Team #39

C.A. NO. 11-1245
CIV. NO. 148-2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION,

Appellant and Cross-Appellee,

vs.

UNITED STATES,

Appellee and Cross-Appellant,

vs.

STATE OF PROGRESS,

Appellee and Cross-Appellant.

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

BRIEF OF APPELLEE AND CROSS-APPELLANT UNITED STATES

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had jurisdiction over this action pursuant to 28 U.S.C. § 1331 (2006) as this action concerns the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006) and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2006).

This appeal is from a final judgment entered by the district court on June 2, 2011, which granted the United States' motion for summary judgment and denied the Plaintiff's motion. (Order (R) at 10-11). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing in its sovereign capacity as owner and regulator of the groundwater in the state or in its *parens patriae* capacity as protector of its citizens who have an interest in the groundwater in the state.

II. Whether the Army Corps of Engineers (COE) has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, because Lake Temp is navigable water under CWA Sections 310(a), 404(a), and 502(7), 33 U.S.C. §§ 1311(a), 1344(a), and 1362(7).

III. Whether COE has jurisdiction to issue a permit under CWA Section 404, 33 U.S.C. § 1344, or the United States Environmental Protection Agency (EPA) has jurisdiction to issue a permit under CWA Section 402, 33 U.S.C. § 1342, for the discharge of slurry into Lake Temp.

IV. Whether the Office of Management and Budget (OMB) decision that COE had jurisdiction under CWA Section 404, 33 U.S.C. § 1344, and that EPA did not have jurisdiction under CWA Section 402, 33 U.S.C. § 1342, to issue a permit for the Department of Defense (DOD) to discharge slurry into Lake Temp and EPA's acquiescence in OMB's decision violated the CWA.

STATEMENT OF THE CASE

This is an appeal from a final Order of the District Court of New Union granting United States' motion for summary judgment in whole and Intervenor/Codefendant State of Progress' summary judgment in part. (R at 10-11). New Union filed a petition for review under 28 U.S.C. § 1331 and the APA, 5 U.S.C. § 702, of an individual permit issued by COE to DOD under the authority of CWA section 404. (R at 3). The United States, New Union, and Progress all filed motions for summary judgment.

On June 2, 2011, the district court granted the United States' petition for summary judgment. The court held New Union lacked standing, COE had jurisdiction to issue a § 404 permit for the addition of fill to Lake Temp, and OMB's dispute resolution between EPA and COE did not violate the CWA. New Union and Progress both filed appeals with the United States Court of Appeals for the Twelfth Circuit, which granted certiorari.

STATEMENT OF THE FACTS

On a United States military reservation in Progress is a body of water known as Lake Temp. (R at 3-4). At its highest water level, the lake is up to three miles wide and nine miles long, and is completely dry approximately one out of every five years. *Id.* The lake is fed entirely by a watershed of surrounding mountains and has no outflow. (R at 4). Nearly one thousand feet below the lake is the Imhoff Aquifer, just five percent of which extends beyond Progress' border into New Union. *Id.*

The lake is used by duck hunters, bird watchers, boaters, and canoers from Progress and surrounding states, and by ducks as a migration stopover. *Id.* DOD is aware of these uses, but has not erected a fence or taken no action other than posting illegal entry signs in 1952 on the state highway running along the southern side of the lake. *Id.*

The aquifer's water is not potable or usable in agriculture without treatment due to a high level of sulfur. *Id.* New Union does not currently use the aquifer. *Id.* A New Union citizen, Dale Bompers, owns, operates, and resides on a ranch above the aquifer, but does not currently access it and has no plans to do so. *Id.*

Nearly ten years ago, DOD developed plans to construct a munitions treatment and disposal facility on the reservation adjacent to Lake Temp. *Id.* Spent munitions will be treated and combined with water to form a slurry, which will be sprayed onto the dry bed of the lake. *Id.* In 2002, the DOD completed an Environmental Impact Statement (EIS) regarding its proposed use of the lake in conformity with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. (R. at 6). New Union did not comment on the EIS, or otherwise contact DOD during process. *Id.* New Union now asserts that it could gather evidence about the possible movement of pollutants from the lake to the aquifer if it established a grid of monitoring wells, but it has not applied to DOD for permission. *Id.*

Pursuant to CWA § 404, COE issued DOD a permit for the slurry discharge into the lake as fill material. (R at 3). EPA has the right to veto such a permit under CWA § 404(c), but chose not to veto after OMB advised against it. (R at 9).

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment and its resolution of federal constitutional issues *de novo*. *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1189 (9th Cir. 1990). Summary judgment should be upheld if the court applied the correct substantive law and the evidence does not reveal any genuine issue of material fact when viewed in the light most favorable to the party opposing summary judgment. FED. R. CIV. P. 56(c); *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001).

SUMMARY OF THE ARGUMENT

New Union lacks standing to challenge the CWA § 404 permit for discharge of fill material. First, New Union cannot establish a sufficient interest - sovereign, proprietary, or *parens patriae* - to establish state standing or gain "special solicitude" as granted in *Mass. v. E.P.A.*, 549 U.S. 497 (2007). Second, the state has pleaded only unproven allegations of speculative harm to the Imhoff Aquifer. Unable to show concrete and imminent injury to an adequate interest, New Union has failed to establish that it has standing to bring suit.

Assuming New Union has standing, COE properly exercised § 404 authority over DOD's proposed discharge onto the lake bed. Lake Temp is a relatively permanent standing body of water that forms a distinct geographic feature. Furthermore, it has been used for interstate recreational commerce by out of state hunters, bird watchers, boaters, and canoers for more than one hundred years. For these reasons, Lake Temp is a "navigable water" or "waters of the United States" as defined in CWA § 502(7); 33 U.S.C. § 1362(7) (2006).

DOD's proposed discharge meets EPA's and COE's joint definition for "fill material" because it will change the bottom elevation of Lake Temp upon discharge, and the contents will not be suspended in the water at any time. "Fill material" is not defined in the CWA and § 404(a) does not qualify it in any way. COE's interpretation of "fill material" to include DOD's discharge is consistent with the decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 129 S. Ct. 2458 (2009), and is a reasonable interpretation of this ambiguous term.

OMB's resolution of a dispute between COE and EPA over whether to designate DOD's discharge fill material was proper and required by the Take Care and Vesting clauses in Article II

of the Constitution. The President delegated authority to OMB to resolve disputes between executive branch agencies. CWA not only does not prohibit such participation, it permits the Administrator to seek such help in CWA § 501(b); 33 U.S.C. § 1361(b) (2006). Furthermore, EPA's decision not to exercise § 404(c) veto authority is not judicially reviewable because Congress committed it to agency discretion. Finally, even if the decision is reviewable, it is not arbitrary because it is consistent with Supreme Court precedent in *Coeur*, and a valid exercise of executive authority.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF STANDING TO NEW UNION WAS PROPER DUE TO NEW UNION'S INABILITY TO DEMONSTRATE A SUFFICIENT STATE INTEREST OR INJURY IN FACT.

The district court properly found that New Union could not establish sufficient standing. Standing is essential to ensure that judicial decisions with real consequences for parties' rights are made "not in the rarefied atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). New Union is unable to create such a context here.

A. New Union Cannot Establish a Sufficient Interest to Support Standing Because Its *Parens Patriae* and Proprietary Interests Are Inadequate and It Has No Sovereign Interest.

A state can assert standing based on three types of interests: *parens patriae*, sovereign, and proprietary. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). New Union's showing is insufficient to support its claims of *parens patriae* and sovereign interest or even a claim of a proprietary interest, which was not made below. In addition, New Union's lack of support for its assertions of interest and its inability to assert a valid procedural right prevent it from receiving *Mass. v. E.P.A.*'s "special solicitude." *Mass. v.*

E.P.A., 549 U.S. 497, 520 (2007).

1. New Union cannot establish *parens patriae* interest on behalf of its citizens, because a substantial segment of the population has not been affected and the alleged quasi-sovereign interest is insufficient.

Ordinarily a state must assert an interest of its own – proprietary or sovereign – to be heard in court, but courts have found that a state may have a sufficient interest on behalf of its citizens generally which has been called "quasi-sovereign." *Snapp*, 458 U.S. at 601. The Second Circuit laid out the test for establishing *parens patriae* status using such an interest, as detailed in *Snapp*: 1) the alleged injury must affect a sufficiently substantial segment of the population; 2) the interest must involve a) the physical and economic health and well-being of the state's citizens or b) the state being denied its rightful status within the federal system to be deemed quasi-sovereign; and 3) the interest must be separate from the interests of particular private parties. *Conn. v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009) (*rev'd on other grounds, American Elec. Power Co., Inc. v. Conn.*, 131 S. Ct. 2527 (2011)). Even if New Union can arguably meet the third element, it is unable to make a sufficient showing on the other two.

a. New Union cannot show that a substantial segment of its population would allegedly be affected.

New Union has not established that the United States' action will affect a substantial segment of New Union's population. In *People by Abrams v. 11 Cornwell Co.*, a partnership of neighbors purchased a house to prevent it from being used by the state as a community home for the mentally disabled. 695 F.2d 34, 37 (2d Cir. 1982) (*vacated in part on other grounds, People v. State of N.Y. by Abrams v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983)). The court found the partnership's act had not only affected the relatively small number of residents who would have moved into the home, but "countless others" in the community would be harmed if such discrimination was left unredressed. *Id.* at 39-40. This constituted a sufficiently substantial

segment of the population. *Id*.

New Union has cited exactly one citizen, who is alleged to be affected by the United States' actions, Dale Bompers. He owns, operates, and lives on a ranch above the Imhoff Aquifer in New Union. (R at 6). One citizen is flatly insufficient to meet the standard of a substantial segment of the state's population. New Union cannot increase that number by claiming Bompers is representative of others who would be affected, because he does not currently and has no definite plans to use the aquifer. *Id.* Thus New Union has made no showing that the actions of the United States have affected even one citizen of New Union, let alone a substantial segment of its population.

b. New Union is unable to assert a sufficient quasi-sovereign interest.

Even if New Union is found to have met the first requirement, it cannot demonstrate an adequate quasi-sovereign interest, the second element for *parens patriae* standing. *Snapp*, 458 U.S. at 601. While a quasi-sovereign interest has never been well defined, the Supreme Court has identified two primary types: "the health and well-being – both physical and economic – of its residents in general" and "not [being] excluded from the benefits that are to flow from participation in the federal system." *Id.* at 607-08. Here, the former is at issue, because New Union is not alleging deprivation of a benefit being given to other states.

An early *parens patriae* case involved environmental harms which affected a state's citizens' economic and physical health and well-being; the effect was "graphic and direct." *Id.* at 604. In *State of Missouri v. State of Illinois*, Missouri's citizens were at risk, via the Mississippi River, of exposure to 1,500 tons a day of "undefecated sewage and other poisonous and noxious matters." 180 U.S. 208, 213 (1901). More recently, a court concluded that an injury to the health and welfare of a state's citizens or its economy must be "sufficiently severe and generalized" to

qualify as a quasi-sovereign interest. *Com. of Pa., by Shapp v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976). Furthermore, in *Mass. v. E.P.A.*, which will be discussed further below, the Supreme Court noted another potential factor in the analysis: whether the injury is one that the state claiming standing could or would likely try to address via statute. 549 U.S. at 519 (quoting *Snapp*, 458 U.S. at 607).

New Union complains of speculative contamination of an aquifer that, according to its pleadings, no one in the state uses or has plans to use. (R at 6-7). It alleges no other effects on the health of its land or citizens, economic or physical, let alone effects that are graphic, direct, severe, or generalized. Finally, New Union would be unable to alleviate the effects of this injury legislatively because the alleged source of the effects is in another state, a sovereign over which New Union has no authority.

2. New Union has no sovereign interest.

New Union asserts sovereign injury based on the portion of the aquifer located within its territory. In *Snapp,* the Supreme Court described two kinds of sovereign interests: the exercise of sovereign power over entities within the state, and the demand for recognition from other sovereigns. 458 U.S. at 601. New Union's alleged basis for injury – as owner and regulator of a portion of the Imhoff Aquifer – does not fit into either of these categories.

3. New Union's proprietary interest is insufficient.

New Union did not raise a proprietary interest, which *Snapp* distinguishes from sovereign and quasi-sovereign interests, at the district court level. *Id*. Even if it is raised belatedly on appeal, however, it is insufficient to provide New Union with standing.

Courts have required a significantly greater proprietary interest for a state to establish standing than New Union can demonstrate here. Recent cases have shown that the potential loss

of millions of dollars in federal funding and protection of the entire 11.5 million acreage of the Sierra Nevada are sufficient. *Davis v. U.S. E.P.A.*, 348 F.3d 772, 778 (9th Cir. 2003); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1168, 1178 (9th Cir. 2011). By contrast, the court pointed out in *State of Nevada v. Burford* that the federal government, not Nevada, owned the mountain at issue in that case, and that the state did not use the allegedly affected land it did own adjacent to the mountain. 918 F.2d 854, 857 (9th Cir. 1990).

New Union has no proprietary interest in Lake Temp and has not used the Imhoff Aquifer for any purpose. In addition, the degree of its interest, five percent of an unused aquifer, is far less than what courts have historically found sufficient. There is thus no sufficient proprietary state interest to support New Union's standing.

4. New Union does not qualify for *Massachusetts*' "special solicitude," because it cannot establish a sufficient quasi-sovereign or proprietary interest, and it does not assert an appropriate procedural right.

New Union also argues that it deserves *Mass. v. E.P.A.*'s "special solicitude" in the standing analysis, which is not specifically defined but appears to be a lower standard on the merits for standing. 549 U.S. at 520. The majority based that determination on three things: (1) Massachusetts' quasi-sovereign interest in its citizens' economic and physical health; (2) the potential loss of much of the state's coastal property, a "substantial portion" of which the state has a proprietary interest in; and (3) the procedural right granted in the Clean Air Act (CAA), 42 U.S.C. § 7607 (2006), that the plaintiffs brought suit under.

New Union cannot make an equivalent showing. As shown above, its quasi-sovereign interest, and *parens patriae* standing overall, is effectively nonexistent, under any of the current definitions used by courts. It also has no applicable sovereign interest, and its unargued proprietary interest in an unused aquifer cannot compare to Massachusetts' ownership of miles

and miles of extensively used coastline.

Finally, the plaintiffs in *Mass. v. E.P.A.* brought suit pursuant to a CAA procedural right, 42 U.S.C. § 7607, that the majority said was "concomitant" with the CAA provision they originally were asking EPA to enforce, 42 U.S.C. § 7521; 549 U.S. at 498. New Union has asserted no similar procedural right under the CWA. It is instead challenging agency action under the APA, 5 U.S.C. § 702 (R at 3), which is not equivalent or even analogous to the CAA procedural right used by the *Mass. v. E.P.A.* plaintiffs and relied on by the Supreme Court in finding "special solicitude."

Consequently, given its failure on all three factors, New Union deserves no "special solicitude" in the below standing analysis.

B. New Union Fails to Establish Standing Because It Cannot Articulate an Imminent and Concrete Invasion of a Legally Protected Interest.

The Supreme Court outlined the bedrock requirements for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The first is that the plaintiff must have experienced an injury in fact, defined as an actual or imminent invasion of a legally protected interest that is concrete and particularized. *Id.* at 560. While New Union arguably could make a sufficient showing on the latter two requirements – that the injury must be fairly traceable to the defendant's conduct and that a favorable decision must be likely to redress the alleged injury (*Id.* at 560-61) – those will not be argued here because the first element cannot be proven.

1. New Union is unable to put forward sufficient evidence regarding injury and is estopped from doing so.

The district court properly found that New Union's allegations of injury are not in fact, but are instead "completely speculative." (R at 6). The requirement of FED. R. CIV. P. 56 to assert more than "mere allegations" to defend summary judgment applies to standing just as it

does to any other element on which the plaintiff bears the burden of proof. *Lujan*, 504 U.S. at 561. In addition, a plaintiff asserting injury based on an action the government took or failed to take against *another party*, as New Union does here, must make a substantially greater showing on the merits of standing than if the plaintiff were being regulated directly. *Id.* at 562. Here, New Union questions EPA's actions and inactions regarding DOD and COE, and thus even if it could meet the typical standing burden – which it cannot – it certainly cannot meet a higher standard.

Furthermore, New Union should be estopped from putting forward any evidence beyond mere allegations it might have or acquire, because of its own prior inaction. In *U.S. v. City of Loveland, Ohio*, the city of Loveland neither participated in a hearing nor submitted objections to a consent decree that would affect its rights and for which all appropriate notice procedures were followed. 621 F.3d 465, 468 (6th Cir. 2010). Loveland brought suit five years later, claiming it was not bound by the consent decree. *Id.* The district court found, and the Sixth Circuit affirmed, that Loveland was barred from doing so: "Loveland forfeited its rights to contest the effects of the consent decree by unreasonably sitting on its rights." *Id.* at 474.

Loveland is on point. EPA, DOD, and COE followed proper procedures during the 2002 EIS process, which detailed the proposed activity at Lake Temp and referenced the Imhoff Aquifer, but New Union declined to participate in any way. (R at 6). New Union further admits its injury is "susceptible to proof," but it has not made any effort to demonstrate that proof. *Id.* Finally, while New Union claims DOD will not grant access to the military reservation to allow it to drill wells to develop its evidence, it has never applied to DOD to install the wells. *Id.* New Union has thus "sat on its rights" for nearly twice as long as Loveland did, without any explanation for its nearly ten-year lack of diligence. Consequently, it should be barred from presenting any evidence it did not raise during the EIS process, the procedure specifically

designed for efficient airing of such evidence.

2. New Union has not alleged a concrete and particularized injury because it does not use the aquifer.

The Supreme Court on multiple occasions in environmental cases has held that to establish a concrete injury, the plaintiff must *use* the allegedly affected area. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972); *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990); *Friends of the Earth, Inc. v. Laidlaw Environmental Svcs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). In *Laidlaw*, a plaintiff testified that he lived near the polluting facility, that the river looked and smelled polluted, and that he once used the river but no longer did because of his concern about the defendant's discharges into it. This, combined with similar testimony from others, was enough for the court to find a concrete injury to their interests. 528 U.S. at 181-82.

Here, by contrast, the water in the aquifer "is not potable or usable in agriculture without treatment because of a high level of sulfur." (R at 4). Bompers does not use the aquifer and has no plans to do so. (R at 6). New Union offers no other evidence suggesting use of the aquifer, either by other individuals or the state itself. State residents do have a right to request a permit from the Department of Natural Resources allowing them to withdraw groundwater (R at 6-7), but that is similarly of no avail. The plaintiff in *American Forest & Paper Ass'n v. U.S. E.P.A.* admitted that none of its members had or intended to obtain a permit required for an action that would demonstrate an injury, and the Tenth Circuit stated that an inference of such intent was insufficient. 154 F.3d 1155, 1159 (10th Cir. 1998). Thus courts clearly require actual use of the allegedly affected area as a requirement for injury in fact, and on the facts alleged New Union cannot establish sufficient concreteness for Article III standing.

3. New Union cannot show its alleged injury is actual or impending because its evidence is entirely speculative.

In addition, the imminent injury must be "*certainly* impending." *Lujan*, 504 U.S. at 564 n. 2 (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). For instance, in a suit against EPA, the Sierra Club submitted as evidence a list of street addresses within a five-mile radius of where a sludge containing a toxic chemical was generated or disposed, and a professor's affidavit that mentioned a "plume of contamination" moving into the area but did not specify that the toxic chemicals were part of that plume. The D.C. Circuit held that this evidence was insufficient to show imminence of the injury. *Sierra Club v. E.P.A.*, 292 F.3d 895, 901-02 (D.C. Cir. 2002). On the other hand, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, the Fourth Circuit found that evidence showing the defendant was actively polluting the water source of the plaintiff's lake – over 500 violations of permitted limits – was sufficient, despite no injury to the plaintiff's own waters at the time of suit. 204 F.3d 149, 157, 160 (4th Cir. 2000).

Here, New Union has shown no such ongoing or egregious pollution posing a "certainly impending" threat, even to adjacent waters. Its evidence in fact sounds similar to the circumstantial evidence offered in *Sierra Club*: the district court here noted that the evidence did not show "when the pollution will reach the edge of the aquifer beneath New Union, the strength of the pollution when it reaches that edge, *or even that it will ever reach that edge*." (R at 5-6) (emphasis added). New Union therefore has not met the baseline *Lujan* requirement that an injury in fact be actual or imminent.

Based on the foregoing, New Union is thus unable to show that it has a sufficient Article III case or controversy, and the district court properly dismissed its action for lack of standing.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE COE HAS JURISDICTION TO ISSUE A CWA § 404 PERMIT SINCE LAKE TEMP IS A NAVIGABLE WATER UNDER THE CWA, IT MEETS COE'S REGULATION § 328.3(A)(3), IS CONSISTENT WITH *RAPANOS*' DEFINITION AND DISTINGUISHABLE FROM *SWANCC*, AND § 328.3(A)(3) QUALIFIES FOR *CHEVRON* DEFERENCE.

The district court properly granted summary judgment since COE has jurisdiction to issue a CWA § 404 permit for the addition of fill material to Lake Temp because the lake is a navigable water under the CWA §§ 301(a), 404(a), and 502(7), as amended, 33 U.S.C. §§ 1311(a), 1344(a), and 1362(a) (2006). This decision was proper because Congress authorized COE to issue CWA § 404 permits and related regulations. Furthermore, Lake Temp is "navigable waters" under the CWA because it meets COE's definition under 33 C.F.R. § 328.3(a)(3)(2011) and the *Rapanos v. United States*, 547 U.S. 715 (2006), definition, in addition to being distinguishable from the facts in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*").

A. Lake Temp is "Navigable Waters" under CWA Because It Meets COE's Regulation § 328.3(a)(3) Defining "Navigable Waters" as All Other Waters Whose Use, Degradation, or Destruction Could Affect Interstate Commerce, and is Used by Interstate Travelers for Recreational Purposes.

Lake Temp meets the "navigable waters" definition under the CWA and COE regulation 33 C.F.R. § 328.3(a)(3). In the CWA § 404, Congress delegated COE authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." U.S. Const. art. I, § 8, cl. 3; § 404(a); § 1344(a). COE then issued regulations in 33 C.F.R. § 328.3 that specifically define the term "waters of the United States" as it applies to their jurisdictional limits under CWA § 404. 33 C.F.R. § 328.1. For the matters presented here, the relevant COE regulation is § 328.3(a)(3) that defines "waters of the United States" as

> All other waters such as *intrastate lakes*, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows,

> playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters: (i) Which are or could *be used by interstate* or foreign *travelers for recreational* or other purposes…

§ 328.3(a)(3) (emphasis added).

Lake Temp is "navigable waters" under the CWA and COE regulation § 328.3(a)(3). First, Lake Temp is an intrastate lake because it is located entirely Progress. Secondly, duck hunters, bird watchers, boaters, and canoers, who travel from inside and outside of Progress, use the lake for recreational purposes. Third, the use, degradation, and destruction of Lake Temp would affect the recreational interstate commerce activities of bird watching and duck hunting, in which 87.5 million Americans participate and constitute a $122.3 billion industry, or one percent of Gross Domestic Product. U.S. Fish & Wildlife Service, U.S. Dept. of Interior, 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, *available at* http://www.census.gov/prod/www/abs/fishing.html. Thus, Lake Temp is clearly "navigable waters" under § 328.3(a)(3).

B. The Recreational Interstate Activities at Lake Temp Do Not Violate 18 U.S.C. § 1382 and a Prescriptive Easement Has Been Established.

Progress cannot claim that the duck hunters and bird watchers' recreational activity is not valid interstate commerce under § 328.3(a)(3) because they entered without permission. In fact, these activities are permissible on the following grounds.

1. Duck hunters and bird watchers' entry onto the military reservation is not illegal because it does not violate 18 U.S.C. § 1382.

The duck hunters and bird watchers who enter the military reservation do not violate 18 U.S.C. §1382 because military authorities cannot restrict general access to the facility where the public has been freely admitted. 18 U.S.C. § 1382 (2011); *Spock v. David*, 469 F.2d 1047, 1053 (3d Cir. 1972) (citing *Flower v. United States*, 407 U.S. 197 (1972)). Under § 1382, it is a crime

for "whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, . . . for any purpose prohibited by law or lawful regulation." Here, although DOD posted signs along the highway in 1952, there is no fence, and DOD has not taken any steps to stop entry for more than fifty years. Since DOD has allowed the public access, following the Supreme Court's reasoning in *Flower*, DOD cannot now restrict Lake Temp's recreational interstate commerce visitors from using the 100 foot trail between the state highway and the lake. 407 U.S. 197 (1972). Thus, Lake Temp's recreational interstate commerce does not violate § 1382.

2. Duck hunters and bird watchers' entry onto the military reservation is permissible because they have established a prescriptive easement.

To establish a prescriptive easement, "the use and enjoyment of the property must be adverse, under a claim of right, continuous, uninterrupted, open, visible, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period." *Burlison v. United States*, 533 F.3d 419, 428 (6th Cir. 2008) (citing *Pevear v. Hunt*, 924 S.W.2d 114, 116 (Tenn.Ct.App. 1996).

Over the past century, duck hunters and bird watchers have established a 100 foot long, clearly visible trail between the State Progress highway and Lake Temp's shore. Because the public has established the use, the exclusivity requirement does not apply here. *Burks Bros. of Virginia*, Inc. v. Jones, 232 Va. 238, 246 (Va.1986). The remaining requirements to establish the prescriptive easement are unquestionably met. The use of the trail has been adverse, and open and notorious, visible, under claim of right and done with knowledge and acquiescence of the owner. DOD has posted "no trespassing" signs since 1954, clearly visible to all users of the trail. (R at 4). The hunters and birdwatchers have disregarded these signs and accessed the lake from a public highway, under claim of right and in plain view of anyone who might pass by, including

DOD personnel. (R at 4). In fact, DOD has knowledge of the use and has taken no further steps to prevent it. (R at 4). However, this knowledge and acquiescence does not amount to permission or license because no affirmative permission has been given and the DOD has not removed the no trespassing signs. (R at 4). This use has been continuous and uninterrupted enough to maintain a clearly visible trail not overgrown from disuse. (R at 4). Lastly, the use has been occurring for over a century, and the hunter's and birdwatchers have been ignoring the no trespass sign for over fifty years, acting under a clear claim of right and long enough to meet even the most generous prescriptive periods. (R at 4).

C. Lake Temp Meets *Rapanos'* Definition of "Navigable Waters" under the CWA.

In addition to Lake Temp's proper CWA jurisdiction under COE regulation's definition of "navigable waters" as "waters of the United States," § 382.3(a)(3), Lake Temp is also a "navigable water" under the holding in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Supreme Court most recently addressed the meaning and scope of the term "waters of the United States" and "navigable waters" in *Rapanos v. United States*. *Id.* Under the plurality opinion, authored by Justice Scalia, "waters of the United States" include only those "relatively permanent, standing or continuously flowing bodies of water," such as streams, oceans, rivers, lakes, and other bodies of water forming geographical features. *Id.* at 732-33. The plurality opinion further explains that the term "waters of the United States"

> [Does] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought, nor does term necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.

Id. at 732 n.5. Lake Temp meets the *Rapanos'* definition of a "water of the United States."

First of all, the definition specifically references "standing [b]odies of water." *Id.* Here, Lake Temp is a standing body of water that measures up to three miles wide and nine miles long during the rainy season in wet years and smaller during the dry season. (R at 3-4). The standing nature of Lake Temp is exemplified by the fact that it supports surface flows from an 800 square mile watershed of surrounding mountains. (R at 4). Furthermore, its proper characterization as a "standing bod[y] of water" is shown by the numerous boats and canoes that were rowed or paddled across the lake by bird watchers and duck hunters for more than a century. (R at 7).

Secondly, the definition denotes "geographic features ordinarily described as 'streams, oceans, rivers, and *lakes*.'" 547 U.S. at 732-733 (quoting Webster's New International Dictionary (2d ed. 1954) (emphasis added)). The term "lake" is therefore a prime example of "waters of the United States," and Lake Temp is clearly a lake.

Thirdly, the plurality's definition includes the "relatively permanent" characteristic that Lake Temp also meets. *Id.* at 732-33. However, the plurality did not define "relatively permanent," finding that "we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel . . . ." *Id.* at 732 n.5. Furthermore, the plurality opinion explained that "navigable waters," under the CWA, do not encompass transitory puddles or ephemeral flows of water. CWA § 507(7); 33 U.S.C. § 1362(7). *Rapanos*, 547 U.S. at 733.

Although the opinion does not precisely define "relatively permanent," it provides insight into characteristics that do not meet this requirement, including frequent drying-up of a stream bed, transitory puddles, or ephemeral flows of water. *Id.* Lake Temp could be characterized as somewhat intermittent because it is wholly dry one of out five years. (R at 4). However, the fact the lake is dry for one-fifth of the time is insufficient to show that it is not "relatively

permanent," frequently drying up, or transitory. On the contrary, its dryness for less than twenty percent of the time reflects its relative permanence. The lake is a standing body of water for eighty percent of the time, providing a continuous and consistent site for duck hunting and bird watching. This is sufficient to meet the "relatively permanent" criteria.

Therefore, for the reasons stated above, Lake Temp meets the *Rapanos* definition of the "navigable waters" as "waters of the United States" under the CWA.

D. Lake Temp is Distinguishable From *SWANNC*'s Ponds that Were Not "Navigable Waters" Because COE's Jurisdiction Is Not Based on the Overturned Migratory Bird Rule.

Unlike in *SWANCC*, COE's basis for jurisdiction over Lake Temp under the CWA is recreational interstate commerce use not the overturned "Migratory Bird Rule." 531 U.S. 159.

Progress erroneously argues that *SWANCC* perfectly matches the Lake Temp situation, and this court should not find COE jurisdiction under the CWA. However, the facts here are in stark contrast to *SWANCC*. There, COE asserted jurisdiction over abandoned sand and gravel pits containing water that were migratory bird habitats. *Id.* at 164. COE attempted to expand its jurisdiction under CWA for the pits under 33 C.F.R. § 328.3(a)(3), by stating its jurisdiction *extended* to intrastate waters that provide habitat for migratory birds. *SWANCC,* 531 at 164; *see also* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206-01 (Nov. 13, 1986). The Supreme Court held that § 328.3(a)(3), as clarified and applied to the gravel pits in *SWANCC* pursuant to the Migratory Bird Rule, exceeded COE's authority under CWA § 404(a). *SWANCC,* 531 at 164.

Instead of using the Migratory Bird Rule, COE has based its jurisdiction on use of the intrastate lake by duck hunters and bird watchers in recreational, interstate commerce, pursuant to § 328.3(a)(3). This basis for jurisdiction does not push the outer bounds of the Commerce

Clause without express authorization of Congress as the Migratory Bird Rule did in *SWANCC*. 531 U.S. at 173. Instead, this basis is well within traditional protections for intrastate activities that are a vital part of interstate commerce. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981) (protecting intrastate mining); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964) (protecting intrastate lodging for interstate travelers). The Supreme Court has thus consistently held that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States v. Lopez*, 514 U.S. 549, 560 (1995).

Finally, Lake Temp is also factually distinguishable from gravel pits in *SWANCC*'s. Lake Temp is part of a larger 800 square mile watershed, and measures three miles wide and nine miles long during the rainy season. (R at 4). It serves as a body of water sufficient to contain boats and canoes, which can travel from shore to shore. *Id.* Unlike *SWANCC*, where the abandoned gravel pits were mere mining depressions containing water, Lake Temp is an actual lake, a relatively permanent standing body of water, and arguably part of a larger aquatic system that Congress intended to protect. *See Rapanos*, 547 U.S. at 733; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-134 (1985).

E. COE's Definition of Navigable Waters Under 33 C.F.R. § 328.3(a)(3) Qualifies for *Chevron* Deference and Is a Reasonable Interpretation of the CWA § 505(7).

This court should give COE's definition of "navigable waters" under § 328.3(a)(3) *Chevron* deference because Congress implicitly delegated COE authority to define the term. There is an implicit delegation from Congress where "the agency's generally conferred authority and other statutory circumstances" make clear that "Congress would expect the agency to be able

to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law…." *United States v. Mead Corp*., 533 U.S. 218, 229 (2001).

As noted *supra,* Part II.(A)., Congress generally conferred authority to COE to issue permits for the discharge of "fill material" into navigable waters. 33 U.S.C. § 1344(c). By not delegating authority to any agency to determine if the waters were navigable before COE may issue a § 404 permit, Congress clearly expected COE to speak with the force of law when making this determination.

Where Congress has made an implicit delegation of authority, the agency interepretation receives *Chevron* deference. When applying *Chevron*, a court must first determine whether Congress has directly spoken to the precise question at issue. *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 842-843 (1984). Here, Congress has not directly spoken to the issue of whether intrastate lakes involved in interstate commerce for recreational and other purposes are "waters of the United States" or "navigable waters" under the CWA. Therefore, the term is ambiguous.

Next, the Court must determine if the ageny interpretation of the ambiguous statute is reasonable. When doing so, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise" but should accept the interpretation if it is reasonable. *Mead*, 533 U.S. at 229 (paraphrasing *Chevron*, 467 U.S.at 845 (1984).

Finally, COE's definition of "navigable waters" in § 328.3(a)(3) qualifies for *Chevron* deference and is consistent with the definitions set forth in *Rapanos*, distinguishable from *SWANCC,* and is rooted in a widely accepted exercise of commerce clause authority. Accordingly, COE's interpretation of navigable waters is reasonable and valid.

III. COE HAS JURISDICTION TO ISSUE A PERMIT UNDER CWA § 404 BECAUSE EPA AND COE PROPERLY DETERMINED THAT DOD'S DISCHARGE IS "FILL MATERIAL" AS DEFINED IN 40 C.F.R. § 232.2.

CWA § 404(a) grants COE jurisdiction over discharges of "fill material," while § 402(a) grants EPA jurisdiction over discharges of pollutants but expressly denies EPA jurisdiction over discharges of fill material. 33 U.S.C. §§ 1342, 1344. The district court correctly held that DOD's discharge requires a § 404 permit pursuant to *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 131 S. Ct. 2458 (2009). However, even if *Coeur* did not speak directly to whether COE had jurisdiction to issue the permit here, COE's decision is a valid interpretation of the regulation defining "fill material," and the regulation as interpreted to include DOD's slurry discharge is a reasonable interpretation of § 404(a).

A. COE's Decision that DOD's Discharge Is "Fill Material" Is Consistent with the Decision in *Coeur*.

New Union argues that DOD's slurry discharge does not meet the definition of "fill material" and is distinguishable from *Coeur* becuase 1) the discharge is not inert and is more pollutant than fill and 2) Lake Temp is not serving as a treatment alternative. Instead, the Supreme Court in *Coeur* held that § 404(a) refers to "fill material" without qualification and does not contain implicit exceptions. Furthermore, the Court did not rest its decision on the fact that the lake was serving as a treatment alternative. Accordingly, *Coeur* is controlling and COE's permit is consistent with the decision.

1. <u>There is no implicit exception to "fill material" in CWA § 404(a) for the materials that DOD proposes to discharge.</u>

The petitioners in *Coeur* argued that a slurry discharge containing pollutants regulated under CWA § 306 performance standards could not also be § 404 "fill material." *Coeur*, 131 S. Ct. at 2468. The Court rejected this argument and held that § 404 contained no such implicit

exception. *Id.* Instead, the proposed slurry discharge qualified as "fill material" because § 404 refers to all "fill material" without qualification. *Id.* In addition, the statute did not indicate that Congress intended to add any layer of complexity to the threshold jurisdictional determination between § 402 and § 404 permit. *Id.* at 2469.

Here, New Union has simply repackaged the argument rejected by the Court in *Coeur*, asserting that liquid and semi-solid spent munitions cannot be § 404 "fill material" because they are more pollutant than fill. (R at 8). The district court correctly rejected that argument because just as § 404 does not contain an implicit exception for materials regulated under § 306 performance standards, it similarly does not contain an implicit exception for the materials that DOD plans to discharge here. (R at 8).

Furthermore, the implicit exception New Union asks the Court to adopt would create numerous difficulties for a § 404 permit applicant. Before applying for a permit, an applicant would have to determine which types and what amount of CWA-defined pollutants must be present to shift the discharge from § 404 to § 402 jurisdiction. Such an exception would destroy the "defined and workable line for determining whether the [COE] or the EPA has the permit authority" created their jointly adopted regulatory scheme. *Coeur*, 129 S. Ct. at 2469.

2. <u>The least damaging treatment alternative analysis is not relevant for making a threshold § 404 permit jurisdiction determination, was not relied on in the *Coeur* majority opinion, and was not a determinative factor in the concurrence.</u>

New Union argues that *Coeur* is also distinguishable because there, the lake served as a treatment alternative and prevented greater environmental detriment. *Coeur*, 129 S. Ct. at 2469, (R at 8). Not only does this argument mischaracterize the *Coeur* decision, it is also misplaced.

In *Coeur*, there were two holdings. *Id.* at 2463. In addition to the first holding that there are no implicit exceptions to "fill material" in § 404, the Court also held that COE and EPA's

interpretation that § 404 permits were not subject to § 306 performance standards was valid. *Id.* at 2469, 2474. The Court reached this second decision in part because the agencies' interpretation upheld COE's authority to consider whether a discharge will prevent greater environmental detriment. *Id.* at 2473-2374. This holding does not control here because New Union is not alleging § 306 or any other standards should apply to a § 404 permit. And while Justice Breyer acknowledged in his concurrence that the least damaging alternatives analysis supported a finding that the discharge was "fill material," was not a determinative factor in his decision. *Coeur*, 129 S. Ct. at 2478.

New Union's argument is also misplaced. After a proposed discharge is determined to be "fill material" and subject to a § 404 permit, § 404(b) requires COE to evaluate that permit application for compliance with EPA regulations. 33 U.S.C. 1344(b) (2006). Under 40 CFR § 230.10(a) (2011), the discharge of dredged or fill material is prohibited "if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." EPA's regulation is a clear indication that a treatment alternatives analysis only comes into play after a "fill material" designation is made.

Because New Union has failed to distinguish the relevant facts in *Coeur* from the facts in this case, *Coeur* controls and DOD's discharge may be designated § 404 "fill material."

B. COE's Decision that DOD's Discharge Is "Fill Material" Is Consistent with 40 C.F.R. § 232.2 and a Reasonable Interpretation of § 404.

COE's decision that DOD's slurry discharge is "fill material" is consistent with EPA and COE's joint definition for the term set forth in 40 C.F.R. § 232.2. In addition, "fill material" as defined to include DOD's discharge is a permissible interpretation of the undefined term "fill material" as used in § 404(a). *Coeur,* 129 S. Ct. at 2468. Accordingly, if New Union is not

simply claiming that there is an implicit exception to § 404 and is instead challenging COE's decision to define DOD's slurry discharge as "fill material," that challenge must also fail.

When analyzing a challenge to both an agency's interpretation of its own regulation and whether that regulation as interpreted is a valid construction of the statute, courts apply a three-step analysis that blends the deferential standards set forth in *Chevron,* 467 U.S. at 842 and *Auer v. Robbins,* 519 U.S. 452, 461 (1997). *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* 317 F.3d 425, 439-440 (4th Cir. 2003) (applying the three-step analysis to a § 404 permitting decision). The court must determine whether 1) the statute is ambiguous; 2) the agency's own regulation is ambiguous and if so, if the interpretation of that regulation is not plainly erroneous or inconsistent with that regulation; and 3) the regulation as interpreted by the agency is a reasonable interpretation of the statute. *Id.*

1. The term "fill material" in § 404(a) is ambiguous.

Where Congress has not "directly spoken" to the "precise question at issue," the statute alone will not resolve the issue and that statute is ambiguous. *Chevron,* 467 U.S. at 842. Here, Congress has not directly spoken to the issue of how to define the term "fill material," directly or indirectly. No other statute in the CWA defines the term, and § 404(a) simply states "[t]he Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Because Congress has not addressed whether materials such as the DOD discharge meet the definition of "fill material," the statute is ambiguous.

2. COE and EPA's "fill material" definition set forth in 40 C.F.R. § 232.2 is either unambiguous or the COE's interpretation is consistent with it.

An agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. at 461. In applying *Auer*

deference, courts must first determine whether the regulation itself is unambiguous; if so, its plain language controls. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

a. COE and EPA's joint definition is not ambiguous.

In 2002, EPA and COE jointly adopted an effects-based definition of "fill material" after notice and comment. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,132 (May 9. 2002). Relevant to the discharge at issue here, the joint regulation defined "fill material" as "material placed in waters of the United States where the material has the effect of…changing the bottom elevation of any portion of a water of the United States." 40 C.F.R. § 232.2.

COE and EPA have imposed two limits on what constitutes "material." First, the definition excludes trash and garbage. § 232.2. Second, the preamble to the final rule clarified a second exclusion:

> Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view.

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,135.

Thus, COE and EPA's definition unambiguously speaks to both what "fill material" is and what it cannot be.

b. Even if COE and EPA's definition of "fill material" is ambiguous, COE's interpretation of that definition is consistent and not erroneous.

DOD's discharge is not trash or garbage, nor will it be suspended in Lake Temp at any time. Instead, it will solidify shortly after being discharged and raise the bottom elevation of the lake immediately. (R at 4). If the term "fill material" is ambiguous, DOD's proposed slurry

discharge clearly meets COE and EPA's definition.

At a minimum, the foregoing reasons establish that the COE and EPA's interpretation of their own regulation as encompassing DOD's discharge is consistent and not plainly erroneous.

c. "Fill material" as defined to include DOD's proposed discharge is a reasonable interpretation of § 404(a).

If Congress has not addressed the precise question at issue, the court must decide whether the agency's construction is based on a permissible interpretation of the statute. *Chevron* , 467 U.S. at 843. Courts should not disturb an agency's decision "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, (citing *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

Textually, COE's interpretation is consistent with the statute. As noted above, § 404 refers to "fill material" without qualification. 33 U.S.C. 1344(a). "Material" is a general term, qualified here by "fill." DOD's proposed discharge is material that will fill portions of the lake, just as any other material discharged in a similar quantity would.

COE's interpretation is also consistent with the structure of § 404. While § 404(a) establishes jurisdiction, §§ 404(b) and 404(c) regulate the materials to be discharged and their effect on the receiving water. 33 U.S.C. at §§ 1344(b), 1344(c). New Union's proposed definition of "fill material" would shift water quality protection from these subsequent sections and impose them on § 404(a).

Finally, COE's interpretation of the statute does not undermine the stated purpose of the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to prevent the discharge of pollutants without a permit. 33 U.S.C. §§ 1251(a), 1311(a). Although a simple effects-based definition would allow more types of discharges to qualify for a § 404 permit, the applicant must meet the standards in § 404(b) guidelines

established by the EPA. These guidelines protect the integrity of waters by prohibiting a fill material discharge if: 1) there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem; 2) the discharge violates any applicable toxic effluent standard or prohibition under § 307; or 3) the discharge would have "significant adverse effects on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites." 40 C.F.R. § 230.10. EPA's authority to veto permits it determines will have an unacceptable adverse effect on water bodies reinforces these prohibitions. § 1344(c).

Because Congress expressed no intent to qualify "fill material" and legislated two supplemental measures, § 404(b) and § 404(c), to advance the goals of the CWA when issuing permits for fill material discharges, the COE and EPA's decision to eliminate confusion and uncertainty in the permitting process through its interpretation of the statute is reasonable.

C. Even if COE's Permitting Authority over DOD Created a Conflict of Interest, EPA Cannot Issue a § 402 Permit for "Fill Material."

New Union argues that because COE is a subsidiary of DOD, EPA should issue DOD a § 402 permit for the discharge of "fill material" to cure the alleged conflict of interest. (R at 8). New Union's contention can be disregarded without addressing the meritless conflict claim. "Section 402(a) grants EPA authority to issue permits for the discharge of pollutants with one important exception: The EPA may not issue permits for fill material that fall under [COE] § 404 permitting authority." *Coeur* 129 S. Ct. at 2467. The Court made this explicitly clear, stating that "Section 402 thus forbids the EPA from exercising permitting authority that 'is provided [to the Corps] in' § 404." *Id*. at 2467 (quoting § 402). The Court also noted that EPA has codified this limitation of its authority in 40 C.F.R. § 122.3. *Id.* at 2467-68.

Because EPA could not cure COE's alleged conflict of interest and Congress has not

tasked any other agency with permitting discharges of "fill material," New Union's contention must fail.

IV. OMB'S PARTICIPATION IN THE DECISION-MAKING PROCESS WAS PROPER AND EPA'S DECISION NOT TO VETO IS NOT REVIEWABLE, AND EVEN IF REVIEWABLE IS NOT ARBITRARY OR CAPRICIOUS.

The district court properly found that OMB's participation was a proper exercise of the President's executive power as granted to him in the Vesting and Take Care clauses of the Constitution. U.S. Constitution, Article II, §§ 1, 3. In addition, EPA's subsequent decision not to veto COE's permit is not reviewable because Congress has committed it to agency discretion. Finally, even if the decision is subject to judicial review, it was not arbitrary or capricious because it was consistent with *Coeur* and was a proper exercise of executive branch authority over discretionary decisions.

A. The District Court Correctly Found That OMB's Participation in the § 404 Decision-Making Process Was Appropriate.

OMB resolved a dispute between COE and EPA regarding DOD's permit application. That participation was valid under all controlling constitutional, statutory and case law authority.

1. The President, and OMB on his behalf, play a Vital and Judicially-Approved Role in Oversight of Executive Branch Agencies.

Article II of the Constitution vests the Executive power in the President and requires that he take care that the laws are faithfully executed. U.S. Constitution, Article II, §§ 1, 3. One way the President fulfills this duty is by delegation of authority to the Office of Management and Budget, which in turn implements his vision throughout the executive branch. http://www.whitehouse.gov/omb/organization_mission/, last accessed 11/15/11.

The propriety of such executive branch oversight by the President and his delegatees has been repeatedly recognized by courts. In 1926, the Supreme Court noted that "unity and co-

ordination in executive administration [are] essential to effective action." *Myers v. U.S.*, 272 U.S. 52, 134 (1926). More recently, courts have acknowledged the necessity of such oversight in the context of EPA specifically. The D.C. Circuit, in *Sierra Club v. Costle*, upheld the propriety of EPA not docketing a meeting between members of EPA and executive branch officials during the final review process of a potential regulation. 657 F.2d 298, 442 (D.C. Cir. 1981). The court first made it clear that such interaction was entirely appropriate unless expressly prohibited by Congress. *Id.* at 443. It then explained why the President's singular authority "to control and supervise executive policymaking" is so important, particularly with regard to EPA: environmental issues "demand a careful weighing of cost, environmental, and energy considerations.... Single mission agencies do not always have the answers to complex regulatory problems." *Id.* at 444. OMB here, acting on behalf of the President, thus not only was permitted to do what it did, it was required to.

2. Executive orders delegate authority to OMB to resolve disputes between executive agencies.

Secondly, successive executive orders have codified OMB's role as agency overseer as proxy for the President. See, e.g., Exec. Order No. 12,088, 43 C.F.R. 47,707 (1978), Exec. Order No. 12,291, 46 C.F.R. 13,193 (1981), Exec. Order No. 12,866, 58 C.F.R. 51,735 (1993). The language of 12088 is typical: "If the [EPA] Administrator cannot resolve a conflict, the Administrator shall request the Director of the [OMB] to resolve the conflict." Here, OMB was doing exactly that: resolving an interagency dispute between COE and EPA.

3. CWA expressly authorizes other agencies to assist with CWA's purpose and does not contravene executive power.

New Union does accurately state that the CWA confers authority on the Administrator of EPA to administer the CWA generally, and various of its provisions individually (R at 9).

However, 33 U.S.C. § 1361(b) specifically grants the Administrator permission to utilize officers and employees of any other agency in order to carry out the purposes of the CWA. Furthermore, nothing in the CWA contravenes the relevant Executive Orders or otherwise forbids oversight by the President or by the OMB acting on his behalf. Such a prohibition, whether express or implied, would be a clear violation of the President's Article II power to administer the laws, since it would be effectively barring him from overseeing the actions of his own agencies. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

4. *Environmental Defense Fund v. Thomas* does not apply because there was not a statutory deadline violation.

New Union is unable to cite a single case in which OMB reviewed an intra-agency conflict involving EPA and made a recommendation which was subsequently accepted by EPA, and was later overturned by the courts. The one case New Union does cite, *Environmental Defense Fund v. Thomas*, is not on point. In *Thomas*, protracted OMB review of proposed EPA regulations delayed promulgation of those regulations well beyond a statutory deadline, and the court found that OMB could not use its authority to cause such a delay. 627 F. Supp 566, 571 (D.D.C. 1986). The court's reasoning relied almost exclusively on the delay, which it called "highly irresponsible," rather than on any facial impropriety of OMB review: "enjoining OMB from interacting at all with EPA simply because OMB *might* cause delay past the new judicial deadline is premature and an unwarranted intrusion into discretionary executive consultations." *Id.* at 569, 572.

Here, OMB's participation caused no delay. OMB simply reviewed a dispute between two executive branch organizations – EPA and COE – under its mandate from the President and the relevant federal regulations, and made a decision. There is nothing in the facts of this case which is incompatible with Congressional intent, as there was in *Thomas*.

5. EPA, not OMB, decided not to veto the §404 permit.

Under 33 U.S.C. § 1344(c), the Administrator has the right to veto the COE's decision to issue a §404 permit for the discharge of fill material, and a contrary directive from another executive branch entity does not eliminate that right. In *State of N.Y. v. Reilly*, OMB did not approve certain rules that EPA had proposed. 969 F.2d 1147, 1149-50. After losing an additional appeal to the President's Council on Competitiveness, EPA ultimately did not promulgate the disapproved rules. The D.C. Circuit found that "the fact that EPA reevaluated its conclusions in light of the Council's advice... does not mean that EPA failed to exercise its own expertise in promulgating the final rules." *Id.* at 152. The same reasoning applies here. The Administrator retained her decisionmaking rights after the adverse recommendation from OMB, rendering her subsequent non-veto the ultimate executive branch decision on the matter. Thus, contrary to New Union's assertion, it is COE's interpretation, reviewed and not vetoed by EPA, which remains before the court for purposes of *Chevron* deference.

B. EPA's Decision Not to Veto COE's § 404 Permit was Not Reviewable Because the Decision is Committed to Agency Discretion by Congress.

The APA, which New Union is attempting to use to bring its suit, excludes judicial review of agency action committed to agency discretion. 5 U.S.C. § 701(a)(2). Under § 404(c), the Administrator is "authorized to prohibit the specification…of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification…as a disposal site" if he determines it will have an "unacceptable adverse effect." 33 U.S.C. 1344(c). While the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* noted that § 701(a)(2)'s exclusion is a narrow one, the statutory language in § 404(c) is purposefully discretionary. 401 U.S. 402, 410 (1971). The Administrator is "authorized" to veto a COE fill material permit and in *Heckler v. Chaney*, the Supreme Court interpreted the word "authorize" to

imply a discretionary delegation of authority. 470 U.S. 821, 835 (1985). And as further evidence, EPA has also interpreted its authority as discretionary in regulations enacted pursuant to 404(c), using the permissive "may" instead of mandatory "shall". *See* 40 C.F.R. § 231.1(a) (1994); 40 C.F.R. § 231.3(a) (1994).

Not only does § 404(c) give EPA discretion over whether to veto a permit, the statute gives EPA discretion over how to determine when a discharge should be vetoed. The EPA need only act if it determines that the effects of the discharge will be "unacceptable." 33 U.S.C. 1344(c). The statute gives no criteria or definition with which to make such a determination. By leaving this determination to the Administrator with no guidance or standards against which to evaluate it, Congress effectively the court "no law to apply." *Overton Park*, 401 U.S. at 410. Congress has further evidenced its intent to insulate from judicial review the Administrator's decision's not to veto a permit by only requiring the Administrator make public her findings and reasons if she decides to veto a § 404 permit. 33 U.S.C. 1344(c).

Furthermore, while one circuit has determined that an action taken under § 404(c) is reviewable (*National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988) (finding that Congress could not have meant to exclude review of EPA non-vetoes by drafting the CWA citizen suit provision to only allow suits based on Administrator or state actions, not the COE's)), the 11th Circuit more recently held the opposite. *Preserve Endangered Areas of Cobb's History* (*PEACH*) *v. United States Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996). In *PEACH*, the court noted that the United States must expressly and unambiguously waive its sovereign immunity before it can be sued. *Id*. Any statutory provisions allowing suits against the United States must be construed strictly. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). The court in *Peach* thus held it was improper to read into the CWA's citizen suit

provision an implicit right to challenge § 404 permit decisions, because doing so would override the provision's clear language excluding review of discretionary EPA actions. *PEACH,* 87 F.3d at 1249. Thus the 11th's Circuit's holding should control because it is both consistent with Supreme Court precedent and more faithful to the plain language of the CWA's Citizen Suit Provision. Finally, New Union has not challenged COE's permit under the CWA's citizen suit provision, which the 4th Circuit used to justify its holding, but instead under APA and 28 U.S.C. 1331, distinguishing that favorable case.

Since Congress clearly expressed its intent that EPA's veto authority be committed to agency discretion leaving no law for courts to apply, the decision is therefore not reviewable.

C. EPA's Decision Not to Veto COE's § 404 Permit was Not Arbitrary or Capricious Because It is Consistent with *Coeur* and Executive Authority Is Vested in the President.

Agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. 706(2)(a). Agency decisions are entitled to a presumption of regularity and a court is not empowered to substitute its judgment for that of the agency. *Overton Park*, 401 U.S. 402, 416. Even if the EPA's decision were subject to judicial review, however, it is not arbitrary or capricious, because it is required by and consistent with the decision in *Coeur* and because the Vesting and Take Care Clauses give the President authority over discretionary decisions made in the executive branch.

1. The decision is not arbitrary or capricious because it is consistent with *Coeur.*

In *Coeur*, the Court held that pursuant to CWA § 402(a), "The EPA may not issue permits for fill material that fall under [COE's] § 404 permitting authority." *Coeur*, 129 S. Ct. at 2467. As explained above, the OMB's participation in the fill designation was proper and the COE's interpretation is valid. Therefore, once DOD's discharge was designated "fill material," pursuant

to 402(a) and *Coeur*, EPA no longer had authority to regulate the discharge subject to a § 402 permit. Instead, EPA could only prohibit the discharge, assuming it found that it would cause "unacceptable adverse impacts." Accordingly, EPA's decision was in accordance with both the relevant statutory and case law.

2. The decision is not arbitrary or capricious due to discretionary decision-making authority vested in the President.

As discussed in detail in section IV(A) above, OMB, on behalf of the President, fulfilled a necessary and proper role in this process by resolving a dispute between two agencies. The Constitution, as interpreted by the courts, gives the President and his designees that right, and there is nothing in the CWA that contradicts it. Thus, there was nothing arbitrary or capricious about OMB's involvement in the decision-making process at issue here.

CONCLUSION

For the foregoing reasons, this court should uphold the District Court's order that (1) New Union does not have standing; (2) The COE had jurisdiction to issue a § 404 permit for the addition of fill to Lake Temp because the lake is navigable waters and the slurry is a fill material; and (3) OMB's dispute resolution between EPA and COE did not violate the CWA.

Dated: November 29, 2011

Respectfully Submitted,

UNITED STATES OF AMERICA