Team No. 37

C.A. No. 11-1245

Civ. No. 148-2011

STATE OF NEW UNION,

Appellant – 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 UNITED STATES, Appellee and Cross – Appellant

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JURISDICTION BELOW

This is an appeal from a final order of the United States District Court. (R. at 1, June 2, 2011). The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 (2006).

JURISDICTION ON APPEAL

The States of New Union and Progress timely appealed the district court's grant of summary judgment in favor of the United States. (R. at 10). This Court has jurisdiction over the district court's decision pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. Whether the district court correctly found that the State of New Union could not assert standing under a sovereign or *parens patriae* theory since New Union failed to show imminent injury from the discharge of fill material in the State of Progress.

2. Whether the district court correctly found that Lake Temp is navigable water because of Lake Temp's size and its usage by interstate travelers and thus is subject to the jurisdiction of the Clean Water Act under Sections 301(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1344(a), 1362(7) (2006).

3. Whether the district court correctly found that the Army Corp of Engineers properly issued the permit to discharge fill material under Section 404 of the Clean Water Act and

thus that the Environmental Protection Agency lacked jurisdiction to issue the permit under Section 402 of the Clean Water Act. 33 U.S.C. § 1342 (2006).

4. Whether the district court correctly found that the Environmental Protection Agency and Army Corp Of Engineers complied with the Clean Water Act by following Executive Order 12,088 by consulting the Office of Management and Budget to resolve the dispute addressing the applicable Clean Water Act section under which to issue the permit and was thus not a violation of the Clean Water Act, 33 U.S.C. § 1251 (2006).

STATEMENT OF THE CASE

This is an appeal from the final order of the District Court for the District of New Union granting the United States' motion for summary judgment. The State of New Union filed a request for review of an individual permit issued by the Army Corp of Engineers (COE) under Section 404 of the Clean Water Act (CWA). 33 U.S.C. § 1344 (2006). This permit allowed the Department of Defense (DOD) to discharge fill material into Lake Temp, located wholly within the State of Progress and on a military reservation owned by DOD. New Union challenges the COE's jurisdiction to issue the fill material permit. (R. at 3).

Following CWA procedure, the Office of Management and Budget (OMB) resolved a dispute between the Environmental Protection Agency (EPA) and the COE regarding permitting jurisdiction. After the dispute resolution procedure, the EPA considered this project as under the purview of the COE and declined to assert jurisdiction outside of its oversight capacity under Section 404(c). (R. at 9). New Union

appeals OMB's intervention in this dispute. The State of Progress intervened since Lake Temp is entirely within that state. (R. at 5).

The parties submitted cross-motions for summary judgment in this matter. The United States seeks to affirm the district court's judgment that New Union lacked standing to bring this case. The United States further seeks to affirm the district court's judgment that even if New Union had standing, a Section 404 permit was appropriate for this fill action. (R. at 5).

STATEMENT OF FACTS

The U.S. Department of Defense ("DOD") seeks a permit from the Army Corps of Engineers ("COE") under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to discharge slurry made up of spent munitions onto the dry bed of Lake Temp, which is located within a military reservation based within the State of Progress. (R. at 4). Climate changes affect the surface area of the lake, which at its largest encompasses twenty-seven square miles. (R. at 3-4). About every five years during the dry season, the lake temporarily dries up and then returns to its original water level. The Imhoff Aquifer, filled with sulfurous water and separated by a thousand feet of alluvial fill beneath Lake Temp, is found primarily within Progress inside the boundaries of the military reservation. A fraction of the aquifer is located in New Union under a single resident's ranch, that of Dale Bompers. (R. at 4). Mr. Bompers does not draw water from the aquifer because of the water's sulfurous nature. Mr. Bompers further expresses that he has no future plans to utilize the water from it. (R. at 6). Furthermore, no evidence has

been presented that the aquifer will be polluted by the DOD's proposed discharge of the slurry into the lake.

Historically, the lake has served as a location for duck hunting, by both Progress residents and out-of-state visitors. After the lake was encompassed by the military reservation, the DOD posted signs forbidding entry along the Progress state highway, which runs south of the lake. However, the DOD acknowledges that these signs have been ignored. Trails consisting of drag marks from rowboats and canoes travel the length between the lake and the highway indicate continued use. The DOD concedes knowledge of the lake's recreational use by interstate visitors for bird watching and hunting activities. (R. at 4).

The fill material will consist of matter from spent munitions along with any remaining solids pulverized. Water is then added to the mixture, which will create a slurry. This slurry will then be sprayed over the dry areas of the lake. This action will raise the entire lakebed by several feet, elevating the lake's highest point by six feet and increasing its surface area by two square miles. (R. at 4).

After the permit request was filed, there was a dispute between the EPA and the COE as to who should issue the permit. The EPA and the COE sent briefing papers regarding the permit issuance dispute to the OMB pursuant to Executive Order No. 12,088 and received an oral resolution. 43 Fed. Reg. 47,707 (Oct. 14, 1978). The COE issued the permit authorizing the DOD to proceed. (R. at 9).

SUMMARY OF THE ARGUMENT

New Union does not have standing to appeal the COE's permit issuance in either its sovereign capacity or in a *parens patriae* capacity because it failed to show imminent injury. New Union fails to show standing in its sovereign capacity because it does not show that it receives injury as a landowner. New Union fails to assert standing in its *parens patriae* capacity because it does not show injury to a substantial percentage of its residents. The only citizen who might be affected, if he received injury, would have standing to sue as a private party, which further prevents New Union from interjecting itself.

Lake Temp is navigable water because of multiple factors, including its size and its use by interstate visitors and wildlife. Thus, permitting issues fall under the jurisdiction of the Clean Water Act. Therefore, the DOD properly sought a permit for the discharge of slurry into Lake Temp.

A Section 404 permit issued by the COE rather than a Section 402 permit from the EPA was appropriate because the slurry is fill material. New Union's attempts to distinguish this case from *Coeur Alaska v. Se. Alaska Conservation Council* are irrelevant to the permit issuance. 129 S.Ct. 2458, 174 L. Ed 2d 193 (2009). Therefore, *Coeur* controls this issue, which holds that a Section 404 permit is required for the discharge of slurry fill material. *Id.*

Pursuant to Executive Order 12,088, the OMB lawfully reconciled the dispute between the EPA and the COE regarding the permitting jurisdiction under the CWA. In its oversight capacity, the EPA followed the standard designated in CWA Section 404(c) when the EPA decided not to veto the COE's properly issued permit. The EPA's decision

not to veto a validly issued CWA Section 404(a) permit, when subjected to limited judicial review under the Administrative Procedure Act (APA), is reasonable since the decision-making process is discernable and it was not arbitrary or capricious. Moreover, the challenge by New Union is a policy challenge, an impermissible collateral attack, on a validly issued permit.

STANDARD OF REVIEW

An appellate court reviews a lower court's dismissal for standing *de novo*. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092 (8th Cir. 2011); *United Fabrics Int'l., Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011). An appellate court reviews agency decisions under the arbitrary and capricious standard. 5 U.S.C. § 706 (2006); *Nat'l Ass'n. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

ARGUMENT

I. New Union fails to assert standing to bring this claim.

Before a court can hear a dispute, the parties must establish that a definite case or controversy exists. U.S. Const. art. III § 2 cl. 3. The affected party must have standing to bring a claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A party without standing has not brought a sufficient case or controversy to the court because that party's interest is not grounded enough in the result. *Id.* at 583 .. The district court below correctly found that New Union lacked standing to bring a claim in both its sovereign

capacity and as *parens patriae* because New Union did not properly show it would suffer injury from the proposed filling of the lakebed.

A. New Union lacks standing in its sovereign capacity because it failed to establish that it would suffer injury as a result of Lake Temp's filling.

To successfully assert standing, a party must show that it will be injured by a private or official violation of the law. *Summers v Earth Island Inst.*, 555 U.S. 488, 491 (2009); *see also Lujan*, 504 U.S. at 582 (holding that particularized injury shows a necessary stake in the claim). The party must also show that an action either is or will be the cause of that injury. *Lujan*, 504 U.S. at 562. Furthermore, the court must possess the ability to redress the impending injury. *Id.*

A party must have enough "stake in the outcome of the controversy" to warrant the use of the powers of the court system. *Summers*, 555 U.S. at 492 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (indicating the need to limit the use of courts to plaintiffs with standing to protect democratic society)). Injury must be specific and certain. *Summers*, 555 U.S. at 493. A remote possibility of an injury occurring is insufficient. *Id.* When a state sues in its sovereign capacity, the identified injury must be incurred in its role as a landowner. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 522 (2007) ("*Massachusetts*").

i. New Union fails to show that filling Lake Temp causes imminent injury to the state.

To constitute injury for the purposes of standing, injury must be imminent. *Lujan*, 504 U.S. at 560. Injury can include damage to the air or earth. *Georgia v Tennessee*

Copper, 206 U.S. 230, 238 (1907). Claims of speculative injury should be dismissed since the injury cannot be considered concrete. *Summers*, 422 U.S. at 493.

While injury does not need to be extensive, a state must still demonstrate that some injury, no matter how miniscule, will occur. Damage that occurs over a period of one hundred years will be sufficiently imminent injury. *Massachusetts*, 549 U.S. at 526. However, that injury must still be concrete and cause damage, similar to global warming, to meet that standard. *Id*. (where the court relied on studies showing global warming was consistently causing injury).

Here, New Union fails to show injury to itself in its sovereign capacity. As defined by *Lujan*, New Union's fear is a speculative injury that may not occur. 504 U.S. at 582. Lake Temp is fully confined within the neighboring state of Progress. Although New Union claims that the Imhoff Aquifer will be damaged by the COE permitted action to fill the lakebed, New Union has conceded that it cannot prove that the proposed fill will cause any harm to the aquifer beneath its land. Further, New Union failed to seek a permit from the DOD to investigate any potential damage to the aquifer. When New Union conceded that the state could not prove injury because it did not seek this permit nor could the state offer evidence of imminent injury, the district court properly dismissed the case for lack of standing.

ii. New Union fails to demonstrate actual injury even under *Massachusetts v. EPA*'s lengthened imminence standard.

The standard presented under *Massachusetts* reinforces the need for a state to show injury when proceeding in a sovereign capacity. *Massachusetts*, 549 U.S. at 521. A state may show a miniscule injury that in the aggregate may cause great damage. *Id.*

Ultimately, injury must occur, even if in miniscule increments, and may not be speculative. *Id.*

In *Massachusetts*, the state and other parties, sued the EPA for failing to promulgate regulations to prevent damages resulting from global warming. *Id.* at 510. The state asserted that scientific data proved that global warming would cause the oceans to rise and destroy significant portions of the state's coastline. Thus, the state reasoned, the EPA should be required to promulgate regulations under the Clean Air Act to prevent or mitigate against the "greenhouse gas" effect. *Id.* at 510.

The state only had standing to bring the controversy because the Supreme Court agreed that an injury continuously inflicted over one hundred years sufficed. *Id.* at 522. Data demonstrated that global warming consistently caused damage, would lead to the rising of the oceans, and eventual damage to the coastline. *Id.* at 523. Minimal damage, over time, represented sufficiently imminent injury for the state to assert standing in its sovereign capacity. *Id.*

Here, New Union failed to demonstrate any injury under the *Massachusetts* standard. First, it failed to offer any proof that filling the lakebed will cause any damage to the aquifer below. Second, if any damage did occur to the aquifer, New Union failed to provide a timeframe for when this damage would occur. Finally, if there were damage, New Union failed to present evidence that this would affect a significant portion of its sovereign territory.

Unlike in *Massachusetts*, where scientific evidence proved that global warming would damage state coastal lands, New Union submits no proof that the fill material will cause any damage to it. New Union's assertions constitute speculation since they rely

solely on the fact that the materials used to fill the lakebed are comprised of some toxic materials. However, while *Massachusetts* had scientific data to support that some damage would occur, New Union lacks even this.

Further, New Union has failed to give an adequate timeframe for when this speculated damage might develop. Although the Supreme Court found that one hundred years was sufficiently imminent, New Union failed to provide a similar figure. For example, if damage could result from this action but the injury were only to affect New Union five hundred years in the future, it is unlikely the Court would have found this to be sufficiently imminent.

Finally, unlike in *Massachusetts*, the speculative damage to New Union would not impact a significant portion of the state. The *Massachusetts* standard applied primarily because almost the entire state coastline would be destroyed by global warming. *Id.* Here, New Union fails to produce evidence that any potential damage would affect a significant portion of the state. With only one resident appearing to live over an aquifer that he does not use, these facts differ from the grand scale interest that the *Massachusetts* holding protected. Therefore, New Union failed to show that the *Massachusetts* standard should apply in this case.

B. New Union fails to show standing in its *parens patriae* capacity.

A state asserts its *parens patriae* authority when it inserts itself as a party to an action to protect the interests of its citizens. *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923). That state may not insert itself when it does not represent a substantial portion of its citizens. *Id.* at 592. Furthermore, a state may not litigate the personal claims of its residents. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Personal claims

include property damage, increased operating expenses, and loss of enjoyment. *Satsky v. Paramount Comm.,* 7 F.3d 1464, 1470 (10th Cir. 1993). Successful *parens patriae* claims require a state to assert a "quasi-sovereign" interest, which is an interest "above and behind the titles of its citizens." *Tennessee Copper,* 206 U.S. at 237 (holding that the litigated issue must be more than damaged land claims).

To show a quasi-sovereign interest for the purposes of suing in a *parens patriae* capacity, a state must prove that if it were acting in its sovereign capacity, the state could pass laws that would prevent the action from occurring. *Massachusetts*, 549 U.S. at 519 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). Additionally, if the ability of the state to draw its share of water is impacted, the state has the right to intervene as *parens patriae*. *South Carolina v. North Carolina*, 130 S.Ct. 854, 867,175 L.Ed.2d 713, 731 (2010).

Here, New Union may not assert a quasi-sovereign interest because its single potentially affected resident, Dale Bompers, could litigate his own claim. Mr. Bompers claims that he will suffer increased costs and diminished land value as a result of the fill action. Assuming *arguendo* that Mr. Bompers could show injury, this would be a personal claim that he could litigate himself. *See Satsky*, 7 F.3d 1464, 1470 (holding that claims such as property damage and increased costs are personal claims and thus inappropriate uses of *parens patriae*.). New Union could not insert itself as a party to litigate on behalf of Mr. Bompers because of the prohibition in *Pennsylvania v New Jersey*, which requires a state to represent the interests of a substantial portion of its residents and not simply damage to land. 426 U.S. at 666.

Potentially claiming that the state's ability to draw its share of water from the aquifer will be affected, pursuant to the *South Carolina v. North Carolina* standard, New Union has not brought proof that the challenged action will do anything to reduce the ability for it, or any of its residents, to draw water from the aquifer. However, New Union chose not to petition the DOD to test the water and see if any damage would occur. All claims of injury are thus speculative and not enough to meet the standard for injury to achieve standing.

Therefore, the district court properly held that New Union lacked standing when it failed to show that the state would be injured, even remotely, by the planned fill. Because New Union cannot prove injury will occur to its water, the state cannot assert standing in its sovereign capacity. Since Mr. Bompers, the only named New Union resident potentially affected by this action, could privately litigate his claims, New Union may not assert standing through *parens patriae*. Additionally, since Mr. Bompers, as with New Union, cannot prove that injury will occur, any claims New Union would litigate on his behalf would also lack standing.

II. Lake Temp is navigable water due to its size and usage, thus subject to the jurisdiction of the Clean Water Act.

The CWA requires permits for the discharge of pollutants, including dredged or fill material, into navigable waters. 33 U.S.C. § 1362(12) (2006); *see generally* 33 U.S.C. § 1251 *et. seq.* Navigable waters are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The Supreme Court has limited the definition of "waters of the United States" to include only "those relatively permanent,

standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]. . .oceans, rivers, [and] lakes.'" *Rapanos v. United States*, 547 U.S. 715, 739 (2006). Waters that do not fall under the *Rapanos* holding may still fall within the definition of navigable waters, and therefore the jurisdiction of the CWA, based on other characteristics. 33 C.F.R. § 328.3(a)(3)(i).

Qualifying characteristics outside the *Rapanos* definition include, "intrastate lakes . . . which are or could be used by interstate or foreign travelers for recreational or other purposes." *Id.* Certain recreational uses of a body of water require that body of water to fall within the jurisdiction of the CWA. *See Colvin v. U.S.*, 181 F.Supp.2d 1050, 1056 (C.D. Cal. 2001) (holding that since the Salton Sea was used by interstate travelers for recreational activities such as water skiing, fishing, and hunting ducks, it was a navigable water of the United States under the CWA).

Here, Lake Temp falls under the definition of navigable water under the CWA due to multiple factors, including recreational use, the presence of migratory birds, and the lake's size. The district court correctly found that Lake Temp was subject to the CWA's jurisdiction because of its use by interstate travelers. Evidence, including "clearly visible" trails and "signs of rowboats and canoes being dragged between the highway and the lake," demonstrates that interstate travelers were using Lake Temp for recreational purposes. (R. at 7). Hunting, rowing and canoeing are clearly recreational activities. Therefore, Lake Temp falls within the purview of the CWA. *See Colvin*, 181 F.Supp.2d at 1056.

The presence of migratory birds, while not conclusive on its own, can be considered when determining whether a body of water is navigable. In *Solid Waste Auth.*

of N. Cook Cnty. v. U.S. Army Corps of Eng'rs ("*SWANCC*"), the COE issued a permit for intrastate ponds pursuant to the "Migratory Bird Rule." 531 U.S. 159, 167 (2001). The "Migratory Bird Rule" extended the COE's jurisdiction under CWA to those waters that "are or would be used as habitat by . . . migratory birds which cross state lines." *See id.* at 164. The COE claimed jurisdiction under the CWA to grant the permit solely pursuant to the "Migratory Bird Rule" since migratory bird species had been observed at those ponds. *Id.* at 163. The Supreme Court held the "Migratory Bird Rule," without other factors, is insufficient to claim jurisdiction under the CWA. *Id.* at 167.

Lake Temp properly falls within the jurisdiction of the CWA because the presence of migratory birds is but one of many factors used to determine it is navigable water. While ducks use Lake Temp as a stopover in their migration, the "Migratory Bird Rule" is not the sole basis for the district court's decision finding that Lake Temp was navigable water. In this instant case, not only did migratory birds use the lake, it was used for recreational purposes.

While not solely determinative, size is another factor considered when determining whether a body of water is navigable. In *SWANCC*, the seasonal and isolated ponds did not qualify as navigable water under the CWA. *SWANCC*, 531 U.S. at 163. The bodies of water at issue were a "scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)." *Id.*

Here, Lake Temp's size is far greater than the scattering of ponds in *SWANCC*. Lake Temp's size is over 15,000 acres compared to the *SWANCC* ponds of one-tenth to a few acres in size. Since Lake Temp's size and usage distinguish the instant case from

SWANCC, this favors requiring a permit issuance for fill discharge under the CWA. Although size alone may not determine navigability, Lake Temp's recreational usage, combined with its size and the presence of migratory birds, lead to the conclusion that it is navigable water and thus subject to the jurisdiction of the CWA.

Defining Lake Temp as a navigable water succeeds not only as a matter of law, but of policy as well. The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). Those bodies of water that are significant in size, used by interstate visitors and utilized by wildlife in their migration, should be protected from actions that may have an environmental effect through the means of a permit issuance program. Requiring the DOD to apply for a CWA permit allows for consideration of the environmental impact the discharge of slurry may have on Lake Temp, a large body of water that affects interstate visitors and wildlife. Therefore, the goal of the CWA strongly favors requiring a permit to be issued for the discharge of slurry into Lake Temp.

As indicated above, the accumulative effect of the various factors prove that Lake Temp is navigable. Thus, the discharge of fill material into Lake Temp is subject to the CWA.

III. The Corps of Engineers, not the EPA, correctly issued the permit pursuant to CWA Section 404 and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*.

The COE has jurisdiction to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." CWA Section 404, 33 U.S.C. § 1344 (2006). The EPA has issued regulations defining fill material, which

includes material "placed in waters of the United States where the material has the effect of . . . (ii) Changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2 (2008). The discharge of pollutants that do not fall under the definition of dredged or fill material fall under the permitting jurisdiction of the EPA. CWA Section 402, 33 U.S.C. § 1342. The Supreme Court recently reaffirmed the COE's jurisdiction to issue Section 404 permits for the discharge of fill material, holding that the "EPA may not issue permits for fill material that fall under the Corps' § 404 permitting authority." *Coeur Alaska, Inc v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467, 174 L. Ed.2d 193, 206 (2009) ("*Coeur*").

Since the instant case aligns with *Coeur*, the district court correctly held that the COE properly permitted the discharge of slurry into Lake Temp under Section 404, rather than the EPA's jurisdiction under Section 402. Here, as in *Coeur*, a lake was to be filled with slurry and the slurry was both a pollutant and fill material. Also, in both cases the COE issued the permit under Section 404 that the EPA did not veto under CWA Section 404(c), 33 U.S.C. § 1344 (c) (2006) (authorizing the EPA to veto Section 404(a) permits if the EPA determines that "the discharge of such materials into such area will have an unacceptable adverse effect"). Therefore, this court should abide by the *Coeur* decision and uphold the COE's jurisdiction to permit the discharge of fill material into Lake Temp due to the similarity of all relevant facts between *Coeur* and the instant case.

The district court properly applied the *Coeur* decision, upholding the COE's jurisdiction to issue the Section 404 permit for the slurry. Remaining distinctions in that case and the one at issue, including the DOD's compliance with effluent requirements and the potential conflict of interest are irrelevant.

A. Since the proposed slurry discharge is both fill material and a pollutant, the COE retains jurisdiction to issue a permit, consistent with *Coeur*.

Even though the discharge is both fill material and a pollutant, it still falls under the definition of fill material under Section 404, and thus subject to the COE's permit issuing jurisdiction. The *Coeur* Court correctly notes, "Section 404 refers to all 'fill material' without qualification." *Coeur*, 129 S. Ct. at 2469, 174 L. Ed.2d at 208. As the district court held, Congress does not make any distinctions among pollutants in CWA Section 502(6), according to toxicity nor does Section 404 define fill material by degrees of toxicity. 33 U.S.C. § 1362(6) (2006); (R. at 8).

The *Coeur* Court found that the slurry was under the jurisdiction of the COE under Section 404(a), since the discharge of the slurry would have the effect of "changing the bottom elevation" of a navigable water of the United States. 40 C.F.R. § 232.2; *Coeur*, 129 S. Ct. at 2468, 174 L. Ed.2d at 207. The CWA does not authorize the EPA to issue permits for the discharge of fill material under Section 402. Instead, the COE controls the authority to issue permits for the discharge of fill material under Section 404(a) of the CWA.

Here, as in *Coeur*, the slurry falls under both definitions of pollutant and fill material. While the slurry contains pollutants, the slurry in this case still falls under the definition of fill material since the slurry, when discharged into Lake Temp, will change the bottom elevation of the lake. Therefore, a Section 404(a) permit is required.

B. Without further discharge of pollution into other navigable waters, no additional permits under the CWA are required.

Without movement of pollution between the permitted body of water into another navigable water, no further permits are required. The tailing pond is the site where the pollutant and non-pollutant materials are separated. *Coeur*,129 S. Ct. at 2464, 174 L. Ed.2d. at 202-3. In *Coeur*, the lake was used as an alternative to constructing a tailings pond, which is usually a preliminary disposal site for slurry. *Id.* After separation in the lake, the pollution in *Coeur* then moved into the river and further into other navigable waters. *Id.*

Two permits were issued in *Coeur*. 129 S. Ct. at 2466, 174 L. Ed.2d. at 204-5. First was the 404(a) permit for the fill material into the lake. The second permit enabled the pollution to move from the lake into the river. *Id.* Since pollutants were moving into navigable waters, at that point, it was appropriate for the EPA to issue a separate 402 permit to regulate that discharge of pollution. *Id.* The lake was the slurry treatment pond and the lake's wastewater complied with CWA's effluent requirements when the lake water discharged into the river downstream. *Coeur*, 129 S. Ct. at 2466, 174 L. Ed.2d at 205; *see also* CWA Section 101(a)(1), 33 U.S.C. § 1251(a) (2006).

Here, unlike in *Coeur*, there is no anticipated movement of pollutants outside of Lake Temp to other navigable waters. Lake Temp will prevent "the discharge of *any* pollutants or wastewater to other navigable waters, in effect creating zero discharge of pollutants, the goal of the statute." (R. at 8) (emphasis added). Even though in *Coeur*, a second permit was required for the movement of pollutants, the *Coeur* lake, as with Lake

Temp, still required a 404(a) permit. Since there is no movement of pollutants from Lake Temp, any further distinction between *Coeur* and here is irrelevant.

Here, the COE properly issued the 404(a) permit for the fill material. Since there was no further movement of pollutants, this permit is the only one required for Lake Temp. Other distinctions between the purposes of the lakes in *Coeur* and the instant case are irrelevant. Even though Lake Temp will not be used as a treatment alternative, the use of the Lake will prevent further discharge of effluence into the navigable waters of the United States. Therefore, any distinction between the *Coeur* case and here is so *de minimis* as to be irrelevant.

C. **The COE, pursuant to Congressional authorization, is the proper agency to issue permits for the discharge of fill material, producing no conflict of interest with the DOD.**

Pursuant to its authority under the U.S. Constitution, Congress passed CWA Section 404, which clearly designates the COE as the permit issuing authority for the discharge of fill material into navigable waters. *See* U.S. Const., art. I.; *see also* CWA Section 304, 33 U.S.C. § 1344 (2006). As a subdivision of an executive department, the COE derives its powers from either enabling legislation or executive orders. *See Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941) ("Subordinate officers of the United States are without power, save only as it has been conferred upon them by an Act of Congress or is to be implied from other powers so granted."). The CWA speaks to conflicts of interest only in regards to State programs, stating that any permit issuing body may not include anyone who received a significant portion of income from permit holders or permit applicants. 40 C.F.R. § 123.25(c) (2006). Under the CWA, "permit

holders" and "permit applicants" do not include state government agencies. 40 C.F.R. § 123.25(c)(1)(iii) (2006).

Claiming a conflict of interest exists between the DOD and the COE to redirect permitting jurisdiction runs contrary to Congressional legislation. As the district court alluded, this argument does not hold any merit. New Union argues that a conflict of interest exists since, in *Coeur*, the COE issued the permit as an "uninterested regulator." However, there is no conflict of interest between the COE and DOD.

Here, Congress designated the COE to issue permits under Section 404, making it proper for the DOD to seek the permit from the COE since no other agency has been given authority to issue these permits. Thus, even though the COE is subordinate to the DOD, the COE remains an uninterested party.

The CWA's prohibition on authorized bodies to issue permits to applicants from whom they receive a significant amount of their income does not create a conflict of interest here. The DOD did not request this permit through a state program, and therefore this prohibition does not apply. Even if it did apply, although the COE, as a subsidiary to the DOD, may derive a significant amount of its income from the DOD, the CWA's conflict of interest provision clearly does not apply to "any department or agency of a State government." 40 C.F.R. § 123.25(c) (1)(iii) (2006).

Since the distinctions urged by New Union do not affect the COE's jurisdiction for issuing the permit, the district court's decision should be affirmed.

IV. The OMB lawfully reconciled a dispute between the COE and EPA while the EPA retained oversight over the COE's properly issued 404(a) permit.

Pursuant to Executive Order 12,088, the EPA and the COE appropriately consulted with the OMB to determine which agency was authorized to issue the fill material permit. Executive Order 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978) ("Executive Order"). Complying with the Executive Order, the OMB would have utilized the judgment of the Administrator of the EPA before verbally directing the COE to issue the permit. *Id.* , CWA § 404(a), 33 U.S.C. § 1344(a). The EPA's oversight capacity, delineated by Section 404(c), authorizes the prohibition of discharge of fill material whenever the EPA determines that the material will have an unacceptable adverse impact. CWA § 404(c), 33 U.S.C. § 1344(c).

The EPA, pursuant to its authority under CWA Section 404(c), did not veto the fill material permit properly issued by the COE under CWA Section 404(a). *Id*. The OMB's dispute resolution was proper, and is subject only to limited judicial review. The EPA's decision not to veto the permit should be upheld because it was not arbitrary or capricious. An attack on policy is an impermissible collateral attack.

A. Pursuant to Executive Order, the OMB utilized the judgment the Administrator of the EPA to resolve the conflict between two agencies.

An Executive Order must be considered along with the act of Congress that ratified and confirmed it; "the Order and the statute together lay a basis for participation by federal agencies in the program." *Ex parte Mitsuye Endo, 323 U.S. 283,299 (1944).* An agency that claims jurisdiction under CWA must follow the directions delineated by the Executive Order.

Executive Order 12,088 orders the Director of the OMB to consider unresolved conflicts at the request of the Administrator of the EPA. Executive Order. Pursuant to the Order, "[t]he Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations." *Id.* OMB defers to the judgment of the Administrator of the EPA in rendering a decision, exercising no discretion of its own.

Here, the OMB, following Executive Order, resolved a dispute between the EPA and the COE arising when the DOD requested a fill permit. This dispute revolved around which agency had jurisdiction to issue a fill permit with pollutant components. The EPA and COE sought the assistance of the Director of the OMB pursuant to Executive Order 12,088. Executive Order.

The EPA followed the procedure delineated in the Executive Order regarding agency conflicts under the Clean Water Act. Procedurally, the Director of the OMB would utilize the judgment of the Administrator of the EPA when considering the conflict. Executive Order. The EPA and COE both presented arguments regarding permitting jurisdiction to the OMB Director. (R. at 9). After following this procedure, the COE issued a permit enabling the DOD to discharge fill material into Lake Temp.

New Union presents no evidence to support that the Executive Order was improperly followed. Had the OMB not participated, the Attorney General, another neutral executive official, would have resolved the conflict prior to litigation. (R. at 10). With the conflict resolved, the district court correctly determined that the OMB's participation in the fill material permitting dispute was consistent with the CWA.

B. EPA's decision not to veto the properly issued 404(a) permit is reasonable.

Judicial review constrains agencies from acting outside of their statutory mandate. *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984). Aggrieved parties are entitled to judicial review under the APA. 5 U.S.C. § 702 (2006). Reviewing courts may set aside agency action only if that action is found to be arbitrary or capricious, or if the action failed to meet statutory requirements. 5 U.S.C. § 706 (2006).

If the agency action is not arbitrary or capricious in an ordinary sense, then it survives the APA's "arbitrary or capricious" standard of review. *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct.1800, 1812, 173 L. Ed.2d 738, 752 (2009). Agency actions are reasonable when they are based on deliberative decision-making procedures. 129 S.Ct. at 1810, 173 L. Ed.2d at 750. Courts will uphold an agency decision even if the agency's decision-making process lacks clarity if the process itself may be reasonably discerned. *Id.*

i. EPA's decision-making path is discernible because it complies with procedure.

The *Chevron* test applies to official rulemaking by an agency. The test inquires whether Congress spoke directly on the issue at hand. If Congress did not, the test determines whether the responsible agency came to a reasonable decision based on an official rulemaking procedure. *Chevron*, 467 U.S. at 844. Claiming that the court is unable to apply a *Chevron* test to this dispute because the OMB's participation removed decision-making authority from the EPA is an inaccurate interpretation of law. The EPA, the COE, and the OMB did not participate in legislative rulemaking. Rather, they interpreted the procedures of the CWA.

Only legislative rules promulgated by an agency and confirming a regulatory requirement are official rulemakings that must be subject to public notice and comment period. 5 U.S.C. § 553(b)(A) (2006); *Spirit of Sage Council v. Norton,* 294 F. Supp.2d 67, 85 (D.D.C. 2003) (vacated on other grounds). A legislative rule does more than maintain a consistent agency policy. A rule is intended to grant rights, impose obligations, or substantially curtail an agency's discretion in decisions. *Norton,* 294 F. Supp.2d at 86 (holding that creating a procedure to revoke permits is a rulemaking because it changes the obligations of federal agencies). A procedure that does not impose new, unexpected obligations is not a legislative rulemaking.

"Interpretive rules," do not require official rulemaking procedure and only remind affected parties of existing duties. *Bragg v. Robertson,* 54 F. Supp.2d 653 (S.D. W. Va. 1999) (permits for surface coal mining not in violation of CWA). General interpretive statements allow agencies to announce tentative intentions for the future without force of law. *Id.* at 665. Thus, following procedure laid out in the CWA is an interpretive rule not subject to official notice and comment periods under the APA and not subject to a *Chevron* test.

The CWA sets the standard by which the EPA can veto a 404(a) permit. CWA § 404(c), 33 U.S.C. § 1344(c) (stating that the EPA may veto any Section 404 plan that it finds has an "*unacceptable adverse effect* on . . . wildlife, or recreational areas.") (emphasis added). The primary responsibility for regulating the discharge of fill material into navigable waters falls on the COE. *Coeur,* 129 S. Ct. at 2469, 174 L. Ed.2d at 208; *see also* Refuse Act, 33 U.S.C. § 407 (2006). The COE has maintained this responsibility for over one hundred years. 33 C.F.R. §§ 320.2(d) and (f) (2011). Because this is not a

change of obligation, as *Norton* was, this is not a legislative rulemaking subject to an official notice and comment period.

Here, the decision not to veto a properly issued 404(a) permit was within the EPA's oversight capacity because the EPA was following a standard set out in the statute. CWA § 404(c); 33 U.S.C. § 1344(c). Also, the COE has long-established authority to permit the discharge of fill material. Allowing the COE to grant the fill permit was interpreting the CWA rather than a legislative rulemaking since it was authorized by procedures promulgated in the Executive Order. Executive Order. New Union improperly questions the agency's procedures rather than whether the permit issuance complies with the law.

Therefore, the action of the EPA is readily discernible since the EPA was following promulgated procedure, interpreting the CWA, instead of legislative rulemaking. Following procedure is not an official rulemaking and thus is not subject to the *Chevron* test. Therefore, this challenge must fail.

ii. EPA's decision not to veto the permit lawfully issued by the COE was not arbitrary or capricious.

Judicial review of an agency action is limited to whether that decision was arbitrary or capricious. 5 U.S.C. § 706(2)(A) (2006); *see also Mattaponi v. United States Army Corps of Eng'rs*,606 F. Supp.2d 121, 141 (D. D.C. 2009) (permitting limited review of an agency decision not to veto). Agencies must supply reasoned analysis for deviations from a settled procedure. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983) ("*State Farm*"). If an agency makes a change reliant on factors outside of those which Congress intended it to consider

or offers an explanation running counter to evidence before the agency, the decision may be found arbitrary and capricious. *Id.* at 43.

Under the arbitrary and capricious standard, the court may not substitute its views for the views of the agency. *W. Neb. Res. Council v. Envtl. Protection Agency*, 793 F.2d 194, 200 (8th Cir. 1986). The party challenging an agency's action bears the burden of proof to demonstrate that the agency's ultimate conclusions are unreasonable. *City of Olmsted Falls v. Fed. Aviation Admin.,* 292 F.3d 261, 273 (D.C. Cir. 2002).

In *State Farm,* the Court's finding of an arbitrary and capricious administrative decision is readily distinguishable from the present case. *State Farm,* 463 U.S. at 30. There, the agency abruptly changed its policy by no longer requiring that all new cars be equipped with seatbelts. Failing to supply "increasingly clear and convincing reasons," for the change, the agency's decision was found to be arbitrary and capricious. *Id.* at 44.

Here, the agencies' decision-making process was demonstrated by reasoned analysis of the problem before them. The EPA and the COE put forth alternative arguments to the OMB regarding permit jurisdiction for evaluation ensuring that all information was available. The OMB, pursuant to the Executive Order should have utilized the judgment of the Administrator of the EPA. The COE then issued the permit for fill material to the DOD. The EPA maintained oversight to ensure that the permit complied with the COE's statutory grant of authority under the CWA.

Thus, by following procedure, the EPA decision not to veto the COE Section 404(a) permit was reasonable and not arbitrary or capricious.

iii. The Supreme Court has previously upheld grants of jurisdiction to the COE for mixed fill material permits.

As noted above, EPA's decision not to veto the Section 404(a) permit issued by the COE is consistent with the Court's ruling in *Coeur.* The *Coeur* Court found that the discharge of mining waste into a lake under a Section 404(a) permit was proper because the slurry met the regulatory definition of fill material. *Coeur,* 129 S. Ct. at 2460, 174 L. Ed.2d at 199. As discussed previously, fill material has the "effect of changing the bottom elevation" of water. 33 C.F.R § 323.2. The *Coeur* Court emphasized that permits for mixed fill material fall under the jurisdiction of the COE.

Here, the discharge of slurry into Lake Temp falls into the definition of fill material since it will raise the elevation of the lake. Therefore, the Section 404(a) permit issued by the COE complied with the CWA and the EPA's decision not to veto the permit was proper since no evidence was presented to satisfy the standard of Section 404(c). The EPA's decision not to veto the Section 404 permit was proper because the decision making process was reasonably discernible and met with statutory requirements. Even under limited judicial review, the decision was reasonable and not arbitrary or capricious.

C. Challenging OMB's dispute-resolution authority is an impermissible collateral attack on a validly issued permit.

Generally, a collateral attack challenges the validity of an action in a proceeding with the legal purpose other than overturning the challenged action. *J & L Specialty Products Corp.,* 5 E.A.D. 333 (1994). A collateral attack is distinguished from direct review because it is an attack on a point of procedure attempting to undermine a judicial proceeding to show that the judgment is ineffective. Black's Law Dictionary (9th ed.

2009). New Union's challenge to the EPA's decision not to veto a properly issued permit amounts to an overall policy challenge rather than a dispute regarding a specific failure of the EPA to perform a discrete and required action.

In *Norton v. Southern Utah Wilderness Alliance*, the court found a similarly impermissible collateral attack. 542 U.S. 55, 65 (2004). The Bureau of Land Management's Wilderness Implementation Plan was challenged because, although the agency was required to manage wilderness lands so as not to compromise the wilderness character of the land, the agency refused to completely forbid off-road vehicles. *Id.* The challenge in *Southern Utah Wilderness Alliance* was against how the agency performed its duties to manage the land rather than a failure to manage them. *Id.* The decision not to completely forbid the vehicles was an overall policy challenge against the Bureau of Land Management, and thus a collateral attack, rather than a dispute regarding a specific failure of the agency to "manage wilderness lands," as required action under the statute. *Id.*

Here, instead of directly challenging the validity of the fill permit, New Union's challenge of the OMB's participation in the conflict resolution is an attack on how the agency fulfills its duty. Under the statutory language of the CWA, the COE is required to issue fill permits. The decision to veto or not veto a Section 404(a) permit is based on the authority granted to the EPA under Section 404(c) of the CWA. The EPA, in its Section 404 permit oversight capacity, must follow the standard set by the statute. Thus, without a specific failure of the agency to perform a discrete or required action, the collateral attack on the COE Section 404(a) permit must fail.

The OMB acted properly by resolving a dispute between the EPA and COE. The EPA properly exercised its oversight authority when it ensured that the COE's fill material permit complied with CWA. New Union's attempt to challenge OMB's procedural participation constitutes an impermissible collateral attack on the proper issuance of a permit. Thus, this court should uphold the district court's determination that OMB's participation in the permit dispute resolution was consistent with the CWA.

CONCLUSION

For the foregoing reasons, this Court should uphold the judgment of the district court below.