C.A. No. 11-1245
C.A. No. 148-2011

IN THE SUPREME COURT OF APPEALS
FOR THE TWELTH CIRCUIT

STATE OF NEW UNION
Appellant

v.

UNITED STATES
Appellee

v.

STATE OF PROGRESS
Intervenor-Appellee

On Appeal from the United States District Court
For the District of New Union

BRIEF FOR APPELLEE
UNITED STATES

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page(s)

United States Supreme Court

TABLE OF AUTHORITIES

Cases — Page(s)

United States Circuit Court of Appeals

TABLE OF AUTHORITIES

Cases/Statutes Page(s)

TABLE OF AUTHORITIES

Statutes/Regulations Page

Federal Regulations

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The State of New Union, filed a complaint in the United States District Court for the District of New Union, under the jurisdictional authority granted to the district court in 28 U.S.C. § 1331 (2006) and under the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006).

This appeal is from a final judgment issued by the district court on June 2, 2011, granting the United States' motion for summary judgment against all of New Union's claims. (Order at 10-11). This Court has proper jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether the State of New Union has standing in its sovereign capacity or its *parens patriae* capacity to challenge the issuance of a permit for the discharge of slurry into Lake Temp when the lake is wholly outside of the State, its claim of injury is conjectural and not supported by evidence, and it has not shown any quasi-sovereign interest?

II. Whether Lake Temp is a navigable body of water and thus a water of the United States, when Lake Temp is a relatively permanent standing body of water that forms a geographical feature and is capable of supporting and effecting interstate commerce?

III. Whether the COE had jurisdiction to issue a permit under the CWA Section 404 when the lawfully permitted slurry was a fill material?

IV. Whether the OMB's guidance to the EPA, in the EPA's decision on whether or not to veto the COE's permit issuance to the DOD was unlawful under the CWA, when the EPA's decision should be afforded deference?

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting the United States' motion for summary judgment and denying New Union's motion for summary judgment. (Order at 10-11). The State of New Union instituted an action seeking

review under 28 U.S.C. § 1331 (2006) and the APA, 5 U.S.C. § 702 (2006), of the authority of the Secretary of the Army acting through the Army Corps of Engineers (COE) under Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344 (2006), to issue an individual permit to the Department of Defense (DOD) to discharge slurry into Lake Temp, a lake wholly within the State of Progress. (Order at 3). New Union sought a ruling invalidating the permit. *Id*. The State of Progress intervened in the action. *Id*. The State of New Union, the State of Progress, and the United States filed motions for summary judgment. *Id*. The district court granted the United States' motion for summary judgment finding New Union lacked standing, the COE had jurisdiction to issue a Section 404 permit for the discharge of slurry into Lake Temp, and the OMB's dispute resolution did not violate the CWA. (Order at 10-11).

The State of New Union appeals the district court's decision as to all of the holdings, and the State of Progress appeals the decision of the district court as to its holding that the COE had jurisdiction to grant a Section 404 permit for the discharge of slurry into Lake Temp. (Order at 1).

STATEMENT OF THE FACTS

Section 404 of the CWA grants the Secretary of the Army through the COE the authority to issue permits of fill material into waters of the United States. 33 U.S.C. § 1344 (2006). After conducting an Environmental Impact Statement (EIS) and following all of its public notice requirements and National Environmental Policy Act (NEPA) requirements, the COE issued a permit to the DOD for the discharge of slurry into Lake Temp, a lake that at its highest water level is on a military reservation within the State of Progress. (Order at 3, 4, 6).

Lake Temp is three miles wide, nine miles long, has no outflow, and is wet year-round four out of five years. (Order at 4). Lake Temp sits one thousand feet atop the Imhoff Aquifer,

which is separated from Lake Temp by alluvial fill. *Id*. New Union borders the State of Progress, but the military reservation and thus the lake do not extend to New Union's border. *Id*. Only five percent of the Imhoff Aquifer is under the State of New Union. *Id*. The aquifer's groundwater is not potable or useable for agriculture without treatment because of naturally occurring sulfur. *Id*.

Lake Temp has been used over the past one hundred years by up to thousands of duck hunters, and a quarter of the hunters came from outside of Progress. *Id*. Although the DOD has a warning sign stating to keep out of the area, DOD knows that people continue to use the lake for hunting and bird watching. *Id*. There are clearly visible signs of rowboats and canoes being lead to Lake Temp from Progress' highway, which runs on the south side of Lake Temp, and the DOD has taken no steps beyond its warning signs to prevent public entry. *Id*.

The Section 404 permit will allow the DOD to discharge slurry onto the dry bed of Lake Temp. *Id*. The slurry consists of spent munitions consisting of liquid, semi-solid, and granular contents mixed with chemicals to make the contents non-explosive. *Id*. It will dry out and evenly raise the bottom of the lake by about six feet and the surface area by two square miles; however, the COE's EIS concluded that under no circumstances would the lake intrude on New Union. *Id*. Further, Lake Temp is located at the low point of a mountain basin, so there is no outflow to affect other water bodies. *Id*. Once the project is completed, it will not recur, and over time the lake will return to its pre-operation condition. (Order at 4-5). The COE issued the permit to the DOD, and although the EPA had the power to veto the permit, upon the advice of the OMB, the EPA chose not to exercise its veto power. (Order at 9).

STANDARD OF REVIEW

Appellate courts review a grant of summary judgment *de novo*, applying the same standard as the district court. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir.

2005). The COE grant of a Section 404 permit is reviewed under the APA's standards, which provide the court will "hold unlawful and set aside" the permit grant only if the COE's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id*. (quoting APA § 706(2)(A), 5 U.S.C.(2)(A) (2000)). The court gives "'substantial weight' to the [COE's] interpretation of its permit granting authority under 33 U.S.C. § 1344." *Id*. The court "must look at the [COE's] decision not as [a] chemist, biologist or statistician . . . but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." *Id*. (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir. 1983)).

SUMMARY OF THE ARGUMENT

The district court was correct in granting summary judgment for the United States' motions against all of the State of New Unions claims. (Order at 10). New Union failed to show it had standing in both its sovereign capacity and its *parens patriae* capacity. New Union's claim for sovereign capacity does not pass the judicially created test for standing under *Lujan v. Defenders of Wildlife* as it was completely hypothetical and conjectural, and New Union put on no evidence showing any possible injury in fact. Further, even if New Union were to be granted a lesser standard of standing as was suggested for states in *Massachusetts v. EPA*, New Union's claim was far more conjectural than the claim in Massachusetts, as the claim in Massachusetts was actually supported by scientific evidence.

Likewise, the district court correctly held the COE had jurisdiction to issue a CWA Section 404 permit for the discharge of slurry into Lake Temp. Lake Temp is a navigable lake, and the slurry permitted was a fill material. (Order at 10). Lake Temp qualifies as a navigable body of water because it is a relatively permanent standing body of water that forms a

geographic feature, which is a "water of the United States" under the CWA. Further, the substantial amount of people that use Lake Temp for hunting and bird watching, including twenty-five percent that live outside of the State of Progress and the substantial amount of economic impact that recreational hunting and bird watching is proven to create, shows that Lake Temp is an intrastate lake which could affect interstate commerce. Further, the slurry to be placed in Lake Temp squarely fits within the COE, the EPA, and *Coeur's* understanding of fill material, as the slurry would raise the bottom of Lake Temp and the materials used were tantamount to the materials in *Coeur*.

Since the slurry was a fill material, Section 404 of the CWA granted unbridled authority to the COE to issue the permit for its discharge. Although Section 402 gives the EPA the authority to grant permits for the issuance of pollutants, giving the COE the authority to grant this permit, even though the fill material contains pollutants, fits with the EPA's interpretation of the permitting jurisdiction ambiguity in the CWA. Because the COE's issuance of the permit to the DOD followed Section 404(b)'s requirements and was in line with the CWA's goals, the decision was neither unlawful nor arbitrary and capricious; therefore, the decision should not be disturbed.

Further, Through E.O. 12146 and E.O. 12088, President Carter assured that all executive branch discretionary decisions including those by the EPA were faithful to the Constitution and the laws of the Nation. Therefore, although the EPA chose not to exercise its vetoing power upon consultation with the OMB, this decision should be afforded deference as the EPA was interpreting its own statutory authority, and participation by the OMB in the EPA's decision did not violate the CWA, nor did it render the EPA's decision arbitrary or capricious.

ARGUMENT

I. THE STATE OF NEW UNION DOES NOT HAVE STANDING TO SUE IN EITHER 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.

A. New Union has failed to carry its burden of presenting a prima facie showing of the essential elements of standing even if a relaxed standard of standing is applied because it has proved no injury in fact.

Article III § 2 of the United States Constitution provides federal court jurisdiction for cases and controversies to which the United States is a party. In order to have a case and controversy, it is a well established principle that a claimant invoking federal jurisdiction must at an irreducible minimum carry the burden of (1) proving an injury in fact that is concrete and particularized and that is actual and imminent, not conjectural or hypothetical; (2) proving that the injury is fairly traceable to the defendant's action; and (3) proving that it is likely and not just speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *See, e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); *Michigan v. U.S. EPA*., 581 F.3d 524, 528 (7th Cir. 2009); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007), extended the *Lujan* standing factors to the states, but distinguished the facts as the party seeking review in *Massachusetts* was a sovereign state rather than as it was in *Lujan*, a private individual. The Court appeared to make this distinction in order to subject states to a lesser degree of scrutiny for standing requirements by saying states were unlike individuals and are subject to "special solicitude." *Id*. at 520. However, after mentioning "special solicitude" the Court continued the analysis by applying the

ordinary *Lujan* requirements for standing. *Id*. at 518-28. Subsequent cases applying *Massachusetts* show there is no agreement on whether or not *Massachusetts* gives states any special leniency for federal jurisdiction standing. See *Michigan*, 581 F.3d at 529 (affording no "special solicitude" to Michigan where Michigan had no quasi-sovereign interest); *North Carolina v. EPA*, 587 F.3d 422, 426 (D.C. Cir. 2009) (giving "special solicitude" to North Carolina as a state suing under the same Clean Air Act provision claimants sued under in *Massachusetts*). Regardless, even if the evidence New Union presented is applied expansively to the *Lujan* factors, New Union failed to carry the burden of showing it had standing.

1. New Union showed no injury in fact as its claims of injury from the Imhoff Aquifer lying under the state are not imminent and are merely conjectural or hypothetical.

To have an injury in fact, the claimant must show through a totality of the circumstances that it has more than just a cognizable interest and in fact, is itself injured or will imminently be injured. *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton* 405 U.S. 727, 734-35 (1972)). Further, the injury alleged must be actual not a series of conjectural or hypothetical theories. *Id*.

The Court in *Lujan* found no actual or imminent injury to members of a wildlife conservation group. *Id*. at 562. The claimants alleged that an administrative regulation interpretation of the Endangered Species Act stating agencies do not need to consult with the United States Secretary of the Interior regarding agency projects in foreign nations that may jeopardize the habitat of endangered species would injure two of its members. *Id*. The members claimed they had visited foreign countries, had seen the habitats of endangered species, they planned to visit these habitats at some point in the future, and projects subject to the regulation interpretation had commenced and would harm the habitat. *Id*. at 563-64.

New Union alleged that the slight portion of the Imhoff Aquifer which lies under the state will be contaminated because of COE's issuance of the permit to DOD, but this allegation is merely conjectural. (Order at 5). The permit allows DOD to spray slurry munitions on dry portions of Lake Temp, which is wholly outside of New Union even at its highest state. (Order at 4). The munitions will dry up soon after they are sprayed, and the lake has no outflow. *Id*. The lake will be raised because of the munitions, but under no circumstances will it intrude on New Union. (Order at 5). Therefore, the munitions will not touch New Union, and New Union will suffer no actual injury.

With no actual injury, New Union proposed an imminent injury theory. It alleged that the munitions will seep into the ground, will travel 1000 feet below into the aquifer, will then contaminate the aquifer, and then the contamination will travel through the aquifer to the portion of the aquifer located under New Union. (Order at 4, 5-6). New Union, however, has failed to support its theory with any evidence. (Order at 5). It has not shown if the water will actually be contaminated. *Id*. It has not shown when or if ever that the water would reach New Union. *Id*. It has not shown if the water were to reach New Union what would be the strength of the pollution. *Id*. Like the claimants in *Lujan*, New Union has alleged some possible harm at some possible point in the future, so it has suffered no injury in fact.

2. Even if New Union is subjected to a lesser degree of standing scrutiny under *Massachusetts*, New Union has failed to show injury in fact because its theory is far more conjectural than the Massachusetts' theory and not at all concrete or particularized.

In *Massachusetts*, the Court found the EPA's failure to regulate greenhouse gases, which was its duty under the Clean Air Act, caused imminent injury of land loss due to sea level rise from climate change. 549 U.S. at 504. Unlike New Union, claimants in *Massachusetts* presented a scientific expert opinion that supported their contention. *Id*. at 521. The expert opinion stated it

was the strong consensus of scientific experts researching climate change that global warming by the end of the century would cause sea level rise, economic impacts from the reduction of water storage in snowpack in mountainous regions, a rise in hurricane intensity, a rise in the spread of disease, and unchangeable and severe changes to natural ecosystems. *Id*.

In stark contrast, New Union only presented evidence that showed if it drilled and sampled from a grid of monitoring wells throughout the aquifer that it might be able to prove contamination. (Order at 6). New Union, however, has never even filed an application to drill such wells. *Id*. As the EIS was conducted in 2002, following normal procedures and presenting all of the evidence in the record, New Union had years to file for the application and to conduct the research necessary, but New Union never did so in all the time. *Id*. Allowing evidence to establish imminent injury, when the evidence only shows further evidence might establish imminent injury, would reestablish the consistently held standing test and cannot be upheld as a valid showing of imminent injury.

In further distinction, Massachusetts proposed a concrete and particularized injury. In unchallenged affidavits, Massachusetts showed that the injury it suffered was land loss from sea level rise caused by the EPA's failure to regulate greenhouse gases that were contributing to global warming. 549 U.S. at 522. New Union, however, completely failed to even propose how contamination will actually injure the state. Currently, the aquifer is not potable or fit for agricultural use without treatment because of the naturally occurring sulfur in the aquifer. (Order at 6). Even if the portion of the aquifer under the state became polluted, New Union has not proposed any particularized theory of concrete harm this would cause the state. The water must be treated in its current state to be used, and if it were polluted it would still have to be treated all the same. Claimants in *Massachusetts* bore their burden of presenting injury in fact by presenting

expert evidence of its concrete and particularized injury; New Union failed to carry this burden by producing no evidence or theory of a concrete and particularized injury to the state.

The district court rightfully held New Union lacked standing in its sovereign capacity. Under ordinary standing analysis or under a more lenient approach, New Union failed to show an injury in fact as it only produced evidence of possible future evidence proving injury, and further, New Union proposed no concrete and particularized injury it would suffer even if pollution were proven. As each of the factors for standing is dispositive, since New Union has not carried the burden of proving injury in fact, it has no standing.

B. New Union does not have standing in its *parens patriae* capacity as even if it were allowed to assert *parens patriae* standing against the federal government, it failed to show any quasi-sovereign interest.

Generally, states are not allowed to assert *parens patriae* standing against the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *South Carolina v. Katezenbach*, 383 U.S. 301, 324 (1966); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). *Massachusetts v. Mellon*, is the seminal case on the ban of *parens patriae* standing against the Federal Government. *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 677 & n.52 (D.C. Cir. 1976). The Court in *Mellon* stated, "It cannot be conceded that a state, as parens patriae [sic], may institute judicial proceedings to protect citizens of the United States from the operations of the statutes thereof . . . it is no part of [the state's] duty or power to enforce their rights in respect to their relations with the [F]ederal [G]overnment." 262 U.S. at 485. *Mellon*, however, was ambiguous as to whether or not there is an absolute ban on *parens patriae* lawsuits against the federal government. See 533 F.2d at 677 (showing contradictory language within *Mellon* as to whether there is an absolute ban on *parens patriae* cases against the federal government).

Many courts have interpreted *Mellon* narrowly, banning any type of *parens patriae* claim against the Federal Government. See *Illinois v. Landrieu*, 500 F.Supp. 826, 828 (N.D. Ill. 1980) (finding Illinois lacked *parens patriae* standing to assert its citizens' rights to compel the Secretary of Housing and Development to promulgate regulations); 533 F.2d at n.52, 678 (finding no *parens patriae* standing for Pennsylvania's claim challenging the SBAs classification of certain areas as class B disaster areas on the basis of federalism). Some courts, however, have interpreted *Mellon* broadly giving *parens patriae* standing to states against the federal government in special instances. See *Abrams v. Heckler*, 582 F.Supp 1155, 1160 (S.D.N.Y 1984) (finding *parens patriae* standing for enforcement of a federal statute and enjoining agency action allegedly in contravention of the statute); *Washington Utils. & Transp. Comm'n v. Federal Commc'ns Comm'n*, 513 F.2d 1142 (9th Cir. 1975) (finding *parens patriae* standing against a federal agency). "While it is debatable whether [*Mellon*] meant to bar all state *parens patriae* suits against the Federal Government, the opinion makes clear at least that the federal interest will generally predominate and bar any such action." *Kleppe*, 533 F.2d at 677.

Regardless of whether New Union is found to be allowed to assert *parens patriae* standing, New Union cannot prove it has *parens patriae* standing. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, found that a state has *parens patriae* standing when the state articulates an interest apart from the interest of its citizens by asserting a quasi-sovereign interest. 458 U.S. at 607. A state has a quasi-sovereign interest in both the physical and economic sense of the health and well-being of its citizens, and it has a quasi-sovereign interest in making sure "the State and its residents are not excluded from the benefits that are to flow from the participation in the federal system." *Id*. The Court stated the interest and injury alleged must be more than just to an unidentifiable group of individual residents, and the Court stressed in determining whether an

alleged injury gives *parens patriae* standing, courts should view whether this type of injury would be one a state would address through its sovereign lawmaking powers. *Id*.

In *Alfred* the Court found Puerto Rico had a quasi-sovereign interest when it sued individuals in the Virginia apple industry for violating the Wagner-Peyser Act and the Immigration and Nationality Act of 1952, which was a statutory scheme imposed to give citizens of Puerto Rico and the United States preference over temporary foreign workers for jobs that became available in the United States. *Id*. at 592, 609. The Court found the violation of the statutory scheme threatened 787 job opportunities for Puerto Rico's citizens. The Court held because of the threat Puerto Rico had a substantial interest in protecting the well-being of its citizens from discrimination. The interest constituted a quasi-sovereign interest that Puerto Rico could assert through its *parens patriae* capacity. *Id*. at 609. Further, the Court stated that Puerto Rico also had an interest in making sure its citizens were afforded full and equal protection in the federal employment service scheme that was established under the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. *Id*. Unemployment of its citizens was a legitimate concern of Puerto Rico that would very well be addressed through Puerto Rico's own legislation, and as such was a quasi-sovereign interest that could be asserted through its *parens patriae* capacity. *Id*. at 609-10.

1. Neither Dale Bompers nor any New Union citizen has a claim that New Union needs to assert in order to protect their economic or physical well-being.

Unlike Puerto Rico in *Alfred*, New Union has asserted no claim that would show and interest in the protection of the well-being of its citizens. New Union tried to assert its *parens patriae* claim through the exemplification of one individual, Dale Bompers. (Order at 6). Dale Bompers lives in New Union atop the mere five percent of the Imhoff Aquifer that runs through

New Union. *Id*. He owns and operates a ranch, and he claimed the value of his ranch would depreciate if the Imhoff Aquifer were to be contaminated. *Id*.

Contrary to the claim, Dale Bompers and the other New Union citizens with land atop the aquifer will not lose any economic value in their land, nor do they stand any chance of getting sick if the Imhoff Aquifer is contaminated. The Imhoff Aquifer groundwater is not potable or useable for agriculture without treatment. *Id*. As such, New Union has a statute that makes it unlawful for anyone to withdraw groundwater from the aquifer without a permit issued from the New Union Department of Natural Resources (DNR). (Order at 6-7). New Union to date, however, has not issued one single permit. (Order at 7). Since New Union's citizens, including Dale Bompers, have no right to the groundwater, no right will be lost or diminished as a result of contamination. Therefore, no economic value of the land would be lost, and the citizens could not get sick because they cannot lawfully use the groundwater for any purpose. (Order at 6-7).

2. <u>New Union's claim will not need to be addressed through its lawmaking process because it is already addressed in the permitting process.</u>

If the Imhoff Aquifer is contaminated, the contamination will not need to be addressed through new legislation because New Union already has a statutory system in place for the use of the aquifer's groundwater. *Id*. Since the aquifer's water is already polluted with naturally occurring sulfur and not potable or fit for agricultural use without treatment, the statutory system must inherently already have a system requiring permitted individuals to treat the groundwater before it can be used under the permit. (Order at 6). Because the current statutory system must take treatment into account, if the aquifer becomes polluted New Union will not have to create any new laws to deal with the pollution; therefore, this is not the type of claim *Alfred* contemplated as one that can be asserted through *parens patriae*.

The district court rightfully held that New Union did not have standing in its *parens patriae* capacity as *parens patriae* claims are generally not allowed by states against the federal government, and New Union has failed to show it has a claim that falls into the limited quasi-sovereign claim exception.

II. THE COE AND EPA HAVE REASONABLY DEFINED THE CWA TERM "THE WATERS OF THE UNITED STATES" TO INCLUDE LAKE TEMP.

In 1972, Congress passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006); *See Rapanos v. U.S.*, 547 U.S. 715, 722 (2006); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 166 (2001) (*SWANCC)*; *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260 (7th Cir. 1993); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). Congress elected to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. . . " 33 U.S.C. §1251(b). "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater move[ed] in hydrologic cycles and it [was] essential that discharge of pollutants be controlled at the source'." *Riverside Bayview*, 474 U.S. at 132 (citing S.Rep. No. 92-911, p. 76 (1972)).

"Under §§ 301 and 502 of the [CWA], 33 U.S.C. §§ 1311 and 1362, any discharge of dredged or fill materials into 'navigable waters' . . . is forbidden unless authorized by a permit issued by the [COE] pursuant to § 404, 33 U.S.C. § 1344." *Id.* at 123 (footnote omitted). "The CWA defines 'navigable waters' as meaning 'the waters of the United States, including the territorial seas'." *Hoffman Homes*, 999 F.2d at 260 (citing 33 U.S.C. § 1344(a)). Though the

CWA does not define the term "waters of the United States," the EPA and the COE define the term in two identically worded regulations. *Id.* "According to the EPA and the COE, 'waters of the United States' includes, among other things, bodies of water wholly within a state whose use or misuse could affect interstate commerce." *Id.* (citing 40 C.F.R. § 230.3(s)(3) (1993); 33 C.F.R. § 328.3(a)(3) (1993)). To maintain continuity with its purpose, Congress chose to broadly define the term "waters of the United States" as covered by the CWA. *Riverside Bayview*, 474 U.S. at 133. However, the term "includes 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*, 547 U.S. at 739 (quoting Webster's New International Dictionary 2882 (2d ed. 1954)) (emphasis added).

A. Lake Temp qualifies as a "water of the United States" under the CWA because it is a relatively permanent, standing body of water that forms a geographic feature.

In *Rapanos*, the Court had to determine "whether four Michigan wetlands, which laid near ditches or man-made drains that eventually empt[ied] into traditional navigable waters, constitute[d] 'waters of the United States'." 546 U.S. at 729. "[T]he CWA authorizes federal jurisdiction only over 'waters'." *Id.* at 731 (citing 33 U.S.C. § 1362(7)). The Court found that the term could not "bear the expansive meaning" to include channels through which water flowed intermittently. *Id*. at 732.

Making a textual analysis, the Court in *Rapanos* found that the term's use of the definite article ("the") and the plural number ("waters") clearly demonstrated that § 1362(7) did not refer to water in general. *Id*. The term referred narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers [and] *lakes*…" *Id*. (quoting Webster's Second 2282) (emphasis added). The Court's subsequent interpretations of the phrase "the

waters of the United Sates" confirmed the limitation of the CWA's scope. *Id.* Thus, the phrase "'the waters of the United States' include[d] only relatively permanent, standing or flowing bodies of water." *Id.* at 732 (footnote omitted).

"Lake Temp is an oval-shaped intermittent body of water that is up to three miles wide and nine miles long during the rainy season in wet years . . ." (Order at 3). Water is located "within a basin with no outlets, and flowing nowhere." (Order at 7). The COE defines the term "lake" as "a standing body of open water . . . that occurs in an isolated natural depression that is not a part of a surface river or stream." 33 C.F.R. § 323.2(b) (2011). Thus, Lake Temp falls within the COE's definition of "lake."

In *Rapanos*, The Court found the CWA's use of "the traditional phrase 'navigable waters' . . . further confirm[ed] that it confer[red] jurisdiction only over relatively *permanent* bodies of water." *Id*. at 734. "The [CWA] adopted the traditional term from its predecessor statutes. *See SWANCC*, 531 U.S. at 180 (STEVENS, J., dissenting). On the traditional understanding, 'navigable waters' included only discrete *bodies* of water." *Id*. The Court also recognized it had "repeatedly described the 'navigable waters' covered by the [CWA] as 'open water' and 'open waters.'" *Id.* at 735 (citation omitted). The Court also noted that traditional meaning of the term carried "*some* of its original substance." *Id.* at 734. "That limited effect includes, at bare minimum, the ordinary presence of water."

However, the Court stated it did not "necessarily exclude stream, rivers, or *lakes* that might dry up in extraordinary circumstances, such as drought." *Id*. at 733, n.5. Furthermore, the Court in *Rapanos* stated that it did not "necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months – such as the 290-day, continuously flowing stream." *Id.* Because that litigation did not present that issue, the

Court did not have to decide "exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.'" *Id.*

Lake Temp is fully dry approximately one out of five years. (Order at 4). Though the lake is dry for a 365-day period, its basin holds water for another 1,460 days. In *Rapanos*, Justice Stevens' dissent stated that "common sense and common usage demonstrate[d] . . . that *intermittent* streams . . . are still streams." 547 U.S. at 801, (STEVENS, J., dissenting) (footnote omitted) (emphasis added). "Indeed, in the 1977 debate over whether to restrict the scope of the COE's regulatory power, Senator Bentsen recognized that the COE's jurisdiction 'cover[s] all waters of the United States, including small streams, ponds, isolated marshes and intermittently flowing gullies.'" *Id*. at n.11 (citing 4 Legislative History of the CWA of 1977 (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 903, 947 (1978)). As a "lake," Lake Temp falls within the same category "as . . . streams and bodies forming geographical features such as oceans [and] rivers . . ." *Rapanos*, 546 U.S. at 732. Thus, arguing *a pari*, intermittent geographical bodies of water, like Lake Temp, were also considered by Congress to be under the COE's regulatory power.

The traditional term of "navigable" meant that waters "were or had been navigable in fact or . . . could reasonably be made so." *SWANCC*, 531 U.S. at 172 (citation omitted). However, the Court found that the CWA's term "navigable waters" includes "something more than traditional navigable waters." *Rapanos*, 547 U.S. at 731. In *Riverside Bayview*, the Court found the CWA's "definition of 'navigable waters' as 'the waters of the United States' [made] it clear that the term 'navigable' as used in the [CWA] is of limited import." 474 U.S. at 133.

> In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statues and exercise its powers under the Commerce Clause to regulate at least

> some waters that would not be deemed 'navigable' under the classical understanding of that term.

Id. (citing S.Conf.Rep. No. 92-1236, p. 144 (1972); 118 Cong.Rec. 33756-33757 (1972) (statement of Rep. Dingell)).

The Court recognized that Congress "intended to allow regulation of waters that might not satisfy the traditional tests of navigability." *Id.* "In determining the limits of its power to regulate discharges under the [CWA], the [COE] must necessarily choose some point at which water ends and land begins." *Id.* at 132. The Court recognized that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.*

When defining its bounds, the COE "may appropriately look to the legislative history and underlying policies of its statutory grants of authority." *Id.* The CWA of 1971, which incorporated Section 404, incorporated "a broad, systematic view of the goal of maintaining and improving water quality." *Id.* The DOD "propose[d] to construct a facility on the shore of Lake Temp to receive and prepare a wide variety of munitions for discharge into the lake." (Order at 4). Though Lake Temp has no outlets or outflow, it qualifies as "navigable" because of the plan to discharge a slurry of spent munitions over its dry bed. (Order at 3, 4). Lake Temp falls within the meaning of the CWA, as an attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251, and under the jurisdiction of the COE.

B. Lake Temp is an intrastate lake which could affect interstate commerce because of its use by interstate travelers for recreational purposes.

"The [COE's] new regulations [under the CWA] deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 724 (referencing 42 Fed.Reg. 37144, n.2 (1977)). "The COE's current regulations interpret 'the waters of the United States' to include, *in addition* to traditional

interstate waters, 33 C.F.R. § 328.3(a)(1) (2004) . . . '[a]ll other waters . . . which *could* affect interstate or foreign commerce,' § 328.3(a)(3) . . . " *Id.* (emphasis added). The term also includes waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes . . ." 33 C.F.R. § 328.3(a)(3)(i) (2004). In *Hoffman Homes*, the Seventh Circuit noted that the EPA's Chief Judicial Officer (CJO) found that the use of "could" meant the agency did not need to show *an actual effect* on interstate commerce. 999 F.2d at 260. The "[s]howing [of] a potential effect would suffice." *Id*. (quoting the CJO's Final Decision at 11).

In *SWANCC*, the Court held that the COE exceeded its authority under the CWA by expanding the definition of "navigable waters" to include instrastate waters used as a habitat by migratory birds. 531 U.S. at 171-72. The Court found that allowing the COE "federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. However, the Court did note that the Seventh Circuit held "that Congress has the authority to regulate such waters based upon 'the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce.'" *Id.* at 166 (quoting *SWANCC v. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999)).

The DOD is aware that people use Lake Temp for hunting. (Order at 4). "There are clearly visible trials leading from the road to [Lake Temp] and they show signs of rowboats and canoes being dragged between the highway and the lake." *Id.* "Hundreds, perhaps thousands of duck hunters . . . have used [Lake Temp] over at least the last one hundred years; most have been residents of Progress but a quarter [of the hunters] were from out of state." *Id.* In 2006, the U.S. Fish & Wildlife Service conducted a survey of U.S. residents that fish, hunt, or watch wildlife.

The survey found there were 2.3 million migratory bird hunters in the United States. U.S. Fish & Wildlife Service, *2006 Nat'l Survey of Fishing, Hunting, and Wildlife-Associate Recreation*, p. 25, (2006), http://library.fws.gov/pubs/nat_survey2006_final.pdf. These hunters spent a total of $1.3 billion on migratory bird-related trip and equipment expenditures. *Id.* These trip expenditures included $261 million on food and lodging and $266 million on transportation. *Id*.

"When [Lake Temp] holds water during migration seasons, ducks have historically used it as a stopover in their migration from the Artic to southern climes and back." (Order at 4). The DOD is aware that people use Lake Temp for bird watching. *Id.* In 2006, nearly a third of the U.S. population participated in wildlife watching. U.S. Fish & Wildlife Service, *2006 Nat'l Survey of Fishing, Hunting, and Wildlife-Associate Recreation*, p. 36, (2006), http://library.fws.gov/pubs/nat_survey2006_final.pdf. "Of all the wildlife in the United States, birds attracted the biggest following." *Id.* Over nineteen million people took trips away from home to observe wild birds. *Id.* "Thirty-seven percent of all the dollars spent in 2006 for all wildlife-related recreation was due to wildlife watching." *Id.* at 37. In pursuit of their watching activities, wildlife-watchers spent $12.9 billion on trips pursuing their activities. *Id.* "Food and lodging accounted for $7.5 billion . . . for the year." *Id*.

The COE and the EPA share the responsibility for administering and enforcing the CWA. *Hoffman Homes*, 999 F.2d at 258. This responsibility includes determining whether the "'destruction of the water body will have an effect on interstate commerce.'" *Id.* at 259 (citing CJO Final Decision at 9). Though the mere presence of migratory birds does not qualify Lake Temp as "waters within the United States," the use of the lake by people for recreational purposes *does* qualify the COE's jurisdiction under the CWA. In 2006, the U.S. hunters and birdwatchers spent a combined total of $14.2 billion was spent on trips. U.S. Fish & Wildlife

Service, *2006 Nat'l Survey of Fishing, Hunting, and Wildlife-Associate Recreation*, p. 25, 37, (2006), http://library.fws.gov/pubs/nat_survey2006_final.pdf. This money was disbursed into the economy through purchases of food and lodging.

Though Lake Temp is an entirely intrastate body, (Order at 7), it is visited by in-state and out-of-state hunters. (Order at 4). It is also visited by birdwatchers. *Id.* "Expenditures for wildlife watching increased 21 percent from 1996 to 2006." U.S. Fish & Wildlife Service, *2006 Nat'l Survey of Fishing, Hunting, and Wildlife-Associate Recreation*, p. 51, (2006), http://library.fws.gov/pubs/nat_survey2006_final.pdf. From 2001 to 2006, the wildlife watching increase was due to a rise in trip-related expenditures. *Id.* The ability of hunters and birdwatchers to use Lake Temp for recreation may be affected by DOD's discharge of the spent munitions slurry. (Order at 3). Thus, it *may* affect interstate commerce. Lake Temp is a "water" of the United States because it "could affect interstate commerce", 33 C.F.R. § 328.3(a)(3), because of its use by interstate travelers for the recreation purposes of hunting and bird watching. *Id*. at § 328.3(a)(3)(i).

III. THE COE HAD PROPER PERMITTING JURISDICTION UNDER THE CLEAN WATER ACT.

A. Without qualification the CWA under Section 404 allows the COE to issue a permit for the discharge of fill material.

CWA Section 404, 33 U.S.C. § 1344(a) (2006) provides without qualification or exception that "the secretary [of the COE] may issue permits . . . for discharge of dredged or fill material." CWA Section 402, 33 U.S.C. § 1342(a)(1) (2006) specifically carves out this exception from the Administrator of the EPA's general permitting authority for the discharge of pollution, providing authorization to the Administrator to issue permits "[e]xcept as provided in . . . 1344."

Inherently, when a material qualifies as both a fill material and a pollutant, CWA Section 404 and Section 402 provide concurrent permitting jurisdiction to both the COE and the EPA. Upon review of the plain language of the statute, however, the CWA provides that the Administrator, under Section 402, has jurisdiction for the discharge of pollutants except for in the case of fill material subject to a Section 404 permit issued by COE. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009). "Section 402 thus *forbids* the EPA from exercising permitting authority that is 'provided [to the COE] in' § 404." *Id*. (emphasis added).

Regardless of whether there is any ambiguity regarding proper permitting jurisdiction for the discharge of fill material, the EPA's own regulations resolve the ambiguity. *Id*. The EPA's regulation provides that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under Section 404 of CWA" do not require a National Pollutant Discharge Elimination System (NPDES) permit, otherwise known as a Section 402 permit. 40 C.F.R. § 122.3(b) (2011) (held invalid as to parts (a) and (h), not part (b)); 129 S. Ct. at 2467-68. Although the provision leaves room for alternative interpretations, the agencies have interpreted the regulation, 40 C.F.R. § 122.3(b), as restating CWA Section 402's text and forbidding EPA from issuing discharges that fall within the COE's Section 404 permitting jurisdiction. 129 S. Ct. at 2468. *Coeur* found the EPA confirmed this reading of the regulations in the *Coeur* Brief for Federal Respondents. *Id*. The Court stated it "defer[s] to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *see also* 129 S. Ct. at 2468.

Interpreting Section 404 and Section 402 as exclusively giving authority to the COE for the issuance permits for fill material, even when it is a pollutant, is a reasonable resolution of conflicting policies because the EPA retains veto power of permits issued under Section 404, 33 U.S.C. § 1344(c), thus retaining the ultimate authority on whether a permit will be issued. Therefore, the agencies interpretation should not be disturbed.

B. The slurry permitted for discharge in Lake Temp is fill material; therefore, COE has permitting jurisdiction over the slurry's discharge.

1. The slurry fits squarely within the regulation's definition of fill material.

Fill material is defined jointly by the EPA and the COE as material placed in waters of the United States where the material will have "the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2011) (COE's definition); 33 C.F.R. § 232.2(5)(2)(ii)(1)(i) (2011) (EPA's definition). The non-exhaustive list of examples of fill materials includes rock, sand, soil, clay, plastics, construction debris, wood chips, and overburden from mining or other excavation activities. 33 C.F.R. 323.2(e)(2) (2011); 33 C.F.R. § 232.2(5)(2)(ii)(2) (2011). The EPA and the COE concur that the discharge of fill material is defined as the addition of fill material into the waters of the United States and includes the "placement of overburden, slurry, or tailings or similar mining related materials." 33 C.F.R. § 323.2(f) (2011); 40 C.F.R. § 232.2(5)(1) (2011).

The uncontested fact that the slurry discharged into Lake Temp will dry out and evenly raise the lake's elevation by six feet, (Order at 3, 4, 8), shows that the slurry is a fill material. Further, the slurry mixture has the qualities inherent in the list of examples of fill materials that both the COE and the EPA provide. The slurry is made up of spent munitions containing liquid, pulverized metals, semi-solids, and granular contents, which include chemicals. (Order at 4, 8). Like these materials, the materials in the examples of fill materials can be pollutants. For

example, plastic is made up of chemicals, and when it corrodes, plastic releases harmful waste. Likewise, construction debris is a broad category that could encompass metals, chemicals, pollutants, and the like.

2. The slurry is tantamount to the discharge in *Coeur*.

The slurry discharged into Lake Temp is similar to the slurry that all of the parties in *Coeur* agreed fit within the definition of fill material. 129 S. Ct. at 2468. New Union alleged the slurry in *Coeur* was different than the slurry to be discharged in Lake Temp because the material in *Coeur* was crushed rock, which is an inert material. (Order at 8). However, this view of the material in *Coeur* does not encompass all of what was in the slurry. The *Coeur* slurry contained only thirty percent crushed rock; the rest was water, but not just plain water. 129 S. Ct. at 2468. The water was to have "[c]hemicals in the water." ***Id.*** The mixture was polluted water that would need to "be cleaned by purification systems" and would kill the population of fish in the lake. *Id*. at 2464, 2465.

Like the mixture of inert rock and chemicals, the slurry to be discharged in Lake Temp is liquid, semi-solid chemicals, and crushed metals. Although the Lake Temp slurry may be more harmful than the slurry in *Coeur*, this was not proven, nor does the CWA even consider this distinction. As the district court correctly found, CWA Section 502(6), 33 U.S.C. § 1362 (2006), defines pollutants categorically, not by toxicity or inertness. (Order at 8). The slurry in *Coeur* and the slurry to be discharged in Lake Temp are both pollutants and fill material.

Section 404 grants unbridled permitting power to COE for fill materials. As the slurry discharged into Lake Temp falls within the CWA regulations definition of fill material, the slurry fits within the *Coeur* interpretation of slurry, and the definition of fill does not take into account

whether the material is a pollutant, the permit for the slurry was rightfully issued under Section 404.

C. The COE lawfully issued the permit under its statutory authority.

As COE was granted authority under Section 404 to issue permits for fill material, and the slurry in the current matter is fill material, the court should only disturb the agency action if it is found that the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2006).

1. COE followed the permitting requirements of Section 404(b).

If a proposed discharge complies with Section 404(b)(1) a permit will be granted unless it is contrary to the public interest. Section 404(b)(1) essentially requires the proposed discharge be examined to determine if there are practicable alternatives, examined to determine the potential physical and chemical impacts on the ecosystem, reviewed to consider the impact on the surrounding areas, and reviewed to consider mitigating factors to minimize the environmental impact. 40 C.F.R. § 230.5 (2011).

The COE conducted an EIS. (Order at 6). In the EIS, agencies must include "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) (2006). Agencies are required to consider alternatives to the proposed action. *Id*. § 4332(2)(C)(iii) (2006). The EIS must also consider reasonable alternatives that will mitigate adverse environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Moreover, the COE's own requirements for issuing any permit including a Section 404 permit call for a public interest review; a review of the proposal's effect on wetlands; analysis of fish, wildlife, and water-quality; a review of the economic impact of the project; and an analysis

of any mitigating steps that will be taken. 33 C.F.R. § 320.4 (2011). The requirements of the EIS and of the COE's permitting process together encompass the requirements of Section 404(b).

As the COE conducted an EIS, as COE followed all of its public notice requirements at all stages of the NEPA process, and as the requirements of the EIS together with the COE's permitting requirements encompass the requirements in Section 404(b), the COE lawfully issued the permit for the discharge of the slurry. (Order at 6).

2. Effluent limitations and performance standards do not apply to Section 404 permits.

Section 404 of the CWA grants COE absolute authority to issue permits for the discharge of fill material; however, some individuals believe when a discharge qualifies as a fill material under Section 404, and the EPA has also adopted a performance standard for the fill material, the discharge of the fill material is thus unlawful. A review of the CWA shows that Congress has not directly spoken on whether performance standards apply, so the statute by itself cannot resolve the issue. 129 S. Ct. at 2469 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, *Inc*. 467 U.S. 837 (1984)). Looking at the regulations, which are entitled to deference if they resolved the ambiguity in a reasonable manner, it is apparent that the regulations too are ambiguous. *Id*. (citing *United States v. Mead Corp*., 533 U.S. 218 (2001)). Consequently, the agencies' subsequent reasonable interpretations of the regulations must be reviewed and given deference. *Id*. (citing *Auer*, 519 U.S. at 461).

However, before even reviewing the agencies subsequent analysis of the regulations, a review of the statutory construction of the CWA shows new source performance standards are not applicable to Section 404 permits. Hence, they do not make an issuance of a Section 404 permit out of compliance with new source performances unlawful. Section 404 permits must follow Section 404(b) to be lawful, and the provision provides nothing in regards to having to

follow Section 306 new performance standards. *Coeur*, 129 S. Ct. at 2464, 2471-72. Section 402 permits, however, specifically provide that discharges must meet all of Section 306's requirements. 33 U.S.C. § 1342(a)(1) (2006). Because Congress included the language in Section 402, but omitted the language in Section 404, it is presumed that Congress acted "intentionally and purposefully in the disparate inclusion or exclusion." *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 384 (2006) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Therefore, Section 306 new performance standards would not be applicable to Section 404 permits and the DOD's issuance of a permit not in compliance with Section 306 was not unlawful.

Further support for interpreting the provisions to provide that Section 404 does not have to follow Section 306 standards comes from the agencies' internal interpretation. As mentioned previously, the regulations construing the CWA do not resolve the ambiguity; therefore, the agencies' subsequent reasonable interpretations of the provisions must be given deference. 129 S. Ct. at 2469 (citing *Auer*, 519 U.S. at 461).

Coeur found the 2004 Regas Memorandum, written by the EPA's then director of the Office of Wetlands, was instructive, to the point, addressed the ambiguity, and resolved the matter in a reasonable and coherent manner applying the polices of both the EPA and the COE. *Id*. at 2473. As such, the Regas Memorandum was entitled to deference. *Id*. (citing 519 U.S. at 461). The Regas Memorandum stipulated when a discharge is permitted under Section 404 and does not require a Section 402 permit, then Section 402's regulatory regime, which includes new source performance standards, does not apply to the discharge. *Id*. "The Regas Memorandum takes an instructive interpretive step when it explains that because the discharge 'do[es] not

require' an EPA permit . . . the EPA's performance standard 'do[es] not apply' to the discharge." *Id*.

Likewise, as the slurry permitted for discharge into Lake Temp was permitted under Section 404 and not Section 402, it would not be subject to the EPA's performance standards, and it was lawfully permitted by the COE.

3. COE's issuance of the permit complied with the goals of the CWA.

The goal of the CWA is to restore and maintain the "chemical, physical and biological integrity of the Nation's waters" by preventing the discharge of pollutants into navigable waters of the United States of America. 33 U.S.C. § 1251(a) (2006). In *Coeur* the court concluded the permit for the discharge of slurry was lawful when it was for a lake that was the "'least environmentally damaging practicable' way to dispose of the" slurry; the placement would be temporary; polluted outflow would be treated; and the lake would return to its prior condition upon conclusion of the operation. 129 S. Ct. at 2465 (citing App. 366a).

The DOD's slurry discharge into Lake Temp is at least as environmentally friendly as the project in *Coeur*, if not more environmentally friendly. The discharge in Lake Temp like that in *Coeur* will be temporary. (Order at 4). Like the lake in Coeur, Lake Temp will return to its pre-operation condition upon conclusion of the project. (Order at 5). Finally, as the district court correctly noted, Lake Temp actually prevents the discharge from flowing into any other navigable waters of the United States, since it is at the low point of a mountain basin and there will be zero discharge. (Order at 8). Therefore, the Lake Temp project is even more in line with the goal of the CWA than the *Coeur* project, and the district court correctly held the DOD's project to be in compliance with the CWA. *Id*.

IV. OMB'S DISPUTE RESOLUTION BETWEEN EPA AND THE COE DID NOT VIOLATE THE CWA.

The Administrator of the EPA has been conferred authority "to administer" the CWA generally. 33 U.S.C. § 1251(d) (2006). Further, the Administrator may veto permits proposed by the COE. 33 U.S.C. § 1344(c) (2006). However, participation by OMB in EPA's decision did not violate the CWA.

In 1978, President Carter signed Executive Order No. 12,088, titled "Federal Compliance with Pollution Control Standards." Exec. Order No. 12,088, 3 C.F.R. 243 (1979). "This order required federal facilities to comply with 'applicable pollution control standards,' including state and local pollution control standards." Major Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F.L. Rev. 169, 216 (1998) (discussing state lead-based paint programs). The order states that "[t]he head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal . . . activities under the control of the agency." However, in regards to compliance with pollution controls, "[t]he Administrator shall make every effort to resolve conflicts regarding such violation between Executive agencies and, on request of any party . . . If the Administrator cannot resolve the conflict, the Administrator shall request the Director of the Office of Management and Budget [OMB] to resolve the conflict." Exec. Order No. 12,088 at 1-602. The order further states that "[t]he Director of the [OMB] shall consider unresolved conflicts at the request of the Administrator." *Id.* at 1-603.

In *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184,1200-01 (11th Cir. 2001), *withdrawn in part by Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), the Eleventh Circuit found that E.O. 12088 was applicable to an interagency dispute between the Tennessee Valley Authority (TVA) and the EPA. The case concerned the "EPA's determination that certain

maintenance and repair projects conducted by TVA at many of its coal-fired power plants . . . constituted 'modifications' that required the TVA to obtain preconstruction permits" under the Clean Air Act (CAA), 42 U.S.C. § 7607 (2006). *Id*. at 1188. Though the court held that the executive order did not deprive them of jurisdiction, the present case can be distinguished.

A. The pre-litigation submission of the interagency dispute between the EPA and COE to the OMB is valid under E.O. 12088.

In *TVA*, the EPA issued an Administrative Compliance Order (ACO), which contained "findings that TVA's 'modifications' of several of its operating plants violated certain provisions of the CAA, and did not fall under any regulatory exemptions." ***Id.*** at 1189. The Environmental Appeals Board (EBA) then reviewed the EPA's contention and "found at least one violation at all but one of the plaints that had been cited in the ACO." ***Id.*** TVA petitioned the Eleventh Circuit to review the EBA's decision. ***Id.*** 1190. The Department of Justice, on the EPA's behalf, asserted that the Eleventh Circuit lacked the necessary subject matter jurisdiction. ***Id.*** at 1190.

The EPA argued that the argued that EBA decision was not ripe for review because the dispute had not been submitted to the OMB "as required by Executive Order 12088, 3 C.F.R. 243 (1978). TVA asserted that the EPA's reliance on E.O. 12088 was a "basis for delaying [the court's] review of its claim as attempt to enforce a right or benefit law." ***Id.*** at 1201. However, the court stated that a "challenge to [its] jurisdiction [was] not an attempt to enforce a right or benefit." The court accepted the EPA's argument that E.O. 12088 applied. ***Id.***

"E.O. 12088 is directed specifically to the EPA Administrator, not to the agency receiving the compliance order . . ." ***Id.*** (citing Exec. Order No. 12,088 at 1-602). The court stated that the "nature" of EPA's argument was the court could not "entertain TVA's petition *before* both parties [had] submitted the dispute to the requisite Executive branch officials," including OMB. ***Id.*** The court found the argument novel. ***Id.*** at 1202. The court considered both

"lack of exhaustion of administration remedies" as a possible basis for "suspending [its] review pending the outcome of internal Executive Branch procedures." *Id.* However, it found that "the existence of the Executive Order did not render the controversy non-justiciable and thereby deprive the court of jurisdiction." *Id.* (quoting *TVA v. United States*, 13 Cl.Ct. 692, 701, n.9 (1987)).

The court held that E.O. 12088 did not present a traditional exhaustion requirement that deprived them deprived them from jurisdiction or prevented review for "prudential reasons." *Id.* at 1202-03. The court found that E.O. 12088 was not equivalent to a statutory scheme created by Congress granting the right of judicial review. *Id.* at 1202. "[E]xecutive orders . . . do not operate pursuant to Congressional authority, nor are they a part of the statutory scheme – the CAA – under which TVA [was] seeking judicial review." *Id*.

Because the Executive Branch does not confer the necessary jurisdiction on the courts, the Eleventh Circuit could not see how "an order governing internal procedures of the Executive Branch could . . . deprive [the] [c]ourt of jurisdiction if the parties satisfied the relevant *statutory* requirements for judicial review." *Id.* Nor did the court believe that E.O. 12088 gave it reason to decline the exercise of jurisdiction based on the judicially developed doctrine of the exhaustion requirement. *Id.* The court stated that the doctrine exists

> 1) to permit the exercise of agency discretion and expertise on issues requiring these characteristics; 2) to allow the full development of technical issues and a factual record prior to court review; 3) to prevent deliberate disregard and circumvention of agency procedures established by Congress; and 4) to avoid unnecessary judicial decision by giving the agency the first opportunity to correct any error.

Id. (quoting *N.B. by D.G. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378-79 (11th Cir. 1996). The court did not believe any of these considerations were relevant or were implicated by the

E.O. 12088 because the EPA has already conducted a review of its compliance order and the EAB decision. *Id*. at 1202-03.

However, the current case can be distinguished from the Eleventh Circuit's analysis. In *TVA*, the court was considering whether "it was 'altogether appropriate to dejudicialize the dispute and allow the Executive an opportunity to act.'" *Id*. at 1201 (quoting *TVA*, 13 Cl.Ct. at 701). In this case, the EPA, COE, and OMB had an opportunity to act and did. The EPA and COE were at disagreement whether the permit in question should be issued under §§ 402 or 404 of the CWA. (Order at 9). "The COE and EPA both sent briefing papers on the issue to OMB and attended a meeting with OMB, which culminated in OMB's oral decision and direct." *Id.* at n.1. E.O. 12088 states that "[i]f the Administrator cannot resolve the conflict, the Administrator shall request the Director of the Office of Management and Budget [OMB] to resolve the conflict." Exec. Order No. 12,088 at 1-602. Thus, OMB resolved the dispute between the EPA and COE and instructed the permit be issued by COE, pursuant to authority granted by the Executive. *Id.* After the OMB's decision, the EPA took no further action and decided not to veto the COE permit. Thus, unlike *TVA*, the EPA had already acted on the dispute concerning the permits.

B. OMB's participation does not prevent the Court from properly interpreting the CWA under *Chevron*.

"[W]hen presented, the reviewing court shall decide all . . . statutory provisions, and determine the meaning of applicability of the terms of an agency action." 5 U.S.C. § 706 (2006). "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." *Id*. § 706(2)(A). In *Chevron,* 467 U.S. at 843, the Supreme Court stated that "if the statute is silent or ambiguous with respect to the specific issue, the question for the

court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted).

The Executive Branch granted OMB the power to resolve conflicts between executive agencies. Thus, OMB's dispute resolution between the EPA and the COE did not violate the CWA. Thus, this court can properly interpret the Section 404 of the CWA using the test enumerated in *Chevron.* As stated before, a review of the CWA shows that Congress has not directly spoken on whether the performance standards apply Section 404. Thus, the statute by itself cannot resolve the issue. It is apparent that regulations are too ambiguous and, consequently, the EPA's subsequent interpretations of the regulations must be reviewed and given deference. EPA's decision was not arbitrary and capricious for two reasons: "First, EPA's decision is required by or consistent with *Coeur* . . . [and] [s]econd, all the executive power of the Unite States is vested by the constitution in the President, not the Administrator of EPA or the Secretary of the Army, U.S. CONST. art. II, § 1, cl. 1." (Order at 10).

As stated above in Section III (A), when a material qualifies as both a fill material and a pollutant, CWA Section 404 and Section 402 provide concurrent permitting jurisdiction to both the COE and the EPA. A plain language review of the CWA provides that the EPA Administrator has jurisdiction for the discharge of pollutants, *except* for in the case of fill material subject to a Section 404 permit issued by COE. *Coeur Alaska*, 129 S. Ct. at 2467 (2009) (emphasis added). "Section 402 thus *forbids* the EPA from exercising permitting authority that is 'provided [to the COE] in' § 404." *Id*. (emphasis added).

Regardless of whether there is ambiguity regarding the jurisdiction concerning the discharge of fill material, the EPA's own regulations resolve the ambiguity. *Id*. EPA provides that the discharge of dredged or fill material does not require a Section 402 permit (also known

as NPDES). 40 C.F.R. § 122.3(b) (2011) (held invalid as to parts (a) and (h), not part (b)); 129 S. Ct. at 2467-68. Although the provision leaves room for alternative interpretations, the agencies have interpreted the regulation, 40 C.F.R. § 122.3(b), as restating CWA Section 402's text and forbidding EPA from issuing discharges that fall within the COE's Section 404 permitting jurisdiction. 129 S. Ct. at 2468. The Court in *Coeur Alaska* stated it "defer[s] to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA,* 131 S. Ct. at 880 (quoting *Auer*, 519 U.S. at 461); *see also* 129 S. Ct. at 2468.

The interpretation of Sections 404 and 402, as giving exclusive permit authority for fill material (even when it is a pollutant) to the COE, is a reasonable resolution of the conflicting policies. However, The EPA still retains veto power over permits issued under Section 404, 33 U.S.C. § 1344(c), and remains the ultimate authority on whether a permit will be issued. After the meeting with the OMB and COE, the EPA made the decision not to veto the CEO permit. (Order at 10). Thus, by taking no further action, the EPA's interpretation should not be disturbed by judicial review.

Executive Order 12146 was signed by President Carter in 1979 "'as an attempt to coordinate federal interagency litigation resources and resolve disputes before court action commenced.'" *Tenn. Valley Auth.*, 336 F.3d at 1200 (quoting *TVA*, 13 Cl.Ct. at 700 (1987)). E.O. 12146 states that "[w]henever two . . . Executive agencies are unable to resolve a legal dispute between the, *including the question of which has jurisdiction to administer a particular program or to regulate a particular activity*, each agency is encourage to submit the dispute to the Attorney General." Exec. Order No. 12,146, 3 C.F.R. 409, 1-401 (1979). If the heads of the agencies "serve at the pleasure of the President and are unable to resolve such a legal dispute, the

agencies shall submit the dispute to the Attorney General to proceeding in any court . . .” *Id.* at 1402. “Therefore, the Attorney General, in his capacity as the executive branch official responsible for resolving the dispute, will take into account a broader range of factors – in particular, the coordination of federal litigation resources . . .”

In *TVA*, the Eleventh Circuit also stated that “[s]ince both EPA’s Administrator and TVA’s board serve at the pleasure of the president, the President could bring this litigation to a close on his own initiative at any point.” *Tenn. Valley Auth.*, 336 F.3d at 1236. The President has the authority to resolve legal and policy disputes between executive agencies. (Order at 10). “Moreover, the Constitution charges the President with the duty to ‘take Care that the Laws be faithfully executed.’” *Id.* (quoting U.S. CONST. art. 11, § 3). Through E.O. 12146 and E.O. 12088, President Carter used his power to “assure that all discretionary decision made within the executive branch, including those made by the Secretary of the Army and the Administer of the EPA, are faithful to the Constitution, treaties and laws of the Nation.” (Order at 10). Thus, participation by the OMB in the EPA’s decision did not violate the CWA, nor did it render the EPA’s decision arbitrary or capricious in order to merit judicial review.

CONCLUSION

The district court’s decision to grant all of the United States’ motions for summary judgment and to deny all of New Union’s motions for summary judgment was correctly held. For the foregoing reasons, the United States respectfully requests this Court UPHOLD the decision of the district court denying New Union’s claims on the grounds that it had no standing, the COE had jurisdiction to permit, and the OMB’s participation did not violate the CWA.