Civ. App. 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 THE STATE OF PROGRESS – APPELLEE AND CROSS APPELLANT

TEAM 28

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

Constitutional Provisions

Statutes

Regulations

Rules

Executive Orders

Congressional Record

JURISDICTIONAL STATEMENT

Appellee and Cross-Appellant, State of Progress ("Progress"), seeks affirmation of the United States Army Corps of Engineers ("COE") grant of a permit to the United States Department of Defense ("DOD") under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344 (2006) ("§ 404"). This Court has jurisdiction over all claims on appeal in accordance with 28 U.S.C. § 1291 (2006) and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006).

STATEMENT OF THE ISSUES

1. Did the district court's denial of Article III standing to the State of New Union ("New Union") violate either the sovereign or *parens patria* standing requirements recently reaffirmed in *Massachusetts v. EPA*?
2. Did the district court err in allowing the definition of navigability to reach isolated, intrastate waters not directly connected to navigable waters or interstate commerce?
3. Did the district court correctly conclude that the Environmental Protection Agency ("EPA") lacked authority to issue a permit under section 402 of the CWA, 33 U.S.C. § 1342 (2006) ("§ 402"), for the discharge of slurry into Lake Temp because the COE had jurisdiction to issue the permit under § 404 of the CWA?
4. Was the district court correct in finding that the Office of Management and Budget's ("OMB") guidance that the COE had jurisdiction and EPA's decision not to veto the COE permit were both proper under the CWA?

STATEMENT OF THE CASE

The COE, through authority granted in § 404 of the CWA, issued a permit to DOD for discharge of fill material into Lake Temp. (R. at 3). New Union challenged the issuance of the § 404 permit in Civ. 148-2011 in the United States Court for the District of New Union. (R. at 1).

The United States, acting for the COE and DOD, defended the challenge and Progress, within whose boundaries the discharge will occur, intervened. (R. at 3).

All parties moved for summary judgment. (R. at 5). On June 2, 2011, the district court entered an order granting partial summary judgment to each of the parties, holding that: (1) New Union does not have standing to challenge the permit; (2) Lake Temp is navigable and thus falls within the CWA's jurisdiction; (3) the COE, not EPA, had authority to permit DOD's discharge of fill material; and (4) OMB's participation in the decision-making process did not violate the CWA. *Id.*

Progress and New Union appealed the district court's order. (R. at 1). On September 15, 2011, this court granted their appeal in C.A. No. 11-1245 and certified the four issues decided in Civ. 148-2011 for review. *Id.*

SUMMARY OF THE FACTS

DOD sought a § 404 permit from the COE for discharge of fill material into Lake Temp. (R. at 4, 7-8). The proposed fill material will be a slurry of water, ground and pulverized munitions and chemicals listed under § 311 of the CWA. (R. at 4). DOD does not plan to discharge the slurry directly into Lake Temp. (R. at 4). Instead, it plans to spray the slurry evenly over the dry bed of the lake. (R. at 4). Though no discharge has yet occurred, DOD has completed an Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"). (R. at 6). DOD estimates that this process will take several years and will raise the lake approximately six feet and increase the surface area by two square miles. (R. at 4). The fill material will allow water from the surrounding mountains to continue to flow into Lake Temp and will not allow runoff to flow out of Lake Temp into any other body of water. (R. at 4).

Lake Temp is an intermittent body of water that is dry one out of five years and rarely reaches its maximum width and length of three miles by nine miles. (R. at 3-4). Even at its maximum area, Lake Temp is wholly within the boarders of Progress. (R. at 4). Almost all the surface water which flows into Lake Temp originates in Progress, though a small amount does flow from New Union. (R. at 4). Since 1952, Lake Temp has been located within a DOD military reservation. (R. at 4). During this time, DOD has attempted to restrict access to the lake, posting signs warning of danger and stating the entry is illegal. (R. at 4). However, residents and nonresidents trespass to illegally use the lake for duck hunting and bird watching. (*Id.*).

Ultimately, the COE issued DOD a § 404 permit for the discharge of fill material into Lake Temp. (R. at 1). At no point during the permitting process did EPA contend that the fill material required a § 402 permit rather than a § 404 permit. (R. at 8). Furthermore, after consulting with OMB and the COE, EPA declined to exercise it veto of the § 404 permit. (R. at 9-10).

New Union challenged the § 404 permit out of fear that the fill material would harm its interest in the Imhoff Aquifer. (R. at 1, 4-5). Though most of the aquifer is located beneath Progress, five percent lies beneath New Union. (R. at 4). New Union's primary concern is that the soil structure between Lake Temp and the Imhoff Aquifer will eventually allow DOD's fill material to seep into its groundwater. (R. at 5-6).

Currently Dale Bumpers, who lives above the aquifer, is the only New Union resident to allege any injury from the proposed discharge. (R. at 6-7). However, New Union regulates and protects its groundwater for all citizens, not just those who own land above an aquifer. (R. at 6). As a result, any resident can obtain a permit from New Union to withdrawal groundwater from the Imhoff Aquifer. (R. at 4, 6).

SUMMARY OF THE ARGUMENT

Though Progress opposes New Union's ultimate position in this case, it does contend that New Union established Article III standing under two of the methods available to states. First, New Union established sovereign standing under *Lujan v. Defenders of Wildlife* through evidence that DOD's discharges into Lake Temp will allow contaminated water to seep into the Imhoff Aquifer. Damage to its interest in the Imhoff Aquifer constitutes (1) an "injury in fact," which is "concrete and particularized" and which is "actual or imminent;" (2) the injury is causally connected to DOD's discharges; and (3) this court's denial of DOD's discharge permit would favorably redressed the injury. New Union also established *parens patria* standing under *Snapp v. Puerto Rico ex rel. Barez* to protect its citizens' interest in the aquifer. It meets these requirements because (1) it regulates, for its citizens, the use of the state's groundwater; (2) it has an interest in protecting its citizens from unsafe groundwater; and (3) damage to the Imhoff Aquifer could harm a substantial number of its citizens' ability to withdraw water.

Lake Temp is an intermittent, isolated water that does not fall under CWA jurisdiction because it is not a "navigable" water. Lake Temp lacks the nexus to other navigable bodies of water for the COE to assert jurisdiction under the holding of *Rapanos v. United States*. Lying wholly in the state of Progress, Lake Temp is not close to other navigable or even interstate waters. The Lake dries up regularly and does not have any outflow to any other waters. Additionally, the Supreme Court struck down attempts to distort the Commerce Clause to reach isolated intrastate bodies of water similar to Lake Temp in *Solid Waste Authority of Northern Cook County v. United States Army Corps of Eng'rs*. Attempts to bring Lake Temp into CWA jurisdiction due to migratory birds, hunters or other tourists creates constitutional concern as the act of filling the lake is too removed from any commerce effect of these activities. At the very

least, the COE attempt to exert jurisdiction through the Commerce Clause raises enough Constitutional problems to evoke a narrow interpretation of "navigable" "waters of the United State." This court should demand a much clearer statement of authority from Congress before allowing the COE to deprive states of their traditional control over land and water use.

If DOD's discharges require a permit, they must be permitted under § 404 rather than § 402. In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* the Supreme Court held that discharges of fill material require a § 404 permit rather than a § 402 permit. DOD's discharges mirror the discharges in *Coeur* and thus are fill material because they are a "slurry" which will raise the bottom elevation of Lake Temp. Furthermore, discharges of fill material are not subject to effluent reduction requirements and thus do not require a § 402 permit. Finally, EPA may not substitute a § 402 permit for an otherwise valid § 404 permit simply because DOD is seeking a permit from an agency it controls.

The district court was correct in finding that OMB's guidance that the COE had jurisdiction over discharges of fill material was appropriate. The President has the power to make sure executive agencies do not conflict with one another. This power has been properly delegated to OMB and was appropriately utilized here to guide EPA and the COE that a § 404 permit was proper for the discharge of fill materials. This is an example of agency disagreement, over which permit applied, that had to be resolved for a consistent executive opinion to exist. Additionally, EPA's decision not to veto the § 404 permit was also proper under the CWA. While the Administer of EPA has the authority to veto a § 404 permit, this is a discretionary decision and is not subject to judicial review. Even if the decision was subject to review, the EPA would only have to show the decision was not "arbitrary" or "capricious." This low bar is passed because the decision was either required by or consistent with Supreme Court precedent set in *Couer*.

STANDARD OF REVIEW

Grants or denials of summary judgment are reviewed de novo and "apply the same legal standards as the district court under Rule 56." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1402 (10th Cir. 1997) (citing *Wolf v. Prudential Ins. Co.,* 50 F.3d 793, 796 (10th Cir. 1995)). Summary judgment is appropriate when a party fails to raise a "genuine dispute as to any material fact" for a jury to consider. Fed. R. Civ. P. 56(a). To meet or rebut this standard, parties must either "[cite] to particular parts of materials in the record" or "[show] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING NEW UNION ARTICLE III STANDING TO CHALLENGE THE ARMY CORPS OF ENGINEER'S GRANT OF DOD'S § 404 PERMIT

Progress supports New Union's stance that it has standing to challenge the COE's grant of DOD's§ 404 permit, despite Progress's ultimate position that New Union's substantive challenge of the grant must fail. Prior to summary judgment, New Union presented evidence of material facts needed to establish standing pursuant to the two methods outlined for states in *Massachusetts v. EPA*. First, it met the requirements needed to protect its sovereign interest in the Imhoff Aquifer. *See Massachusetts v. EPA*, 549 U.S. 497, 521-526 (2007) (following *Lujan v. Defenders of Wildlife*. 504 U.S. 555, 560-561 (1992)). It also met the requirements needed to act as *parens patriae* to protect its citizens' interest in the Aquifer. *Id.* at 519-520 (citing *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). Therefore, because New Union presented evidence of material facts that it had sovereign and *parens patriae* standing, the district court's grant of summary judgment was in error and should be reversed.

A. New Union Meets the Requirements Necessary to Establish Sovereign Standing under *Lujan v. Defenders of Wildlife*.

Plaintiffs seeking to establish Article III standing are typically required to show that they (1) suffered an "injury in fact," which was "concrete and particularized" and which was "actual or imminent;" (2) the injury was causally connected to the challenged action; and (3) the injury would be favorably redressed by a court. *Lujan*, 504 U.S. at 560-561. States seeking to protect sovereign interests can establish standing through this test. *See Massachusetts*, 549 U.S. at 521-526; *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 339 (2d Cir. 2009) *rev'd on other grounds Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). New Union meets these requirements because it has shown that (1) polluted water will eventually seep through the alluvial fill separating Lake Temp and Imhoff Aquifer and damage New Union's groundwater; (2) the COE grant of a § 404 permit will allow DOD to discharge pollutants which will damage the Imhoff Aquifer; and (3) denial of the § 404 permit would force DOD to seek a § 402 permit from the EPA, which would require treatment of the pollutants prior to discharge. Because New Union presented evidence of material facts for each element, the district court's grant of summary judgment was in error and should be reversed.

1. Evidence suggesting polluted water will contaminate the Imhoff Aquifer is sufficient to show that New Union has suffered an "injury in fact."

An "injury in fact" is established if the COE's grant of a § 404 permit will cause "concrete and particularized" and "actual or imminent" damage to New Union's sovereign interest in the Imhoff Aquifer. *Lujan*, 504 U.S. at 560. New Union satisfies the "concrete" injury requirement if the damage to the aquifer is "real" and not "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1982). It satisfies the "particularized" injury requirement if the damage affects its ownership rights in the groundwater. *Massachusetts*, 549 U.S. at 522. Finally, because

New Union alleges an environmental injury, it satisfies the "imminent" injury requirement if the damage results in a "future injury" which is not "speculative." *Connecticut*, 582 F.3d at 342-344. New Union's evidence indicates that "contaminated water from the permitted activity will enter Imhoff Aquifer," causing real, future harm to its ownership rights in the groundwater. As a result, New Union satisfies the first element of the *Lujan* test.

The relevant inquiry when determining "injury in fact" is "injury to the plaintiff," not "injury to the environment." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). In *Massachusetts*, the Court held that damage to Massachusetts' costal lands, stemming from EPAs failure to regulate greenhouse gases, constituted an "injury in fact." 549 U.S. at 522. The Court considered the harm to the state's property a "concrete" injury even though the harm was "widely shared" by other states and private landowners. *Id.* The Court also considered this a "particularized" injury because Massachusetts was the owner of "a substantial portion of the state's coastal property." *Id.* Finally, the Court held that Massachusetts suffered an "actual" and an "imminent" injury because the state had already begun to lose coast line and would suffer additional losses as sea levels continued to rise "over the course of the *next century*." *Id.* at 523-524 (emphasis added).

The Second Circuit applied a similar analysis in *Connecticut*, finding that power generators carbon dioxide emissions caused damage to eight states' property interests. 582 F.3d at 341. There, the court concluded that the states' numerous current and futures injuries satisfied the "injury in fact" element. *Id.* at 341-345. The court first examined the "reduced size of the California snowpack." *Id.* at 341-342. It found that California had suffered a "concrete" injury, because "property damage is 'plainly a concrete harm under Supreme Court precedents.'" *Id.* (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C.

Cir. 2007)). The court also found that California suffered a "particularized" injury because it incurred a distinct harm and that because the harm was "occurring now" the injury was "actual or imminent." *Id.*

Though the states in *Connecticut* alleged several current injuries, the court noted that the "bulk of the State's allegations concern future injury." *Id.* at 342 (injuries included damage to states "beaches;" "marshes and tidelands;" and "*groundwater aquifers*") (emphasis added). The power generators argued that none of these injuries met the "imminent" requirement because they would occur at "some unspecified date." *Id.* The court disagreed, holding that *Lujan* required an examination of the "certainty of the injury occurring" and did not impose a "strict temporal requirement that a future injury occur within a particular time period." *Id.* at 343; *see also Am. Bottom Conservancy v. United States Army Corps of Eng'rs*, 650 F.3d 652, 658 (7th Cir. 2011) (future injuries need not be "certain" merely "probabilistic"); *Alliance for Legal Action v. United States Army Corps of Eng'rs*, 314 F. Supp. 2d 534, 542 (M.D. N.C. 2004) (possible future reduction in "water quality" sufficient for finding of "injury in fact"). The court concluded that the states met this burden because evidence showed that their future injuries were "certain to occur." *Connecticut*, 582 F.3d at 344.

Prior to the United States motion for summary judgment, New Union presented evidence that, because the soil above the aquifer is "unconsolidated alluvial fill," the aquifer will be contaminated by DOD's discharges. (R. at 5). This uncontroverted evidence shows that New Union's injury will be "concrete" because it will be "real," not "hypothetical" and that the injury will be "particularized" because it will affect New Union's ownership interest in groundwater. New Union's also presented evidence showing that the contamination will cause a future "injury in fact" to its ownership interest in the Imhoff Aquifer. Under *Massachusetts* and *Connecticut*,

evidence of a "concrete", "particularized" future injury is sufficient to establish an "injury in fact." 549 U.S. at 522-523; 582 F.3d at 342-344.

The district court tried to deny that New Union suffered an injury in fact because it failed to develop scientific evidence that the aquifer will be contaminated. Though such evidence would undoubtedly strengthen New Union's case, it is not necessary at this stage of the litigation. *See Sierra Club v. United States Army Corps of Eng'rs*, 935 F. Supp. 1556, 1571, n. 17 (S.D. Ala. 1996) (citing *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 806 (11th Cir. 1993) (when a defendant moves for summary judgment on standing, the "specific facts set forth by the plaintiffs in their affidavits must be accepted as true"). New Union's evidence showed that its groundwater would be contaminated because the soil above the aquifer was "unconsolidated alluvial fill." (R. at 5). The district court's tacit acceptance of this fact and the United States' failure to dispute it effectively bars any evidentiary challenges to New Union's "injury in fact." Thus, it would be improper for this court to require further scientific evidence that the aquifer will be contaminated.

The district court also tried to diminish the significance of New Union's injury, noting the absence of evidence relating to the timing of the contamination. Though New Union admits this shortcoming, it is not fatal to its cause. As stated in *Connecticut*, the critical distinction is the "certainty of the injury occurring" not the timing of the injury. 582 F.3d at 342-343 (finding that injuries certain to occur within the "next 10 to 100 years" were injuries in fact); *see also Massachusetts*, 549 U.S. at 523-524 (continued loss of coastal land over the "next century" was an injury in fact). New Union has alleged a certain injury because its evidence shows that "contaminated water . . . will enter the aquifer." (R. at 5).

Finally, the district court's concern with the strength of the contamination is misplaced. As many courts have noted, large injuries are not needed for standing; "an identifiable trifle will suffice." *E.g. Sierra Club v. United States Army Corps of Eng'rs*, 645 F.3d 978, 987-988 (8th Cir. 2011) (reduction in "aesthetic" value of land was sufficient); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (fear of pollution to small pond was sufficient). Here, New Union's five percent stake in the aquifer and the unknown magnitude of the pollution are immaterial. Instead, the relevant inquiry is will the contamination harm New Union's interest in the aquifer? The evidence shows that DOD's discharges will pollute New Union's groundwater. Following *Sierra Club* and *Gaston*, nothing more is required to show "injury in fact."

2. The COE's grant of DOD's § 404 permit will directly lead to damage to New Union's interest in the Imhoff Aquifer.

To establish a causal connection between damage to the Imhoff Aquifer and DOD's § 404 permit, New Union must show that that the injury is "fairly traceable to the actions of the defendant" and not the "independent action of some third party." *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Lujan*, 504 U.S. at 560. New Union presented evidence that DOD's planned discharges into Lake Temp would eventually lead to contamination of the Imhoff Aquifer. Neither the district court nor the United States disputes this connection. As a result, New Union satisfies the second element of the *Lujan* test.

3. Damage to the Imhoff Aquifer would be adequately redressed through a denial of DOD's § 404 permit.

The damage to the aquifer is redressible if New Union can show that a " 'favorable decision will relieve a discrete injury.' " *Massachusetts*, 549 U.S. at 525 (quoting *Larson v. Valente*, 456 U.S. 228, 244, n. 15 (1982)). Importantly, New Union does not need to show that

all its injuries would be redressed to satisfy this element. *Id.* Denial of DOD's § 404 permit would favorably redress New Union's injury because it could halt the discharge of munitions into Lake Temp. Additionally, even if the discharges continued under a § 402 permit, the injury would still be redressible because the EPA would require treatment of the munitions. 33 U.S.C. § 1342(a). Neither the district court nor the United States disputes the redressibility of New Union's injury. Therefore, New Union satisfies the third element of the *Lujan* test.

B. New Union Meets the Requirements Necessary to Establish *Parens Patriae* Standing under *Snapp v. Puerto Rico ex rel. Barez*.

The Supreme Court does not consider states "normal litigants" and thus accords them "special solicitude" when determining standing. *Massachusetts*, 549 U.S. at 517, 520. States are given standing to litigate on behalf of their citizens as *parens patriae* if they (1) "articulate an interest apart from the interests of particular private parties"; (2) "express a quasi-sovereign interest"; and (3) claim an "injury to a sufficiently substantial segment of [their] population." *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). New Union meets these requirements because (1) it regulates, for its citizens, the use of the state's groundwater; (2) it has an interest in protecting its citizens from unsafe groundwater; and (3) damage to the Imhoff Aquifer could harm a substantial number of its citizens' ability to withdraw water. Because New Union presented evidence of material facts for each element, the district court's grant of summary judgment was in error and should be reversed.

The Supreme Court has long held that states have *parens patriae* standing to litigate on behalf of their citizens. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *Snapp*, 458, U.S. at 607; *Massachusetts*, 549 U.S. at 517. Though *parens patriae* standing has been denied in State suits against the Federal Government, it is allowed when states are asserting their citizens' "rights

under federal law." *Compare Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923) (deny standing) *with Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945) *and Massachusetts*, 549 U.S. at 520 (granting standing).

To establish *parens patriae* standing, states must first "articulate an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607 (concluding that states must be "more than a nominal party" to the litigation). States must also "express a quasi-sovereign interest." *Id.* (usually an interest in the "health and well-being -- both physical and economic -- of [their] residents" or a denial of their "rightful status within the federal system"). Finally, states must claim an "injury to a sufficiently substantial segment of [their] population." *Id.* (consideration of the "indirect effects of the injury" is permitted, though injuries to a small "group of individual citizens" are not considered substantial).

In *Snapp*, Puerto Rico sued as *parens patriae* for its migrant farmworkers who suffered discrimination at the hands of Virginia applegrowers. *Id.* at 597-598. There, the Court found that Puerto Rico's strong interests in protecting its workers from characterizations of inferiority and in assuring their rights under federal labor laws were sufficiently different from privately held interests. *Id.* at 608-609. The Court also found that Puerto Rico possessed a quasi-sovereign interest in the economic well-being of its workers and in their rights to protection under federal law. *Id.* at 608-610. Finally, though only a few workers suffered direct discrimination, the Court found that the applegrowers actions indirectly led to a substantial injury to all Puerto Rican citizens. *Id.*

In *Connecticut*, the Second Circuit found that the State plaintiffs had met the requirements of *Snapp* needed for *parens patriae* standing. 582 F.3d at 338. There, the court found that the states' desire to protect "public health" and "resources" from air pollution were

"interest[s] apart" from privately held interests. *Id.* The court also found that the states' concern for their citizens' physical "health and well-being" were "classic examples of a state's quasi-sovereign interest." *Id.* Finally, the court found that the states suffered a substantial injury because the defendants' carbon dioxide emissions would harm nearly all of their citizens. *Id.*

New Union meets the requirements of *Snapp* needed to establish *parens patriae* standing. Much like the states in *Connecticut*, New Union is not a nominal party to this litigation. As owner and regulator of the state's groundwater, New Union has a strong, separate interest in keeping the Imhoff Aquifer free from contamination. This represents a classic quasi-sovereign interest because it rests on New Union's concern for the economic well being of its citizens. Contamination of the aquifer could lead to diminished land values and may limit New Union's citizens' ability to make beneficial use of the state's groundwater. New Union also possesses a quasi-sovereign interest in protecting it citizens' rights under the CWA. As in *Snapp*, it may sue to ensure that its citizens "receive the full benefit of federal laws." 458 U.S. at 610 (Puerto Rico's suit pursuant to Wagner-Peyser Act and the Immigration and Nationality Act of 1952 was a quasi-sovereign interest).

Finally, the contamination would injure a substantial segment of New Union's population. Though Dale Bompers is the only citizen to allege a direct injury, the indirect effects of the contamination would harm all New Union's citizens. *Cf. id.* at 607. New Union does not "limit withdrawals to owners of land above the groundwater." (R. at 6). Rather, it allows all its citizens to apply for groundwater withdrawal permits, provided that the groundwater is not threatened with depletion. Following *Snapp* and *Connecticut*, this represents an injury to a "substantial segment" of New Union's population.

The district court concluded that New Union failed to state a case for *parens patriae* standing. However, the court's failure to cite *Snapp* shows a fundamental misunderstanding of the law. The court assumed that New Union was acting as a representative for its citizen, Dale Bompers. It then focused its analysis on Mr. Bompers' alleged injuries. Finding no injuries to Mr. Bompers, the court concluded that New Union could not establish *parens patriae* standing.

At no point was an analysis of Mr. Bomper's injuries needed for New Union to show *parens patriae* standing. The district court effectively relied on an organizational standing analysis to reject New Union's *parens patriae* standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (the first step in organizational standing analysis is that constituents "have standing to sue in their own right"). However, *Snapp*, which was decided after *Hunt*, does not require that states meet the organizational standing requirements. 458 U.S. at 607. Instead, it requires that states assert injuries to interests "*apart from* the interests of [their] individual citizens." *Connecticut*, 582 F.3d at 339 (citing *Snapp*, 458 U.S. at 607) (states' injuries must also affect a "substantial segment of [their] population, not one individual").

New Union has presented evidence of material facts which satisfy the requirements of *Lujan* and *Snapp*. Since Article III standing can be established through either test, the district court's grant of summary judgment was in error and should be reversed.

II. THE DISTRICT COURT ERRED IN ALLOWING THE ARMY CORPS ON ENGINEERS TO EXERT JURISDICTION OVER AN ISOLATED, INTRASTATE WATERS WITH NO DIRECT NEXUS TO NAVIGABLE WATERS OR STRONG CONNECTION TO INTERSTATE COMMERCE.

Lake Temp is an intermittent, non-navigable body of intrastate water that does not fall under the jurisdiction of the CWA. EPA jurisdiction under § 402 and COE jurisdiction under § 404 only apply to CWA regulated waters or "navigable waters." 33 U.S.C. § 1344; 33 U.S.C § 1342. The CWA's definition of "navigable waters" is "the waters of the United States,

including the territorial seas." 33 U.S.C. § 1362(7) (2006). The use of the articles "the" and the plural "waters" demonstrates that this does not refer to all water in general but to a narrower group of waters. *See Rapanos v. United States*, 547 U.S. 715, 716 (2006).

Lake Temp lacks the nexus to other navigable bodies of water for the COE to assert jurisdiction under *Rapanos.* Additionally, the Supreme Court struck down attempts to distort the Commerce Clause to reach isolated intrastate bodies of water similar to Lake Temp in *Solid Waste Authority of Northern Cook County v. United States Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

Because evidence of material facts exist which suggests that Lake Temp is not a navigable water of the United States, this court should reverse the district court's grant of summary judgment and reject the COE's attempt expand its jurisdictional reach to Lake Temp.

A. Lake Temp Lacks the Nexus to Other Navigable Bodies of Water Necessary for the COE to Assert Jurisdiction under *Rapanos v. United States*.

While the term "navigable waters" under the CWA is broader than the traditional use of the term, and includes some waters that are not navigable in fact, the term navigable is not without meaning. *SWANCC,* 531 U.S. at 172. In *Rapanos*, the Supreme Court confirmed that "navigable waters" includes only relatively permanent bodies of water and not intermittent bodies of water. 547 U.S. at 732-733. While the court in *Rapanos* declined to "decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] or the United States,'" it did indicate that "intermittent and "ephemeral" streams do not fall under the definition of navigable waters. *Id*. at 733.

Additionally, the Court in *Rapanos* found that only those wetlands with a continuous surface connection to a body of water that is a "waters of the United States" in its own right are covered by the CWA due to their close nexus to those waters. *Id*. at 742.

Lake Temp is an intermittent body of water that rests wholly within Progress. That is, except for dry years, when it doesn't exist at all. Lake Temp is completely dry one out of every five years, or 20 percent of the time. This irregularity disqualifies Lake Temp from CWA jurisdiction under *Rapanos* where the effect of the word navigable in the CWA was said to require "at a bare minimum the ordinary presence of water." *Id*. at 734.

While "navigable waters" may include waters abutting navigable waters or water with outflow into navigable waters, it is unreasonable to think the term could stretch so far as to cover isolated, intrastate, intermittent waters with absolutely no outflow, such as Lake Temp. Even during wet years, Lake Temp is still only three miles wide and nine miles long. Surrounding surface waters flow into the lake, but Lake Temp has no outflow to any other water source. This distinguishes Lake Temp from other wetlands and intrastate waters which are classified as waters of the United States because it maintains no connection to a navigable water. In *Rapanos*, the Supreme Court established that this nexus must be a strong one requiring "a continuous surface connection." Not only is Lake Temp far removed from any other waters, no runoff leaves the lake so there is no possibility of a connection with other waters. Finally, a continuous surface connection would be impossible to achieve because Lake Temp is completely dry, with no surface water at all, one out of every five years.

Following *Rapanos*, Lake Temp is not navigable because it has no nexus with any other water body, much less another water that is a "waters of the United States."

B. The COE Improperly Distorts the Commerce Clause in an Attempt to Expand Its Regulatory Reach to Include Intrastate Bodies of Water such as Lake Temp.

This court should reject the COE's attempts to distort the Commerce Clause to create jurisdiction over Lake Temp. In doing so, the court would be following Supreme Court president established in *SWANCC*.

The Constitution grants Congress the authority to "regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. While the grant of authority to Congress under the Commerce clause is broad, it is not unlimited. *See United States v. Morrison*, 529 U.S. 598 (2000) (declining to allow Commerce Clause authority to regulate violence against women); *United States v. Lopez*, 514 U.S. 549 (1995) (declining to allow Commerce Clause authority to regulate guns in school zones).

The COE exerts jurisdiction through the Commerce Clause by defining "waters of the United States" as those waters "the degradation or destruction of which could affect interstate commerce." 33 C.F.R. § 328.3(a)(3) (2011). This includes waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." *Id.*

In 1986, the COE attempted to extend its jurisdiction further to include intrastate waters through the migratory bird rule. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (later codified at 33 C.F.R. § 328.3). This rule further defined waters of the United States by stating that wholly intrastate waters "[w]hich are or would be used as habitat" by migratory birds fall under CWA control. *Id*. The Supreme Court in *SWANCC* summarily rejected the migratory bird rule as outside the bounds of the CWA. 531 U.S. at 174.

When an administrative interpretation of a statute invokes the outer limits of Congress' power, the Supreme Court requires a clear indication that Congress intended that result. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Furthermore, when there are multiple constructions of a statute, and one construction raises Constitutional issues and an alternative construction does not, the interpretation that does not raise Constitutional issues is preferred. *Id.* at 574. A court's duty to

intervene heightens when interpretation of a statute allows for federal encroachment on traditional state power. *See United States v. Bass*, 404 U.S. 336, 349 (1971). The COE is prohibited from substantially "alter[ing] sensitive federal-state relationship" by regulating conduct "traditionally subject to state regulation" without a clear statement from Congress that this is its intent. *Rewis v. United States,* 401 U.S. 808, 811-812 (1971). As part of the stated goals of the CWA, Congress chose to

> recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (2006).

The COE's attempt to use the presence of migratory birds, travelers and hunters to assert jurisdiction over Lake Temp is identical to the argument the Supreme Court rejected in *SWANCC*. In both cases, the waters were removed from other waters and completely in one state. Therefore, in order to assert that the waters were "navigable" the court had to rely on something besides the water itself. Migratory birds were spotted at the water in both cases. The Supreme Court recognized in *SWANNC*C that every year millions Americans spend billions of dollars to hunt and observe migratory birds. 531 U.S. at 166. Despite a significant number of these people traveling from out of state for these hunting and bird watching activities, the Court still rejected this as an independent reason to allow the COE to exert jurisdiction. *Id.* at 173. The court proclaimed in *SWANCC* that the financial contribution of out-of-state bird watchers and hunters is too attenuated to allow for federal jurisdiction over waters on that basis. *Id.*

New Union and the United State may argue Lake Temp is a different situation from *SWANCC* because it receives more tourist traffic. However, the logic behind *SWANCC* does not

change simply because more tourists are involved. The COE is still attempting to use impermissible financial connections from something removed from filling the water to draw the connection to interstate commerce.

Just as in SWANCC, the use of Lake Temp by interstate travelers is attenuated from commerce. No fees are garnered from the use of Lake Temp. In fact, signs around the DOD property prohibit public use. The United State and New Union presented no evidence about how filling the dry bed of Lake Temp to eventually create a slightly larger lake with a higher bottom would affect commerce. Requiring the logical leap that the DOD's § 404 permit may affect travel and travel may then affect interstate commerce is the kind of "pil[ing] inference upon inference the Supreme Court has recently begun to reject. *See Lopez*, 514 U.S. at 567.

Additionally, tourists travel every day, participating in a wide variety of commercial and non-commercial activities. It would be a huge overstep to allow the COE jurisdiction over every water that "could be used" by these travelers for "recreation or other purposes" as called for in 33 C.F.R. § 328.3(a)(3)(i). Essentially, any water could be use by an out of state traveler for some purpose. Allowing the COE to exert jurisdiction on this basis would clearly violate the CWA by reading the terms "navigable" waters and "the waters of the United States" out of the statute and allowing regulation of all water. This broad overstep of authority cannot be tolerated.

New Union and the United States may attempt to find significance in the fact that Lake Temp is slightly larger than the waters addressed in *SWANCC*. However, this is not a relevant inquiry. While small size may prevent navigability, large size does not establish it. At its largest, Lake Temp has a maximum width and length of three miles by nine miles. This is not large enough to become a vehicle for interstate commerce, considering the Lake rest wholly in Progress. Beyond this, it is not the size of the water but its connection to interstate commerce or

other waters that are navigable that matters. Lake Temp is entirely located in the state of Progress. It is not connected or adjacent to any navigable waters. Nor does it have any outflow to navigable waters. Additionally, no tie exists between Lake Temp and commerce. Thus, regardless of its size, this isolated water does not fit the mold for regulation under the CWA.

Additionally, New Union and the United States may attempt to argue that Congress' failure to pass House Bill 3199 equates to acquiesce to COE regulations defining "the waters of the United States." 123 Cong. Rec. 10,420, 10,434 (1977) (bill would have overturned the COE's 1977 regulations and the extension of CWA's jurisdiction to waters not navigable in the traditional sense). However, this falls far short of the clear showing of Congress' intent that would be necessary to allow the COE to assert jurisdiction in such a sweeping and constitutionally troubling manner. Failed legislative proposals are a particularly dangerous ground to rest interpretation of a prior statute and should not be seen as an overt rejection of the content of the proposed bill. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (Supreme Court was not willing to read aiding and abetting cause of action into Securities and Exchange Act despite Congress' inability to pass legislation saying there was no aiding or abetting cause of action). Legislative proposals fail everyday for a variety of reasons, some substantive and some not. Sometimes Congress runs out of time to address an issue or members of Congress agree not to proceed with efforts to pass a bill as a bargaining chip in return for their colleagues' support of their position on an unrelated issue. Failure to pass a bill is not an affirmative rejection but a non-action that could mean a variety of things. Additionally, actions or inactions of the 1977 Congress is a bad gauge to find intent of the 1972 Congress in passing the CWA.

This court should follow the Supreme Court's precedent in *SWANCC* and reject the COE's attempts to create CWA jurisdiction through activities affecting commerce or through us by interstate or foreign travelers. At the very least, the COE's attempt to exert jurisdiction through the Commerce Clause raises enough Constitutional problems to evoke a narrow interpretation of "navigable" "waters of the United State." This court should demand a much clearer statement of authority from Congress before allowing the COE to deprive states of their traditional control over land and water use. This court should follow the Supreme Court's suit, as the Court in *SWANCC* rejected the COE's broad definition of navigable waters. In that case, the Court declined to give any deference to the COE and "read the statute as written to avoid the significant constitutional and federalism questions raised by the respondents' interpretation." *SWANCC*, 531 U.S. at 174.

The district court erred in granting the United States' and New Union's motion for summary judgment. This court should reject the district court's finding and instead follow the precedent set in *Rapanos* and *SWANCC*.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ARMY CORPS OF ENGINEERS, NOT THE ENVIRONMENTAL PROTECTION AGENCY, WAS THE APPROPRIATE AGENCY TO PERMIT DOD'S DISCHARGE OF FILL MATERIAL.

Progress continues to contend that DOD's proposed discharges do not require a permit. However, if a permit is required, it must come from the COE, not the EPA. As the Supreme Court recently made clear in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009), the COE is the appropriate agency to issue permits for discharges of "slurry" which fill and raise a lakebed. Prior to summary judgment, New Union tried unsuccessfully to distinguish *Coeur*, claiming that a § 402 permit was needed because (1) DOD's proposed discharges were pollutants, not fill material; (2) Lake Temp would not effectively treat

DOD's discharges under the § 404 permit; and (3) DOD's control over the COE created an impermissible conflict of interest. New Union has failed to present evidence of material facts which would require this Court to shift permitting authority from the COE to EPA. Thus, the district court's grant of summary judgment was correct and should be affirmed.

A. The EPA has no Authority to Issue a § 402 Permit Because DOD's Proposed Discharges are Fill Material.

The COE regulates the discharge of all "fill material into the navigable waters" of the United States. 33 U.S.C. § 1344(a). The COE and EPA have jointly defined "fill material" as any "material [which] . . . [changes] the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(i) (2011) (COE); 40 C.F.R. § 232.2 (2011) (EPA). New Union does not dispute that DOD's discharge of the slurry will change the bottom elevation of Lake Temp. Therefore, the district court correctly concluded that EPA lacked authority to issue a § 402 permit.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" without a § 402 or § 404 permit. 33 U.S.C. § 1311(a) (2006). The EPA is responsible for permitting the discharge of all pollutants under § 402 of the CWA, except as provided in § 404. 33 U.S.C. § 1342(a). Under § 404, the COE is tasked with permitting the discharge of "fill material." 33 U.S.C. § 1344(a). The CWA's definition of "pollutant" is broad and includes substances such as "rock" and "munitions." 33 U.S.C. § 1362(6) (2006). The COE's and EPA's definition of "fill material" is equally broad, encompassing any "material [which] . . . [changes] the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(i); 40 C.F.R. § 232.2. Without further guidance, it would be unclear if the COE or EPA has authority to permit discharges which can be classified as "pollutants" and as "fill materials." Thankfully, the Supreme Court has recently resolved this issue.

In *Coeur*, the Supreme Court held that the COE, not EPA, has authority to permit discharges of "slurry" into a small lake. 129 S. Ct. at 2467. The Court first determined that "if the [COE] has authority to issue a permit . . . then EPA lacks authority to do so." *Id.* It based its conclusion on § 402 of the CWA, which grants EPA authority to issue all discharge permits, *except* as provided for in § 404. *Id.* (emphasis added); *see also* 40 C.F.R. § 122.3(b) (2011) (EPA does not require a § 402 permit for discharges "regulated under section 404 of the CWA"). Section 404 charges the COE with permitting the discharge of "fill material." 33 U.S.C. § 1344(a). Thus, the Court concluded that the COE, not EPA, was the appropriate agency to regulate discharges of "fill material." *Coeur*, 129 S. Ct. at 2467-2468.

The Court then determined that if the "slurry" of crushed rock and water would change the "bottom elevation" of the lake, it was "fill material." *Id.* at 2468 (citing 40 C.F.R. § 232.2 (2011)). The Court concluded that rock-based slurry met EPA's definition of "fill material" because the discharges would raise the lakebed "50 feet." *Id.* at 2464, 2468; *see also* 40 C.F.R. § 232.2 (slurry falls within EPA's examples of "fill material"). Rather than challenge this finding, the respondents argued that an exception to § 404 exists if the "material is subject to an EPA new source performance standard." *Coeur*, 129 S. Ct. at 2468-2469. The Court quickly dismissed this argument, noting that "§ 404 refers to all 'fill material' without qualification" and thus cannot be restricted by new source performance standards. *Id.* at 2469. As a result, the Court held that EPA had no authority to regulate the discharge because the slurry met the only requirement necessary for classification as a fill material. *Id.*

New Union advances an argument similar to the respondent's in *Coeur*, claiming that DOD's proposed discharges require a § 402 permit from EPA because they will contain pollutants. *Id.* As in *Coeur*, this argument is without merit because it fails to conform to the

statutory text. *Id.* Section 404 regulates all discharges of " 'fill material' without qualification." *Id.* Thus, discharges containing fill material are still regulated under § 404 even though they may also contain pollutants.

There is no dispute that the rock slurry in *Coeur* or the munitions and chemical waste slurry here are pollutants. *See* 33 U.S.C. 1362(6) (pollutant includes "munitions," "chemical wastes" and "rock"). However, classifying these discharges as pollutants does not resolve the issue. If the discharges "[change] the bottom elevation of any portion of a water of the United States," they must also be classified as fill material. 40 C.F.R. § 232.2.

DOD's proposed discharges will raise the lakebed "by several feet," while the discharges in *Coeur* would have raised the lakebed "50 feet." (R. at 4); 129 S. Ct. at 2464. Again, *Coeur* held that § 404 regulates all discharges of " 'fill material' without qualification." *Id.* at 2469. Therefore, because DOD's discharges will be classified as fill material, DOD must obtain a § 404 permit, not a § 402 permit. As a result, the district court's conclusion that EPA lacked the authority to issue a § 402 permit for DOD's discharges of fill material was correct and should be affirmed.

B. The EPA has no Authority to Issue a § 402 Permit Because the CWA does not Require Treatment of Fill Material.

Unlike § 402, discharges permitted under § 404 are not subject to the effluent reduction requirements of the CWA. *Compare* 33 U.S.C. § 1342(a) (§ 402 permits subject to § 306) *with* 33 U.S.C. § 1344(a) (§ 404 not subject to § 306). New Union misreads these statutes and incorrectly concludes that all discharges require treatment. This assertion flies in the face of *Coeur*, which held that discharges of fill material are not subject to § 306 requirements. 129 S. Ct. at 2469-2476. Therefore, New Union's conclusion that a § 402 permit is needed because DOD's § 404 permit does not treat the discharged fill material is flawed and should be rejected.

In *Coeur*, the respondents unsuccessfully argued that the petitioner's discharges of fill material were subject to § 306 of the CWA's and thus must be treated prior to discharge. *Id.* at 2469. There, a froth-flotation gold mine planned to discharge "processed wastewater" which included solid pollutants. *Id.* at 2470. Section 306 and EPA's corresponding regulations severely restricted discharges of these materials. *See* 33 U.S.C. § 1316(b) (2006); *see also* 40 C.F.R. § 440.104(b)(1) (2011). Despite these statutory and regulatory restrictions, the Court concluded that the discharge was permissible under § 404. *Coeur*, 129 S. Ct. at 2476.

First, the Court found that the omission of § 306 from § 404 indicated that "Congress did not intend § 306(e) to apply to the [COE] § 404 permits or to discharges of fill material." *Id.* at 2471. Though the Court found this absence instructive, it still considered the CWA ambiguous on this issue and turned to EPA's interpretation of the statutes and regulations for guidance. *Id.* at 2471-2472. The Court focused its analysis on an EPA memo, which explained that § 306's gold ore mining standards did not apply to discharges regulated under § 404. *Id.* at 2473. The Court deferred to this conclusion and held that discharges of fill material were not subject to § 306 treatment requirements. *Id.* at 2474.

Here, New Union argues that a § 402 permit is needed because DOD's § 404 permit does not effectively treat the discharged fill material. Unlike *Coeur*, this Court does not need to rely on an explanatory to reject this argument. Although § 306 calls for effluent reductions from a wide range of categories, it does not cover "munitions" or "chemical waste." *See* 33 U.S.C. § 1316(b). Nor are "munitions" or "chemical waste" covered by EPA regulations promulgated pursuant to § 306. *See* 40 C.F.R. §§ 440.10-471.106 (2011). Furthermore, the inclusion of chemicals listed under 33 U.S.C. § 1321 (2006) ("§ 311") in the fill materials is also irrelevant because the CWA does not incorporate § 311 into § 306. *See generally* 33 U.S.C. § 1316. As a

result, this court must reject New Union's "treatment" argument because it fails to conform to the CWA or to the Supreme Court's holding in *Coeur*.

C. The EPA has no Authority to Issue a § 402 Permit Because the CWA does not Prohibit the COE from Issuing § 404 Permits to DOD.

Federal agencies seeking to discharge fill materials must comply with the requirements of § 404 of the CWA. 33 C.F.R. § 323.3(b) (2011). Congress granted the Secretary of the Army the power to issue or deny § 404 permits. 33 U.S.C. § 1344(a). The Secretary, in turn, granted this power to the COE. 33 C.F.R. § 323.6(a) (2011). Therefore, New Union's argument that EPA, under § 404, had the power to issue DOD a permit fails to conform to the CWA and should be rejected.

New Union contends that EPA is the appropriate permitting agency because "the COE cannot help but [serve] the interests of DOD." (R. at 8). This statement has no support in law or in fact. The CWA does not grant EPA the power to issue § 402 permits in place of § 404 permits. *See* 33 U.S.C. § 1344(a)-(c). Rather, EPA's power is limited to denying or restricting discharges it believes will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c). EPA decided not to exercise its authority to deny or restrict DOD's permit. Under § 404 of the CWA, it had the power to do no more.

New Union has also failed to provide any evidence which suggests that the COE or DOD acted inappropriately. On the contrary, the district court record suggests that the COE and DOD followed the appropriate procedures to issue and obtain a § 404 permit. First, DOD applied for a permit from the COE, as required by 33 C.F.R. § 323.3(a). Next, DOD conducted an EIS, satisfying the requirements of 33 U.S.C. § 1344(b)(1). *See* 40 C.F.R. § 230.10(a)(4) (2011) (EIS meet EPA requirements for adverse impact analysis). Finally, the COE and DOD provided

public notice at all stages of the EIS analysis. *See* 33 U.S.C. 1344(a) (notice required before COE may issue § 404 permits). When combined, this evidence strongly suggests that the COE and DOD were strictly following the CWA, not trying evade it. As a result, New Union's argument that EPA, rather than the COE, had the power to issue the § 404 permit is flawed and should be rejected.

New Union has failed to present evidence of material facts which suggest that EPA had authority to issue a § 402 permit. Therefore, the district court's grant of summary judgment was correct and should be affirmed.

IV. THE OFFICE OF MANAGEMENT AND BUDGET'S GUIDANCE THAT A § 404 PERMIT APPLIED TO THE DEPARTMENT OF DEFENSE'S PROPOSED DISCHARGE AND THE ENVIRONMENTAL PROTECTION AGENCY'S DECISION NOT TO VETO THE § 404 PERMIT WERE BOTH REASONABLE ACTIONS MADE UNDER PROPER LEGAL AUTHORITY.

The district court was correct in finding that OMB's guidance that the COE had jurisdiction over discharges of fill material under § 404 was appropriate. OMB was acting under a valid presidential delegation of authority to coordinate policy between two agencies. Additionally, the district court was correct in finding that EPA's decision not to veto the § 404 permit was also proper under the CWA. The administer of the EPA has complete discretion in making this decision and it is not subject to judicial review. Therefore, this court should affirm the district court's grant of summary judgment.

A. The OMB was Acting Under Proper Authority in Trying to Prevent a Conflict Between the EPA and the COE.

The United States Constitution vests executive power in the President, not the Administer of the EPA or the Secretary of the Army. U.S. Const. art. II, § 1, cl. 1. The President is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This requires the President to assure that decisions made by executive branch agencies follow the

laws of the United States and do not conflict with one another. This is key, as the doctrine of the unitary executive requires that the United States speak with one voice before federal court and that this voice represent the common interests of the government and not the interests of a particular agency. *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

The President may designate to the head of any executive branch department or agency *any function* that is vested in the President by law. 3 U.S.C. § 301 (2006) (emphasis added). In 1993, President Clinton delegated some presidential functions to OMB, an agency within the Executive Office of the President. The grant of power given to OMB stated that

> Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that *decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget* (OMB) *shall carry out that review function*. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and *procedures that affect more than one agency*, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide *guidance to agencies* and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (emphasis added). President Obama recently reaffirmed this Order. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). However, though OMB has had direct oversight over agency decisions, including EPA and COE decisions, since 1993, it has had the power to influence agency decisions since the 1970s. *See e.g.* Exec. Order No. 12,149, 44 Fed. Reg. 43,247 (July 20, 1979) (OMB given oversight over Federal Regional Councils, which included EPA and COE).

Since OMB has authority over issuance of regulations, it follows that it also has authority over the implementation of those regulations. A main purpose of OMB review is to insure

"decisions made by one agency do not conflict with the policies or actions taken or planned by another agency." Exec. Order No. 12,866. The issuance of § 404 and § 402 permits is a prime example where coordination is necessary to ensure agencies do not contradict one another. The EPA is responsible for permitting the discharge of all pollutants under § 402 of the CWA, except as provided in § 404. 33 U.S.C. § 1342(a). Under § 404, the COE is tasked with permitting the discharge of "fill material." 33 U.S.C. § 1344(a). Coordination is necessary to make sure that the two agencies agree on which permit applies in certain situations because all discharges into the navigable waters of the United States requires one of the two permits, but never both.

If Lake Temp is classified as a navigable water, then DOD must obtain a discharge permit under § 402 or § 404. Permit applicants can be and often are confused about which permit is required for their particular discharge. *See e.g. Coeur*, 129. S. Ct. at 2463. In situations where it is unclear which permit is needed, OMB has the power to step in and "provide guidance" to EPA and the COE. Exec. Order No. 12,866.

Here, OMB followed its executive mandate and provided guidance to EPA and the COE when it instructed the agencies that the COE's issuance of a § 404 permit was the proper. At no point did OMB attempt to unduly influence the decision making process, nor did it attempt to mandate the terms of the permit issued to DOD. OMB's only role in this process was coordinating between the COE and EPA to ensue that these executive agencies did not conflict with one another. Therefore, because OMB was acting on authority delegated from the President, its actions were proper and should be affirmed.

B. The EPA's Decision Not to Veto the DOD's § 404 Permit was Proper.

EPA had the authority to veto the § 404 permit, but chose not to exercise it. This discretionary decision is a proper action available to the EPA under the CWA.

1. EPA chose not to exercise its authority to veto the DOD's § 404 permit.

Congress granted the Administer of the EPA authority to "administer" the CWA. 33 U.S.C. § 1251(d). In particular, the Administer "is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he or she is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site." 33 U.S.C. § 1344(c). "Specification" of a disposal site is the process by which a disposal site is permitted under § 404. *See e.g. Ohio Valley Envtl. Coal v. United States Army Corps of Eng'rs*, Nos. 3:05-0784, 3:06-0438, 2009 WL 3424175, at *1, n.1 (S.D. W. Va. Oct. 21, 2009); *see also* 33 U.S.C. § 1344(b) ("each such disposal site shall be specified for each such permit by the [Corps]").

Because § 404(c) authorizes EPA to prohibit, withdraw, deny or restrict the specification of disposal sites that would otherwise be authorized by a §404 permit, EPA has authority to veto a COE § 404 permit. *See e.g.*, *Coeur*, 129 S. Ct. at 2467. Despite this authority, EPA made a conscientious decision not to veto DOD's § 404 permit for Lake Temp. By not utilizing its 404(c) authority to prohibit specification of Lake Temp as a disposal site, EPA chose to affirm the discharge of the fill material under § 404.

New Union attempts to argue that OMB's participation prevented EPA from exercising its § 404(c) powers. However, as the district court correctly noted, this is nothing more than a collateral attack on EPA's decision to not veto the permit. OMB was not administering, nor was it interpreting the statute. Rather, it was simply acting as a referee between two agencies who differed in their view of the proposed discharge into Lake Temp.

New Union failed to grasp this important distinction, concluding that, after OMB's participation, EPA no longer had authority under § 404(c) to veto the permit. The COE on the

other hand, correctly noted that after OMB's participation, EPA "*decided* not to veto the COE permit." (R. at 10) (emphasis added). The ability of EPA to decide if § 404(c) should be applied after OMB's participation is critical because it implies that EPA never lost its authority to administer the statute. Thus, because EPA maintained its authority under § 404(c), OMB's participation was not improper and is not grounds for reversal.

2. EPA's decision not to exercise its § 404(c) authority was either not subject to judicial review or could not be judicially overturned because it was not "arbitrary" or "capricious."

Under the APA, agency action in an area committed to agency discretion is not subject to judicial review. 5 U.S.C. § 701(a)(2) (2006). However, if an agency decision is subject judicial review, that review is limited to whether the agency's actions were "arbitrary" or "capricious." 5 U.S.C. §706(2)(A). Arbitrary and capricious review is highly deferential, with a strong presumption in favor of finding the agency action valid. *Natural Res. Def. Council v. EPA (NRDC)*, 16 F.3d 1395, 1400 (4th Cir. 1993). Furthermore, "a reviewing court must generally be at its most deferential," when matters involve complex predictions based on special expertise rather than "simple findings of fact." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983).

The Administrator of the EPA is authorized to reject § 404 permits, but is not required to do so unless he or she makes a determination that the materials will have "an unacceptable adverse effect." 33 U.S.C. § 1344(c). The subjective nature of finding something either acceptable or unacceptable suggests that it is a completely discretionary decision. Therefore, judicial review would violate the APA. 5 U.S.C. § 701(a)(2).

However, even if the Administrator's decision is subject judicial review, it cannot be overturned unless his or her actions were "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). To

determine if the decision was "arbitrary" or "capricious," courts must determine if the Administrator "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas*, 462 U.S. at 105; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decisions are "arbitrary" or "capricious" if an agency relied on impermissible factors; failed to "consider an important aspect of the problem"; offered an explanation which "run counter to the evidence"; or reached an implausible conclusion).

New Union failed to provide any evidence that EPA's decision not to veto DOD's § 404 permit was "arbitrary" or "capricious." On the contrary, EPA's decision represented a rational, reasoned decision which was in accord with Supreme Court precedent. The district court correctly noted that EPA's decision not to veto the permit is "required by or consistent with *Coeur*." (R. at 10); *Cf. Fredrick County Fruit Growers Ass'n v. McLaughlin*, 703 F. Supp. 1021, 1026 (D.D.C. 1989) (agencies following instructions of federal courts "cannot be deemed to have acted in an arbitrary or capricious manner"). Again, *Coeur* held that the COE, not EPA, has authority to permit discharges of slurry, and that when COE has the authority to issue a permit, then EPA lacks the authority to do so. 129 S. Ct. at 2467. Here, as in *Coeur*, the EPA decided not to veto a § 404 permit. Therefore, because New Union failed to present any evidence that EPA decision was "arbitrary" or "capricious," this court must give deference to EPA's decision. *See NRDC*, 16 F.3d at 1400.

EPA's decision also deserves deference because of the complex nature of the CWA. As the district court noted, EPA administrates over one hundred sections of the CWA. The vast majority of these sections, including § 404(c) require more than "simple findings of fact." *See e.g.* 33 U.S.C. 1311(b) (control of effluent discharges requires determination "best practicable

control technology"). Section 404(c) is equally complex, requiring the Administrator to determine if fill material will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c). When complex matters such as these are before this court, deference must be given to EPA. *See Baltimore Gas*, 462 U.S. at 103. The APA does not provide judicial review for discretionary agency decisions. However, if EPA's decision not to veto the § 404 permit is subject to judicial review, it was not arbitrary or capricious and therefore cannot not be overturned by this court. Therefore, the district court correctly found that OMB's guidance concerning the COE's jurisdiction over DOD's discharges of fill material and EPA's decision not to veto DOD's § 404 permit were both proper under the CWA and should be affirmed.

CONCLUSION

The district court correctly concluded that the COE, not EPA, had jurisdiction to issue DOD a discharge permit and that OMB's participation in the permitting process was proper. However, the district court incorrectly concluded that New Union did not have standing to challenge DOD's permit and that Lake Temp is a navigable water under the CWA. Therefore, Progress respectfully asks this Court to affirm the district court's denial of summary judgment with respect to issues III and IV and reverse the district court's grant of summary judgment with respect to issues I and II.