Currently, Lake Temp is not being used for interstate or foreign commerce. While not directly applicable to its analysis under § 404, the COE has given examples of the types of use that will support such a designation under other COE regulations. 33 C.F.R. § 329.6(a). Such uses include transporting goods and passengers across the lake for profit and commercial guiding operations. *Id.* Here, there is no evidence of goods being shipped from one shore to the other. Although hunters do cross the lake to hunt from the other shore, there is no evidence that the hunters are anything more than private citizens hunting for their own benefit. (R. at 7).

Moreover, there is no evidence that Lake Temp was used for interstate or foreign commerce in the past. Although the lake may have been susceptible to such use in the past, the regulation says "were used in the past, or may be susceptible to use in interstate or foreign commerce." *Id.* § 328.3(a)(1). The COE could have said "may have been susceptible to use" if past susceptibility justified jurisdiction. However, the verb before "susceptible to use" is in the present tense. *Id.* Thus, susceptibility only matters when looking prospectively at the potential uses for the lake. Because there is no evidence that Lake Temp was used for interstate or foreign commerce before it became part of the military base, the COE cannot base its jurisdiction on the past use of the lake.

Looking prospectively to the potential uses of the lake, Lake Temp cannot be susceptible to use in interstate or foreign commerce in its current condition because it is situated inside a military base where trespassing is expressly prohibited. (R. at 4). Case law indicates that a water body can still fall under the COE jurisdiction if it could be susceptible to use in interstate or

foreign commerce with reasonable improvements. *Rapanos*, 547 U.S. at 731. Analyzing the reasonableness of the improvements involves a "balancing of the cost and need at a time when the improvement would be useful." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). No matter how little an improvement to Lake Temp would cost, there is absolutely no need for any such improvement because the land surrounding the lake would still be closed to the public. Thus, Lake Temp cannot become susceptible to use in interstate or foreign commerce even with reasonable improvements.

Because Lake Temp is not, has not, and cannot reasonably become susceptible to use in interstate or foreign commerce, Lake Temp does not fall within this category of water bodies under the jurisdiction of the COE.

2. Lake Temp Is Not an Interstate Water.

The COE also claims jurisdiction over "[a]ll interstate waters." 33 C.F.R. § 328.3(a)(2). When a water body is entirely contained within the borders of one state, then the water body is an intrastate water, not an interstate water. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 163 (2001). Lake Temp is still entirely within the borders of Progress at its highest level. (R. at 5). Thus, Lake Temp is not an interstate water.

3. The Use, Degradation, or Destruction of Lake Temp Will Not Affect Interstate Commerce.

Finally, the COE claims jurisdiction over "[a]ll other waters such as intrastate lakes . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). The regulation then lists three examples of how the use of a water body could affect such commerce. *Id.* If Lake Temp is used in one of these ways, then the COE has jurisdiction to issue a § 404 permit.

i. Lake Temp Is Not Being Used for Recreational or Other Uses Because Any Such Use Is Illegal.

The COE can issue a § 404 permit if Lake Temp is or could be "used by interstate or foreign travelers for recreational or other purposes." *Id.* § 328.3(a)(3)(i). For example, a federal district court in California upheld the determination that a purely intrastate lake was subject to the CWA because interstate travelers used the lake for recreational boating and fishing. *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). This case is distinguishable for one key reason: Lake Temp is not a public waterway open for such use. It is wholly within a United States military base, and the military has the power to prohibit trespassing on its bases. 18 U.S.C. § 1382 (2006). Because the military has elected to prohibit any trespassing on Lake Temp, any hunting or bird watching that takes place on the lake is illegal.

The fact that such activity has occurred in an open and notorious way is of no importance. The United States Constitution grants Congress the sole power to dispose of and regulate federal lands, such as military bases. U.S. Const. art. IV, § 3, cl. 2. This power is exclusive, and only through some act of Congress can "rights in lands belonging to the United States be acquired." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403 (1917). Thus, no matter what process Progress allows for property rights to be acquired by prescription, such state laws do not apply to federal lands like Lake Temp. Because Congress has not granted a right to the hunters and bird watchers, any such use remains illegal.

The illegal use of Lake Temp is not worthy of being taken into the COE's jurisdictional consideration. Imagine if the illegal use was not so seemingly benign as hunting and bird watching. Consider moonshiners setting up on the shore of Lake Temp and using its waters in the distilling process. If the illegal hunting establishes COE jurisdiction, then other illegal

activity necessarily would as well. This would be an unreasonable interpretation of "recreational or other uses." Thus, the COE cannot use the hunters to establish a link to interstate commerce.

ii. There Is No Evidence of Lake Temp Being a Source of Fish or Shellfish Sold in Interstate Commerce.

The regulation states that the COE can exercise jurisdiction over a water body based on its affect on interstate or foreign commerce if "fish or shellfish are or could be taken [from the water body] and sold in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3)(ii). There is no evidence that Lake Temp contains any fish or shellfish.

iii. Lake Temp Is Not and Cannot Be Used for Industrial Purposes Because the Military Is Not a Productive Enterprise.

Lastly, the COE states that it can exercise jurisdiction over any water bodies which "are used or could be used for industrial purpose [sic] by industries in interstate commerce." *Id.* § 328.3(a)(3)(iii). The noun "industry" is defined as:

> (a) systematic labor [especially] for some useful purpose or the creation of something of value; (b) a department or branch of a craft, art, business, or manufacture; [especially] one that employs a large personnel and capital [especially] in manufacturing; (c) a distinct group or productive or profit-making enterprises; [and] (d) manufacturing activity as a whole . . . .

Merriam Webster's Collegiate Dictionary 638 (11th Ed. 2006). A common thread runs through all of these definitions in that they focus on the productive and creative aspect of the defined group. Again, the non-public nature of Lake Temp restricts use of the lake exclusively to the United States Military. The military is not in and of itself productive. For example, if there is a need for a new B2 Bomber, Northrop Grumman manufactures the plane and benefits from the profit of the sale. Northrop Grumman, About Us, http://www.northropgrumman.com/about_us/index.html (last visited Nov. 20, 2011). The military does not manufacture anything. It produces no profit. It creates nothing of value. Thus, the military is not an industry.

The three specifically listed examples analyzed above are not exclusive. The COE can still claim jurisdiction if it can show that the use, degradation, or destruction of a water body could affect interstate or foreign commerce. 33 C.F.R. § 328.3(a)(3). However, the only affect Lake Temp has on interstate or foreign commerce comes from the hunters, a small percentage of whom are not from Progress. (R. at 4). Holding that such a *de minimis* effect subjects the lake to COE jurisdiction runs counter to the stated policy of the CWA. *See, e.g.*, 33 U.S.C. § 1251(a)(stating the goal of the CWA); *SWANCC*, 531 U.S. at 172-73.

B. Subjecting Lake Temp to COE Jurisdiction Would Run Counter to the Stated Policy of the CWA.

Reading 33 C.F.R. § 328.3 as excluding water bodies such as Lake Temp is the only way for the regulation to comply with the stated policy of the CWA. The CWA begins with a broad statement that the "objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, the United States Supreme Court has twice ruled that the scope of the CWA is tempered by the next subsection of the act. *See SWANCC*, 531 U.S. at 167-68; *Rapanos*, 547 U.S. at 733.

Congress acknowledged that a state traditionally maintains sovereignty over the natural resources within its borders. 33 U.S.C. § 1251(b). Thus, it stated that the policy of the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.*

The Supreme Court relied on this section when it ruled that the COE could not base its jurisdiction on the Migratory Bird Rule. *SWANCC*, 531 U.S. at 172-73. In *SWANCC*, the petitioners sought to fill seasonal and permanent ponds to construct a landfill. *Id.* at 162. The site was wholly within the state of Illinois, and there was no connection between the ponds and an

interstate water body. *Id.* at 163. Pursuant to the Migratory Bird Rule, the COE asserted jurisdiction over the ponds because the ponds were used as a habitat for migratory birds that crossed state lines. *Id.* at 164. The Supreme Court ruled, however, that such a connection to interstate commerce was too tenuous to support COE jurisdiction under the CWA. *Id.* at 174.

Lake Temp is indistinguishable from the ponds in *SWANCC*. While some of the purely seasonal ponds were only a few inches deep, some ponds were permanent and measured a few feet in depth. *Id.* at 163. Thus, these larger ponds were no less navigable in fact than Lake Temp. Significantly, the Seventh Circuit Court of Appeals upheld the COE's jurisdiction based on the effect that the hunters of these migratory birds have on interstate commerce. *Id.* at 166. However, this was the holding that the Supreme Court specifically reversed. *Id.* The use of Lake Temp has no more effect on interstate commerce than the use of the ponds in *SWANCC*. Therefore, Lake Temp has an insufficient connection to interstate commerce for the COE to assert jurisdiction over the lake under the CWA. Thus, the district court erred when it ruled that Lake Temp was subject to regulation under the CWA.

III. If Lake Temp Is Subject to the CWA, Then the District Court Properly Ruled that the Discharge Is Subject to a § 404 Permit.

Under § 402 of the CWA, no pollutant can be discharged into a navigable water without a permit issued by the EPA. 33 U.S.C. § 1342. One exception to this rule is that the COE has the authority under § 404 of the CWA to issue permits for the discharge of dredge or fill into navigable waters. *Id.* § 1344. Although the CWA defines pollutant broadly, including even solid waste and munitions, the Supreme Court has ruled that the discharge of dredge or fill is not subject to the EP permitting process because such a discharge is specifically exempted from § 402. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009).

Thus, if the discharge in this case is dredge or fill, then such a discharge is subject to a § 404 permit.

A. The Discharge Material Meets the Regulatory Definition of Fill.

Before 2002, the EPA and the COE had different standards for determining when a discharge was fill for purposes of the CWA. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material" (Final Revision of "Fill Material"), 67 Fed. Reg. 31,129, 31,131 (May 9, 2002) (to be codified at 33 C.F.R. § 323.2(e)). The COE used a purpose-based test that excluded any discharge that had the primary purpose of disposing of waste material. *Id.* Thus, the only discharges covered by § 404 were discharges that had some beneficial purpose, such as creating new developable land or building levies. *Id.* The EPA, on the other hand, adopted an effects-based test. *Id.* The EPA interpreted § 404 to cover any discharge that had the effect of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Id.* It did not consider whether the primary purpose of the discharge was for waste disposal or beneficial use. *Id.*

In 2002, the COE and the EPA issued a joint regulation defining fill material based primarily on the effects-based test. *Id.* at 31,132. If the proposed discharge meets this regulatory definition of fill, then the § 404 permit issued by the COE was proper.

1. The Material Will Change the Bottom Elevation of Lake Temp.

The regulatory definition states that fill material is material that has the effect of either "[r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2011). This is consistent with the effects-based test because discharges that have the primary purpose of disposing of waste material are still covered by § 404 when the waste has the effect of fill. Final

Revision of "Fill Material," 67 Fed. Reg. at 31,133. Even though the discharge into Lake Temp will have the primary purpose of discharging spent munitions, the proposed activity will raise the bed of Lake Temp by several feet. Thus, the material will have the effect of changing the bottom elevation of the lake, meaning it falls under the regulatory definition of fill material.

2. The Material Is Not Trash or Garbage.

The effects-based test is not absolute, however. The regulation specifically excludes "trash or garbage" from the definition of fill material. 33 C.F.R. § 323.2(e)(3). This restriction is aimed at materials such as junk cars, used tires, and discarded kitchen appliances. Final Revision of "Fill Material," 67 Fed. Reg. at 31,134. Such trash or garbage is not suitable for fill material because it may create "physical obstructions that alter the natural hydrology of waters and may cause physical hazards as well as other environmental effects." *Id.* The record states that the slurry will only be sprayed on the dry parts of the Lake Temp, and the banks will continually be graded to allow the flow of runoff to remain unimpeded. R. at 4. Further, the slurry will be applied evenly across the entire lakebed. (R. at 4). Thus, the proposed activity will not create a physical obstruction or hazard in Lake Temp of the type excluded from the regulatory definition of fill material.

B. The Regulatory Definition Is Due Substantial Deference.

When an agency is tasked with implementing a statute, the agency's interpretation of any ambiguous provision is due substantial deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 846 (1984). Such an interpretation will be followed by the courts unless it is "plainly erroneous or inconsistent with the regulations." *Coeur Alaska*, 129 S. Ct. at 2468.

The CWA is ambiguous as to what qualifies as fill material under § 404. 33 U.S.C. § 1344. Before 2002, the EPA interpreted the provision using the effects-based test, and the COE relied on the purpose-based test. Final Revision of "Fill Material," 67 Fed. Reg. at 31,131. Congress granted to the EPA, in conjunction with the COE, the power to determine what constitutes a fill material. 33 U.S.C. § 1344. Pursuant to this power, the two agencies issued 33 C.F.R. § 323.2 to resolve the ambiguity in the statute. Thus, if this regulation is based on a reasonable reading of the CWA, it is due substantial deference by this court.

1. The Supreme Court Has Ruled that 33 C.F.R. § 323.2 Is a Reasonable Reading of the CWA.

The Supreme Court analyzed 33 C.F.R. § 323.2 in *Coeur Alaska*. 129 S. Ct. at 2458. In that case, a mining operation sought a § 404 permit for the discharge of tailings into an adjacent pond. *Id.* at 2464. These tailings were discharged primarily for waste disposal purposes. *Id.* However, the COE issued the permit pursuant to 33 C.F.R. § 323.2 because the discharge had the effect of raising the bottom elevation of the lake. *Id.* In its analysis, the Court determined that the CWA is ambiguous as to what constitutes a fill material under the CWA. *Id.* at 2469. The Court then held that 33 C.F.R. § 323.2 is a reasonable reading of the statute. *Id.* As such, it was due substantial deference, and the § 404 permit was proper. *Id.*

2. This Reading Is Consistent with the Objective and History of the CWA.

The Court held that 33 C.F.R. § 323.2 is a reasonable reading of the CWA because such a reading is consistent with the objective and history of the CWA. *Id.* As stated earlier, the objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This means that the CWA is focused on the integrity of the water itself, not the purpose for which the water is being used. Thus, it is reasonable that the agencies would look to the effect that the proposed discharge will have on the

integrity of the water. Because similar materials will have a similar effect on the integrity of the water, the materials should be similarly regulated regardless of the purpose for the discharge.

The effects-based test is supported further by examining why the COE retained jurisdiction over the discharge of dredge and fill material under the CWA. Before the CWA, the COE had jurisdiction to regulate discharges into the navigable waters of the United States under the Rivers and Harbors Act of 1899. *SWANCC*, 531 U.S. at 684 (Stevens, J., dissenting). The purpose of this regulatory power was to maintain the navigability of the nation's waterways by "protect[ing] their use as highways for the transportation of interstate and foreign commerce." *Id.* This is the authority that the COE carried over in the CWA, albeit with a broader scope. *Id.* The purpose of the discharge has no bearing on the navigability of a waterway. It is the effect of that discharge that poses the threat to the waterway's use as a highway of interstate commerce. Thus, it is reasonable for the COE to assert jurisdiction over any discharge that has the effect of replacing any portion of a waterway with dry land or raising the bottom elevation of a water body. Because this interpretation of the CWA is reasonable, and because the discharge at issue here will raise the bottom elevation of Lake Temp, the district court properly held that the COE could exercise jurisdiction over the proposed activity.

IV. The District Court Correctly Ruled that the OMB's Participation Was Not Improper.

Congress gave the administrator of the EPA (Administrator) the general duty to oversee the CWA. 33 U.S.C. § 1251(d). This duty is subject to specific exceptions, such as the COE's authority to issue § 404 permits. *Id.* § 1344. With multiple agencies implementing different portions of the statute, tensions inevitably will arise when both agencies claim jurisdiction over a proposed regulated activity.

The executive branch has a procedure for resolving disputes among its several agencies implementing the CWA. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 17, 1978). Per the instructions of the president, the Administrator is to refer such conflicts to the Office of Management and Budget for resolution. *Id.*

The president can rightfully create such a process to resolve agency disputes arising under the CWA for two reasons. First, the president has the authority to resolve disputes among the executive agencies as part of his duty to faithfully execute the laws of the United States. Second, Congress did not intend to preclude the president's directive authority by its simple delegation of a general duty to the Administrator. Because the president properly created this dispute resolution process, the EPA and the COE properly relied on the determination by the OMB that the proposed discharge into Lake Temp was subject to a § 404 permit.

Further, Congress grated the Administrator the specific authority to veto any § 404 permit. Regardless of the type of permit that the OMB decided should apply, the Administrator did not choose to exercise this right in this case. This failure to veto the permit is not subject to judicial review because it is committed to the Administrator's discretion by law. However, even under review, the failure to veto the § 404 permit was not arbitrary, capricious, or an abuse of discretion.

A. The President Has the Authority to Resolve Disputes Among the Executive Agencies.

It is the president's duty to ensure that the laws of the United States are faithfully executed. U.S. Const. art. II, § 3. Implicit in this constitutional mandate, the Supreme Court has found that the president has the power of appointment and removal in regard to "executive" agencies, the authority to demand written opinions from executive officers, and the right to privileged communications with his staff. *See generally Myers v. United States*, 272 U.S. 52

(1926); U.S. Const. art. II § 2, cl. 1; *United States v. Nixon*, 418 U.S. 683, 708 (1974). These powers combine to provide the president with plenary power to oversee, supervise, and direct executive officers. As James Madison noted, "If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

When agencies disagree over the meaning of the law, the president has the duty and authority to ensure that the executive branch resolves a dispute to guarantee uniformity in the law. As the Supreme Court noted:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the law which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

Myers, 272 U.S. at 135. Nothing limits the president's ability to direct his "unelected subordinates" to make certain substantive decisions that are permissible within their respective enabling statutes. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (U.S. 2010).

President Carter cited to the authority Congress delegated to him under § 313 of the CWA when creating the dispute-resolution procedure. Exec. Order No. 12,088, 43 Fed. Reg. at 47,707. Congress' power delegated to the president under the CWA vests in the president alone, granting the president the greatest possible amount of authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 597, 635 (1952) (Jackson, J., concurring). The executive order provides a process for the efficient implementation of the CWA at federal facilities throughout the executive branch. Exec. Order No. 12,088, 43 Fed. Reg. at 47,707. Section 1-604 makes clear that the dispute resolution procedure does not trump the CWA. *Id.* Rather, it is an additional

procedure. *See id.* At the very least, the president moves in the "zone of twilight" where the factual scenario and "congressional inertia, indifference or quiescence" gives the President more room to exert control. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

In resolving the dispute, the OMB did not improperly encroach upon the executive branch's counterparts by making law or adjudicating parties' rights. *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). As a matter of policy, the OMB resolved a ambiguity relating to the COE and the EPA's interpretation of the law. The OMB was ensuring that the executive branch operated as a unit by consistently applying the same meaning of "fill material," thereby ensuring that congressional intent was fulfilled and the laws are faithfully executed.

B. The CWA Does Not Preclude the President's Directive Authority.

Congress delegated the general administration of the CWA to the Administrator. 33 U.S.C. § 1251(d). Absent express language, this simple delegation should not be read to reflect Congress' intent to prevent the president from using directive authority to control the Administrator's actions. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). Rather, the CWA's delegation to the Administrator reflects the Legislature's intent to vest a particular agency within the executive branch primary responsibility for the CWA as opposed to the executive branch as a whole. *Id.* at 2330.

This statutory interpretation avoids a constitutional question. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("When deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . .") The executive and legislative branches are in the best position to develop a working solution in this situation. Congress is free to amend the CWA and expressly preclude directive authority. Congress has

demonstrated the ability to insulate decision makers from presidential control by creating independent agencies. *See Humphrey's Ex'r*, 295 U.S. at 602. Therefore, if Congress wants to change this reading, it may clarify its intent and create a similar insulating effect in regard to the Administrator's discretion under the CWA as it has done for independent agencies.

Further, presidential control is beneficial because it provides the administrative process with accountability. *Free Enter. Fund*, 130 S. Ct. at 3155. The legislative and judicial branches can only react to agency action. *I.N.S. v. Chadha*, 462 U.S. 919, 924 (1983). Yet, the president must monitor the exercise of power, lest a fourth branch is left to act in its own discretion. *See Free Enter. Fund*, 130 S. Ct. at 3138. Therefore, courts should not read into the CWA a provision that would upset the current balance of power. That reading would not only improperly limit the President's power, but would also strengthen the legislative branch. *Id.* at 3156 ("[O]ne branch's handicap is another's strength"). To preserve this balance, the President must retain directive authority absent an express and specific delegation of authority to the agency. Thus, the CWA does not preclude the President's directive authority, and the involvement by the OMB was not improper.

C. The Administrator's Decision Not to Veto the § 404 Permit Is Not Reviewable.

As opposed to its simple delegation of general authority, Congress granted the Administrator specific discretionary power to veto any § 404 permit. 33 U.S.C. § 1344(c). The Administrator retained this right regardless of the OMB's decision that a § 404 permit was appropriate. Thus, the Administrator's failure to exercise this right cannot be judicially reviewed.

There is a presumption against reviewability regarding an agency's decision not to take enforcement action. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Typically, these decisions require an evaluation numerous factors that the relevant agency is best situated to balance. *Id.*

Agency expertise provides a better understanding of what will promote an efficient allocation of resources, will likely result in a successful outcome, and is congruent with the agency's overall strategy. *Id.* at 831-32. The Administrator is in a very unique situation. She must balance two bodies of law that are administered by two different agencies under one enforcement strategy. Congress would likely expect her to undertake a number of fact-intensive considerations regarding working relationships, policy congruency, the intricacies of each permit program likely to produce the most environmentally protective and functional solution to each project, and the allocation of talent and resources between the agencies. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan. Envtl. L.J. 215 (2003).

Further, there is less need for judicial review of agency inaction because the agency is not exercising its coercive power over an individual's liberties or property rights when it decides not to act. *Chaney*, 470 U.S. at 832. While the veto power does not involve criminal enforcement, the Administrator's veto power directly affects a permitee's future activities. 5 U.S.C. § 551. Similar to a criminal conviction, the Administrator's exercise of her veto power provides the courts with a substantive use of discretion to evaluate. *Chaney*, 470 U.S. at 832. However, when the Administrator does not issue a veto, she has not exercised coercive power. Thus, there is no use of discretion to evaluate.

Additionally, the Administrator's inaction preserves the status quo, while her action reverses a permit already in existence. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); 33 U.S.C. §1344(c). In *Overton Park*, Congress prohibited the Secretary of Transportation from approving the use of federal funds unless he made a certain affirmative finding. *Id.* at 405. Here, the Administrator's veto decision has the exact opposite effect. For

action to take place she must do nothing, thereby allowing the permits continued existence. If she chooses to act, she will reverse the status quo.

Even with regards to agency action, Chapter Seven of the APA denies judicial review of federal agency action "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The latter applies where Congress has not spoken to the issue. *Chaney*, 470 U.S. at 830. Courts will refuse to review agency action where no meaningful standard against which to judge the agency's exercise of discretion. *Id.* Initially, § 404 may appear to provide this standard with the "unacceptable-adverse-effect" language. *See* 33 U.S.C. § 1344(c). However, the only law to apply in § 404(c) pertains to the procedures and standards that the Administrator must abide by if she decides to veto a permit. *Id.* The Administrator's initial decision to undertake this procedure is wholly unconditioned. *Id.* Moreover, it does not use putatively mandatory language such as "shall." *Id.*; *see S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

Precluding judicial review of this failure to veto complies with the legislative intent behind the statutory grant of authority. Generally, there is a presumption of reviewability, but it may be overcome by clear and convincing evidence. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (U.S. 1984). The applicable clear and convincing evidence standard is met when congressional intent to preclude judicial review is "'fairly discernible' in the detail of the legislative scheme." *Id.* at 350-51. This can be shown using broad inferences about the entire statute or specific legislative history. *Id.* at 349. The structure of the CWA is a unique balance of history, innovation, and compromise and the legislative scheme reflects this relationship of jurisdiction. *See* Andreen, *supra* page 31. Section 404(c) reaffirms EPA's primacy stated in § 1251 by effectively giving the Administrator the final decision. 33 U.S.C. § 1344(c). The

Administrator determines when the environmental effects will be unacceptable. *See Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 141 (D.C. Cir. 2009). Thus, the veto power does not mandate that the Administrator consider the COE's opinion or expertise on the matter. *See id.* Therefore, the Administrator's veto decision requires a great deal of discretion to balance this unique relationship of jurisdiction between two powerful agencies. Because of this discretion, judicial review of the Administrator's inaction is not reviewable.

D. Even if Reviewed, the Failure to Veto the § 404 Permit Was Not Arbitrary, Capricious, or an Abuse of Discretion.

If the failure to veto the § 404 permit is subject to judicial review, then the inaction will be invalidated if it is arbitrary, capricious, or an abuse of discretion. *See id.* Under § 706 of the APA, the ultimate decision requires a separate analysis from the procedure the agency undertook to arrive at that decision. *See Overton Park*, 401 U.S. at 402. As the material facts are not disputed here, the only applicable analyses apply to the questions of law (the meaning of "navigable waters" and "pollutant" under the CWA) and the application of law to facts (the Administrator's process for deciding whether or not to veto the permit).

The COE and the Administrator deserve *Chevron* deference under the CWA. *Chevron, U.S.A., Inc.*, 467 U.S. at 846; *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). The COE administers the dredge-and-fill program, while the Administrator has oversight authority. 33 U.S.C. §1344. Because of the COE's authority under the CWA, *Chevron* deference is required. *See id.* The OMB's involvement does not distort the appropriate application of *Chevron* review because the COE's interpretation of "navigable waters" and "pollutant" is before the Court. The permit on review is the same permit that the COE intended to issue before the OMB's ruling. (R. at 10). It is neither arbitrary nor capricious because *Coeur Alaska* either requires the result, or the result is consistent with the holding in that case. *See Coeur Alaska*, 557 U.S. at 261.

The lack of formal findings does not require remand because the record before the court provides a discernible path for the Administrator's decision. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (holding that courts could not require a statement of basis because the administrative record supported the decision and neither the agency's enabling act nor the APA require such a procedure); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (holding that courts should affirm even ambiguous decisions if the agency's path is discernible). The DOD's entire permit application was available to the Administrator. 40 C.F.R. § 231.3 (2011). Therefore, if this Court affirms the district court's holding, then the Administrator's substantive decision is necessarily neither arbitrary nor capricious.

A showing of bad faith or improper conduct is an exception to this record rule and may provide a basis to require further explanation from the agency. *See Overton Park*, 401 U.S. at 420. First, agency action has a presumption of regularity and good faith. *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981). Moreover, review of agency proceedings is inappropriate where the agency is not party to the suit. New Union did not name the Administrator or the EPA in these proceedings. R. at 5. By failing to name the Administrator in this suit, New Union did not request review of the Administrator's actions and any review for bad faith or improper conduct would be inappropriate.

Further, presidential involvement is beneficial and expected. *Costle*, 657 F.2d at 408. The OMB's directive also did not create political pressure unbeknownst to Congress. The District of Columbia Court of Appeals explained that this political pressure is necessary, beneficial, and expected in the modern bureaucratic environment:

> Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the

> courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.

Costle, 657 F.2d at 408. Thus, the involvement by the OMB does not point to bad faith or improper conduct.

With the strong deference owed to the Administrator under the CWA and the lack of bad faith or improper conduct in the record, this court cannot say that the Administrator abused her discretion or acted in a arbitrary or capricious way when she did not veto the § 404 permit.

CONCLUSION

This court should find that New Union had standing to seek review of the issuance of the permit, in either its *parens patriae* capacity or its sovereign capacity. The elements of both standing analyses are satisfied by New Union. The state should not be barred from this action based on the district court's narrow interpretation of case law or the improper analyses of *parens patriae* standing.

Moreover, this court should find that the CWA is not applicable here because Lake Temp does not qualify as a navigable water under the statute. It is a purely intrastate water body with an insufficient connection to interstate or foreign commerce to support CWA regulation.

In the alternative, should this court find Lake Temp is subject to the CWA, this court should affirm that the COE had jurisdiction to issue the § 404 permit. This was appropriate since the discharges will meet the requirements of fill material under the CWA.

Finally, this court should affirm that the OMB's participation in the resolution of the dispute between the EPA and the COE was not improper. The president has the power to create a resolution process, the CWA does not preclude this authority, and the decision not to veto was either not subject to review or was not arbitrary, capricious, or an abuse of discretion.